KENTUCKY LAW SUMMARY

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

September 30, 2022
69 K.L.S. 9
Louisville, Kentucky

CASE DIGESTS

VERBATIM OPINIONS

COURT OF APPEALS

LANDLORD AND TENANT LAW

FORCIBLE ENTRY AND/OR DETAINER ACTION

TERMINATION OF A MONTH-TO-MONTH LEASE

NOTICE PROVISIONS

Pursuant to KRS 383.200-285, forcible detainer is statutory proceeding dealing exclusively with present right of possession of real property — Tenant is guilty of forcible detainer when he refuses to vacate premises after his right of possession has ended — Pursuant to KRS 383.695(2), month-to-month tenant's right to possession may be terminated by landlord or tenant giving written notice to other at least 30 days before periodic rental date specified in notice — Tenant can only be guilty of forcible detainer if he remains after notice period has expired — In instant action, tenant rented property from landlord on month-to-month basis with rent payable between 1st and 3rd of each month — On August 8, 2020, landlord provided tenant with written notice to vacate premises within 30 days — Tenant did not vacate premises — Landlord filed forcible detainer complaint against tenant on September 8, 2020 — District court determined that landlord provided sufficient notice to tenant — Tenant vacated premises following denial of tenant's direct appeal to circuit court — Tenant appealed — REVERSED and REMANDED — Public interest exception to mootness doctrine applied — For landlord to obtain right of immediate possession of property to sustain September 8, 2020, complaint, notice must have been given 30 days prior to September 1, 2020, which was closest periodic rental date — Passage of time did not cure deficiency — Forcible detainer action focuses on and determines which party is entitled to present possession of property at commencement of action, not at some later date — Noncompliant notices are considered invalid and cannot serve to terminate tenant's right of possession —

Ricky Young and Sandy Young v. William House and Pauline House (2021-CA-0501-DG); Pulaski Cir. Ct., Whitaker, J.; Opinion by Judge Dixon, *reversing and remanding*, rendered 7/8/2022, and designated not to be published. The opinion was ordered published on 8/19/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

– Note –
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Ricky and Sandy Young (collectively "the Youngs") appeal the Pulaski Circuit Court's order affirming the judgment of the Pulaski District Court finding them guilty of forcible detainer with respect to property owned by William and Pauline House (collectively "the Houses"). After careful review of the brief, record, and law, we reverse the opinion of the Pulaski Circuit Court and remand the matter to the Pulaski District Court for entry of an order vacating the judgment and dismissing the complaint.

FACTS AND PROCEDURAL BACKGROUND

On September 8, 2020, the Houses filed a forcible detainer complaint against the Youngs. A hearing was held on September 22, 2020. Due to COVID-19 protocols, the Youngs were expected to attend remotely. Counsel for the Youngs called his clients as witnesses; however, after an unsuccessful attempt to reach them via the phone number provided in the record, the court denied counsel's request to make additional attempts, and they did not testify. Consequently, Pauline House was the sole witness, and the facts are not in dispute.

The Houses are the owners of the property at issue, and the Youngs have been their tenants for five years. After a prior lease expired, the Youngs rented the property month-to-month with rent payable between the 1st and 3rd of each month. There were no allegations of unpaid rent. Written notice to vacate within 30 days was provided to the Youngs on August 8, 2020, but they did not vacate the property. After the close of evidence, the court concluded that, contrary to the Youngs' assertion, the written notice to vacate was sufficient and adjudged the Youngs guilty of forcible detainer.

The Youngs appealed to the Pulaski Circuit Court arguing the Houses had provided insufficient notice. In its opinion affirming, the circuit court stated that the notice to vacate should have been provided on August 1, 2020, instead of August 8, in order to terminate the Youngs' lease on September 1, 2020. However, the court found that the matter was moot because it had been more than four months since the Houses demonstrated their intent to terminate the Youngs' tenancy, and "the main issue of contention in this case was always a lack of time –and not whether [the Houses] could terminate the tenancy[.]" We granted discretionary review.

STANDARD OF REVIEW

As the Youngs' claims involve questions of law, our review is *de novo*. *Pennyrile Allied Cmty. Servs., Inc. v. Rogers*, 459 S.W.3d 339, 342 (Ky. 2015).

ANALYSIS

As an initial consideration, because the Youngs vacated the premises following the denial of their direct appeal, we must determine whether this matter is moot. A matter is moot when the judgment sought "'cannot have any practical legal effect upon a *then* existing controversy.'" *Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014) (citing *Benton v. Clay*, 192 Ky. 497, 500, 233 S.W. 1041, 1042 (1921)). Despite their relocation, the Youngs claim our review is proper given that the forcible detainer judgment has collateral consequences – for instance, damaging their credit and negatively impacting their future ability to obtain housing, employment, and benefits. Alternatively, the Youngs argue that we should review the matter under the public interest exception to mootness and cite in support *Shinkle v. Turner*, 496 S.W.3d 418 (Ky. 2016), and *Phillips v. M & M Corbin Properties, LLC*, 593 S.W.3d 525 (Ky. App. 2020). While the Youngs' assertion of collateral consequences may have merit, we hold that the public interest exception applies.

To meet the public interest exception, a litigant must clearly show that: "(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." *Morgan*, 441 S.W.3d at 102 (citation omitted). The Supreme Court of Kentucky has previously concluded that "the proper and efficient application of the law pertaining to the special statutory proceeding for forcible entry and detainer is a matter of public interest[,]" satisfying the first criteria. *Shinkle*, 496 S.W.3d at 420. Additionally, as there is no appellate guidance concerning the notice provision at issue herein, and given the import of notice in the proper execution of these ever-prevalent causes of action, we likewise conclude that the remaining criteria have been established. Accordingly, we shall review the merits of the Youngs' arguments.

The Youngs contend the court erred in affirming the judgment of guilt where: (1) due to improper notice, the Houses did not have the right of immediate possession at the time they filed their complaint, and (2) the Youngs were denied due process by the court's refusal to make a second attempt to obtain their testimony. Because we agree that the underlying action should be dismissed for the Houses' failure to provide adequate notice, as we will detail below, we do not reach the merits of the Youngs' due process claim.

Forcible detainer is a special statutory proceeding which deals exclusively with the present right of possession of real property and is governed by KRS[1] 383.200-285. *Shinkle*, 496 S.W.3d at 421-22. "In Kentucky, a tenant is guilty of a forcible detainer when he refuses to vacate the premises *after* his right of possession has ended." *Id.* at 421; KRS 383.200(3)(a). Under the Uniform Residential

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Landlord and Tenant Act (URLTA),[2] codified at KRS 383.500-705, a month-to-month tenant's right to possession may be terminated by the landlord or the tenant giving written notice to the other "at least thirty (30) days before the periodic rental date specified in the notice." KRS 383.695(2). A tenant can only be guilty of forcible detainer if he or she remains after the notice period has expired. *Shinkle*, 496 S.W.3d at 424.

[1] Kentucky Revised Statutes.

[2] In accordance with KRS 383.500, URLTA was enacted without amendment by Pulaski County, Ky., Ordinance No. 120.1 (Aug. 10, 1993), and is, therefore, controlling in this matter. For clarity, we will refer to KRS instead of the parallel ordinance citations.

Though the proper application of KRS 383.695(2) is a matter of first impression, the plain meaning of the statute controls. *Executive Branch Ethics Comm'n v. Stephens*, 92 S.W.3d 69, 73 (Ky. 2002). KRS 383.695(2) requires not only that notice be provided 30 days in advance but also mandates that it occur wholly prior to a specified periodic rental date.[3] [4] Applying KRS 383.695(2), for the Houses to obtain the right of immediate possession to the property, as required by KRS 383.200(3)(a) to sustain their September 8, 2020, complaint, notice must have been given 30 days prior to September 1, 2020, the closest periodic rental date.[5] As the evidence conclusively demonstrates that notice was provided only 23 days in advance of September 1, 2020, the district court's conclusion that the Youngs were afforded sufficient notice is erroneous.

[3] *See also* Restatement (Second) of Property, Land. & Ten. § 1.5 cmt. f (1977); 3A Robert A. Keats, Ky. Prac. Real Estate Transactions § 26:11 (2021).

[4] In contrast, as detailed in *Shinkle*, in cases in which URLTA does not apply, one month's notice, with no constraints on when in the rental period it must be given, is all that is required by KRS 383.195.

[5] KRS 383.565(2) establishes that the beginning of the month is the default periodic rental date unless the parties agree otherwise.

Lastly, we must determine whether the circuit court, which agreed that the notice was improper, was correct that the subsequent passage of time cured the deficiency. As the Kentucky Supreme Court in *Shinkle*, 496 S.W.3d 418, decisively rejected the concept of curing, we conclude the court erred.

In *Shinkle*, the Court denounced the lower court's attempt to cure the premature filing of a forcible detainer complaint by delaying its finding of guilt until after the proper time for notice had expired. *Id.* at 423-24. In so holding, the Court emphasized that, "[a] forcible detainer action focuses upon and determines which party is entitled to *present* possession of the property at the commencement of the action, not at some later date." *Id.* at 422 (citations omitted). Herein, while the circuit court did not expressly attempt to circumvent the applicable notice requirements, its conclusion that the matter is moot has the same practical effect. Noncompliant notices are considered invalid and cannot serve to terminate a tenant's right of possession. *Pack v. Feuchtenberger*, 232 Ky. 267, 22 S.W.2d 914 (1929). Absent proper notice to the Youngs, the Houses' forcible detainer complaint necessarily fails for want of a cause of action and should be dismissed. *Shinkle*, 496 S.W.3d at 423; *Clay v. Terrill*, 670 S.W.2d 492 (Ky. App. 1984).

CONCLUSION

Therefore, and for the forgoing reasons, the opinion of the Pulaski Circuit Court is REVERSED and the matter is REMANDED to the Pulaski District Court for entry of an order vacating the forcible detainer judgment and dismissing the underlying action.

ALL CONCUR.

BEFORE: DIXON, MCNEILL, AND TAYLOR, JUDGES.

GOVERNMENT

ELECTIONS

ELECTION CONTEST

ANTI-ELECTIONEERING LAW

BURDEN OF PROOF

Primary for Republican nomination for Campbell County Commissioner District One was held on May 17, 2022 — To prepare for primary day, Campbell County Board of Elections (Board of Elections) held several election training sessions on May 2, 3, and 4, 2022 — According to Board of Elections, it was long practice in Campbell County to allow election candidates to meet and greet poll workers during those training sessions — All candidates must leave before training sessions start; however, candidates may leave behind campaign materials for trainees — On May 4, 2022, Brian Painter (Painter) visited Campbell County Administration Building, where training sessions took place and placed campaign literature and pens on training tables — That same day, in-person absentee voting was held on floor above training sessions — After training session ended, 19 trainees went upstairs and cast votes on in-person absentee ballots for Campbell County Commissioner District One Republican primary for Campbell County Commissioner — After primary voting was completed, Painter received 4,180 votes and his challenger David Fischer (Fischer) received 4,074 votes — Thus, Painter won primary by 106 votes — Fischer filed election contest petition and petition for injunctive relief alleging that Painter violated anti-electioneering law, KRS 117.235(3)(b), and KRS 121.055 of Corrupt Practices Act by distributing campaign materials and handing out pens worth $0.22 each at County Administration Building on May 4 — Parties agreed that there was no need for evidentiary hearing — Record contains affidavit of one poll worker who attended May 4th training session and voted upstairs afterwards — Poll worker attested that he was told he would not be able to vote in his precinct on election day and it was suggested to him to vote upstairs in county clerk's office after training — Poll worker believed that Painter distributed campaign materials at training session to influence poll workers to vote for him because poll workers would be voting immediately after training sessions — Record also contained affidavit of Campbell County Deputy Clerk who attested that no early voting took place on May 2 or May 3 — Further, deputy clerk attested that on May 4, 34 people voted during early voting hours — Record does not contain evidence that Painter's conduct directly influenced and solicited votes for him — Trial court vacated Painter's victory and directed that Painter be replaced with Fischer on general election ballot — Trial court found that Fischer did not appear to have lost because Painter violated election laws on May 4; however, trial court noted that available data does support conclusion that events of May 4 likely altered voting such that election was not "fair" — Trial court noted that vast majority of votes were cast on election day, but that Painter received statistically significant larger share of votes cast prior to election day — Trial court found that Painter's conduct violated electioneering statute, but did not violate Corrupt Practices Act — Various parties appealed — HELD that trial court erred in voiding primary results — KRS 120.065 sets standard for voiding primary and deeming people's nomination as vacant — Pursuant to KRS 120.065, record must demonstrate that there has been such fraud, intimidation, bribery, or violence so pervasive as to cast doubt on fairness of entire election before court may adjudge election void — Challenger is required to prove his case by clear and convincing evidence — Kentucky courts are reluctant to void entire election where there is no sufficient evidence of prejudice or manipulation which would support drastic measure of voter disenfranchisement — In instant action, record demonstrates that Painter improperly electioneered on separate floor of County Administration Building on same day that in-person absentee voting occurred — There is also evidence that 19 people who encountered Painter and his campaign materials also voted in primary upstairs during in-person absentee voting hours — However, there is no evidence in record that those 19 people voted for Painter or changed their planned votes from Fischer to Painter — There is no evidence those voters favorably viewed their encounters with Painter and his campaign materials, thus motivating them to proselytize others, thereby creating ripple effect — There is no evidence that Painter's conduct on May 4 directly swayed votes for him — Even if court were to discard all in-person absentee votes cast on May 4, Painter still won by majority

— Trial court vacated Painter's victory based on purported ripple effect of Painter's conduct because Painter received majority of in-person absentee votes, whereas Fischer received many of his votes on primary day — This anomaly does not warrant voter disenfranchisement — A statistical anomaly in absentee voting is not alone sufficient grounds to set aside an election or to cast out all absentee ballots —

James Luersen, In His Official Capacity as Campbell County Clerk; James Luersen, In His Official Capacity as Member of the Campbell County Board of Elections; Jack Snodgrass, In His Official Capacity as Member of the Campbell County Board of Elections; James Schroer, In His Official Capacity as Member of the Campbell County Board of Elections; and Kenneth Fecher, Designee of Sheriff Michael Jansen, In His Official Capacity as Member of the Campbell County Board of Elections v. David Fischer and David Fischer for Campbell County Commissioner (2022-CA-0788-EL) and *Brian Painter and Painter for Commissioner Committee v. David Fischer; David Fischer for Campbell County Commissioner; James Luersen, In His Official Capacity as Campbell County Clerk; James Luersen, In His Official Capacity as Member of the Campbell County Board of Elections; Jack Snodgrass, In His Official Capacity as Member of the Campbell County Board of Elections; James Schroer, In His Official Capacity as Member of the Campbell County Board of Elections; and Kenneth Fecher, Designee of Sheriff Michael Jansen, In His Official Capacity as Member of the Campbell County Board of Elections* (2022-CA-0789-EL); Election appeal arising from Campbell Cir. Ct., Cunningham, Jr., Special J.; Opinion by Judge K. Thompson, *reversing*, rendered 8/26/2022. A motion for discretionary review was filed with the Kentucky Supreme Court on 8/29/2022. Discretionary review was denied on 9/14/2022. **Finality endorsement was issued on 9/16/2022.**

These appeals come before the Court from a June 27, 2022, order of the Campbell Circuit Court, vacating the victory of Campbell County Commissioner Brian Painter ("Painter" or "Appellant") for his renomination in the District One Republican primary on May 17, 2022, and replacing Painter with challenger David Fischer ("Fischer" or "Appellee") on the November general election ballot.[1] We reverse. Accordingly, we conclude that Painter is entitled to be the Republican nominee for the Campbell County Commissioner general election in accordance with the tabulated primary results of May 17, 2022.

[1] Fischer asserts in his appellee brief that the brief of Campbell County Clerk James Luersen and the Campbell County Board of Elections is deficient and does not comply with the Kentucky Rules of Civil Procedure ("CR"). Having reviewed the brief filed by Campbell County Clerk James Luersen and the Campbell County Board of Elections, the Court holds that it substantially complies with the Civil Rules.

Additionally, by separate order entered concomitantly herewith, we deny Fischer's motion and renewed motion to dismiss the appeals, and we deny the motions for reconsideration of an oral argument or alternatively for leave to file a reply brief.

I. BACKGROUND

The primary for the Republican nomination for Campbell County Commissioner was on May 17, 2022. In preparation for primary day, the Campbell County Board of Elections held several election training sessions on May 2, 3, and 4, 2022. According to Campbell County Clerk James Luersen and the Campbell County Board of Elections (collectively referred to as "Luersen"), it is the long practice and tradition of Campbell County to allow election candidates to meet and greet poll workers during those training sessions. Luersen states, however, that all candidates must leave before the training sessions start, but the candidates may leave behind campaign materials for the trainees.

On May 4, 2022, Painter visited the Campbell County Administration Building, where the training sessions took place, and he placed campaign literature and pens on the training tables. That same day, in-person absentee voting was held upstairs on the floor above the training sessions. After the May 4th training session concluded, nineteen trainees went upstairs and cast votes on in-person absentee ballots for the Campbell County Commissioner District One Republican primary for Campbell County Commissioner. Painter won the primary by 106 votes. In total, Painter received 4,180 votes, and Fischer received 4,074 votes.

On May 25, 2022, Fischer and his campaign for Campbell County Commissioner filed an election contest petition and a petition for injunctive relief. Therein, Fischer alleged Painter's conduct violated Kentucky's anti-electioneering law[2] and KRS 121.055,[3] a central component of the Corrupt Practices Act (KRS 120.015), by distributing campaign materials and handing out pens worth $0.22 each at the County Administration Building on May 4, 2022. Painter responded to the petitions, and Luersen was joined as a party to the proceedings.

[2] Kentucky Revised Statute ("KRS") 117.235(3)(b) provides that "[n]o person shall electioneer within the interior of the building . . . during the hours in-person absentee voting is being conducted in the building." Subsection (3)(d) further provides that electioneering "shall include . . . the distribution of campaign literature, cards, or handbills[.]"

[3] KRS 121.055 provides in pertinent part that "[n]o candidate for nomination or election to any [county] office shall expend, pay, promise, loan or become liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person."

The parties agreed there was no need for an evidentiary hearing. Thus, the circuit court directed the parties to submit supplemental briefing on the matters, after which it would take the matter under submission. The record contains the affidavit of Mark Lickert, a poll worker who attended the May 4th training session and voted upstairs afterwards. Record on Appeal ("R.") at 18. He attested that he was told he would not be able to vote in his precinct on election day and it was suggested to him to vote upstairs in the county clerk's office after training. *Id.* He believes that Painter distributed campaign materials at the training session to influence poll workers to vote for him because the poll workers would be voting immediately thereafter. *Id.* at 19. The record also contains an affidavit of Campbell County Deputy Clerk Rhonda Wright. R. at 192. She attested that no early voting took place on May 2, or May 3, 2022. *Id.* at 193. She further attested that, on May 4, 2022, thirty-four people voted during early voting hours. *Id.* Notably, the record does not contain evidence that Painter's conduct directly influenced and solicited votes for him.

On June 27, 2022, the circuit court entered an order vacating Painter's victory and directing Luersen to replace Painter with Fischer on the general election ballot. The circuit court found that Wright's affidavit indicates that nineteen trainees cast votes on May 4, 2022, during in-person absentee voting hours. R. at 321, ¶ 7. The circuit court also found that "Fischer does not appear to have lost because Painter violated the [sic] Kentucky's election laws on May 4." *Id.* at 324, ¶ 16. The court noted though that the "available data does support a conclusion that the events of May 4 likely altered the *voting* such that the election was not 'fair.'" *Id.* at 324, ¶ 17. "The vast majority of the votes cast in the primary were cast on election day. Fischer received more of those votes than Painter did. However, Painter received a statistically significant larger share of the votes cast prior to election day," the court remarked, analyzing data from the Campbell County Clerk's website. *Id.*

The court added:

> Clearly, Painter received not insignificantly more votes than Fischer prior to election day (a lead of 129 votes) which was enough to overcome his shortfall on May 17 (a deficit of 23 votes). It is not unreasonable to conclude that Painter's efforts in those early days, including the electioneering Fischer complains of, moved some early votes his way. **It is impossible to say how much was due to improper politicking versus old-fashioned (and legal) hard work – other than to say what happened on May 4 does appear to have been influential, but not decisive.**

Id. (emphasis added).

The court then opined:

> As a practical matter, it is impossible to know exactly how many votes changed because of a particular violation of the election laws. Voters cannot be compelled to go under oath and explain their choices or motivation. Moreover, one cannot accurately gauge the ripple effect of one voter being improperly electioneered, then speaking to a spouse or friend, and so on. Such impacts may be more pronounced when the offending party is an incumbent – someone already cloaked in the mantle of governmental authority and power.

Id. at 327, ¶ 24.

The court concluded that Painter's conduct violated the electioneering statute but did not violate the Corrupt Practices Act. *Id.* at 326, ¶ 21.

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The court reasoned that it must discard the election results "for misconduct which impairs the fairness or equality of the process irrespective of whether it can be determined conclusively that it changed the outcome." *Id.* at 327, ¶ 24. The court based its decision to vacate Painter's victory on the common law dictates in the Kentucky Supreme Court case *Ellis v. Meeks*, 957 S.W.2d 213 (Ky. 1997). R. at 326, ¶¶ 21, 23.

Ellis involved an election contest regarding the primary election for the Democratic nomination for the 11th Ward Alderman in Louisville, Kentucky. 957 S.W.2d at 213. Incumbent Reginald Meeks received 815 votes, and his challenger Gerry Marie Ellis received 807 votes. *Id.* Ellis filed an election contest petition after she learned that Meeks had greeted voters and brought fried chicken to several polling places, making it available to poll workers and others present on election day. *Id.* at 214. Although Ellis could not prove that Meeks' conduct diverted votes to his favor, the Kentucky Supreme Court voided the entire election and deemed the nomination as vacant on the ground that Meeks' conduct violated Kentucky's anti-electioneering law and Corrupt Practices Act, creating an uneven playing field which, if left undisturbed, would have diminished voter confidence in the electoral and judicial processes. *Id.* at 217.

II. STANDARD OF REVIEW

These appeals come before the Court upon the circuit court's findings of fact and conclusions of law and upon the record made in the circuit court. Accordingly, "the court's findings of fact shall not be set aside unless clearly erroneous[.]" *Hardin v. Montgomery*, 495 S.W.3d 686, 693 (Ky. 2016) (internal quotation marks omitted) (citing CR 52.01; *McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008)). "A factual finding is not clearly erroneous if it is supported by substantial evidence."[4] *Id.* (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). The circuit court's conclusions of law regarding the interpretation of election laws, however, are reviewed *de novo*. *Id.* at 694 (citation omitted).

[4] "Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men." *Id.* (citation omitted).

III. ANALYSIS

The electoral process is the core of our democratic government, and all courts should abhor superseding that process. Nevertheless, the General Assembly has recognized there may be instances when election results do not accurately reflect the will of the people. In such instances, the judicial branch not only has the authority to void an election but has the duty to do so where there are such "frauds and irregularities in the election that it cannot be told who was elected." *Stewart v. Wurts*, 143 Ky. 39, 135 S.W. 434, 439 (1911). The seriousness of the Court's duty was emphasized in *Skain v. Milward*, 138 Ky. 200, 127 S.W. 773, 778-79 (1910):

> [Elections] are the means provided by law for the expression of the will of the people. To set them aside unnecessarily would be to destroy that confidence in them which is essential. If often set aside they would be less attended; for the voters would await the next chance, and the election, instead of settling things, would be only the starting point for new controversies. Elections must be free and equal; but they cannot be free and equal unless supported by public confidence. When once the notion prevails that confidence may not be placed in the stability of elections, their power and usefulness is destroyed.

KRS 120.065 sets the standard for voiding a primary and deeming the people's nomination as vacant. The statute states in pertinent part:

> If it appears from an inspection of the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly nominated, the court may adjudge that there has been no election, in which event the nomination shall be deemed vacant.

KRS 120.065.[5] In other words, the record must demonstrate there has been such fraud, intimidation, bribery, or violence so pervasive as to cast doubt on the fairness of the entire election before the court may adjudge the election void. *See also Hardin*, 495 S.W.3d at 693 (quoting *Stewart*, 143 Ky. 39, 135 S.W. 434, 439 (1911) ("[I]t must be affirmatively shown, not only that [fraud, intimidation, bribery, or violence] existed, but that they affected the result to such an extent that it cannot be reasonably determined who was elected.")).

[5] The quoted text has been the standard for voiding elections since Kentucky revised its statutes in 1942. *See* 1942 Ky. Acts ch. 208.

Consequently, the evidentiary bar is high for a successful election challenge: The burden of proof upon the challenger is clear and convincing. This elevated standard has been analyzed in early opinions. In *Skain*, the Court stated:

> The burden of proof is on the contestant to show such fraud, intimidation, bribery, or violence in the conduct of election that neither the contestant nor contestee can be adjudged to have been fairly elected. These things *are not presumed*, but it must be *affirmatively shown*, not only that they existed, but that they affected the result to such an extent that it cannot be reasonably determined who was elected.

127 S.W. at 778 (emphasis added). Mere speculation or suspicion will not justify requiring the voters to "undergo the labor, excitement, and expense of another election unless *clearly convinced* that the results. . . . were not fairly and legally attained." *Stewart*, 135 S.W. at 439 (emphasis added). In *Hall v. Martin*, 183 Ky. 120, 208 S.W. 417, 419 (1919), the Court earnestly warned against a court's exercising its duty to adjudge an election void unless "the evidence should point *unerringly* to the establishment of the invalidating facts." (Emphasis added.) In *Upton v. Knuckles*, the onerous burden on the challenger was recognized when the Court stated: "[I]t is only in the most *flagrant* kind of case that voters will be disfranchised for illegal acts of the election officials." 470 S.W.2d 822, 827 (Ky. 1971) (emphasis added).

In *Goodwin v. Anderson*, the Court remarked:

> Section 1569 [Kentucky's former electioneering statute[6]] provides a heavy penalty upon conviction of any person electioneering on election day within any polling place or within 50 feet thereof. But in the absence of specific pleading that such acts were committed and that they changed the result, or were of such character as to require the court to say that there was such fraud and intimidation that it could not be said there was a fair election, the allegations cannot be deemed to state a ground of contest.

269 Ky. 11, 106 S.W.2d 152, 155 (1937), *overruled on other grounds by Barger v. Ward*, 407 S.W.2d 397 (Ky. 1966).

[6] In 1942, the Commonwealth of Kentucky revised Section 1569 to become KRS 118.330. KRS 118.330 was then repealed in 1972, and later reenacted in 1974 as KRS 117.235. In 1978, KRS 117.235 was amended to include the electioneering definition. And in 1994, the General Assembly amended KRS 117.235 so that no electioneering may occur within 500 feet of a building where the county clerk's office is located or where absentee voting is being conducted. The 500 feet restriction has since been amended to 100 feet.

In *Pettit v. Yewell*, 113 Ky. 777, 68 S.W. 1075, 1075 (1902), a Republican election-judge distributed ballots for a general election for mayor, explaining how each recipient could vote the straight Republican ticket. *Id.* During the election contest, the Court ruled that, even though the election-judge's reprehensible conduct violated Kentucky's election laws, there was no evidence of how the informed voters voted or how the contestant had been prejudiced. *Id.* Thus, the Court refused to discard all votes of the affected precinct. Id. In so holding, the Court reasoned, "[t]he statute prohibiting judges from being guilty of such conduct is mandatory as to the officer, but we are unwilling to disfranchise the voters of that precinct because of his conduct." *Id.*

In *Hill v. Mottley*, certain election officers greeted incoming voters as "good fellows" who knew how to vote "wet," in reference to adopting a local liquor law. 142 Ky. 385, 134 S.W. 469, 473 (1911). The Court ruled:

> Conceding that this practice was indulged in, it cannot be contended that either the voter to whom such an improper remark was addressed or all the voters of the entire city should be disfranchised for such misconduct. To do so would be to make an election depend, not upon the result as indicated by the ballot, but upon the propriety or impropriety of remarks made by the officers conducting the election.

Id.

In *Sims v. Atwell*, the trial court found that electioneering had occurred not only in the vicinity of the polling places but up to the very doors of the voting rooms. 556 S.W.2d 929, 933 (Ky. App. 1977). And yet, on review, this Court rejected the

election contestant's request to invalidate the votes of the affected precinct. *Id.* This Court ruled that "there was no evidence that the electioneering interfered with the secrecy of the voting or that it in any way affected the outcome of the election at the . . . precinct"; thus general objections to the electioneering conduct could not sustain a judgment invalidating all votes cast in that precinct. *Id.*

Application of the elevated standard prescribed by KRS 120.065 can be found also in the case cited by the *Ellis* Court, *Adams v. Wakefield*, 301 Ky. 35, 190 S.W.2d 701 (1945), *overruled on other grounds by Barger*, 407 S.W.2d 397. In Adams, a case which involved a ballot question regarding a local liquor law, Kentucky's then-highest court refused to set aside the election results. 190 S.W.2d at 704. The Court determined that the contestant's evidence of the prohibitionists' conduct was too illusory and speculative to be of any weight or consequence on the election outcome. *Id.* Consequently, the Court found the grounds for the election contest were not sustained as the contestant had failed to demonstrate that the prohibitionists' electioneering around the polls converted enough votes to sway the election results. *Id.*

Kentucky courts have been reluctant to void an entire election where there was no sufficient evidence of prejudice or manipulation, which would support such the drastic measure voter disenfranchisement. In *Hardin v. Montgomery*, the Kentucky Supreme Court reversed a trial court's order setting aside election results and declaring the office vacant. 495 S.W.3d at 692. Although *Hardin* involved several election irregularities and a violation of the Corrupt Practices Act, the Court held that the evidence presented by the election contestant was insufficient to set aside the election. *Id.* at 706. The contestant had failed to discharge his burden of proof that the alleged violations were linked to invalid or illegal votes directly manipulating the election outcome so that it could not have been adjudged as fair. *Id.* The Court reiterated and emphasized the elevated standard for setting aside an election, which the contestant's evidence woefully failed to meet:

> Thus, if the number of invalid ballots would be sufficient to change the result if they had been cast for the minority, then the election should be set aside upon the ground that it could not be determined with certainty that the result . . . represented the will of the majority. However, if it can reasonably be done, a court should uphold the validity of an election, and not set it aside for light and trivial causes, and where there has been fraud, intimidations, bribery, illegalities, and irregularities, and the results of such sinister influences can be eliminated, and the result clearly ascertained between the legal voters, it is the duty of the court to do so, and to sustain the election, but, if the fraud, intimidation, bribery, irregularities, and illegalities are such, that the court cannot with reasonable certainty determine who has received a majority of the legal votes, the election should be set aside, and a candidate cannot be declared a victor, unless he can be shown to have received a majority or plurality of the legal votes cast at the election. And the established rule is that where, after giving the evidence of fraud (or irregularities) its fullest effect, and fraudulent or illegal votes may be eliminated, and *the result of the election be fairly ascertained from votes which were regular or untainted*, the court should not go to the extreme of declaring the election void.

Id. at 709 (internal quotation marks, brackets, and citations omitted).

In the instant case, the record demonstrates that Painter improperly electioneered on a separate floor of the County Administration Building on the same day that in-person absentee voting occurred. There is also evidence that nineteen people, who encountered Painter and his campaign materials, also voted in the primary upstairs during in-person absentee voting hours.

However, there is no evidence in the record that those nineteen people voted for Painter or changed their planned votes from Fischer to Painter. And there is no evidence those voters favorably viewed their encounters with Painter and his campaign materials, thus motivating them to proselytize others, thereby creating a ripple effect. There is also no evidence that Painter's conduct on May 4, 2022, directly swayed votes for him. Even if the court were to discard all in-person absentee votes cast on May 4, 2022, Painter still wins by a majority.

Instead, the circuit court vacated Painter's victory based on the purported ripple effect of Painter's conduct because Painter received the majority of in-person absentee votes whereas Fischer received many of his votes on primary day. This anomaly, however, does not warrant voter disenfranchisement. The Kentucky Supreme Court has warned that "our case law holds that a statistical anomaly in absentee voting is not alone sufficient grounds to set aside an election or to cast out of all the absentee ballots." *Hardin*, 495 S.W.3d at 697. "Showing that the vote tally *looks* suspicious is not the same thing as proving the illegality of the votes tallied." *Id.* at 698. "Because a statistical anomaly alone does not authorize the courts to disturb results of th[e] election, other evidence of significant irregularities affecting those votes must be established." *Id.* Furthermore, "[b]efore a case is submitted . . . on circumstantial evidence the proven facts must justify a fair inference of liability. An inference of liability is not a fair one if other inferences of non-liability are equally as reasonable." *Id.* at 705 (quoting *Bryan v. Gilpin*, 282 S.W.2d 133, 135 (Ky. 1955)).

Nothing in the record supports the circuit court's ripple effect theory. And, based on the record, Fischer has not differentiated the effect of Painter's legitimate campaigning efforts from his improper electioneering conduct at the May 4th training sessions. Fischer's proffered explanation as to why Painter received more absentee votes than Fischer is conjecture at best and does not establish a causal nexus between Painter's conduct and his 106-vote-majority win. "[U]nconvincing and unproven allegations that merely raise questions cannot provide the basis for voiding the result of an election." *Id.* at 707.

Accordingly, the circuit court's holding is based on mere speculation and illusory evidence, which do not meet the elevated standard for voiding a primary under KRS 120.065. "One contesting an election has a heavy burden and the public has a right to demand substantial proof. Tolerating a lesser standard allows mere speculation and suspicion of political wrongdoing to become a presumption of electoral corruption." *Hardin*, 495 S.W.3d at 705. Based on the record, Fischer has not discharged this heavy burden. Therefore, we hold the facts of this case do not warrant judicial intervention voiding the entire Republican primary for Campbell County Commissioner.

Courts must not whittle away the elevated standard for setting aside election results to the extent that the cure becomes worse than the disease, *aegrescit medendo*. "[T]he power to nullify an election and cast aside the apparent will of the people is a tremendous power that cannot be exercised on the basis of popular perception and common assumption supported only by evidence that arouses suspicion." *Hardin*, 495 S.W.3d at 705. When the circuit court invalidated the primary results, it disenfranchised all Campbell County voters who had cast legal votes in the primary for the Republican nominee of the Campbell County Commissioner. Accordingly, this judicial intervention shall not stand.

IV. CONCLUSION

WHEREFORE, based on the foregoing reasons, we REVERSE the Campbell Circuit Court's June 27, 2022, order voiding the 2022 Campbell County Commissioner Republican primary results.

ALL CONCUR.

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

EQUINE LAW

NEGLIGENCE

FARM ANIMALS ACTIVITY ACT (FAAA)

HORSE RACING ACTIVITIES EXEMPTION

NEGLIGENCE ACTION FILED BY AN INDIVIDUAL WHO WAS A GUEST OF A LICENSED HORSE OWNER AT THE KENTUCKY DERBY AND WHO WAS BITTEN BY A HORSE WHILE WALKING THROUGH THE STABLES

PREMISES LIABILITY

Plaintiff was at Churchill Downs at 2018 Kentucky Derby as guest of licensed horse owner whose horses were being trained by Bradley Stables — While plaintiff was walking through stables on backside area of Churchill Downs, plaintiff was bitten by horse owned by Bradley Stables — Horse was stabled pursuant to "Stall Agreement" with Churchill Downs — Plaintiff filed instant negligence action against Churchill Downs and Bradley Stables — Defendants filed motions for summary judgment — Trial court granted motions for summary judgment — Plaintiff appealed — REVERSED and REMANDED — Pursuant to *Keeneland Association, Inc. v. Prather* (Ky. 2021), "horse racing activities" exemption under KRS 247.4025 of Farm Animals Activity

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

Act (FAAA), protections otherwise afforded property owners and others under FAAA do not apply if injury resulted from "horse racing activities," which is defined as "the conduct of horse racing activities within the confines of any horse racing facility licensed and regulated by KRS 230.070 to KRS 230.990, but shall not include harness racing at county fairs" — Instant action is covered by horse racing activities exemption — Injury occurred on Derby Day at Churchill Downs in which live racing occurred — Plaintiff was injured after being bit by horse located on Churchill Downs premises — Horse that bit plaintiff was ten-year-old non-racing thoroughbred "stable pony" employed for purpose of escorting racehorses to and from track in order to keep them calm and under control — Since liability is not foreclosed under FAAA, common law premises liability must be considered — Trial court determined that plaintiff was licensee, not invitee — Duty owed licensee is to not knowingly let licensee come upon hidden peril or willfully or wantonly cause licensee harm — Under *Bramlett v. Ryan* (Ky. 2021), in determining existence of duty, court need only consider: (1) if property owner invited or ratified presence of guest on premises, and (2) if guest was injured or harmed in course of or as result of "activity taking place on the premises" — If both requirements are met, property owner owes duty of reasonable care to guest as matter of law — Under *Bramlett*, Churchill Downs owed plaintiff duty of reasonable care — Plaintiff and her husband were invited by horse owner to enter property owned and controlled by Churchill Downs — Plaintiff, her husband, and horse owner entered property through rear gate — Upon entry, horse owner was required by staff to present owner's identification badge and to escort plaintiff and her husband onto property as guests — Under facts, Churchill Downs was aware that guests were on property and ratified plaintiff's presence on its premises — Even if plaintiff's presence was limited to touring stables, this constitutes "activity taking place on the premises" — Bradley Stables owned and controlled horse that bit plaintiff — Accordingly, *Bramlett* is not dispositive with respect to Bradley Stables because Bradley Stables' potential liability need not be viewed as premises issue — Because it is undisputed that Bradley Stables was aware that guests were permitted in stable area and that Bradley Stables owned and controlled personal property that caused underlying injury, ordinary negligence principles apply — Thus, both Churchill Downs and Bradley Stables owed plaintiff duty of reasonable care —

Joi Denise Roby and Blue Cross Blue Shield of Texas v. Churchill Downs, Inc.; Bradley Racing Stables, LLC; Kyle McGinty; and William "Buff" Bradley (2021-CA-0766-MR); Jefferson Cir. Ct., McDonald-Burkman, J.; Opinion by Judge McNeill, *reversing and remanding*, rendered 8/26/2022. The Appellant filed a petition for modification or extension on 9/15/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

On May 5, 2018, Appellant, Joi Denise Roby (Roby), was at Churchill Downs in Louisville, Kentucky, where the 2018 Kentucky Derby was being hosted on that day. She and her husband were guests of Appellee, Kyle McGinty (McGinty), a licensed horse owner whose horses Roby claims were training with Appellees, William "Buff" Bradley (Bradley) and Bradley Racing Stables, LLC (Bradley Stables).[1] While Roby was walking through the stables located on the backside area of the Churchill Downs property, she was bit on the breast by a horse owned by Bradley, causing serious injuries. The horse was stabled pursuant to a "Stall Agreement" with Appellee Churchill Downs, Inc. (Churchill Downs).

[1] For simplicity, both will be collectively referred to as "Bradley."

As a result, Roby filed a negligence suit in Jefferson Circuit Court against Churchill Downs, Bradley, and Bradley Stables.[2] The latter two Appellees subsequently filed for summary judgment, which was granted. Churchill Downs also filed for summary judgment, which was denied. Upon a motion for reconsideration, however, the circuit court entered summary judgment in favor of Churchill Downs. Roby appeals to this Court from both summary judgment orders as a matter of right.

[2] According to Roby's notice of appeal, McGinty became a party to this action by a third-party complaint by Churchill Downs for indemnity and contribution. Blue Cross Blue Shield of Texas has filed a derivative Employee Retirement Income Security Act (ERISA) subrogation and recovery claim against Appellees.

STANDARD OF REVIEW

A motion for summary judgment should 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." CR[3] 56.03. "Because no factual issues are involved and only a legal issue is before the court on the motion for summary judgment, we do not defer to the trial court and our review is *de novo*." *Univ. of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013) (citation omitted). In negligence cases, while duty is an issue of law, "[b]reach and injury, are questions of fact for the jury to decide." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (citation omitted). With these standards in mind, we turn to the applicable law and the facts of the present case.

[3] Kentucky Rules of Civil Procedure.

ANALYSIS

Both summary judgments at issue here were issued mere months before the rendition of *Keeneland Association, Inc. v. Prather*, 627 S.W.3d 878 (Ky. 2021). Therefore, the parties and the circuit court were without the benefit of its guidance. *Prather* is highly instructive of the present issues, and is summarized as follows:

> During the 2016 September Yearling Sale at Keeneland, a horse broke loose from its handler and headed toward pedestrians who were crossing a path between barns. One pedestrian, Roy J. Prather, fell while attempting to flee and fractured his shoulder. Prather and his wife, Nancy Prather, filed suit in Fayette Circuit Court alleging various negligence claims against Keeneland and Sallee Horse Vans, Inc., the transportation company that agreed with the horse's purchaser to transport it to its destination. Keeneland Sallee argued that the Prathers' claims were barred by Kentucky Revised Statute (KRS) 247.402, a provision of the Farm Animals Activity Act (FAAA) that limits the liability of farm animal activity sponsors and other persons as to claims for injuries that occur while engaged in farm animal activity.
>
> Finding the FAAA applicable, the trial court granted summary judgment in favor of Keeneland and Sallee. On appeal, the Court of Appeals raised a new legal theory *sua sponte* and reversed the trial court's decision. Noting that in a separate statute the legislature recognized the sale of race horses as integral to horse racing activities and that horse racing activities are specifically exempted from the FAAA, the appellate court concluded the trial court erroneously dismissed the Prathers' claims.

Id. at 880. Of specific importance is *Prather*'s application of the "horse racing activities" exemption under KRS 247.4025 (hereafter referred to as the Exemption). Pursuant to the provision, the protections otherwise afforded property owners and others under the FAAA do not apply if the injury resulted from "horse racing activities," which is defined as "the conduct of horse racing activities within the confines of any horse racing facility licensed and regulated by KRS 230.070 to 230.990, but shall not include harness racing at county fairs[.]" KRS 247.4015.

The Court in *Prather* ultimately concluded that the Exemption was inapplicable under the facts. In so holding, the Court provided a thorough analysis of the FAAA, its legislative history, and its application – which is very fact specific. *Prather*, 627 S.W.3d at 886. Accordingly, we granted oral argument in the present case in order to more closely address the unique facts at issue here, and for the parties to have an opportunity to address *Prather*. For the following reasons, we reverse the circuit court and remand.

We need not saddle this Opinion with unnecessary legal baggage. It is undisputed that if the Exemption does not apply here, then Appellees would be relieved from liability pursuant to the affirmative provisions of the FAAA. Therefore, our primary concern is the applicability of the Exemption. To reiterate for purposes of clarity:

> KRS 247.401 to 247.4029 shall not apply to farm animal activity sponsors, farm animal activity professionals, persons, or participants when engaged in **horse racing activities**.

KRS 247.4025(1) (emphasis added); and

> **"Horse racing activities" means the conduct of horse racing activities** within the confines of

> any horse racing facility licensed and regulated by KRS 230.070 to 230.990, but shall not include harness racing at county fairs . . . .

KRS 247.4015(8) (emphasis added). Clearly, the General Assembly has provided a very broad, if not redundant, definition. And its plain language appears to encompass the activity at issue in the present case. However, as the Court discussed in *Prather*, this is not an unbridled Exemption:

> Nothing in the record supports a conclusion that Keeneland, Sallee or Prather were engaged in the "conduct of horse racing activities" under any reasonable meaning of the phrase. The only activities occurring on the Keeneland premises were the transport of horses, by hand, to and from the backside, sales arena, and transport vans where the horses were loaded and taken off the premises after being purchased. No live racing was occurring, Keeneland's racing meets being confined to April and October of each year. Horse sales and horse racing are entirely different activities and the FAAA treats them as such. While the Court of Appeals' classification of Keeneland as a horse racing facility is proper, Keeneland was not operating as a horse racing facility during the September Yearling Sale. Therefore, the blanket exemption of horse racing activity from the FAAA in KRS 247.4025(1) is inapplicable.

Prather, 627 S.W.3d at 886.

Accordingly, the Exemption and *Prather* are the twin spires framing our analysis. Yet, these beacons are far from narrow. For the following three reasons, we believe that the undisputed underlying activity in the present case is distinguishable from the horse sales in *Prather* and is therefore covered by the Exemption: 1) It was Derby Day at Churchill Downs. Indeed, live racing was occurring; 2) Roby was injured after being bit by a horse located on the premises; 3) that horse, or more precisely, a "stable pony," was a ten-year-old non-racing thoroughbred employed for the purpose of escorting racehorses to and from the track in order to keep them calm and under control. If such events are not considered the "conduct of horse racing activities," it begs the question of what does? Indeed, a wide girth of conduct and accompanying injuries would be rendered unactionable if this Court were to unilaterally limit an otherwise broad legislative Exemption. For example, the class of persons with the highest likelihood of injury are a small cadre who assume an immense risk – *i.e.*, jockeys. A distant second are employees involved in the handling of horses. Unless otherwise exempted as agricultural employees, their remedy would likely be a workers' compensation claim. *See* KRS 342.650; and Ronald W. Eades, 18 Ky. Prac., Workers' Comp. § 3:2 (2021). That leaves everyone else. If the only actionable injuries remaining are those that occur during, and as a direct result of the "the fastest two minutes in sports," the class of potential plaintiffs would be *de minimis*.[4]

[4] We are cognizant that the Exemption is not limited to the Derby or even injuries caused by horses. The examples provided herein are merely instructive and not dispositive of future cases.

In that same vein, the circuit court determined that the Exemption does not apply since the "stabling of horses" is included in the definition of farm animal activities under KRS 247.4015(3) and (5) and, therefore, the FAAA operates to bar Roby's claim. This is incorrect. Applying the circuit court's logic, anything included under the definition of farm animal activity in KRS 247.4015(3) cannot also be horse racing activity, which would render the Exemption meaningless. The Exemption negates what is otherwise provided in KRS 247.401 to 247.4029. Since KRS 247.4015(3) falls within KRS 247.401 to 247.4029, the Exemption applies to that section. Whatever the legislature intended here, it certainly did not intend a toothless law. If a narrower Exemption is to exist, then the General Assembly or our Supreme Court may so instruct.

However, our analysis does not end here. Having determined that liability is not foreclosed under the FAAA, we must now consider the common law of premises liability. In the present case the circuit court further determined that Roby was a licensee, not an invitee. The duty owed a licensee is to "not knowingly let her come upon a hidden peril or willfully or wantonly cause her harm." *Smith v. Smith*, 563 S.W.3d 14, 17 (Ky. 2018) (citation, footnote, and brackets omitted). Therein, a divided Court reaffirmed that "Kentucky law remains steadfast in its adherence to the traditional notion that duty is associated with the status of the injured party as an invitee, licensee, or trespasser." The Court ultimately reversed and remanded determining that:

> a dispute exists as to whether [plaintiff] was a licensee or an invitee. [Defendant] argues that [plaintiff] came over to her house on her own accord. [Plaintiff] argues that she was invited over to babysit her great-granddaughter, albeit gratuitously. This Court has previously held that a family member invited to assist another whether gratuitously or on a monetary basis was an invitee.

Id. at 18 (internal quotation marks and citations omitted). In a more recent and unanimous decision, however, the Court clarified the relevant law as follows:

> Distinguishing guests as either licensees or invitees has proven particularly challenging for the court because the mutuality of benefit between a property owner and a guest required for an invitee is difficult to demonstrate in the context of a social visit. Because the benefit received by a property owner in hosting a guest is not easily quantified in the way an economic or business profit is measured, the distinction created by mutuality of benefit is not useful in distinguishing a licensee from an invitee in a social context. The result of this difference in relational dynamics leads to unpredictability for both property owners and entrants and often leads to inequitable results.
>
> . . . .
>
> The determination of the existence of a duty is still a legal question for the court to determine. But **the court need only consider 1) if the property owner invited or ratified the presence of the guest on the premises, and 2) if the guest was injured or harmed in the course of or as a result of an activity taking place on the premises. If both requirements are met, the property owner owes a duty of reasonable care to the guest as a matter of law.**

Bramlett v. Ryan, 635 S.W.3d 831, 837, 839 (Ky. 2021), *reh'g denied* (Dec. 16, 2021) (emphasis added).[5]

[5] Like *Prather*, both summary judgments at issue here were issued mere months before the rendition of *Bramlett*. Therefore, the parties and the circuit court were without the initial benefit of its guidance. However, the parties were permitted to address both cases at oral argument.

For the following three reasons, we believe that Churchill Downs owed Roby a duty of reasonable care: 1) Roby and her husband were invited by McGinty to enter property owned and controlled by Churchill Downs; 2) they entered the property through a rear gate; and 3) upon entry, McGinty was required by the grounds staff to present an owner's identification badge and to escort Roby and her husband onto the property as guests. Therefore, because Churchill Downs staffed the entrances, provided a credential identification/guest system of entry, and was aware that guests were on the property, it ratified Roby's presence on the premises. The absence of such a finding would compel a conclusion that Roby was a trespasser, which is entirely unsupported by the record or the parties here.

As to the second prong of our analysis, *Bramlett* provided the following examples:

> Although this Court's opinion in *Hardin* [*v. Harris*, 507 S.W.2d 172 (Ky. 1974)] did not expressly define what constitutes an activity for the purposes of this rule, the Court's use of broad language – "activities conducted on the premises" – has been properly interpreted by both this Court and the Court of Appeals to encompass a wide range of possible circumstances, including children swimming in a pool, *Grimes v. Hettinger*, 566 S.W.2d 769 (Ky. 1978), adults swimming in a pool, S*cifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996), riding ATVs, *Mathis v. Lohden*, No. 2007-CA-00824-MR, 2008 WL 399814 (Ky. App. Feb. 15, 2008), and driving people in a car, *Helton v. Montgomery*, 595 S.W.2d 257 (Ky. App. 1980).

Id. at 839 n.32. The scope of activities occurring at Churchill Downs on Derby Day is self-evident. Even if Roby's presence was limited to touring the stables, this certainly constitutes "an activity taking place on the premises." *Id.* at 839.

Lastly, but significantly, Bradley owned and controlled the horse that bit Roby. Accordingly, *Bramlett*, *et al.*, are not dispositive here because Bradley's potential liability need not be viewed as a premises issue. Because it is undisputed that Bradley was aware that guests were permitted in the stable area and that he owned and controlled the personal property that caused the underlying injury, ordinary negligence principles apply. Therefore, both Churchill and Bradley owed Roby a duty of reasonable care. Accordingly, "[w]ith the scope of the [Appellees'] duty determined, the determination of breach of such duty should be left to the discretion of the jury." *Bramlett*, 635 S.W.3d at 839.

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

CONCLUSION

For the foregoing reasons, we REVERSE the circuit court's summary judgments, and REMAND this case for trial.

LAMBERT, JUDGE, CONCURS.

CETRULO, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

CETRULO, JUDGE, CONCURRING IN RESULT: Respectfully, I concur in result. The majority Opinion primarily relies upon two decisions rendered by the Supreme Court since the trial court issued the ruling on appeal. In *Prather*, 627 S.W.3d 878, the Court provided a thorough analysis of the FAAA and, based upon that analysis, the majority found that the Exemption applies and liability was not foreclosed under the FAAA. With that portion of the Opinion, I agree and would remand the matter to the trial court in keeping with the holding in *Prather*.

However, *Prather* also stands for the principle that while "[d]esigned to be narrow and exacting so as to preserve one's right to trial by jury, summary judgment is nevertheless appropriate in cases where the nonmoving party relies on little more than 'speculation and supposition' to support his claims." *Id.* at 890.

In reviewing the record and the orders below, it is abundantly clear (and the parties agree to this), that the trial court's summary judgment was primarily based upon general premises liability law. The lower court opinion found that the plaintiff was a licensee and not an invitee because she was not there to benefit Churchill Downs. The trial court specifically found no breach of duty owed because the only duty owed to a licensee is to not knowingly let her come upon a hidden peril or wantonly cause her harm. Again, this ruling was before the Supreme Court decision in *Bramlett v. Ryan*, 635 S.W.3d 831, as the majority Opinion notes.

However, the facts seem to confirm that Bradley was only a licensee of Churchill Downs, and that Roby only had permission to enter the premises from the licensee. Likewise, it is undisputed that Roby approached the horse while it was in its stall and did so with full knowledge and experience with horses. Since the trial court did not have the benefit of the *Bramlett* opinion, when it rendered its ruling, I would simply remand for the trial court to examine the facts and for possible further proceedings consistent with that opinion.

CRIMINAL LAW

DRIVING UNDER THE INFLUENCE (DUI)

MOTION TO DISMISS A CHARGE PRIOR TO TRIAL WITHOUT THE COMMONWEALTH'S CONSENT

Dispatch notified officer of possible intoxicated driver who struck and ran over road sign — Officer located vehicle and initiated traffic stop — Defendant told officer that she drank six beers that night and had run over road sign — Officer knew defendant because defendant's husband was fellow police officer — Officer called defendant's husband — Husband arrived on scene — Officer decided to let defendant leave with her husband, but defendant refused claiming that she had drinking problem and needed to learn a lesson — Officer eventually arrested defendant on charge of alcohol intoxication — Officer did not administer field-sobriety test or conduct breath or blood test to determine defendant's blood alcohol content — Commonwealth reviewed evidence, including officer's body camera footage, and charged defendant with first-offense operating motor vehicle under the influence (DUI) — Defendant moved to suppress statements she made to officer and to dismiss DUI charge alleging that there was insufficient evidence to prosecute DUI charge — District court heard motion to dismiss first — Both parties agreed to "pre-try" case in hearing on motion to dismiss — Parties wanted to determine if any further issues would need to be fleshed out before trial — In its brief, Commonwealth stated that "parties agreed that the District Court could make a decision on the motion to dismiss based on whether there was sufficient evidence to move forward with prosecution" — Record indicated that Commonwealth agreed that district court could express its view regarding sufficiency of evidence and welcomed that advice; however, nothing in record suggested that Commonwealth consented to dismissal of charges — Commonwealth put on its case — District court did not believe evidence was sufficient to sustain DUI charge and overcome directed verdict at trial — District court dismissed DUI charge — Circuit court found that jeopardy attached after district court weighed evidence — Commonwealth appealed — REVERSED and REMANDED — Pursuant to RCr 9.64, authority to dismiss criminal complaint before trial may only be exercised by Commonwealth, and trial court may only dismiss via directed verdict following a trial — Trial judge has no authority to weigh sufficiency of evidence prior to trial or to summarily dismiss indictments in criminal cases — Proper time for evaluation of sufficiency of the evidence is following conclusion of Commonwealth's proof by means of motion for directed verdict — Court of Appeals noted, however, that there are limited procedural, constitutional, and administrative circumstances in which court may properly dismiss indictment — In instant action, Commonwealth did not consent to dismissal of DUI charge — Commonwealth did consent to allow district court to "pre-try" case to assess whether it could survive directed verdict motion if one were made at proper time — However, consent to such advisory assessment does not amount to consent to dismiss criminal charge under RCr 9.64 —

Com. v. Wendy Fillhardt (2020-CA-1563-DG); Campbell Cir. Ct., Zalla, J.; Opinion by Judge Acree, *reversing and remanding*, rendered 9/2/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

This Court granted the motion of the Commonwealth of Kentucky for discretionary review of the Campbell Circuit Court's order affirming dismissal of the criminal charge against Appellee, Wendy Fillhardt. After careful review, we reverse and remand to the district court for further proceedings.

On August 24, 2019, dispatch notified Officer Billy Linkugel of a report that a possible intoxicated driver struck and ran over a road sign. The officer located the vehicle and initiated a traffic stop. The driver, Fillhardt, told Officer Linkugel she drank six beers that night and had, in fact, run over the road sign. Officer Linkugel knew Fillhardt because her husband was a fellow police officer. The officer called Fillhardt's husband who soon arrived on the scene. Officer Linkugel decided to let Fillhardt's husband drive her home, but Fillhardt refused to go with her husband. She claimed she had a drinking problem and needed to learn a lesson. Fillhardt stated she would rather go to jail than leave with her husband.

Officer Linkugel let Fillhardt and her husband talk privately. Then, Fillhardt's husband told his fellow officer to arrest her. At this point Fillhardt left her vehicle, visibly upset, and expressed how embarrassed she was. She said she did not want Officer Linkugel to cut her a break, but Linkugel did. He asked Fillhardt if she would like to call her aunt for a ride but Fillhardt declined. Ultimately, he arrested her on the charge of alcohol intoxication. He did this despite noticing Fillhardt's speech was slurred, and her vehicle was damaged. Because the officer did not charge Fillhardt with operating a motor vehicle while under the influence of alcohol, he never administered a field-sobriety test, nor did he conduct a breath or blood test to determine Fillhardt's blood alcohol content.

The Commonwealth reviewed the evidence including the officer's body camera footage and charged Fillhardt with first-offense operating a motor vehicle under the influence (DUI) pursuant to KRS[1] 189A.010. On December 13, 2019, Fillhardt made two oral motions in district court. First, she moved to suppress several statements she made during her encounter with Officer Linkugel. Second, she moved to dismiss the DUI charge on grounds the Commonwealth had insufficient evidence to prosecute the DUI charge.[2] The district court bifurcated the two motions, hearing the motion to dismiss first.

[1] Kentucky Revised Statutes.

[2] Fillhardt also moved to dismiss based on lack of probable cause to initiate the traffic stop, but the district court never ruled on this motion.

According to both parties, they agreed to "pre-try" the case in the hearing on Fillhardt's motion to dismiss. The parties' intention in doing so was to determine any further issues that would need to be fleshed out before trial. In its brief, the Commonwealth states: "The parties agreed that the District Court could make a decision on the motion to dismiss based on whether there was sufficient evidence to move forward with prosecution." (Appellant's Brief, p. 3.) The record indicates the Commonwealth agreed the district court could

express its view regarding the sufficiency of the evidence and welcomed that advice; however, there is nothing to suggest the Commonwealth consented to a dismissal of charges.

The Commonwealth put on its case, calling Officer Linkugel to testify and producing video evidence of the traffic stop. The judge did not believe this evidence would be sufficient to sustain the DUI charge and overcome a directed verdict at trial. Consequently, the district court dismissed the DUI charge, and the circuit court found jeopardy attached after the district court weighed the evidence. The Commonwealth now appeals.

We need not address whether the Commonwealth produced sufficient evidence to overcome a directed verdict because a directed verdict motion, and its standard, are only applicable during jury trials. CR[3] 50.01; *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004) (citing *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822 (Ky. 1975)) ("a directed verdict is clearly improper in an action tried by the court without a jury"). There was no jury trial; the district court erred by weighing the evidence and, on that basis, granting a directed verdict.

[3] Kentucky Rules of Civil Procedure.

There is only one question for this Court to review: Did the district court properly dismiss the criminal charge contrary to the Commonwealth's desire to proceed? This issue is strictly one of law; accordingly, we review the district court's ruling *de novo*. *Commonwealth v. Groves*, 209 S.W.3d 492, 495 (Ky. App. 2006). Having reviewed our jurisprudence, however, it is clear the district court lacked authority to grant a motion to dismiss the charge, prior to trial, without the Commonwealth's consent.

In *Commonwealth v. Isham*, the Kentucky Supreme Court, relying on RCr[4] 9.64, stated: "the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial." 98 S.W.3d 59, 62 (Ky. 2003). RCr 9.64, in full, states: "The attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness."

[4] Kentucky Rules of Criminal Procedure.

Applying the rule, the Kentucky Supreme Court has "consistently held that a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008) (citing *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (Ky. 1972); *Barth v. Commonwealth*, 80 S.W.3d 390, 404 (Ky. 2001); *Flynt v. Commonwealth*, 105 S.W.3d 415, 425 (Ky. 2003)). Unless logic is abandoned completely, the rule applies regardless of how charges, felony or misdemeanor, are brought. *Hoskins v. Maricle*, 150 S.W.3d 1, 17 (Ky. 2004) (quoting *Rice v. Commonwealth*, 288 S.W.2d 635, 637 (Ky. 1956) (discussing various charging documents)).

Based on this rule as interpreted by the Supreme Court, now-Justice VanMeter concluded in *Buckler v. Commonwealth* that "[t]he proper time for an evaluation of the sufficiency of the evidence is following the conclusion of the Commonwealth's proof by means of a motion for a directed verdict." 515 S.W.3d 670, 672 (Ky. App. 2016) (citing *Isham*, 98 S.W.3d at 62). And yet, pre-trial motions continue to be brought in criminal cases to dismiss for lack of sufficient evidence of probable cause.[5]

[5] There are limited procedural, constitutional, and administrative circumstances in which a court may properly dismiss an indictment. *See Bishop*, 245 S.W.3d at 735 (citing *Hayden*, 489 S.W.2d at 514-15 (circuit court properly dismissed indictment where the underlying statute is unconstitutional); *Commonwealth v. Hill*, 228 S.W.3d 15, 17 (Ky. App. 2007) (circuit court properly dismissed indictment where prosecutorial misconduct prejudiced the defendant); *Partin v. Commonwealth*, 168 S.W.3d 23, 30-31 (Ky. 2005) (circuit court properly dismissed indictment where there existed a defect in the grand jury proceeding); RCr 8.18(1)(b) ("court may hear a claim that the indictment or information fails to invoke the court's jurisdiction . . ."); *see also Alexander v. Commonwealth*, 556 S.W.3d 6, 8 (Ky. App. 2018) (internal citations and footnote omitted) ("It is axiomatic that absent extraordinary circumstances, a trial court may not dismiss an indictment prior to trial except with consent of the Commonwealth."). None of these circumstances applies in this case. Dismissals for these reasons do not result from weighing evidence but by the exercise of the court's supervisory powers. *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449, 453-54 (Ky. 1996), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004) (Courts are vested with "certain implied powers . . . to manage [their] own affairs so as to achieve the orderly and expeditious, accurate and truthful disposition of causes and cases. . . . All such authority must be exercised with great caution even though it is necessarily incidental to the function of all courts."). As explained in *McCue v. Commonwealth*, No. 2021-CA-0948-MR, ___ S.W.3d ___ (Ky. App. Sep. 2, 2022) (rendered with the instant case), a court's exercise of its inherent supervisory powers does not violate the separation of powers doctrine, unlike the court's weighing of evidence before proceeding to trial.

In *Isham*, an employee and employer got into a verbal altercation during which the employee stated, "if he . . . were to receive a warning letter for missing work that he would have his lawyer come here to work and fire on [everyone] who works here." 98 S.W.3d at 60. The employer filed a criminal complaint, and a charge of terroristic threatening was brought against the employee. *Id.* at 60-61. The employee moved to dismiss the charges against him, and the court did so, agreeing that his statements could not be construed as a terroristic threat. *Id.* at 61. The Kentucky Supreme Court reversed the dismissal, citing RCr 9.64 as the only potential authority for dismissing the criminal complaint against Isham. *Id.* at 62. As the Supreme Court interprets RCr 9.64, the Commonwealth must consent to any dismissal before the jury trial. 98 S.W.3d at 62.

In *Buckler*, a grand jury indicted Buckler, a Carter County deputy sheriff, on two counts of sodomy in the third degree, pursuant to KRS 510.090(1)(e), for forcing two female prisoners to perform oral sex on him. *Buckler*, 515 S.W.3d at 671. Buckler challenged the charges brought against him with a motion to dismiss, arguing KRS 510.090(1)(e) could not apply to him as he did not fall into the defined actors who could violate the statute. *Id.* This Court concluded, summarily, that the circuit court did not have the power to grant the motion to dismiss and did not err by declining to do so. *Id.* at 672.

Accordingly, we must determine whether the Commonwealth consented to dismissal of the DUI charge. We conclude consent was not given.

In this case, the district court believed the Commonwealth could not prove the DUI charge without a field-sobriety test or a breath or blood test to determine Fillhardt's blood alcohol content. This general scenario compares with *Isham*, in which the district court dismissed the criminal charge because it did not believe the statements constituted the crime charged. *Isham*, 98 S.W.3d at 61. However, we must reiterate: "It is premature for the trial court to weigh the evidence prior to trial to determine if the Commonwealth can or will meet [its] burden." *Id.* at 62 (quoting *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky. App. 1995)); *see also Buckler*, 515 S.W.3d at 672 (citing *Isham*, 98 S.W.3d at 62) ("The proper time for an evaluation of the sufficiency of the evidence is following the conclusion of the Commonwealth's proof by means of a motion for a directed verdict.").

This case does differ slightly from *Isham* and *Buckler* in that the Commonwealth agreed to allow the district court's "pre-try" of the case to assess whether it could survive a directed verdict motion if one were made at the proper time. Nothing similar occurred in *Isham* or *Buckler*. However, consent to such an advisory assessment does not, in the opinion of this Court, amount to consent to dismiss the criminal charge under RCr 9.64.

The Kentucky Supreme Court in *Isham* stated a judge only has the power to dismiss criminal charges if the Commonwealth expressly agrees to this dismissal. *Isham*, 98 S.W.3d at 62. The key phrase in *Isham* applicable to this case is this: "[T]he Commonwealth never sought a dismissal of the complaint." *Id.* Except for the circumstance outlined in *Isham* under RCr 9.64, and the non-merit-based exceptions listed in *Bishop*, the district court is powerless to dismiss criminal charges in the absence of the Commonwealth's consent to dismissal. *Id.* Thus, like the district court in *Isham*, which "simply lacked the authority to dismiss the complaint prior to trial[,]" 98 S.W.3d at 62, here, the district court similarly lacked authority to dismiss the criminal charges against Fillhardt.

We will not opine on the wisdom of "pre-trying" a case to test evidence other than to say, in this case, it seems to have been a waste of judicial resources. Besides, *Isham* already clearly tells bench and bar that it is "not the province of a trial judge to evaluate evidence in advance in order to decide whether a trial should be held." *Id.* (citing *Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994), *overruled on other grounds by Keeling v. Commonwealth*, 381 S.W.3d 248, 254 (Ky. 2012)). Otherwise, a separation of powers issue arises, for it is not within the judiciary's authority to exercise the executive function assigned to the prosecutors to

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

bring criminal charges. *McCue v. Commonwealt*h, No. 2021-CA-0948-MR, ___ S.W.3d ___ (Ky. App. Sep. 2, 2022); *see also Flynt*, 105 S.W.3d at 424 (quoting *Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972)) ("It is manifest that the prosecution of crime is an executive function and that 'the duty of the executive department is to enforce the criminal laws.'").

Accordingly, we reverse the Campbell Circuit Court order affirming and remand this case to the Campbell District Court for further proceedings.

ALL CONCUR.

BEFORE: ACREE, DIXON, AND K. THOMPSON, JUDGES.

CRIMINAL LAW

DRIVING UNDER THE INFLUENCE (DUI)

MOTION TO DISMISS A CHARGE PRIOR TO TRIAL WITHOUT THE COMMONWEALTH'S CONSENT

WELLS v. COMMONWEALTH

Grand jury indicted defendant on various charges, including driving under the influence (DUI) and possession of marijuana — After his indictment, but before trial, defendant filed motion to dismiss charges for lack of probable cause pursuant to *Wells v. Com.* (Ky. App. 1986) — Commonwealth repeatedly claimed that motion was improper, but defense counsel claimed that this was standard motion for "*Wells* hearing" and that she frequently filed such motions in district court cases — Trial court entertained motion and conducted hearing — After applying "*Wells* factors," trial court denied motion, finding that Commonwealth had presented sufficient evidence to establish probable cause as to defendant's operation of truck — Trial court did not question in its order whether defendant's motion or hearing were proper — Defendant entered conditional guilty plea, reserving his right to appeal denial of motion to dismiss — HELD that defendant was not entitled to dismissal of indictments under RCr 9.64 — Pursuant to RCr 9.64, authority to dismiss criminal complaint before trial may only be exercised by Commonwealth, and trial court may only dismiss via directed verdict following a trial — Trial judge has no authority to weigh sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases — There are justifications for dismissing case at pre-trial stage that do not require trial court to weigh evidence — These justifications are based in supervisory powers of every court — Circumstances that demand exercise of supervisory powers include unconstitutionality of criminal statute, prosecutorial misconduct that prejudices defendant, defect in grand jury proceeding, insufficiency on the face of the indictment, or lack of jurisdiction of court itself — None of these circumstances is present in instant action — Record indicates that Commonwealth never consented to dismissal of indictment — *Wells* does not provide vehicle for legal maneuver used in instant action — There is no such things as a "*Wells* hearing" — In *Wells*, defendant was tried before district court sitting without a jury — Trial court convicted defendant of DUI, which Court of Appeals reversed finding that Commonwealth presented insufficient evidence of operation by defendant to convict defendant of DUI — Defendant in *Wells* did not bring his appeal from the sort of pre-trial motion to dismiss that has apparently become acceptable in some courts and known, at least to instant defense counsel, as "*Wells* hearing" — *Wells* cannot be shoehorned into a pre-trial summary disposition motion contrary to *Com. v. Isham* (Ky. 2003) and its progeny — Further, after decision in *Wells*, legislature amended KRS 189A.010(1), expanding circumstances under which person violates that statute — Since amendment in 1991, offense is not limited to "operating" motor vehicle, which was addressed in *Wells*, but now includes being in physical control of motor vehicle while intoxicated —

Bryan N. McCue v. Com. (2021-CA-0948-MR); Hart Cir. Ct., Patton, J.; Opinion by Judge Acree, *affirming*, rendered 9/2/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Bryan N. McCue, Appellant, appeals the Hart Circuit Court's April 13, 2021 findings of fact, conclusions of law, and order denying his motion to dismiss. We affirm.

On July 28, 2020, police were called to a truck stop in Horse Cave, Kentucky. The caller reported a possible shoplifter concealing stolen items in a black duffel bag. The caller also described the potential thief's truck – a maroon Ford F-150 – and relayed the truck's license plate number.

Sergeant Murphy arrived and found a truck matching the description. A black duffel bag was in the truck bed. Appellant sat in the driver's seat and a woman sat in the passenger's seat. The truck was parked but the engine was running. Appellant's eyes were glassy, his pupils were constricted, and he avoided eye contact. Appellant repeatedly reached toward the floorboard, alarming Sergeant Murphy and prompting him to ask Appellant to step out of the truck.

Appellant refused to exit the truck, and Sergeant Murphy and a second police officer attempted to remove him. As they did, Appellant tried to strike Sergeant Murphy with his elbow, but missed. The officers placed him under arrest and searched him. They found marijuana and gabapentin pills in his pockets.

A grand jury indicted Appellant on the following charges: driving under the influence, second offense; resisting arrest; possession of marijuana; first-degree possession of a controlled substance, first offense; second-degree disorderly conduct; third-degree assault; and failure to produce insurance card.

Following his indictment but before trial, Appellant filed a motion to dismiss his charges for lack of probable cause pursuant to *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986). Appellant requested a hearing on the motion. The Commonwealth repeatedly asserted the motion was improper, but Appellant's counsel claimed this was a standard motion for a "*Wells* hearing" and that she frequently filed such motions in cases in district court.

The trial court entertained the motion and conducted a hearing on March 16, 2021. After applying what has become known as the "*Wells* factors," the trial court denied the motion, concluding the Commonwealth presented sufficient evidence to establish probable cause as to Appellant's operation of the truck. Nowhere in its order does the trial court question whether Appellant's motion or the hearing to decide it were proper.

Appellant entered a conditional guilty plea to driving under the influence, resisting arrest, and being in possession of marijuana. He reserved his right to appeal the denial of his motion to dismiss, and now does so, arguing *Wells* supports dismissal of the indictment for lack of probable cause. Appellant's brief implicitly presumes but does not address the procedural propriety of his motion.

We agree with the trial court that Appellant was not entitled to dismissal of his indictments, but this is where our agreement ends. For purposes of appellate review, that is enough to affirm the conviction.

However, the motion the trial court entertained and the proceeding to decide it are plainly at odds with both the Kentucky Rules of Criminal Procedure and Kentucky jurisprudence. For this reason, we do not reach the substantive arguments in Appellant's brief. We affirm on a different ground, procedural in nature, making Appellant's other arguments moot. *Wells v. Commonwealth*, 512 S.W.3d 720, 721-22 (Ky. 2017) ("Even if a lower court reaches its judgment for the wrong reason, we may affirm a correct result upon any ground supported by the record.").

The Commonwealth argues the trial court lacks authority to dismiss an indictment prior to trial without the prosecutor's consent. As far as it goes, that is a correct statement of the law.

Our criminal rules provide that "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness." RCr[1] 9.64. Our Supreme Court interprets that rule this way: "[T]he authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial." *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003). Thus, in *Isham*, the Supreme Court held that "[o]nly the Commonwealth had the ability, with the permission of the trial court, to dismiss the complaint against Isham." *Id.*

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[1] Kentucky Rules of Criminal Procedure.

A subsequent Supreme Court opinion fleshes out this rule a little more. In *Commonwealth v. Bishop*, the Court "note[d] the strictures imposed by Kentucky law on trial judges who are asked to summarily dismiss criminal indictments." 245 S.W.3d 733, 735 (Ky. 2008). "This Court has consistently held that a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Id.* (citing *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (Ky. 1972); *Flynt v. Commonwealth*, 105 S.W.3d 415, 425 (Ky. 2003); *Barth v. Commonwealth*, 80 S.W.3d 390, 404 (Ky. 2001)). The weighing of evidence is what *Bishop* says the trial court lacks authority to do.

But *Bishop* also says there are justifications for dismissing a case at the pre-trial stage that do not require the trial court to weigh evidence. These justifications are based in the supervisory powers of every court. "[T]here are certain implied powers . . . vested in the court to manage its own affairs so as to achieve the orderly and expeditious, accurate and truthful disposition of causes and cases. . . . All such authority must be exercised with great caution even though it is necessarily incidental to the function of all courts." *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449, 453-54 (Ky. 1996), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004) (citations omitted). *Bishop*'s non-exclusive list of circumstances that demand the exercise of supervisory powers include the unconstitutionality of the criminal statute, prosecutorial misconduct that prejudices the defendant, a defect in the grand jury proceeding, an insufficiency on the face of the indictment, or a lack of jurisdiction by the court itself. *Bishop*, 245 S.W.3d at 735 (citations omitted). None of these circumstances is present in this case.

The line of demarcation between judicial authority to dismiss some cases and not others is drawn by the separation of powers doctrine. "No person or collection of persons, being of one of those departments [legislative, executive, and judicial], shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ky. Const. § 28. Legislation grants to prosecutors the power to prosecute criminal cases in their capacity as officers of the executive branch. KRS[2] 15.725(1), (2). Our jurisprudence recognizes that "the prosecution of crime is an executive function[.]" *Flynt*, 105 S.W.3d at 424. *See also Gipson v. Commonwealth*, 133 Ky. 398, 404, 118 S.W. 334, 336 (1909) (prosecutors have the "right to ask . . . a verdict of guilty . . . [for the] citizens of the [C]ommonwealth . . . interested in having the law enforced by the punishment of the guilty"). And, "because prosecutors have the sole discretion whether to engage in plea bargaining with a defendant, th[e Kentucky Supreme C]ourt and its predecessor have held that, unless the Commonwealth consents, courts cannot: (1) accept pleas of guilty and unilaterally limit the sentences which may be imposed; (2) amend a charge prior to the presentation of evidence; or (3) dismiss a valid indictment . . . ." *Flynt*, 105 S.W.3d at 425 (citing *Commonwealth v. Corey*, 826 S.W.2d 319, 321 (Ky. 1992); *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky. 1976); *Commonwealth v. Cundiff*, 149 Ky. 37, 147 S.W. 767, 768 (1912) (some citations omitted)).

[2] Kentucky Revised Statutes.

In effect, Appellant's motion to dismiss was a motion for summary judgment, "and the rule in Kentucky has long been that summary judgment does not exist in criminal cases." *Barth*, 80 S.W.3d at 404 (citing *Hayden*, 489 S.W.2d at 516; *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky. App. 1995)). "The Commonwealth is entitled to present its evidence to a jury before a trial court can dismiss a charge by directed verdict of acquittal." *Id.*

The record unequivocally shows the Commonwealth never consented to dismissal of Appellant's indictment. It repeatedly objected to Appellant's motion and questioned whether it was even proper. The trial court, too, was skeptical, correctly believing it lacked authority to dismiss criminal charges prior to a directed verdict motion. Despite this doubt, the court heard Appellant's motion to dismiss and denied it.

Such a pre-trial motion as Appellant brought improperly asks the trial court to weigh evidence. Whether entertaining the motion is just a waste of judicial resources or, as *Bishop* suggests, if weighing the evidence is error in and of itself, does not matter. If it be error, it is harmless error. However, there was no error in *denying* the motion, contrary to Appellant's argument.

Notwithstanding any prior success averred by Appellant's counsel, *Wells* does not provide the vehicle for doing what has been repeatedly prohibited. Because Appellant's counsel suggests the so-called "*Wells* hearings" are not uncommon, we deem it necessary to put *Wells v. Commonwealth*, 709 S.W.2d 847, in its proper jurisprudential context.[3]

[3] A trial court's consideration of a pre-trial motion for summary disposition need not be prompted by a defendant's motion for a so-called "*Wells* hearing." In *Commonwealth v. Fillhardt*, No. 2020-CA-1563-DG, __ S.W.3d __ (Ky. App. Sep. 2, 2022) (rendered with the instant case), the Campbell District Court heard the appellee's motion to dismiss and subsequently granted the motion when the defendant and Commonwealth agreed the district court could hear the evidence and advise the parties whether the evidence could survive a directed verdict motion. However, nothing indicates the Commonwealth agreed to dismissal before trial based on the hearing.

Contrary to Appellant's suggestion, there is no such thing as a "*Wells* hearing" – there wasn't even a "*Wells* hearing" in *Wells*. Appellant's counsel may have succeeded in convincing some trial courts such a thing exists, but only by bastardizing the opinion's holding. It is more than noteworthy that the defendant in *Wells* "was tried before the Fayette District Court sitting without a jury." *Wells*, 709 S.W.2d at 848. He was convicted of operating a motor vehicle while under the influence of alcohol in violation of KRS 189A.010(1). On appeal, the Fayette Circuit Court affirmed. *Wells*, 709 S.W.2d at 848. This Court granted discretionary review to consider the appellant's argument that the evidence presented at trial was insufficient to carry the Commonwealth's burden of proving the requisite conduct – Wells' operation of a motor vehicle in violation of KRS 189A.010(1). *Wells*, 709 S.W.2d at 848.

The posture of the case – appeal of a judgment of conviction after trial – tells us *Wells* was not a review of a summary disposition, but dismissal after trial. Had Wells' case been tried to a jury, the question would have been whether a directed verdict should have been granted. Because it was tried before the court without a jury, a directed verdict motion would have been improper. *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822, 823-24 (Ky. 1975) (holding that a directed verdict is improper in a bench trial). *See also Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004) ("[A] directed verdict is clearly improper in an action tried by the court without a jury.").

Therefore, appellate review addressed whether the evidence the Commonwealth presented to the factfinder – the trial court – was sufficient to sustain the conviction as a matter of law. The circuit court concluded it was. This Court reversed, holding that "the Commonwealth presented *insufficient evidence* of operation by the appellant to sustain a conviction under KRS 189A.010(1)." *Wells*, 709 S.W.2d at 850 (emphasis added).

Wells did not bring his appeal from the sort of pre-trial motion to dismiss that has apparently become acceptable in some courts and known at least to Appellant's counsel as a "*Wells* hearing." *Wells* cannot be shoehorned into a pre-trial summary disposition motion contrary to *Isham* and its progeny. But there is more that must be noted about the attempt to do so.

Appellant's reference to the "*Wells* factors" insinuates there is a finite set of factors to consider. To the contrary:

> This Court did not state that the *Wells* . . . factors were exclusive for determining probable cause when there is a question of whether the defendant was driving, but cited factors observed in prior cases involving this question. Probable cause is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527, *reh. den.* 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983).

White v. Commonwealth, 132 S.W.3d 877, 883 (Ky. App. 2003). Furthermore, after the decision in *Wells*, the legislature amended KRS 189A.010(1), expanding the circumstances under which a person will violate the statute. Ky. Laws 1st Ex. Sess. ch. 15 § 2 (H.B. 11) (eff. Jul. 1, 1991). Since 1991, the offense is not limited to *operating* a motor vehicle – which *Wells* addressed – but now includes "be[ing] in physical control of a motor vehicle" while intoxicated. KRS 189A.010(1).

Summary dismissal before trial without the Commonwealth's consent based on a lack of probable cause was never an option. Because the trial court was correct in denying the motion, we affirm the Hart Circuit Court's April 13, 2021 findings of fact, conclusions of law, and order, and the conviction in this case.

ALL CONCUR.

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

AUTOMOBILE ACCIDENT

ACCIDENT INVOLVING AN UNLICENSED UNDERAGE DRIVER WHO TOOK HIS GRANDFATHER'S VEHICLE WITHOUT HIS GRANDFATHER'S PERMISSION

Defendant, who was 15 years old, was visiting his grandfather on grandfather's farm — Grandfather was taking nap on another part of his property when defendant took keys to grandfather's truck without grandfather's permission and drove truck — Later that evening, defendant struck pedestrian (plaintiff) and then fled scene — Defendant was later apprehended — Plaintiff filed instant action against defendant and grandfather, as owner of vehicle — Plaintiff alleged that grandfather failed to properly train and/or supervise defendant and that grandfather negligently entrusted vehicle to grandson — Eventually, grandfather moved for summary judgment stating that he could not be held liable for accident because he did not give defendant permission to use vehicle, defendant's actions were unforeseeable, and he had no duty to supervise or train defendant — Plaintiff argued that grandfather could be held jointly and severally liable for damages under KRS 186.590(3) — Further, plaintiff noted that grandfather failed to contact authorities immediately upon learning that his truck was missing — Plaintiff further argued that there was evidence of implied permission by grandfather — Trial court granted summary judgment in favor of grandfather — Plaintiff appealed — AFFIRMED — KRS 186.590(3) states, in part, that every motor vehicle owner who causes or knowingly permits minor under age of 18 to drive vehicle on highway shall be jointly and severally liable with minor for damages caused by negligence of minor in driving vehicle — KRS 186.590(3) did not apply because there was no evidence that grandfather gave defendant permission to drive truck — Although plaintiff presented compelling argument that grandfather "knowingly permitted" defendant to use vehicle by not immediately notifying authorities upon discovery of missing truck, KRS 186.590(3) does not impose brightline "reasonable time to notify" rule upon one whose vehicle was taken without his permission or knowledge — Evidence was undisputed that defendant took keys out of grandfather's pants while grandfather was napping — Plaintiff produced no evidence that grandfather knew on or before date of accident that defendant would take his keys without permission and drive his vehicle on public roads — Defendant admitted that he had taken his grandfather's truck a week prior to accident on joyride to town, but stated that he did not get caught — There was no evidence that grandfather or defendant's mother knew of any alleged use of grandfather's vehicle by defendant prior to accident — Parents owe no duty to third parties to supervise or control their minor child to prevent child from harming others unless parents know, or should know, of need and opportunity to exercise such control — There was no evidence that grandfather ever "permitted" defendant to operate his vehicle on public road — There was not sufficient evidence to suggest or imply that grandfather had custody or control over defendant — There is no Kentucky authority that would extend negligent supervision claim to non-custodial grandparent — Defendant's theft of keys and subsequent negligent driving was not foreseeable to grandfather —

Jeremy Bottoms v. Charles Smith and Dalton Ronald Smith, By and Through His Parent and Guardian, Diane Mary Smith (2021-CA-1085-MR); Nelson Cir. Ct., Ballard, J.; Opinion by Judge Cetrulo, *affirming*, rendered 9/9/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

This is an appeal from a summary judgment of the Nelson Circuit Court in favor of the owner of a vehicle that was taken by an unlicensed, underage driver, resulting in an accident that caused injuries. After careful consideration, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On July 13, 2018, Dalton Smith ("Dalton"), a 15-year-old, was visiting the farm of his grandfather, Charles Smith ("Charles"). Charles owned a Chevy Silverado truck and was on another part of the property, taking a nap, when Dalton took the keys to that truck, without permission of Charles. Dalton was driving the truck later that evening when he struck a pedestrian, Jeremy Bottoms ("Bottoms"), causing injuries. Dalton fled the scene but was later apprehended.

Bottoms filed suit against Dalton, by and through Dalton's mother, Diane Mary Smith ("Diane"), and against Charles, as owner of the vehicle. He alleged that Charles failed to properly train and/or supervise his grandson; and that he negligently entrusted the vehicle to Dalton. The depositions of Bottoms, Dalton, Diane, and Charles were all taken, and written discovery was exchanged.

Charles moved for summary judgment asserting that he could not be held liable under Kentucky law due to the lack of permission, because the grandson's act was unforeseeable, and because he had no duty to supervise or train his grandson. Bottoms argued that Charles could be held jointly and severally liable for damages pursuant to KRS[1] 186.590(3) because he knowingly permitted Dalton to use the vehicle or "gave or furnished" the vehicle to him, by failing to supervise. He also failed to contact the authorities immediately upon learning the vehicle was missing. Bottoms further argued the theory of negligent entrustment applied and that there was evidence of "implied" permission by Charles.

[1] Kentucky Revised Statute.

The Nelson Circuit Court found that KRS 186.590(3) did not apply and further declined to find that Charles violated any duty to supervise or train his grandson, Dalton. The court also reviewed the argument of negligent entrustment and concluded that there was insufficient evidence to support such a claim against the grandfather in this case, and found no case law in Kentucky supporting a claim of negligent entrustment on a theory of "implied" permission. Based upon its review of the motions, depositions, and discovery in the case below, the court below granted summary judgment in favor of Charles.[2] This appeal followed.

[2] Dalton remains as a defendant in this matter. However, by the express provisions of CR 54.02, a trial court may grant a final judgment on less than all the claims when more than one claim for relief is presented in an action by including the finality language in its order, which this court did. *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008).

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). 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 a genuine issue of material fact for trial. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) (citations omitted). "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004) (citations omitted).

ANALYSIS

Appellant's first argument is that the trial court erred in finding that KRS 186.590(3) did not apply to these facts. That statute provides:

> Every motor vehicle owner who causes or knowingly permits a minor under the age of eighteen (18) to drive the vehicle upon a highway, and any person who gives or furnishes a motor vehicle to the minor shall be jointly and severally liable with the minor for damage caused by the negligence of the minor in driving the vehicle.

(Emphasis added.)

The Nelson Circuit Court concluded that this statute did not apply as there was no evidence of permission by Charles. On appeal, Bottoms asserts that the court below narrowly construed the word "permits" and should have more liberally construed this statute to provide a source of recovery to anyone who is injured by a minor.

We agree that case law under this statute suggests that its purpose was to provide an additional source of recovery of damages when a minor driver is found responsible for them. *Sizemore v. Bailey's Adm'r*, 293 S.W.2d 165, 168 (Ky. 1956). In *Sizemore*, the Court held that it was clear that this was the intent of the legislature, but further noted that KRS 186.590 is in derogation of an established

rule of law and therefore must be construed rigidly according to its plain meaning. *Id.* "By making the person liable who enables a minor to operate a motor vehicle, an additional source for the recovery of damages is provided." *Peters v. Frey*, 429 S.W.2d 847, 849 (Ky. 1968) (citing *Sizemore*, 293 S.W.2d at 169). We recognize that the minor is unlikely to have funds to compensate the injured party.

However, in reviewing the cases analyzing this statute, as the trial court also did, it is apparent that the plain meaning of the statute does require "permission" and that no liability attaches to an owner of a vehicle unless it is first established that the vehicle was operated *with permission*. *Commonwealth Fire & Casualty Ins. Co. v. Manis*, 549 S.W.2d 303, 305 (Ky. App. 1977). Under the plain language of KRS 186.590(3), Charles would only be liable for Dalton's negligence if three elements are met: (1) he is the owner of the motor vehicle involved in the accident; (2) he caused or knowingly permitted Dalton to drive the vehicle; and (3) Dalton is a minor under the age of 18. *See also State Auto. Ins. Co. v. Reynolds*, 32 S.W.3d 508, 510 (Ky. App. 2000). While the first and third elements were present, the evidence simply did not establish that Charles "caused or knowingly permitted" Dalton to drive the vehicle. Appellant presented a compelling argument that Charles "knowingly permitted" Dalton to use the vehicle by not immediately notifying the authorities upon discovery of his missing truck. The time period that lapsed may have been as much as a few hours.

However, we simply cannot read the language of the statute that broadly, nor impose a brightline "reasonable time to notify" upon one whose vehicle is taken without permission or knowledge. In *Cook v. Hall*, 308 Ky. 500, 214 S.W.2d 1017 (1948), Kentucky's highest Court held that the negligence of a 15-year-old boy could not be imputed to his father where there was no evidence that the father had knowledge of or had caused his son to use the vehicle. Here, Charles neither caused nor knowingly permitted Dalton to possess those keys. The evidence was undisputed that Dalton took the keys out of his grandfather's pants while he was napping. We must agree with the trial court that KRS 186.590(3) simply cannot be applied to impute joint and several liability upon Charles.

Secondly, Bottoms argues that the trial court erred in granting summary judgment on the negligent supervision claim. Bottoms asserts that Dalton had a history of making impulsive decisions and that Charles was on notice that his grandson required a higher degree of supervision because he referred to him as "a handful."

In contrast, Charles argued that *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002), is dispositive of this issue and further supports the summary judgment granted below. *James* dealt with the alleged negligence of parents whose son initiated the tragic school shootings in 1997 in Paducah. *Id.* at 883. In that case, the court granted summary judgment to the parents as there was nothing known on or before the date of that event to indicate a need to protect or prevent that minor from shooting classmates at his school. *Id.* at 887. The appellants herein similarly have produced no evidence that Charles knew on or before this date that Dalton would take his keys without permission and drive his vehicle on public roads. It is asserted that Dalton had taken his grandfather's truck a week earlier, on a joyride to town; however, having reviewed the depositions and entire record, and upon further questioning of the attorneys at oral arguments, there was no evidence offered that Charles knew of any alleged use of his vehicle by Dalton prior to this evening. The trial court addressed this as well, noting that Dalton stated he did not get caught on the week prior joyride and he only admitted this to his mother after the incident in question.

Additionally, we are guided by *Hugenberg v. West American Insurance Company/Ohio Casualty Group*, 249 S.W.3d 174 (Ky. App. 2006). In *Hugenberg*, an underage, unlicensed child took a friend's car and wrecked it, causing serious injuries to a passenger. The *Hugenberg* Court stated, "[p]arents owe no duty to third parties to supervise or control their minor child to prevent the child from harming others unless the parents know, or should know, of the need and opportunity to exercise such control . . . ." *Hugenberg*, 249 S.W.3d at 185. The *Hugenberg* Court determined that there was a question of fact as to whether the owner of that vehicle may have given an underage driver implied or even actual permission to operate the vehicle. *Id.* at 195. Further in *Hugenberg*, the evidence suggested that the owner had permitted the driver to operate his vehicle before and may have even given him the keys on the night in question. *Id.* Thus this Court found summary judgment in favor of that owner was premature.

In contrast, here there was no evidence that Charles ever "permitted" Dalton to operate his vehicle on a public road, nor that he had any knowledge of any prior such use until after this event. Even Bottoms recognizes that *Hugenberg* placed no duty on a parent to regulate a child's behavior on an ongoing basis, unless they knew or should know of a specific need to prevent their child from committing an injurious act. *Id.* at 184.

Similarly, as part of Bottoms' argument that the court erred in granting summary judgment on the negligent supervision claim, he asserts 1) that Charles had "custody and control" of Dalton, even though he was a grandfather, not a parent, and, 2) that Dalton's behavior was "foreseeable." First, we have reviewed the testimony of all witnesses and agree with the trial court that there is simply not sufficient evidence to imply or suggest any custody or control by Charles in this case. Dalton did not have a closet, a chest, a room, or even a bed at his grandparents' home. He did not keep clothing there and generally only stayed a night or two a week. All the testimony confirmed there was no "custody or control" with the grandparents. Bottoms cites to no authority in Kentucky that would extend the negligent supervision claim to a non-custodial grandparent.

Second, Bottoms again asserts that Dalton's actions were foreseeable, inasmuch as Charles did not prevent harm to others by reporting his vehicle's absence after he awoke. However, the trial court was unpersuaded.

> After consideration of the facts and the existing case law, the court finds Dalton's theft of the keys and subsequent joyride was not foreseeable. Charles has testified Dalton had never previously driven his vehicle to his knowledge. While the fact that Dalton had had behavioral issues in the past might make an adult think he might have more such problems, those issues would not lead one to expect him specifically to steal a vehicle.

The trial court relied upon *Bruck v. Thompson*, 131 S.W.3d 764 (Ky. App. 2004), where the original act was the owner leaving his keys in a vehicle that resulted in a subsequent act of a thief stealing the vehicle and negligently driving it. The trial court analyzed *Bruck* and other cases to conclude that Dalton's theft of the keys and subsequent negligent driving was not foreseeable to Charles. We agree. As in *Bruck*, Dalton's theft of the vehicle and negligent driving constituted an "independent force," which was the superseding cause of Bottoms' injuries. *Id.* at 767. This independent force – Dalton's actions – broke the chain of causation and relieves Charles from any liability, if any existed. *Id.* at 767-68. *See also NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993), and *Howard v. Spradlin*, 562 S.W.3d 281 (Ky. App. 2018).

CONCLUSION

The Nelson Circuit Court correctly interpreted Kentucky law and properly concluded that there were no genuine issues as to any material fact and Charles was entitled to judgment as a matter of law. Accordingly, we AFFIRM the summary judgment of the Nelson Circuit Court, as to Charles, and the matter is remanded to the trial court for further proceedings as to Dalton.

ALL CONCUR.

BEFORE: ACREE, CETRULO, AND L. THOMPSON, JUDGES.

FAMILY LAW

DEPENDENCY, NEGLECT OR ABUSE (DNA) ACTION

SUFFICIENCY OF THE EVIDENCE

PARENT'S REQUEST THAT TRIAL COURT INTERVIEW CHILDREN *IN CAMERA*

Mother had four minor children — Mother was divorced from father of three oldest children — That father subsequently died — Youngest child's father was still alive — On January 22, 2021, mother reported to law enforcement that she believed her ten-year-old daughter had been sexually abused by mother's ex-boyfriend — Over course of investigation, professionals with law enforcement, Cabinet for Health and Family Services (Cabinet), and child advocacy center became concerned that mother might be intoxicated or have mental health issues — On January 27, 2021, Cabinet decided that children should stay with their maternal grandmother for the night — Officer and social worker confronted mother outside of children's school and informed mother of Cabinet's plan — Mother became violent and was arrested — On January 29, 2021, Cabinet filed dependency, neglect or abuse (DNA) petitions alleging that children were abused or neglected and seeking emergency custody — Family court entered emergency orders granting custody of children

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

to maternal grandmother — After family court held temporary removal hearing, family court learned that mother had been arrested for assault on police officer and ordered mother to undergo psychological evaluation and to submit to random drug screens — Family court eventually changed children's placement from grandmother to mother's cousin — Family court ordered mother to undergo psychological assessment with Dr. Ebbers, then later set aside this order — Family court held adjudication hearing on July 15, 2021 — Cabinet presented evidence from several social workers and state trooper — Ongoing social worker testified that mother told her that she suspected sexual abuse a week or two prior to reporting it — Daughter confirmed to social worker that abuse took place as to two perpetrators, mother's ex-boyfriend and daughter's former step-father — Social worker noted that it was appropriate for mother to report abuse — Social worker stated that, to best of her knowledge, mother complied with safety plan in keeping children away from perpetrators, but that mother would not sign release for evaluation from Dr. Ebbers and had not completed substance abuse or mental health evaluation — Social worker admitted that family court had retracted requirement that mother be evaluated by Dr. Ebbers and that mother had complete substance abuse and mental health evaluation with another social worker — Social worker also testified that mother had 20 to 30 drug tests — None of tests were positive for drugs, and only two were positive for alcohol — Social worker testified that children consistently requested that they be allowed to go home to mother and that children did not feel unsafe with mother — Social worker noted that mother seemed paranoid and believed that everyone was against her — Social worker admitted that she was not mental health professional and not competent to diagnose mother with any mental illness — Trooper testified that he came to mother's residence to investigate report that daughter had been abused — He noted that mother smelled of alcohol, but appeared coherent, although mother seemed distracted and slurred her speech a bit — When trooper informed mother that children all denied that abuse had occurred and that mother was only one who believed it had occurred, mother became distraught — On next day, when trooper interviewed daughter, daughter told him that sexual abuse reported by mother had occurred — Daughter also made written allegations of separate incident against different individual — Trooper noted that daughter did not appear fearful of mother or blame mother for sexual abuse — Trooper testified that mother acted appropriately by reporting sexual abuse — Trooper noted that sexual abuse case was still ongoing — Social worker at children's advocacy center testified that she was concerned that mother suffered from mental health issues due to her interactions with mother over sexual abuse allegations — Upon conclusion of Cabinet's proof, mother moved to dismiss petition — Mother requested that family court interview children *in camera* — Family court denied motion — Mother did not put on any additional proof — Family court denied mother's renewed motion to dismiss — Family court found that mother made false allegations as to sexual abuse of daughter (three accusations in 14 month period); that mother drinks and children are afraid when she drinks with ex-boyfriend; that mother's actions demonstrate mental health issues; and that there was risk of harm to children — Family court determined that abuse or neglect was proven by preponderance of evidence by checking following grounds: continuously or repeatedly failed or refused to provide essential parental care and protection for child, considering age of child, and did not provide child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for child's well-being — Family court's handwritten findings were sufficient to indicate that mother created or allowed to be created a risk of physical or emotional injury by other than accidental means, although family court did not check-mark that ground — Family court found that it was in best interest of children that they be removed and ordered mother to submit to psychological evaluation with Dr. Ebbers — Family court denied mother's motion to reconsider/alter, amend, or vacate — Following dispositional hearing, family court determined that continued removal and placement with cousin was in children's best interest — Mother appealed — VACATED and REMANDED — There was insufficient evidence to conclude that children were abused or neglected — None of Cabinet's witnesses pointed to any failures in mother's care that would support abuse or neglect — There was no evidence that mother was not appropriately protective of children or did not respond appropriately by reporting her suspicions that daughter was sexually abused, except perhaps not reporting them sooner — Mother had mandatory duty to make report under KRS 620.030 if she knew or had reasonable cause to believe daughter was being abused — Daughter subsequently confirmed to two different social workers and a police officer that two people had sexually abused her — It appears that mother's reactions during this stressful time prompted Cabinet to make mother target of Cabinet's response — None of witnesses testified that they did not believe daughter or that they had any reason to suspect her disclosures were fabricated — Additionally, trooper testified that investigation into allegations was ongoing — Without any kind of support from witnesses' testimony, family court focused almost exclusively on its conclusion that mother's mental condition resulted in her making false claims that daughter was sexually abused and found that, for this reason, children were abused or neglected — This conclusion required multiple inferences — Family court's vague reference to what occurred in a prior domestic violence case was not proper subject of judicial notice — Further, mother had no notice that family court intended to take judicial notice of prior domestic violence proceedings — There was insufficient evidence for family court to conclude that mother's alcohol use caused risk of abuse or neglect — There was no evidence that mother was addicted to alcohol; that she was ever drunk around children; that she was asked not to drink alcohol; that her alcohol use rendered her unable to care for her children; or that her drinking caused risk that she would be unable to care for her children — Each of Cabinet's witnesses acknowledged that they were not competent to make diagnosis about mother's mental health — Family court's finding that mother had "mental health issues" was essentially meaningless as it did not establish any risk to children — KRS 403.290(1) provides, in part, that court may interview child in chambers to ascertain child's wishes as to his custodian and as to visitation — Chapter 403 governs dissolution of marriage and child custody — Chapter 620 governs DNA actions — Mother failed to adequately preserve her argument that family court erred in refusing to interview children *in camera* because she failed to offer any proof about children's anticipated testimony as required by KRE 103(a)(2) —

C.L. v. Com. of Kentucky, Cabinet for Health and Family Services; B.H., A Minor; and Com. of Kentucky, Office of Lewis County Attorney (2021-CA-1188-ME); *C.L. v. Com. of Kentucky, Cabinet for Health and Family Services; Com. of Kentucky Office of Lewis County Attorney; and L.L., A Minor* (2021-CA-1192-ME); *C.L. v. Com. of Kentucky, Cabinet for Health and Family Services; A.L., A Minor; and Com. of Kentucky, Office of Lewis County Attorney* (2021-CA-1194-ME); and *C.L. v. Com. of Kentucky, Cabinet for Health and Family Services; Com. of Kentucky, Office of Lewis County Attorney; and K.L., A Minor* (2021-CA-1197-ME); Lewis Fam. Ct., Preston, J.; Opinion by Judge K. Thompson, *vacating and remanding*, rendered 9/9/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

C.L. (mother) appeals following dispositions in these dependency, neglect, and abuse (DNA) actions. She challenges the adjudications in which she was found to have abused or neglected L.L., K.L., A.L., and B.H. (collectively the children) on the basis that there was insufficient evidence before the family court to conclude that the children were abused or neglected due to lack of parental care or were at risk of abuse or neglect based on her making false reports, use of alcohol, or her "mental health issues." Mother also argues that the children should have been interviewed *in camera*. We vacate and remand because we agree with mother that there was insufficient evidence to conclude the children were abused or neglected.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has four children: L.L., a girl, born in April 2008; K.L., a girl, born in June 2010; A.L., a boy, born in June 2012; and B.H., a boy, born in April 2017. Mother was divorced from the father of the three oldest children, with that father having subsequently died, and B.H.'s father is C.H. Mother

came to the attention of the Cabinet for Health and Family Services (the Cabinet) in association with mother making a report to law enforcement on January 22, 2021, that she believed K.L. was sexually abused by mother's ex-boyfriend R.S. In the course of mother's subsequent interactions with law enforcement, the Cabinet, and a children's advocacy center over the next few days, professionals raised concerns that mother might be intoxicated or have mental health issues.

Without any concrete proof of any impairment by mother and only unverified reports, this escalated to the Cabinet deciding on January 27, 2021, that the children should go to stay with their maternal grandmother for the night. Without any warning that she, herself, was under investigation, an officer and a social worker confronted mother outside her children's school, ordered that she step out of her vehicle, and told her of this plan. The announcement of this decision to mother resulted in mother becoming irate. The situation escalated with mother becoming violent and ultimately being placed under arrest.

On January 29, 2021, the Cabinet filed DNA petitions alleging that the children were abused or neglected and seeking emergency custody. Social worker Michelle Howard detailed incidents and reports between January 23, 2021 and January 27, 2021, that made her concerned with "mother's mental health and possible substance abuse at this time which place the children at risk of harm." Howard's allegations included outside reports, mother's refusal to voluntarily complete a mental health and substance abuse assessment, mother's "very erratic behavior" during a phone call with a forensic interviewer at the Buffalo Trace Children's Advocacy Center (BTCAC), and mother becoming "very combative with law enforcement and [Tasha Craft]" resulting in her arrest after she assaulted and spit at Craft and kicked at law enforcement.

The family court entered emergency orders granting custody of the children to the maternal grandmother, finding as to each child: "The child is in danger of imminent death or serious physical injury or is being sexually abused."

After the family court held a temporary removal hearing, on February 1, 2021, the family court found that mother was arrested for assault on a police officer and ordered her to undergo a psychological evaluation and submit to random drug screens. On May 13, 2021, the family court changed the children's placement from the grandmother to mother's cousin, A.W. The family court ordered mother undergo a psychological assessment with Dr. Ebbers and then later set this order aside.

The family court conducted an adjudication hearing on July 15, 2021. The Cabinet presented testimony by Lewis County social worker Howard, Kentucky State Trooper Curtis Ingram, Mason County social worker and special investigator Tasha Craft, and BTCAC executive director and social worker Hope Burns. Social worker Jessica Duvall, who conducted a drug and alcohol and mental health assessment of mother, and also met with mother in a counseling capacity, was excluded as a witness because there was no clear understanding demonstrated that mother had waived the patient-provider privilege.

Howard testified she was the ongoing worker for the Cabinet in this case and first became involved on January 23, 2021, when she accompanied Ingram to investigate a report of possible sexual abuse and to interview K.L. Howard testified that mother told her she suspected the sexual abuse a week or two prior but did not report it then because she did not think anyone would believe her. Howard stated that during the interview K.L. confirmed the abuse took place as to two perpetrators (R.S. and M.M.), writing down on paper what had happened in regard to her former step-father, M.M. Howard confirmed that it was appropriate for mother to report her concerns.

Howard explained she then implemented a prevention plan in which mother agreed that the children would have no contact with R.S. or M.M. and that she would keep the children safe. Howard stated that as far as she knew, mother complied with the safety plan in keeping the children away from the perpetrators but did not comply as she would not sign a release for an evaluation from Dr. Ebbers and had not completed a substance abuse and mental health evaluation. However, Howard admitted that the family court had retracted the requirement that mother be evaluated by Dr. Ebbers and mother did complete a substance abuse and mental health evaluation with Duvall in March.

Howard testified that mother had twenty to thirty drug tests and none of them tested positive for drugs, and only two tested positive for alcohol.

Howard testified that the children consistently requested that they be allowed to go home to mother each time she talked with them and the children did not feel unsafe with mother. Howard confirmed that mother had previously taken the children to counseling and mother had disclosed to Howard that she had past history of sexual trauma herself.

Howard testified that on January 25, 2021, she again spoke with mother as she was scheduling a child advocacy center interview for K.L., and at that time asked if mother would be willing to take a substance abuse and mental health assessment based upon concerns that she and others had.

Howard stated she was concerned that mother's mental health could pose a risk to the children and reported that during their conversations mother seemed to zone in and out, talked in circles and would get off track, was erratic, had trouble staying on topic, and talked very fast. Howard thought mother was paranoid as she seemed to think that everyone was against her, felt that no one from their community wanted to help her, believed her ex-boyfriend was driving past her home and going into her home when she was not there, and believed her ex-boyfriend was getting information about the case from Howard's coworker. Howard agreed she was not a mental health professional and not competent to diagnose mother with any mental illness but explained that the children had not been returned to mother because Howard still had concerns about mother's mental health.

Howard testified she asked mother about an anonymous report that mother had confronted C.H. with a gun when he came to pick up their child, B.H. According to Howard, mother explained that C.H. was very late, was angry, and would not leave when she asked him to leave, so she got her gun.

Howard also testified about a report that mother went to a hotel with her children for three days (from January 25-27, 2021) and expressed concern that mother would do this, rather than choosing to stay in her home or with grandmother. Howard also reported that when the children were placed with their grandmother, mother contacted Howard numerous times and accused Howard of allowing grandmother to abuse the children.

Trooper Ingram testified he came to mother's residence on the evening of January 22, 2021, to investigate mother's report that K.L. had been sexually abused by mother's ex-boyfriend R.S. He explained that when he arrived mother was not yet there but arrived within five minutes having been driven by a friend to get a pizza. Mother apologized for drinking due to the stress that the sexual abuse allegations had caused her but indicated that the children were not present. According to Ingram, although he could smell alcohol on her, she appeared coherent, but seemed distracted and would talk above him and around his questions. He did not think she was extremely intoxicated, but she was slurring her speech a bit.

According to Ingram, mother explained that K.L. had initially denied that any sexual abuse had occurred, but mother believed that it had based upon K.L.'s demeanor of acting "weird" or "funny" with her eyes getting "big" and finding a piece of toilet paper in the bathroom trashcan that had blood on it. Ingram explained that when he recounted to mother his understanding that the children had all denied the abuse occurred, and that mother was the only one who believed it had, mother became distraught, cursed at him, and stated that if he was not going to help, he should get out of her house. Ingram explained he was caught off guard by mother's sudden shift.

Ingram stated that the next day he returned with Howard and interviewed mother and K.L. at maternal grandmother's residence. Ingram testified that grandmother and mother's sister said K.L. told them nothing had happened. However, when Ingram interviewed K.L., she told him the sexual abuse reported by mother had occurred and also made written allegations of a separate incident of sexual abuse against a different individual. Ingram acknowledged that K.L. did not appear fearful of mother or about being at mother's home and did not blame mother for the sexual abuse.

Ingram testified mother acted appropriately by reporting the sexual abuse. He explained that after K.L.'s report, he opened up a case, interviewed the alleged perpetrators, and K.L. was sent to be interviewed at a child advocacy center. Ingram noted that the sexual abuse case was still ongoing and not closed, and that it would be up to the Commonwealth's Attorney to decide whether to present the case to the grand jury.

Craft testified that on January 27, 2021, she was called to the children's school to assist with the Mason County Sheriff's investigation of an anonymous report they had received that mother and her paramour had gotten into a fight and mother was staying with the children at a hotel, drinking alcohol, had mental health issues, and was paranoid. Craft testified that when mother arrived (with B.H. asleep in the back seat of the car), mother was asked to step out and Craft set about trying to negotiate a safety plan that the children would go to their grandmother's home for the night and told mother

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that she could go with them if she was not impaired. Craft stated she did not know what she would do if mother did not agree to the plan.

According to Craft, mother told her she would have to arrest mother before they would take her children away and lunged at Craft. Craft stated the deputy interfered and then mother fought the deputy while using profanity. Craft explained that when mother asked why Craft was removing the children and Craft tried to explain that she was not, mother spit at her, and mother was ultimately arrested. Craft testified that based on mother's erratic behavior, she feared mother was under the influence and did not understand why mother reacted the way she did.

Craft stated she interviewed the children but kept her interviews short once she found out about the sexual abuse investigation that had already been started in Lewis County. She explained that K.L. told her about the investigation and voluntarily disclosed to her about the sexual abuse. According to Craft, when asked about the report she had received, all three children told her that mother and R.S. had gotten into an altercation when mother thought R.S. had put a knot on B.H.'s head and mother had been drinking, and they were at the hotel because R.S. was in their home. A.L. stated he was afraid when mother drank and was afraid she would get really drunk. K.L. stated that mother and R.S. drank alcohol.

Craft testified that mother recognized her from a 2020 investigation into whether K.L. and another victim were sexually abused by a teacher, and K.L. also remembered her from that prior investigation.

Burns testified that on January 23, 2021, mother telephoned the BTCAC and spoke with her about the sexual abuse allegations concerning K.L. and mother's frustration that no one was believing her. Burns expressed concern that mother was anxious and angry, spoke over her and in incomplete sentences, and worried about the tone of mother's voice and the way she was speaking. Burns explained she feared that mother herself and the children were in possible danger and believed that mother needed to be assessed to see if she was under the influence, possibly needing therapy or mental health counseling. Burns explained that when she asked mother if she was under the influence of drugs or alcohol that mother became irate. Burns admitted to raising her voice as well.

Burns stated she believed mother was paranoid based on mother having previously called the office earlier and telling another advocate that mother was afraid her phone was tapped and had left the police department in Maysville because she worried someone would overhear her. Burns was also concerned when she overheard mother questioning K.L. about the abuse. Burns reported that mother stated K.L. had been abused multiple times, no one believed mother that the sexual abuse had occurred, and that, instead, everyone thought she was coaching K.L. about the sexual abuse. However, Burns admitted that it would be natural for a parent to be anxious, stressed, and nervous when dealing with an abuse situation.

Burns testified that on January 25, 2021, mother called the BTCAC again to schedule a forensic interview for K.L. and apparently did not realize at first that it was Burns on the phone. According to Burns, when mother realized she was speaking to Burns, mother became angry that Burns had previously accused her of being under the influence of drugs and refused to allow her daughter to be interviewed there. Burns explained she would provide a referral to a different children's advocacy center.

Burns testified that based on the two phone calls she was concerned that mother suffers from mental health issues and, therefore, contacted the Cabinet after each phone call to report her concerns about mother's mental health and possible substance abuse. When asked why she was concerned, Burns explained that mother's thoughts were rapid and incomplete, she was not able to stop and listen, and she was excessively wordy. Burns was concerned with mother's safety and the safety of the children and did not think she should be alone with the children. Burns explained she thought that mother needed a mental health assessment.

Upon the conclusion of the Cabinet's proof, mother moved to dismiss the petition on the grounds that the Cabinet failed to carry its burden of showing that the children were at risk of abuse or neglect. Mother requested that the family court interview the children *in camera*. That motion was denied, and mother did not put on any additional proof. She renewed her motion to dismiss, which was denied.

The family court explained its decision as follows:

> What I see in this particular case is that [mother] for whatever reason has made – you know I'm the judge in domestic violence court too and I can't just ignore all that stuff that comes before. This is the third allegation that [mother] has made in regards to [K.L.] being sexually abused by three different people in fourteen months span. The domestic violence case was filed in October of '19. This report was in January '21, so in fourteen months [mother] for some reason thinks that [K.L.] has been sexually abused by three different men on three different occasions, and none of them have been substantiated by anyone other than after, I don't know, [K.L.] had been talked to regarding these or whatever, but I've never been presented with any physical proof that anything's been happening to these kids. As we stand right now, I mean, I have testimony that [K.L.] initially said that nothing happened.
>
> I think that what we have here – and maybe mom has a drinking problem, maybe not. I know that one child said that they were scared when mom and [R.S.] drank. But my concern here is [mother's] mental state. And I think the proof is, that she is suffering from some sort of mental condition in regards to believing that [K.L.] is constantly being sexually abused by men. And these, the way she acted towards the police and workers, that's just not, in this court's view, normal reactions to somebody who you've called to help and that may not give you the answer you want to hear.
>
> So, I'm going to enter a finding of risk of harm to these children and because I just think that until this lady gets some kind of help in dealing with whatever, whatever she's going through, that these children are going to continue to be subjected to this same type of behavior, that they've been subjected to by their mother. And, again, this has nothing to do with whether or not this woman loves her children. And maybe because she loves her children she's experiencing whatever mental conditions, I don't know, I'm not trained in that, and I don't express any kind of opinions in regards to that. But based upon what I've heard today by a preponderance of the evidence, I find that the Commonwealth has proved that the children are under risk of harm and I'm going to enter a finding to that effect.

In the written orders entered following the adjudication hearing on July 15, 2021, the family court specifically found: "Mother makes false allegations as to sexual abuse of one child (3 times in 14 months) – Also, mother drinks + children are afraid when this happens with [R.S.] (boyfriend). Mother[']s actions demonstrate mental health issues. Risk of harm for children."

The family court determined that abuse or neglect was proven by a preponderance of the evidence by check-marking the following grounds: "Continuously or repeatedly failed or refused to provide essential parental care and protection for the child, considering the age of the child" and "[d]id not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being[.]"

Oddly enough, the family court did not mark "[c]reated or allowed to be created a risk of physical or emotional injury by other than accidental means[.]" However, we believe its handwritten findings were sufficient to indicate such a ground.

The family court concluded that the facts supported removal, it was in the best interest of the children that they be removed, that continuation in their home was contrary to their welfare, and that reasonable efforts were made to keep them in their home. The family court also ordered mother to submit to a psychological evaluation with Dr. Ebbers.

On July 26, 2021, mother filed a motion to reconsider/alter, amend, or vacate. The family court denied this motion on August 12, 2021.

On September 9, 2021, following a dispositional hearing, the family court determined that continued removal and placement with A.W. was in the children's best interest. Mother appealed after the disposition, to challenge the findings in the adjudication.

STANDARD OF REVIEW

Juvenile DNA proceedings require distinct hearings for an adjudication and a disposition. Kentucky Revised Statutes (KRS) 620.100(2), (4). *See* KRS 610.080 (same but not specific to DNA proceedings). During the adjudication, the family court determines the truth or falsity of the allegations in the petition, with the Cabinet bearing the burden of proving dependency, abuse, or neglect by a preponderance of the evidence. KRS 620.100(3). Next comes the disposition in which the family court determines what action shall be taken. KRS 620.100(4). "[A] disposition order, not an adjudication order, is the final and appealable order with regard to a decision of whether a child is dependent, neglected, or abused." *J.E. v. Cabinet*

for Health and Family Services, 553 S.W.3d 850, 852 (Ky. App. 2018).

Pursuant to KRS 600.020(1), a child can be defined as abused or neglected based on a variety of actions a parent does or does not take, including inflicting a physical or emotional injury upon a child (as in KRS 600.020(1)(a)1.) or creating a risk of physical or emotional injury upon a child (as in KRS 600.020(1)(a)2.). The grounds the family court found involved the similar provisions about failing to provide essential and adequate parenting care pursuant to KRS 600.020(1)(a)3. and KRS 600.020(1)(a)8.

The family court has broad discretion to determine whether a child is abused or neglected. *R. C. R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 38 (Ky. App. 1998).

> This Court's standard of review of a family court's award of child custody in a dependency, abuse and neglect action is limited to whether the factual findings of the lower court are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Whether or not the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them.

L.D. v. J.H., 350 S.W.3d 828, 829-30 (Ky. App. 2011). "[T]he findings of the [family] court will not be disturbed unless there exists no substantial evidence in the record to support its findings." *R. C. R.*, 988 S.W.2d at 38.

> If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed de novo. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). If the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the trial court abused its discretion in applying the law to the facts. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). Finally,
>
> > [s]ince 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.

L.D., 350 S.W.3d at 830 (quoting *B.C.*, 182 S.W.3d at 219).

I. Lack of Parenting Care Was Not Established by Substantial Evidence

We first consider whether there was substantial evidence to support the grounds for abuse or neglect that the family court checked in the form orders: "Continuously or repeatedly failed or refused to provide essential parental care and protection for the child, considering the age of the child" and "[d]id not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being[.]"

As occurred in *K.D.H. v. Cabinet for Health and Family Services*, 630 S.W.3d 729, 736-37 (Ky. App. 2021), and *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 854 (Ky. App. 2008), we do not believe the Cabinet presented substantial evidence that the children were abused or neglected. None of the witnesses pointed to any failures in mother's care for the children that would support abuse or neglect on these grounds.

Just as in *K.D.H.* and *M.E.C.*, the record lacked any evidence that mother subjected the children to any direct physical or emotional abuse or failed to attend to their physical needs as would be required to satisfy these grounds. Additionally, there was absolutely no evidence presented by the witnesses that mother was not appropriately protective of the children or did not respond appropriately by reporting her suspicions that K.L. was sexually abused, except perhaps not reporting them sooner.

II. Risk to the Children Was Not Established by Substantial Evidence

We next proceed to examining whether the family court had before it substantial evidence to establish risk of abuse or neglect based on the three enumerated grounds it raised: false allegations, alcohol use, and mental health issues. To establish abuse or neglect through risk of harm, "'the risk of harm must be more than a mere theoretical possibility,' it must be 'an actual and reasonable potential for harm.'" *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 923 (Ky. 2021) (quoting *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 32 (Ky. App. 2011)). A risk of harm cannot be established through inferences upon inferences, as that is nothing but speculation. *K.H.*, 358 S.W. at 32. Here, it is speculative that even if these three grounds were established, they could establish an actual and reasonable potential for harm to the children.

While all of the Cabinet's witnesses point to concerns about mother having a problem with drugs or alcohol, or having mental health issues, most of this testimony was impermissibly vague. While there is an indication that mother seems to react in a manner that is not "typical" and overreacts to any perceived criticism, and seemed paranoid, very little testimony connected mother's behavior to any potential impact on the children. The witnesses had no way of knowing what actual conduct by mother's ex-boyfriend R.S. may have sparked mother's fears that they dismissed as paranoid. The witnesses lacked any personal knowledge about whether R.S. indeed entered mother's home without permission. However, the children consistently reported to Craft that they stayed in the motel because R.S. was in their home.

A. False Reports

Mother argues that there was insufficient evidence of false reports by mother, arguing it was improper for the family court to take judicial notice of a domestic violence case, the Cabinet petition did not accuse mother of making false reports or connect the allegations of sexual abuse to abuse or neglect of the children, and the evidence presented simply did not support the family court's conclusion. Mother also argues that the family court did not seem to understand the difference between a false report and an unsubstantiated report, citing KRS 519.040.

We have a situation where a mother made a report about suspected sexual abuse of her ten-year-old child. We note that mother had a mandatory duty to make a report pursuant to KRS 620.030 if she knew or had reasonable cause to believe K.L. was being abused. K.L. subsequently confirmed that two persons had indeed sexually abused her (to two different social workers and a police officer), but it appears that mother's reactions during this stressful time prompted the Cabinet to make mother the target of the Cabinet's response. Importantly, none of the witnesses testified that they did not believe K.L. or that they had any reason to suspect her disclosures were fabricated. Additionally, Ingram testified the investigation into these allegations was still ongoing. Therefore, there was no final conclusion as to whether the sexual abuse was substantiated or unsubstantiated, or whether charges would be pursued against these men.

However, without any kind of support from the witnesses' testimony, the family court made extensive oral pronouncements which focused almost exclusively on the court's conclusion that mother's mental condition resulted in her making false claims that K.L. was being sexually abused and that for this reason all the children were abused or neglected. Such a conclusion required multiple inferences that were at odds with the testimony presented during the adjudication hearing.

The family court's vague reference to what occurred in a prior domestic violence case was not the proper subject of judicial notice. Kentucky Rule of Evidence (KRE) 201(b) specifies in relevant part:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within . . . in a nonjury matter, the county in which the venue of the action is fixed; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

While "it is a well-established principle that a trial court may take judicial notice of its own records and rulings, and of all matter patent on the face of such records," *M.A.B. v. Commonwealth Cabinet for Health and Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015), it was unclear whether the family court was referencing written findings made in its own records, testimony (and if so, by whom), or perhaps just the family court's general recollection of the proceedings. Whatever the family court took notice of, it was not of record in this DNA case, so we cannot review it. Therefore, without any clarification on this matter, it was inappropriate for the family court to make a ruling based on a previous domestic violence case.

We emphasize that taking judicial notice of testimony in an unrelated proceeding is particularly problematic as it is not necessarily undisputed and is not subject to cross-examination by the present parties. *See Lage v. Esterle*, 591 S.W.3d 416, 422-23 (Ky. App. 2019) (explaining problems with this kind of "judicial notice" and reversing on this basis). Additionally, the family court never informed the parties of its intent to take judicial notice of the domestic violence proceedings until the court orally announced its decision. Under these circumstances, given the lack of appropriate notice, mother could not present any evidence to counter

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

whatever material the family court was relying upon. We additionally believe it was unlikely that whatever occurred in that domestic violence case conclusively established that mother makes false reports of sexual abuse.

It is troubling that the family court seemed to believe that because there was no physical evidence, there were accusations against multiple men, and that K.L. initially denied that the sexual abuse occurred, that this necessarily means that sexual abuse did not take place and the reports of it were fabricated by mother and K.L. A lack of physical evidence is not synonymous with reports of sexual abuse being fabrications. A lack of physical evidence does not mean that nothing happened.

Unfortunately, sexual abuse of girls may be much more common than we would like to believe. *See* Kimberly A. Crnich, *Redressing the Undressing: A Primer on the Representation of Adult Survivors of Childhood Sexual Abuse*, 14 Women's Rts. L. Rep. 65, 66 (1992) (citing statistics stating "6% to 62% of female children . . . have been victims of sexual abuse" and that the rate of "molestation may be as high as one in every three girls"). Given such frequency, it is an unfortunate truth that one child may be molested by more than one perpetrator in a short period of time.

Additionally, an initial denial by a child does not mean that sexual abuse did not take place. "Some studies suggest that the majority (approximately 75 percent) of children who eventually disclose sexual abuse previously denied that the abuse occurred." Sarah F. Shelton, *Evaluating the Evaluation: Reliance Upon Mental Health Assessments in Cases of Alleged Child Sexual Abus*e, 15 Nev. L.J. 566, 579 (2015).

But whether or not K.L. was sexually abused was not a matter truly before the family court. The Cabinet never alleged in its petition or intimated during the adjudicatory proceeding that K.L. and her siblings were subject to abuse or neglect based on mother making false allegations that K.L. was sexually abused or causing K.L. to make false reports of sexual abuse. There was also no testimony provided to support such an inference, other than Ingram expressing confusion about how mother became convinced that K.L. was sexually abused where K.L. initially denied that such abuse took place. Whatever doubts there may have been about how mother became sufficiently convinced that K.L. was sexually abused by R.S. that she felt the need to report it, this ultimately does not matter as Ingram and Howard testified that K.L. subsequently confirmed to them herself that she was sexually abused by two men and made a detailed disclosure about an incident of sexual abuse by her former step-father. Therefore, to the extent that abuse or neglect was found based on the family court's finding that "Mother makes false allegations as to sexual abuse of one child (3 times in 14 months)[,]" it is not supported by the evidence.

B. Alcohol Use

Mother argues that the family court's findings regarding her drinking were equivocal and based on hearsay, but that even if a parent has a substance use disorder, that does not necessarily mean that the parent is thereby rendered unable to properly care for children. We agree. There was insufficient evidence for the family court to conclude that mother's alcohol use caused a risk of abuse or neglect to the children.

While there was evidence to support a finding that mother drinks alcohol, this is hardly in and of itself, without anything more, grounds for finding abuse or neglect. Alcohol is legal and parents are not required to be abstinent just because they are parents.

While hearsay testimony from a witness relating what one child said indicated that this child was afraid when mother drank with her former boyfriend, there was not enough detail given with this to know why this caused fear or if the fear was associated with any risk of harm. While abuse or neglect can be found pursuant to KRS 600.020(1)(a)3. based on a parent "[e]ngag[ing] in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child, including but not limited to parental incapacity due to a substance use disorder as defined in KRS 222.005[,]" this was not one of the grounds the family court indicated was established.

Pursuant to KRS 620.023(1)(c), family courts in considering the best interests of children shall consider if relevant whether the parent has a "[s]ubstance use disorder, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child[.]" KRS 222.005(12) defines a "substance use disorder" as:

> a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems. Criteria for substance use disorder are in the most current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders[.]

Simply put, there was no evidence mother has a substance use disorder associated with her use of alcohol. There was absolutely no evidence that mother was addicted to alcohol, she was ever drunk around the children, she was asked not to drink alcohol, her alcohol use rendered her unable to care for her children, or that her drinking caused a risk that she would be unable to care for her children. *Compare with Cabinet for Health and Family Services on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 576 (Ky. 2018) (finding risk of harm based upon parent's admitted prior history of drug abuse, failure to appropriately take suboxone as prescribed, and missed and positive drug tests). Indeed, the family court equivocated in its oral explanation of its decision on whether or not mother had a drinking problem, which would appear to indicate this was not proven by the Cabinet by a preponderance of the evidence, much less that the Cabinet proved this conduct impacted the children.

At most, all the information the Cabinet had before it was mother's acknowledgment to Ingram that she had been drinking (when the children were not around), the children acknowledging when asked that their mother drank alcohol, and anonymous reports to the Cabinet that mother was intoxicated. Anonymous reports that have not been verified in any respect are not entitled to any weight. There was also no indication that the two tests out of twenty or thirty that were positive for alcohol revealed an elevated blood alcohol level, rather than just the presence of alcohol, or that by drinking mother violated any court orders. Without more, this evidence does not demonstrate risk of abuse or neglect.

C. Mental Health Issues

As to mother's "mental health issues," mother argues that whatever these were, the evidence could not establish risk of abuse or neglect. Mother notes that mental illness is not mentioned in the statutory list of neglectful or abusive behavior. She acknowledges that while mental illness is listed as a consideration for determining the best interest of the child pursuant to KRS 620.023(1)(a), she denies that it has ever been established that she has a mental illness, and if she did, that it rendered her unable to care for her children's immediate and ongoing needs. She notes that the "[n]eeds of the child" are defined in KRS 600.020(41) as consisting of "necessary food, clothing, health, shelter, and education[.]"

Mother is correct that in considering the best interests of the children, pursuant to KRS 620.023(1)(a) family courts are to consider "[m]ental illness as defined in KRS 202A.011 . . . of the parent, *as attested to by a qualified mental health professional*, which renders the parent unable to care for the immediate and ongoing needs of the child" with KRS 202A.011(9) defining a "[m]entally ill person" as:

> a person with *substantially impaired capacity* to use self-control, judgment, or discretion in the conduct of the person's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors[.]

(Emphasis added.)

The Cabinet witnesses indicated that their greatest concern was mother's mental health. However, each of the witnesses acknowledged that they were not competent to make any kind of diagnosis about mother's mental health. At most, all of them could only testify about their own observations.

Did they observe things that gave them pause? Certainly. Were these observations which generated vague suspicions that something was "off" sufficient to conclude that there was a risk that the children would thereby be neglected or abused? No.

It should be obvious that many parents may have mental health issues. According to government statistics provided by the National Institute for Mental Health, Mental Illness, "[n]early one in five U.S. adults live with a mental illness (52.9 million in 2020)." https://www.nimh.nih.gov/health/statistics/mental-illness/ (last visited Sep. 2, 2022). While of course these vary in how serious they may be, it is evident that having a mental illness or having "mental health issues" does not, in and of itself, mean that parents put their children at risk of abuse or neglect. Instead, as set out in our statutes, a mental illness which substantially impairs that parent and renders the parent "unable to care for the immediate and ongoing needs of the child" must be properly diagnosed by a mental health professional.

None of these requirements were established through the Cabinet's evidence. Therefore, the family court's finding that mother had "mental health issues" was essentially meaningless as it did not establish any risk to the children. However, we wish to emphasize that it would likely benefit both mother and the children for mother to seek appropriate mental health services and counseling for herself.

Given the lack of substantial evidence to support any of the family court's findings that the children were abused or neglected by mother, reversal is warranted.

III. Interviewing the Children

As to mother's argument that the family court erred in refusing to interview the children in chambers, this argument was inadequately preserved as mother failed to offer any proof about their anticipated testimony as required by KRE 103(a)(2). *See Holland v. Commonwealth*, 466 S.W.3d 493, 501 (Ky. 2015) (explaining why this offer of proof as to anticipated testimony is required to preserve an objection). However, we briefly address this issue to provide future guidance should mother ask for the children to testify in a future proceeding.

While *Addison v. Addison*, 463 S.W.3d 755, 763-64 (Ky. 2015), could be argued as providing that the family court did not have to interview the children, we do not believe that *Addison* resolves the issue. In *Addison*, the Court distinguished two situations concerning testimony offered by children. While the Court confirmed that generally a competent child should not be prohibited from testifying as an eyewitness simply due to her young age, the Court held that there was no requirement that young children be required to testify in a dispute involving child custody or parenting time, concluding that in the latter situation courts had the discretion to determine whether such testimony (*in camera* or in open court) should be allowed. *Id.*

We note that *Addison* was generally interpreting KRS 403.290(1) which provides in relevant part: "The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation." KRS 403.290(1) is of course contained within Chapter 403 which governs dissolution of marriage and child custody, rather than Chapter 620 which governs DNA actions. While the *Addison* Court also referenced a party's argument that KRE 611(a)(3) applied (which provides "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: . . . [p]rotect witnesses from harassment or undue embarrassment"), this ground was not considered independently from KRS 403.290(1).[1]

[1] While in *B.S. v. Cabinet for Health and Family Services*, No. 2017-CA-000109-ME, 2018 WL 6266779, at *3 (Ky. App. Nov. 30, 2018) (unpublished), a termination case, our Court cited *Addison* for the proposition that "[w]hether or not to interview the children was within the sound discretion of the family court, which is granted wide latitude in exercising that discretion[,]" the Court had already determined: the parent who wished to call the children to testify suggested (rather than asked) for the children to be interviewed *in camera*, backed away from all children being interviewed and did not adequately preserve the anticipated evidence of the one child, which appeared would be irrelevant in any event, and the Court further indicated the testimony of the children would add nothing given the extensive evidence about what had occurred. While *B.S.* can be cited pursuant to CR 76.28(4)(c), as there are no published opinions adequately addressing whether DNA or termination cases should be treated the same as custody dispute cases between parents with the court being granted the same discretion to determine whether children should testify despite KRS 403.290(1) not applying, we do not believe *B.S.* is controlling as it does not squarely address this issue.

CONCLUSION

There is no substantial evidence supporting the Lewis Family Court's findings of fact in the adjudication orders that the children were abused or neglected; thus, there is no justification for the children's continued removal from mother's care in the adjudication and disposition orders. Therefore, we vacate the family court's adjudication and disposition orders entered against mother and remand for dismissal.

However, we do not know what has occurred in the interim and whether new additional evidence may make the Cabinet believe that it can now establish that mother is presently unfit to care for the children. Therefore, the children shall be returned to the custody and care of mother within ten days of this Opinion becoming final, unless the Cabinet files new petitions seeking emergency custody, and the family court makes appropriate findings that the children are in danger warranting continued removal within that time.

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; CALDWELL AND K. THOMPSON, JUDGES.

CRIMINAL LAW

FLEEING OR EVADING POLICE

DISORDERLY CONDUCT

JURORS

JUROR'S STATEMENT THAT SHE RECOGNIZED POLICE OFFICER FROM VIDEO PLAYED DURING TRIAL AS BEING A FORMER FRIEND WHO HAD ASSAULTED HER IN THE PAST

DEFENSE COUNSEL'S PRESENCE AT BENCH CONFERENCE CONCERNING JUROR WHILE DEFENDANT REMAINED AT DEFENSE TABLE

SEARCH AND SEIZURE

INVESTIGATORY STOP

Around midnight, officers heard yelling while they were on patrol — Officers followed noise for several blocks and found defendant on apartment patio, which sat two to three feet below grade and behind row of bushes — Defendant was surrounded by empty beer cans — Defendant's eyes were bloodshot and he was yelling at woman inside apartment — Officers asked defendant what was going on — Defendant motioned to woman and said, "It's my girlfriend, my girlfriend" — Woman shook her head indicating "no" — Officers asked defendant to step up off patio and to sit on sidewalk — Instead, defendant began running — Officers saw defendant drop white plastic bag in parking lot — Officers continued chase and eventually caught defendant — Officers then retrieved white bag — Bag contained marijuana, heroin, cocaine, jewelry, and 12 pages of notes written in Spanish — Officers also recovered substantial amount of currency from defendant — Trial court denied defendant's motion to suppress evidence seized from him at time of his arrest — Jury found defendant guilty of first-degree trafficking in a controlled substance (heroin), first-degree trafficking in a controlled substance (cocaine), first-degree fleeing or evading police, third-degree assault, tampering with physical evidence, resisting arrest, second-degree disorderly conduct, and possession of marijuana — Jury found defendant not guilty of alcohol intoxication in a public place — Trial court denied defendant's motion for new trial or jnov — Defendant appealed — REVERSED defendant's convictions for tampering with physical evidence and first-degree fleeing or evading police, and AFFIRMED defendant's remaining convictions — After jury was seated, Commonwealth called Officer Chenault as witness to narrate his account of encounter with defendant while body-cam video from Officer Hardison played for jury — Defendant objected to Officer Chenault's testimony about what Officer Hardison saw, stated, or observed — Trial court agreed and limited Officer Chenault's testimony accordingly — During break in Officer Chenault's testimony, Juror 2724170 approached bench and informed court that she recognized Officer Hardison's name and his voice in video — She told court that she and Officer Hardison had been friends about 15 years earlier, but that friendship ended when he assaulted her — Trial court concluded that juror could not be impartial and excused her — During bench conference, Commonwealth advised court that it would not be calling Officer Hardison as witness — However, near end of Commonwealth's case, Commonwealth called Officer Hardison to stand — Officer Hardison explained that he had just returned from military leave — Commonwealth stated that it had not been sure whether Officer Hardison would be available for trial — Defense counsel did not object to Officer Hardison's testimony — Defendant alleged that he was deprived of his constitutional right to be present at all critical stages of the proceedings — Defendant was present in courtroom and had interpreter; however, defendant remained at counsel table

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

during bench conference with Juror 2724170 — It does not appear from record that interpreter provided defendant with translation of discussion at bench — Defendant alleged that his absence from bench conference prevented him from fully participating in his own defense and violated his right to confront and cross-examine Officer Hardison — Defendant argued that these errors, while not preserved, were structural errors — In alternative, defendant argued for review for palpable error — Errors did not amount to structural error — Defendant's absence from one bench conference, during which he was represented by counsel, did not affect entire framework of trial so as to render proceedings fundamentally unfair — Bench conference is critical stage of criminal proceeding; however, right to be present at all critical stages of criminal proceeding is not absolute — Defendant was represented by counsel who fully participated in bench conference — Further, defendant failed to establish that he suffered any prejudice due to his absence from bench conference — Defendant did not explain how allegation of Officer Hardison's assault on juror, which was more than a decade old, would have been relevant or admissible — There was no evidence that Commonwealth intentionally misled trial court or defense when it said that Officer Hardison would not testify — Defendant failed to identify any substantial prejudice from allowing Officer Hardison to testify — Commonwealth identified Officer Hardison as potential witness in its pre-trial disclosures — On appeal, Commonwealth conceded that defendant was entitled to directed verdict on charge of tampering with physical evidence; therefore, set aside this conviction — There was sufficient evidence for jury to infer that defendant understood officers' commands to stop fleeing — Defendant alleged that he primarily spoke Spanish, with only limited English skills — There was no evidence that defendant's act of fleeing or eluding police created substantial risk of death or serious physical injury — There was no evidence of any significant traffic on street during chase; that defendant ran out in front of vehicles; or that officers were required to do so during chase — While officers fell during chase, there was no evidence that they were placed at risk of "serious physical injury" — Thus, defendant was entitled to directed verdict on charge of first-degree fleeing or evading police — Under facts, it was jury issue as to whether patio could be considered "public place" for purposes of disorderly conduct charge; therefore, trial court did not err in denying defendant's motion for directed verdict on charge of second-degree disorderly conduct — Officers had reasonable suspicion to justify initial investigatory stop — Officers heard yelling several blocks away from patio — Officers had reasonable basis to believe that patio was public place — Defendant appeared to be intoxicated — Officers reasonably concluded that woman in apartment did not want defendant to be on her patio — Defendant fled after officers clearly established a reasonable suspicion for the stop — Thus, trial court properly denied defendant's motion to suppress evidence obtained following his arrest —

Luis O. Garcia Martinez v. Com. (2021-CA-1062-MR); Jefferson Cir. Ct., Bisig, J.; Opinion by Judge Maze, *affirming in part, reversing in part, and remanding*, rendered 9/9/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Luis O. Garcia Martinez (Martinez)[1] appeals from a judgment of conviction by the Jefferson Circuit Court. He argues that he was unfairly prejudiced by his exclusion from a bench conference and because the Commonwealth presented the testimony of a witness who it had previously stated would not testify. These issues are not preserved for review, and we find no palpable error or prejudice occurred as a result. However, we agree with Martinez that he was entitled to directed verdicts on the charges of tampering with physical evidence and first-degree fleeing or evading police. But he was not entitled to a directed verdict on the charge of second-degree disorderly conduct. Finally, we conclude that the trial court did not err in denying Martinez's motion to suppress evidence seized during and following his arrest. Hence, we reverse in part, affirm in part, and remand for entry of a new judgment and sentence as set forth below.

[1] The Commonwealth's/Appellee's brief spells the defendant's/Appellant's last name as "Martines." That spelling also occurs at various points in the record below. However, the name is spelled as "Martinez" in the indictment and in the Appellant's brief. In addition, his last name is sometimes listed as "Garcia Martinez" or "Garcia-Martinez." This is consistent with the common form for Spanish surnames, which typically employ a paternal surname followed by a maternal surname, with the paternal surname being primary. But the defendant/Appellant is most commonly referred to as "Martinez," and we will continue to use this name and spelling in the interest of consistency.

I. Facts and Procedural History

On January 28, 2016, a Jefferson County grand jury returned an indictment charging Martinez on charges of first-degree trafficking in a controlled substance (heroin), first-degree trafficking in a controlled substance (cocaine), first-degree fleeing or evading police, third-degree assault, tampering with physical evidence, resisting arrest, second-degree disorderly conduct, possession of marijuana, and alcohol intoxication in a public place. The charges against Martinez and the issues on appeal stem from an interaction he had with two Louisville Metro Police Department (LMPD) officers on October 29, 2015. Around midnight on that date, Officers John Chenault and Joseph Hardison heard yelling while on patrol in the Beechmont neighborhood of Louisville. They followed the noise for several blocks and found Martinez on an apartment patio, which sat two-to-three feet below grade and behind a row of bushes. Martinez was surrounded by empty beer cans. His eyes were bloodshot and he was yelling at a woman inside.

The officers then asked Martinez what was going on. He motioned to a woman standing inside the apartment and said, "It's my girlfriend, my girlfriend." However, the woman shook her head indicating "no." Officer Chenault directed Martinez to step up off the patio and then Officer Hardison told him to sit down on the sidewalk. Instead, Martinez took off running.

During the ensuing chase, Officer Hardison saw Martinez drop a white plastic bag in a parking lot. The officers continued after Martinez, chasing him back and forth across Third Street several times and onto the grounds of a nearby apartment complex. Once there, the officers tackled Martinez and used a Taser to subdue him.

After Martinez was in custody, Officer Hardison retraced his steps to recover a flashlight that he had dropped during the chase. In addition, Officer Hardison found the white bag that Martinez had dropped. The bag contained marijuana, heroin, cocaine, jewelry, and twelve pages of notes written in Spanish. The officers also recovered a substantial amount of currency from Martinez.

Prior to trial, Martinez moved to suppress evidence seized from him at the time of his arrest. Following a hearing, the trial court denied the motion. The matter then proceeded to a jury trial in May 2021. The jury ultimately found Martinez not guilty of alcohol intoxication in a public place, but guilty of the remaining charges. The jury fixed his sentence at a total of seven years' imprisonment, which the trial court imposed. After trial, Martinez moved for new trial or a judgment notwithstanding the verdict. The trial court denied the motion. This appeal followed. Additional facts will be set forth below as necessary.

II. Issues Relating to the Testimony of Officer Hardison

Martinez first raises several issues involving the testimony of Officer Hardison. After the jury was seated, the Commonwealth called Officer Chenault as its first witness. In pertinent part, Officer Chenault began to narrate his account of the encounter with Martinez while the body-cam video from Officer Hardison played for the jury. Martinez objected to Officer Chenault's testimony about what Officer Hardison saw, stated, or observed. The trial court agreed and limited Officer Chenault's testimony accordingly.

During a break in Officer Chenault's testimony, Juror 2724170 approached the bench and informed the trial court that she recognized Officer Hardison's name and his voice in the video. She told the court that she and Officer Hardison had been friends about fifteen years earlier, but the friendship ended when he assaulted her. Concluding that the juror could not be impartial, the trial court excused her from jury service.

During the bench conference, the Assistant Commonwealth's Attorney advised the court that "we're not calling [Officer Hardison] as a witness." But near the end of the Commonwealth's case, the Commonwealth called Officer Hardison to the stand. Officer Hardison explained that he had just returned from military leave and the Commonwealth offered that it had been unsure whether he would be available for trial. Martinez's counsel did not object to Officer Hardison's testimony.

A. Deprivation of Right to Be Present at Critical Stages of the Proceeding

Martinez first contends he was deprived of his constitutional right to be present at all critical stages of the proceedings. Martinez was present in the courtroom and had an interpreter. However, he remained at the counsel table during the bench conference with Juror 2724170. Furthermore, it does not appear from the record that the interpreter provided Martinez with a translation of the discussion at the bench.

Martinez argues that his absence from the bench conference prevented him from fully participating in his own defense. He asserts that the bench conference revealed information substantially related to Officer Hardison's credibility. As a result, Martinez maintains that his absence from the bench conference frustrated his Sixth Amendment right to confront and cross-examine Officer Hardison.

As noted, Martinez's counsel did not object either to Martinez's absence at the bench conference or to Officer Hardison's later testimony. Martinez essentially argues that they may be reviewed as structural errors despite their lack of preservation. In the alternative, Martinez asks this Court to review the issues under the palpable error standard of RCr[2] 10.26.

[2] Kentucky Rules of Criminal Procedure.

We disagree that Martinez's claims on these issues amount to structural error. Structural errors "affect[] the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420 (2017) (internal quotation marks and citation omitted). As such "a structural error def[ies] analysis by harmless error standards." *Id.* at 1907-08 (internal quotation marks and citation omitted). "Structural errors are rare." *Crossland v. Commonwealth*, 291 S.W.3d 223, 232 (Ky. 2009). Moreover, the structural error has only been found in seven circumstances: (1) complete denial of counsel; (2) biased trial judge; (3) racial discrimination in selection of grand jury; (4) denial of self-representation at trial; (5) denial of public trial; (6) defective reasonable-doubt instruction; and (7) erroneous deprivation of the right to counsel of choice. *McCleery v. Commonwealth*, 410 S.W.3d 597, 605 (Ky. 2013) (citations omitted). In this case, Martinez's absence from a single bench conference, during which he was represented by counsel, did not affect the entire framework of the trial so as to render the proceedings fundamentally unfair.

Since Martinez did not preserve this objection, our review is limited to palpable error. An error is palpable when it affects the substantial rights of a party and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. RCr 10.26. To determine whether manifest injustice has occurred, an appellate court must find that on the whole case there is a substantial possibility that the result would have been different had the error not occurred. *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011).

It is well-established that a defendant has a right to be present and represented by counsel at all critical stages of a criminal proceeding. *See Tennessee v. Lane*, 541 U.S. 509, 523, 124 S. Ct. 1978, 1988, 158 L. Ed. 2d 820 (2004). We agree with Martinez that the bench conference was a critical stage of the criminal proceeding. *Allen v. Commonwealth*, 410 S.W.3d 125, 139 (Ky. 2013). However, the right to be present at all critical stages of a criminal proceeding is not absolute. *See* RCr 8.28. Unlike in *Allen*, Martinez was not representing himself – he was represented by counsel who fully participated in the bench conference involving the juror. Thus, the trial court's failure to include Martinez in the bench conference did not affect his substantial rights.

Furthermore, Martinez fails to establish that he suffered any prejudice due to his absence from the bench conference. Martinez asserts that he would have asked his counsel to cross-examine Officer Hardison about the alleged assault on the juror. But as the Commonwealth notes, the proposed cross-examination would have involved a collateral matter and would have been subject to the relevancy limitations of KRE[3] 402. *See also Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky. 2005). Furthermore, prior bad acts are generally not admissible unless the court determines that the conduct is probative of truthfulness. KRE 403, 404, and 608. Martinez offers no explanation of how an allegation of assault, dating back more than a decade, would have been relevant or admissible. Therefore, he cannot establish any prejudice resulting from his absence from the bench conference.

[3] Kentucky Rules of Evidence.

B. Unfair Surprise

Martinez next argues that he was unfairly surprised by Officer Hardison's testimony after the Commonwealth stated he would not appear. Martinez notes that Officer Hardison was the only witness who could testify to seeing him drop the bag containing the drugs. Martinez contends that he was misled by the Commonwealth's statement that Officer Hardison would not testify and that it affected counsel's ability to cross-examine him.

As previously noted, Martinez's counsel did not object when Officer Hardison was called. Therefore, we must also review this issue under the palpable error standard. As an initial matter, there was no evidence the Commonwealth intentionally misled the trial court or the defense. During the bench conference, the Commonwealth stated that it did not intend to call Officer Hardison to testify. In addition, the Commonwealth advised the court that it was unsure whether Officer Hardison would be available for trial because he was on military leave. Given the changing circumstances of trial and the availability of Officer Hardison, we find no indication that the Commonwealth intentionally misrepresented its intentions.

Furthermore, Martinez has failed to identify any substantial prejudice from allowing Officer Hardison to testify. The Commonwealth identified Officer Hardison as a potential witness in its pre-trial disclosures. The Commonwealth's statements occurred after trial had begun and could not have affected defense counsel's ability to prepare. And as discussed above, the allegations about Officer Hardison probably would not have been admissible. Therefore, we agree with the Commonwealth that Martinez failed to show a substantial possibility that the outcome of the trial was affected.

III. Denial of Motions for Directed Verdict

Martinez next argues that he was entitled to directed verdicts on the charges of tampering with physical evidence, fleeing or evading police, and disorderly conduct. On appellate review, a trial court's denial of a motion for directed verdict should only be reversed "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4-5 (Ky. 1983)). In determining whether to grant a motion for directed verdict, the trial court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Id.* To sustain a motion for a directed verdict, the Commonwealth must produce less than a "mere scintilla of evidence." *Id.* at 188.

A. Tampering With Physical Evidence

KRS[4] 524.100 makes it unlawful for a person to tamper with physical evidence. In relevant part, that statute provides the following:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; . . . .

[4] Kentucky Revised Statutes.

The statute requires the Commonwealth to "prove both that the defendant committed one of the proscribed criminal acts – [d]estroys, mutilates, conceals, removes, or alters – and that the defendant did so with the intent to impair its verity or availability." *McGuire v. Commonwealth*, 595 S.W.3d 90, 98 (Ky. 2019) (internal quotation marks and citation omitted). In *Commonwealth v. James*, 586 S.W.3d 717, 731 (Ky. 2019), our Supreme Court held that, "where a defendant merely drops, throws down, or abandons drugs in the vicinity of the defendant and in the presence and view of the police, and the officer can quickly and readily retrieve the evidence, the criminal act of concealment or removal has not taken place."

Likewise, Martinez argues that his actions in dropping the plastic bag in plain view of Officer Hardison cannot amount to concealment within the meaning of KRS 524.100. The Commonwealth agrees that, under *McGuire* and *James*, a directed verdict would be appropriate on the charge of tampering with physical evidence. Since the Commonwealth has conceded the error, we will set aside the conviction for tampering with physical evidence.[5]

[5] The Commonwealth reserved its right to file supplemental briefing based upon the outcome

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of the Kentucky Supreme Court's decision in *Commonwealth v. Bell*, No. 2021-SC-0252-DG. The Kentucky Supreme Court heard oral arguments in that case in June 2022, but no opinion in that case has been rendered as of this writing. Furthermore, the controlling issue in *Bell* was whether the defendant's "furtive but futile acts" of attempting to hide a bag of drugs amounted to concealment within the meaning of the statute. This Court concluded that it did not because the drugs remained in plain view despite the defendant's efforts. *Bell v. Commonwealth*, No. 2019-CA-1260-MR, 2021 WL 2274313, at *2 (Ky. App. Jun. 4, 2021), *review granted* (Oct. 20, 2021). Regardless of the outcome in *Bell*, we conclude that *McGuire* and *James* remain applicable because there was no evidence in this case that Martinez attempted to conceal his actions by dropping the bag out of the sight of Officer Hardison.

B. Fleeing or Evading Police

KRS 520.095(1)(b) criminalizes pedestrian flight from police, when the "person knowingly or wantonly disobeys an order to stop, given by a person recognized to be a peace officer[.]" In addition, the statute requires the presence of an aggravating circumstance, in this case, "[b]y fleeing or eluding, the person is the cause of, or creates a substantial risk of, serious physical injury or death to any person or property[.]" *See Bell v. Commonwealth*, 122 S.W.3d 490, 496 (Ky. 2003). Martinez challenges the sufficiency of the evidence on both of these elements.

First, Martinez argues that there was no evidence he "knowingly or wantonly" disobeyed an order to stop. He points out that he primarily speaks Spanish with only limited English skills. In fact, the officers needed to translate a simple command such as "sit down" so that Martinez could understand it. As a result, Martinez contends there was no evidence he understood the officers' orders to stop fleeing.

Second, Martinez contends that there was no evidence that his fleeing from the police was the cause of or created a substantial risk of serious physical injury to any person or property. He notes that it was around midnight; there was very little traffic on Third Street while he was fleeing from the officers. He contends that any risk of harm to the officers was merely speculative and not sufficient to support the charge of first-degree fleeing or evading.

In response, the Commonwealth notes that Martinez demonstrated an understanding of basic English. The Commonwealth also points to Officer Hardison's testimony that there was traffic on Third Street despite the late hour. The Commonwealth also notes that both officers fell during the chase. Thus, the Commonwealth argues that there was sufficient evidence to submit this charge to the jury.

Martinez clearly disobeyed the officers' commands to stop fleeing. The only question was whether he understood that command. There was sufficient evidence for the jury to infer that he did. The more difficult question is whether Martinez's act of fleeing or eluding police created "a substantial risk of death or serious physical injury."

> Generally speaking, however, we would observe that a *substantial* risk is a risk that is "[a]mple," "[c]onsiderable in . . . degree . . . or extent," and "[t]rue or real; not imaginary." Accordingly, it is clear that not all risks are substantial – hence the phrase "low risk" – and not every hypothetical scenario of "what might have happened" represents a substantial risk. In any trial, the issue of whether a defendant's conduct creates a substantial risk of death or serious physical injury "depends upon proof" and reasonable inferences that can be drawn from the evidence.

Bell, 122 S.W.3d at 497 (citations omitted).

In *Bell*, the defendant dropped a handgun while fleeing from the police. The Commonwealth argued that this created a substantial risk of harm because it could have gone off and injured the officers. The Kentucky Supreme Court emphasized that not every potential risk constitutes a "substantial" risk of harm under the statute. *Id.* at 498-99. In contrast, a defendant who drives erratically while fleeing from police clearly creates a substantial risk of harm to other persons or property. *See Crain v. Commonwealth*, 257 S.W.3d 924, 929 (Ky. 2008), and *Lawson v. Commonwealth*, 85 S.W.3d 571, 576 (Ky. 2002), *overruled on other grounds by Hall v. Commonwealth*, 551 S.W.3d 7 (Ky. 2018).

In this case, there was no evidence of any significant traffic on Third Street during the chase. Likewise, there was no evidence that Martinez ran out in front of vehicles or that the officers were required to do so during the chase. And while the officers fell during the chase, there was no evidence that they were placed at risk of "serious physical injury." Consequently, we must agree that Martinez was entitled to a directed verdict on the charge of first-degree fleeing or evading police.

C. Second-degree Disorderly Conduct

> A person is guilty of disorderly conduct in the second degree when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:
>
> (a) Engages in fighting or in violent, tumultuous, or threatening behavior;
>
> (b) Makes unreasonable noise;
>
> (c) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency; or
>
> (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

KRS 525.060(1).

Martinez argues that the patio of his girlfriend's apartment was not a "public place" within the meaning of the statute. However, the Kentucky General Assembly defined "public place" in KRS 525.010(3) as:

> "Public place" means a place to which the public or a substantial group of persons has access and includes but is not limited to highways, transportation facilities, schools, places of amusements, parks, places of business, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.

This definition is applicable to all offenses set out in KRS Chapter 525. In *Maloney v. Commonwealth*, 489 S.W.3d 235, 241 (Ky. 2016), the Kentucky Supreme Court further clarified that:

> KRS 525.010(3) provides a definition of a "public place" but that definition is not exhaustive, and while this Court has not explicitly stated whether a porch would be considered a public place, our previous decisions make it clear that Appellant's porch was open at least to limited access by the general public, which would include inquisitive police officers.

The Court in *Maloney* concluded that the front porch of a residence was a "public place" because it was "open at least to limited access by the general public[.]" *Id.* The dissent instead relies upon *Pace v. Commonwealth*, 529 S.W.3d 747 (Ky. 2017), which held that a partially-walled back patio was within the protected curtilage of the home. *Id.* at 756. However, the issue in *Pace* concerned whether the officers lawfully entered onto the patio for purposes of the Fourth Amendment. The Supreme Court held that the patio enjoyed curtilage protection. Consequently, the officers could not have maintained a lawful vantage point when viewing items inside the apartment that were only visible from the patio. *Id.*

The current case, unlike *Pace*, did not involve a warrantless entry or search. Officers Chenault and Hardison did not enter onto the patio. They merely viewed Martinez from the vantage of the public sidewalk adjacent to the patio, and they directed him to step off the patio onto the sidewalk. Consequently, the Fourth Amendment analysis applied in *Pace* is not applicable here.

Rather, the only question is whether the patio was a "public place" within the definition set out in KRS 525.010(3). As a result, the analysis set out in *Maloney* is directly applicable. The patio in this case was somewhat more secluded than in *Maloney* – it was several feet below grade level and at least partially behind a row of bushes. Nevertheless, we conclude that, like the porch in *Maloney*, it was open to at least limited access by the general public. Moreover, the statute provides that "[a]n act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place." KRS 525.010(3). Even if the apartment patio was private, the officers could hear Martinez's shouting from several blocks away. Under the circumstances, there was at least a jury issue whether the patio could be considered a "public place" for purposes of the disorderly conduct statute. Therefore, the trial court did not err by denying Martinez's motion for a directed verdict on the charge of second-degree disorderly conduct.

IV. Denial of Motion to Suppress

Finally, Martinez argues that the trial court erred by denying his pre-trial motion to suppress evidence seized from him at the time of his arrest. RCr 8.27 sets out the procedure for conducting a suppression hearing. When the trial court conducts a hearing, our standard of review is two-fold. "First, the factual findings of the court are conclusive if

they are supported by substantial evidence[;]" and second, this Court conducts "a *de novo* review to determine whether the [trial] court's decision is correct as a matter of law." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000) (footnotes omitted) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998)).

Martinez argues that Officers Chenault and Hardison lacked any reasonable suspicion to detain him or to pursue him when he fled. Consequently, he maintains that any evidence seized as a result of the stop should have been suppressed. However, both officers testified that they could hear yelling from several blocks away. And as discussed above, the officers had a reasonable basis to believe that the patio was a public place. They also observed that Martinez appeared to be intoxicated. And from the reaction given by the woman inside the apartment, the officers reasonably concluded that she did not want Martinez to be on her patio. Accordingly, the officers had a reasonable suspicion to justify the initial investigatory stop. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Martinez correctly notes that "flight, in and of itself, is insufficient to establish probable cause." *Commonwealth v. Jones*, 217 S.W.3d 190, 197 (Ky. 2006) (citing *United States v. Margeson*, 259 F. Supp. 256, 265 (E.D. Pa. 1966)). However, the probable cause standard is a "'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Williams v. Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983) (additional citations omitted)). Unlike in *Jones*, Martinez fled after the officers clearly established a reasonable suspicion for the stop. And Martinez did not simply "walk away once he noticed the presence of authorities[,]" like the defendant in *Jones*. 217 S.W.3d at 197.

Rather, the facts of this case more closely resemble those in *Hunter v. Commonwealth*, 587 S.W.3d 298 (Ky. 2019), where the defendant fled after the officers identified themselves and directed him to stop. *Id.* at 307-08. Although this evidence was not sufficient to sustain the charge of first-degree fleeing or evading, it was sufficient to support a finding of probable cause for the pursuit and arrest. *Id.* Likewise, the trial court in this case did not clearly err in finding that the officers had probable cause to pursue and arrest Martinez after he defied their orders to stop and fled. In any event, Officer Hardison recovered the bag containing the drugs after Martinez had discarded it. Thus, that evidence was not "seized" from him within the meaning of the Fourth Amendment. *See United States v. Martin*, 399 F.3d 750, 753 (6th Cir. 2005). Therefore, the trial court properly denied Martinez's motion to suppress evidence obtained following his arrest.

V. Conclusion

Based on the foregoing, we reverse Martinez's convictions for tampering with physical evidence and first-degree fleeing or evading police. However, we affirm Martinez's remaining convictions. This matter is remanded to the Jefferson Circuit Court for entry of a new judgment consistent with this Opinion.

GOODWINE, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

GOVERNMENT

CONTRACTS

HEALTH CARE, HEALTH FACILITIES, AND HEALTH SERVICES

MEDICAID

MANAGED CARE ORGANIZATION (MCO)

2020 AWARD OF MCO CONTRACTS

PROTEST OF 2020 AWARD OF MCO CONTRACTS FILED BY AN INSURANCE COMPANY THAT WAS NOT AWARDED AN MCO CONTRACT

EXECUTIVE BRANCH CODE OF ETHICS (EBCE)

KENTUCKY MODEL PROCUREMENT CODE (KMPC)

Managed care organization (MCO) is private company selected through government procurement process to run Commonwealth's Medicaid system — In 2019, during Governor Bevin's administration, Finance and Administration Cabinet (FAC) and Department of Medicaid Services of Cabinet for Health and Family Services (CHFS) issued request for proposals (2019 RFP) to determine which five health insurance companies would be awarded contracts to operate Kentucky's MCO program — Anthem Kentucky Managed Care Plan, Inc. (Anthem), Passport Health Plan (Passport), Molina Healthcare of Kentucky, Inc. (Molina), UnitedHealthcare of Kentucky, Ltd. (United), Humana Health Plan, Inc. (Humana), Aetna Better Health of Kentucky Insurance Company (Aetna) and WellCare Health Insurance Company of Kentucky, Inc. (WellCare) responded to 2019 RFP — After scoring, Molina, United, Humana, Aetna, and WellCare were awarded MCO contracts — In December 2019, Governor Beshear was sworn into office — Thereafter, CHFS cancelled previously awarded MCO contracts because Governor Beshear intended to modify Kentucky's Medicaid program by terminating Governor Bevin's implementation of work requirement as condition for qualification for Medicaid — Commonwealth issued new RFP (2020 RFP) for MCO program — Same seven companies submitted proposals — After scoring, Molina, United, Humana, Aetna, and WellCare were awarded contracts — Sixteen points separated Molina, which was fifth awardee, and Anthem, which had sixth highest score — On June 12, 2020, Anthem filed protest with FAC contesting awards, and eventually filed three supplements to its protest — Anthem argued that FAC should have conducted oral presentations on 2020 RFP; that FAC improperly waived scoring two categories; that FAC should not have deducted points for Anthem's failure to include its certificate of authority (COA) in electronic copy of is proposal because it provided hard copy of COA; that FAC failed to produce evaluators' notes upon its open records request; and that Molina should have been disqualified from RFP due to its retention of Emily Parento (Parento) — Prior to being retained by Molina, Parento was co-chair of Governor Beshear's Transition Team for Health and Families from November 15, 2019, until his inauguration on December 10, 2019 — As member of transition team, Parento advised administration on matters relating to CHFS — Parento was given access to identities of awardees of 2019 RFP prior to their public announcement — Molina hired Parento to consult related to planned implementation of its anticipated new health plan in Kentucky Medicaid market — Anthem claimed Parento's position with transition team gave her access to non-public information which she could have then provided to Molina to assist in preparation of its 2020 RFP response — On August 14, 2020, FAC denied Anthem's protests — While Anthem was exhausting its administrative remedies, Molina entered into agreement to acquire Passport's MCO assets — As required by Passport's then-existing contract with Commonwealth, Passport sought and received approval of the assignment of its existing MCO contract from FAC — Assignment became effective on September 1, 2020 — Based on this assignment, Molina was allowed to retain Passport's prior membership under Section 26.2 of its MCO contract effective January 1, 2021 — Humana filed protest of CHFS' decision to allow Molina to retain Passport's membership — FAC denied Humana's request — On September 4, 2020, Anthem filed action in Franklin Circuit Court contesting FAC's decision and moved for temporary injunction — Anthem alleged scoring irregularities raised before FAC and claimed that Molina's employment of Parento violated both Executive Branch Code of Ethics (EBCE) and Kentucky Model Procurement Code (KMPC) — Thereafter, United filed cross-claims alleging that Anthem also violated EBCE and KMPC by employing Catherine Easley (Easley), a former employee of CHFS — Circuit court denied United's motion for injunctive relief and found that Easley did not participate in development of 2019 RFP for CHFS or assist Anthem in development of its response to RFP — Circuit court found United's allegation of irreparable harm to be speculative — United also contested Molina's retention of Passport's membership — After exhausting administrative remedies, Humana also filed suit in Franklin Circuit Court alleging CHFS and FAC breached MCO contract by allowing Molina to retain

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Passport's membership — On October 23, 2020, circuit court granted Anthem's motion for temporary injunctive relief — Rather than removing Molina as awardee, court ordered CHFS to allow Anthem to participate as sixth MCO for Commonwealth — United cross-claimed that Anthem's participation as sixth MCO was breach of Section 26.2 of MCO contract, which United claimed expressly limited CHFS to awarding no more than five contracts for MCO program — Circuit court consolidated Humana's action with Anthem's action — Anthem, Molina, United and CHFS filed motions for summary judgment — Circuit court determined that no additional discovery was needed to decide any issue — Circuit court found that CHFS and FAC did not violate terms of MCO contract by allowing Molina to retain Passport's membership; that order allowing Anthem to be sixth participant in MCO program did not violate MCO contract; that Parento's employment by Molina was insufficient to disqualify Molina from 2020 RFP because she did not "substantially influence" Commonwealth's decision to award Molina a contract; that Parento expressly bound herself to requirements of EBCE by signing confidentiality agreement during her tenure on transition team; that Easley's employment did not violate EBCE and, therefore, does not disqualify Anthem from 2020 RFP; and that scoring of 2020 RFP was flawed — Circuit court found that none of four identified scoring deficiencies would be sufficient on their own to invalidate RFP process, but cumulative effect of those errors coupled with "appearance of impropriety" created by Parento's work for Molina was sufficient to vacate 2020 RFP and order MCO program be rebid — Circuit court ordered new RFP be issued because it did not have sufficient authority to grant Anthem a contract — Circuit court ordered six MCO contracts remain in effect pending new RFP — Parties appealed and cross-appealed — AFFIRMED circuit court's determinations that Commonwealth correctly interpreted Section 26.2 of MCO contract and allowed Molina to retain membership; that Parento is bound by EBCE because she consented to confidentiality statement; and that additional discovery was not necessary; however, REVERSED circuit court's order invalidating 2020 RFP and REMANDED to circuit court for entry of order vacating temporary injunction which granted Anthem an MCO contract — Pursuant to KRS 45A.285(2), where KMPC applies, offeror aggrieved by award of contract by Commonwealth may file protest with secretary of FAC within two weeks after person knows or should have known of facts giving rise thereto — Once FAC has issued decision on protest, protestor may seek judicial review of that decision — An award must not be arbitrary and capricious or contrary to law — Courts presume that officials are honest, have performed with integrity, and have carried out their statutory duties to the best of their ability as required by law — Absent proof which overcomes this presumption, courts will not interfere with agency's power to accept or reject bids — Discussed scoring irregularities alleged by Anthem — Oral presentation were not required under circumstances of 2020 RFP — Given presumption of correctness afforded agency decision-making and notice given to offerors, scoring team's choice not to hold oral presentations where no additional information was needed to assist them in their decision was not error — Scoring team acted within its authority when it chose to waive scoring of two sections of 2020 RFP — During scoring, team realized that those two sections caused confusion for offerors based on discrepancies in their answers — Scoring team's deduction of points from Anthem's score because Anthem failed to submit electronic copy of COA was neither arbitrary nor capricious — Anthem cited no authority which excuses offeror from fully complying with requirements of RFP — Scoring team's failure to maintain their preliminary notes in their entirety is insufficient to rebut presumption of correctness of award — "Appearance of impropriety" standard applied by circuit court to Parento's involvement in 2020 RFP was not supported by law — KMPC does not reference "appearance of impropriety" as justification for nullifying agency decision — Rather, agency decision is entitled to presumption of correctness unless there is proof that it was obtained by fraud or was unsupported by agency's findings of fact — EBCE requires actual violation of code to occur for FAC to void contract with Commonwealth — Parento bound herself to EBCE by signing confidentiality agreement to gain access to information regarding 2019 RFP — Circuit court was without jurisdiction to determine whether Parento violated EBCE because Anthem did not exhaust administrative remedies with Executive Branch Ethics Commission before raising this issue before circuit court — Anthem first raised this issue as grounds for disqualification of Molina from 2020 RFP before circuit court — Anthem's protest regarding whether Molina's retention of Parento violated KMPC was untimely filed with secretary of FAC — Anthem knew or should have known of this issue more than two weeks prior to filing its protest — In addition, even if protest had been timely filed, Anthem's allegations do not rebut agency's presumptively correct decision — Speculation alone cannot invalidate procurement decision — Record does not prove Parento influence scoring team or that Parento shared with Molina any confidential information that she gained as member of transition team — Commonwealth properly interpreted Section 26.2 of MCO contract and allowed Molina to retain its membership as "currently contracting" MCO — Because this issued concerned interpretation and enforcement of terms of contract with Commonwealth, reviewed FAC's decision *de novo* — Circuit court applied incorrect standard of review of this issue by finding it was required to defer to agency so long as agency interpretation was not arbitrary and capricious — Because Anthem did not rebut presumption of correctness of FAC's decision, there was no basis to invalidate 2020 RFP; therefore, contracts originally awarded to five MCOs must be enforced and temporary injunction granting Anthem's contract was vacated — A court may not usurp agency's authority over procurement to compel a contract be awarded to a specific offeror — Circuit court's authority is limited to invalidating an award where a party successfully rebuts presumption of correctness afforded agency decisions —

Molina Healthcare of Kentucky, Inc. v. Anthem Kentucky Managed Care Plan, Inc.; Aetna Better Health of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky, Inc.; Com. of Kentucky; Eric Friedlander, In His Official Capacity as Secretary of Kentucky Cabinet for Health and Family Services; Holly M. Johnson, In Her Official Capacity as Secretary of the Kentucky Finance and Administration Cabinet; Humana Health Plan, Inc.; Kentucky Cabinet for Health and Family Services; Kentucky Finance and Administration Cabinet; UnitedHealthcare of Kentucky, Ltd.; and WellCare Health Insurance Company of Kentucky, Inc. d/b/a WellCare of Kentucky, Inc. (2021-CA-0806-MR); *Humana Health Plan, Inc. v. Anthem Kentucky Managed Care Plan, Inc.; Aetna Better Health of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky, Inc.; Com. of Kentucky; Eric Friedlander, In His Official Capacity as Secretary of Kentucky Cabinet for Health and Family Services; Holly Johnson, In Her Official Capacity as Secretary of the Kentucky Finance and Administration Cabinet; Humana Health Plan, Inc.; Kentucky Cabinet for Health and Family Services; Kentucky Finance and Administration Cabinet; Molina Healthcare of Kentucky, Inc.; UnitedHealthcare of Kentucky, Ltd.; and WellCare Health Insurance Company of Kentucky, Inc. d/b/a WellCare of Kentucky, Inc.* (2021-CA-0819-MR); *UnitedHealthcare of Kentucky, Ltd. v. Anthem Kentucky Managed Care Plan, Inc.; Aetna Better Health of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky, Inc.; Com. of Kentucky; Eric Friedlander, In His Official Capacity as Secretary of Kentucky Cabinet for Health and Family Services; Holly M. Johnson, In Her Official Capacity as Secretary of the Kentucky Finance and Administration Cabinet; Humana Health Plan, Inc.; Kentucky Cabinet for Health and Family Services; Kentucky Finance and Administration Cabinet; Molina Healthcare of Kentucky, Inc.; and WellCare Health Insurance Company of Kentucky, Inc. d/b/a WellCare of Kentucky, Inc.* (2021-CA-0822-MR); *Aetna Better Health of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky, Inc. v. Anthem Kentucky Managed Care Plan, Inc.; Com. of Kentucky; Eric Friedlander, In His Official Capacity as Secretary of Kentucky Cabinet for Health and Family Services; Holly M. Johnson, In Her Official Capacity as Secretary of the Kentucky Finance and Administration Cabinet; Humana Health Plan, Inc.; Kentucky Cabinet for Health and Family Services; Kentucky Finance and Administration Cabinet; Molina Healthcare of Kentucky, Inc.; UnitedHealthcare of Kentucky, Ltd.; and WellCare Health Insurance Company of Kentucky, Inc. d/b/a WellCare of Kentucky, Inc.* (2021-CA-0824-MR); *Kentucky Cabinet for Health and Family Services v. Anthem Kentucky Managed Care Plan, Inc.; Aetna Better Health*

of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky Inc.; Humana Health Plan, Inc.; Kentucky Finance and Administration Cabinet; Molina Healthcare of Kentucky, Inc.; UnitedHealthcare of Kentucky, Ltd.; and WellCare Health Insurance Company of Kentucky, Inc. d/b/a WellCare of Kentucky, Inc. (2021-CA-0847-MR); *Anthem Kentucky Managed Care Plan, Inc. v. Kentucky Cabinet for Health and Family Services; Aetna Better Health of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky Inc.; Humana Health Plan, Inc.; Kentucky Finance and Administration Cabinet; Molina Healthcare of Kentucky, Inc.; Secretary Eric Friedlander, In His Official Capacity as Secretary of Kentucky Cabinet for Health and Family Services; Secretary Holly Johnson, In Her Official Capacity as Secretary of the Finance and Administration Cabinet; UnitedHealthcare of Kentucky, Ltd.; and WellCare Health Insurance Company of Kentucky, Inc. d/b/a WellCare of Kentucky, Inc.* (2021-CA-0849-MR); and *Finance and Administration Cabinet v. Anthem Kentucky Managed Care Plan, Inc.; Aetna Better Health of Kentucky Insurance Company; Cabinet for Health and Family Services, Com. of Kentucky; Humana Health Plan, Inc.; Molina Healthcare of Kentucky, Inc.; UnitedHealthcare of Kentucky, Ltd.; and WellCare Health Insurance Company of Kentucky, Inc.* (2021-CA-0855-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Judge Goodwine, *affirming in part, reversing in part, vacating in part, and remanding*[1], rendered 9/9/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

[1] In Molina's appeal, No. 2021-CA-0806-MR, we affirm, in part, and reverse, in part, the orders of the circuit court. In Humana's appeal, No. 2021-CA-0819-MR, we affirm, in part, and reverse, in part, the orders of the circuit court. In United's appeal, No. 2021-CA-0822-MR, we affirm, in part, reverse, in part, and vacate, in part, the orders of the circuit court. In Aetna's appeal, No. 2021-CA-0824-MR, we reverse the orders of the circuit court. In CHFS' cross-appeal, No. 2021-CA-0847-MR, we reverse the orders of the circuit court. In the FAC's cross-appeal, No. 2021-CA-0855-MR, we reverse the orders of the circuit court. In Anthem's appeal, No. 2021-CA-0849-MR, we affirm the orders of the circuit court.

Molina Healthcare of Kentucky, Inc. ("Molina"), Humana Health Plan, Inc. ("Humana"), UnitedHealthcare of Kentucky, Ltd. ("United"), and Aetna Better Health of Kentucky Insurance Company d/b/a Aetna Better Health of Kentucky Inc. ("Aetna") appeal the April 28, 2021 opinion and order and the June 16, 2021 order of the Franklin Circuit Court. The Cabinet for Health and Family Services ("CHFS"), the Finance and Administration Cabinet ("FAC"), and Anthem Kentucky Managed Care Plan, Inc. ("Anthem") cross-appeal. After a thorough review of the record, as well as oral arguments, we affirm, in part; reverse, in part; vacate, in part; and remand.

BACKGROUND

In Kentucky, a managed care organization ("MCO") is a private company selected through the government procurement process to run the Commonwealth's Medicaid system. In 2019, during the administration of Governor Matthew Bevin, the FAC and the Department of Medicaid Services of CHFS issued a request for proposals ("2019 RFP") to determine which five health insurance companies would be awarded contracts to operate Kentucky's MCO program. Seven companies, Anthem, Passport Health Plan ("Passport"), Molina, United, Humana, Aetna, and WellCare Health Insurance Company of Kentucky, Inc. ("WellCare"), responded to the 2019 RFP. After scoring, Molina, United, Humana, Aetna, and WellCare were awarded MCO contracts.

In December 2019, Governor Andy Beshear was sworn into office. Thereafter, CHFS cancelled the previously awarded MCO contracts because Governor Beshear intended to modify Kentucky's Medicaid program. The Bevin administration had applied for and received a waiver under Section 1115 of the Social Security Act, 42 United States Code ("U.S.C.") § 1315(a) ("Section 1115 waiver"). As part of the Section 1115 waiver, Kentucky implemented a work requirement as a condition for qualification for Medicaid. Governor Beshear terminated the waiver.[2] The Commonwealth then issued a new RFP ("2020 RFP") for the MCO program.

[2] A group of Medicaid recipients successfully challenged the Bevin administration's application for the Section 1115 waiver before its provisions took effect. *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019).

The same seven companies submitted proposals. After scoring, the same five companies – Molina, United, Humana, Aetna, and WellCare – were awarded contracts. Sixteen points separated Molina, the fifth awardee, and Anthem which had the sixth highest score.[3]

[3] Molina and Anthem received scores of 1507 and 1491, respectively.

On June 12, 2020, Anthem filed a protest with the FAC contesting the awards.[4] Anthem also filed three subsequent supplements to its protest. First, Anthem argued the FAC should have conducted oral presentations on the 2020 RFP. Second, Anthem claimed the FAC improperly waived scoring two categories. Third, Anthem complained that the FAC should not have deducted points for its failure to include its certificate of authority ("COA") in the electronic copy of its proposal because it provided a hardcopy of the COA. Fourth, Anthem argued the FAC failed to produce the evaluators' notes upon its open records request.

[4] Passport also filed a protest, but we will not address it because the company has not participated on appeal and no longer has an interest in the MCO program due to its acquisition by Molina.

Finally, Anthem alleged Molina should have been disqualified from the RFP due to its retention of Emily Parento ("Parento"). Prior to being retained by Molina on January 30, 2020, Parento was the co-chair of Governor Beshear's Transition Team for Health and Families from November 15, 2019, until his inauguration on December 10, 2019. As a member of the transition team, Parento advised the administration on matters relating to CHFS. She was given access to the identities of the awardees of the 2019 RFP prior to their public announcement. Record on Appeal ("R.")[5] at 402. Molina hired her "to consult related to the planned implementation of its anticipated new health plan in the Kentucky Medicaid market." *Id.* at 401. Anthem claimed Parento's position with the transition team gave her access to non-public information which she could have then provided Molina to assist in the preparation of its 2020 RFP response.

[5] These are citations to the record in the circuit court case initiated by Anthem, Action No. 20-CI-00719. Citations to "H.R." are to the record in Humana's circuit court case, Action No. 20-CI-00987.

On August 14, 2020, the FAC denied Anthem's protests. The FAC determined none of Anthem's allegations rebutted the presumption of correctness afforded agency decisions on procurement. KRS[6] 45A.280. Furthermore, the FAC found some of Anthem's claims, including those related to Parento's work for Molina, were untimely under KRS 45A.285.

[6] Kentucky Revised Statutes.

While Anthem was exhausting administrative remedies, Molina entered into an agreement to acquire Passport's MCO assets. As required by Passport's then-existing contract with the Commonwealth, Passport sought and received approval of the assignment of its existing MCO contract from the FAC.[7] The assignment became effective on September 1, 2020. Based on the assignment, Molina was allowed to retain Passport's prior membership under Section 26.2 of its MCO contract effective January 1, 2021.

[7] Passport was previously awarded an MCO contract to provide services from July 1, 2019, until December 31, 2020. The assignment provided that Passport would continue to operate the MCO program on behalf of Molina for the remainder of the contract period to ensure as little disruption as possible for Medicaid members.

Humana filed a protest of CHFS' decision to allow Molina to retain Passport's membership. Humana alleged CHFS incorrectly interpreted Section 26.2 of the MCO contract. Section 26.2 of the MCO contract details a system by which CHFS assigns Medicaid enrollees to the MCOs. It states, in pertinent part, that "[a]n MCO currently contracting with the Commonwealth in the Managed Care Program that remains with the Managed Care Program shall not have its current membership reassigned effective January 1, 2021[.]" R. at 2858. Molina entered into the MCO contract with CHFS on May 29, 2020. Based on the assignment of Passport's MCO contract to Molina on September 1, 2020, CHFS determined Molina was a "currently contracting" MCO effective January 1, 2021. Humana Record ("H.R.")[8] at 99. Therefore, Molina was permitted to retain the membership it acquired with the assignment. The FAC was unconvinced by Humana's argument and denied the protest.

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

[8] *See* footnote 5 on page 11.

On September 4, 2020, Anthem filed an action in the circuit court contesting the FAC's decision and moved for a temporary injunction. Anthem alleged the scoring irregularities raised before the FAC and claimed Molina's employment of Parento violated both the Executive Branch Code of Ethics ("EBCE") and the Kentucky Model Procurement Code ("KMPC").

Thereafter, United filed crossclaims alleging Anthem also violated the EBCE and the KMPC by employing Catherine Easley ("Easley"), a former employee of CHFS. In 2019, Easley was an executive advisor to CHFS and left that position to become a Community Outreach Coordinator for Anthem. Her work for both employers pertained to the Section 1115 waiver. The circuit court denied United's motion for injunctive relief. The court found Easley did not participate in the development of 2019 RFP for CHFS or assist Anthem in the development of its response to the RFP. Furthermore, it determined United's allegation of irreparable harm was speculative.

United further contested Molina's retention of Passport's membership, arguing it suffered irreparable harm from CHFS' decision. After exhausting administrative remedies, Humana also filed suit in the circuit court alleging CHFS and FAC breached the MCO contract by allowing Molina to retain Passport's membership.

On October 23, 2020, the circuit court granted Anthem's motion for temporary injunctive relief. Rather than removing Molina as an awardee, the court ordered CHFS to allow Anthem to participate as the sixth MCO for the Commonwealth. The court determined "the public interest in enhanced competition, and the benefit to Medicaid recipients of having a wider range of choices" outweighed the "marginal disadvantage" to the five original awardees.

United further crossclaimed that Anthem's participation as the sixth MCO was a breach of Section 26.2 of the MCO contract. United argued the contract expressly limited CHFS to awarding no more than five contracts for the MCO program. It further alleged that, with a sixth participant, it would not have sufficient membership to operate in the Commonwealth.

On January 11, 2021, the circuit court consolidated Humana's action with Anthem's and ordered all parties to submit motions for partial summary judgment on any threshold issues which were either questions of law or which could be decided based on discovery which had been completed at the time. Anthem, Molina, United, and CHFS filed motions for summary judgment. The circuit court entered an opinion and order resolving the motions on April 28, 2021.

First, the circuit court determined no additional discovery was necessary to decide any issue. Next, the court held CHFS and FAC did not violate the terms of the MCO contract by allowing Molina to retain Passport's membership. Third, CHFS' compliance with the court's order by allowing Anthem to be the sixth participant in the MCO program was not a violation of the MCO contract. Fourth, Parento's employment by Molina is insufficient to disqualify Molina from the 2020 RFP because she did not "substantially influence" the Commonwealth's decision to award Molina a contract. Relatedly, the court determined Parento expressly bound herself to the requirements of the EBCE by signing a confidentiality agreement during her tenure on the transition team. Fifth, Easley's employment did not violate the EBCE and, therefore, does not disqualify Anthem from the 2020 RFP. Finally, the court determined the scoring of the 2020 RFP was flawed.

Ultimately the court concluded that, although none of the four identified scoring deficiencies would be sufficient on their own to invalidate the RFP process, the cumulative effect of those errors coupled with the "appearance of impropriety" created by Parento's work for Molina was sufficient to vacate the 2020 RFP and order the MCO program be rebid. The court ordered a new RFP be issued because it did not have sufficient authority to grant Anthem a contract. The court ordered the six MCO contracts remain in effect pending the new RFP. On June 16, 2021, the circuit court denied motions to alter, amend, or vacate filed by the parties apart from correcting minor misstatements.

These appeals and cross-appeals followed.

STANDARD OF REVIEW

Summary judgment is appropriate where there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR[9] 56.03. When considering a motion for summary judgment, the circuit court must view the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Isaacs v. Sentinel Insurance Company Limited*, 607 S.W.3d 678, 680-81 (Ky. 2020) (citation omitted). On appeal, we review decisions on motions for summary judgment *de novo*. *Id.* at 681 (citation omitted).

[9] Kentucky Rules of Civil Procedure.

Furthermore, when reviewing an agency decision, the circuit court must not reinterpret the merits of a claim, nor "substitute its judgment for that of the agency as to the weight of the evidence." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006) (citations omitted). Circuit court review is limited to determining "if the findings of fact are supported by substantial evidence of probative value and whether or not the administrative agency has applied the correct rule of law to the facts so found." *Id.* (internal quotation marks and citation omitted). Substantial evidence is defined as that which "has sufficient probative value to induce conviction in the minds of reasonable [persons]." *Id.* (citation omitted). A court must affirm an agency decision that is supported by substantial evidence even if it would have reached a different conclusion. *Id.* at 132 (citation omitted). The possibility of reaching two inconsistent conclusions based on the evidence does not preclude the administrative decision from being supported by substantial evidence. *Id.* at 131 (citation omitted).

While issues of law are reviewed *de novo*, "we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing." *Commonwealth, ex rel. Stumbo v. Kentucky Public Service Commission*, 243 S.W.3d 374, 380 (Ky. App. 2007) (citing *Board of Trustees of Judicial Form Retirement System v. Attorney General of Commonwealth*, 132 S.W.3d 770, 787 (Ky. 2003); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-45, 104 S. Ct. 2778, 2782-83, 81 L. Ed. 2d 694 (1984)).

ANALYSIS

On appeal and cross-appeal, the following issues have been raised: (1) whether scoring of the 2020 RFP violated the KMPC; (2) whether the "appearance of impropriety" attributed to Parento's involvement with Molina was proper; (3) whether the EBCE applied to Parento because either (a) her work on the transition team met a definition under KRS 11A.010 or (b) she bound herself by signing the confidentiality statement; (4) if the EBCE applied to Parento, whether she violated its provisions; (5) whether Parento's work for Molina violated the KMPC; (6) whether the Commonwealth correctly interpreted Section 26.2 of the MCO contract to allow Molina to retain Passport's membership; (7) whether the circuit court and/or CHFS had authority to award Anthem a sixth MCO contract as ordered in the temporary injunction; (8) whether additional discovery was necessary to determine whether genuine issues of material fact exist; (9) whether Easley's employment by Anthem violated the EBCE; (10) whether either Molina, Anthem, or both should have been disqualified from the RFP rather than invalidating the entire process; (11) whether Aetna was permitted to retain the SKY program award if the 2020 RFP was invalidated.[10]

[10] The Supporting Kentucky Youth ("SKY") program is a Medicaid program which serves Kentucky's children in foster or out-of-home care, those receiving adoption assistance, former foster youth, and Medicaid-eligible Department of Juvenile Justice youth. It was included in the 2020 RFP but was awarded to Aetna separately from the broader MCO contracts.

The Court will now address the above-enumerated issues, though not necessarily in the order set forth above, and other issues we deem necessary to our analysis.

1. Anthem's alleged scoring deficiencies are insufficient to rebut the presumption of correctness afforded to agency decisions under the KMPC.

The KMPC "establishes uniform practices and procedures against which the procuring entity's conduct can be objectively measured." *Commonwealth v. Yamaha Motor Mfg. Corp.*, 237 S.W.3d 203, 206 (Ky. 2007). With its adoption, the legislature intended to, in part, ensure the bidding process for government contracts is fair and equitable, and increase public confidence in the procurement process. KRS 45A.010(2)(d), (e).

Where the KMPC applies, an offeror aggrieved by the award of a contract by the Commonwealth may file a protest with the secretary of the FAC within two weeks after the person "knows or should

have known of the facts giving rise thereto." KRS 45A.285(2). Once the FAC has issued a decision on the protest, the protester may seek judicial review of that decision. *Yamaha*, 237 S.W.3d at 206 (citation omitted). An award must not be arbitrary and capricious or contrary to law. *Id.*

> The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a **presumption of correctness** and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

KRS 45A.280 (emphasis added). We presume that "officials are honest, have performed with integrity, and have carried out their statutory duties to the best of their ability as required by law." *Pendleton Bros. Vending, Inc. v. Commonwealth, Finance and Admin. Cabinet*, 758 S.W.2d 24, 30 (Ky. 1988). The presumption of correctness granted to agency decisions is not conclusive, but it affords agencies discretion such that "every purchasing decision or alleged omission is not subject to judicial oversight." *Id.* Absent proof which overcomes the presumption, we will not interfere with an agency's power to accept or reject bids. *See Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. App. 1984).

Anthem alleged four scoring irregularities which the FAC rejected but the circuit court found, when considered with Parento's involvement, were sufficient to invalidate the RFP. These include: (1) failure to hold oral presentations; (2) waiver of scoring of two sections of the 2020 RFP; (3) deduction of points for Anthem's failure to include its COA in the electronic copies of its proposal; and (4) disposal of notes by members of the scoring team. We will consider each alleged deficiency individually.

First, oral presentations were not required under the circumstances of the 2020 RFP. Oral presentations are not required

> [w]here it can be clearly demonstrated and documented from the existence of adequate competition or prior experience with the particular supply, service, or construction item, that acceptance of an initial offer without discussion would result in fair and reasonable best value procurement, and the request for proposals notifies all offerors of the possibility that award may be made on the basis of the initial offers.

KRS 45A.085(7)(c). As articulated by the FAC, the Commonwealth has adequate experience with MCOs – approximately nine years – and there was sufficient competition for the 2020 RFP – seven proposals for five contracts. R. at 196. Furthermore, the authority of the evaluators to award contracts without oral presentation is confirmed by regulation. 200 KAR[11] 5:307 § 5(1) states, in relevant part,

> [i]f it has been provided in the solicitation that an award may be made without written or oral discussions, the purchasing officer may, upon the basis of the written proposals received, award the contract to the responsible offeror submitting the proposal determined in writing to be the most advantageous to the Commonwealth.

Section 70.1 of the 2020 RFP gives offerors notice that scheduling of oral presentations would be at the discretion of the Commonwealth and that "[t]he Commonwealth reserves the right not to require oral presentations/demonstrations if they do not affect the final rankings." R. at 183.

[11] Kentucky Administrative Regulations.

Amy Monroe ("Monroe"), a director in the Division of Goods and Services Procurement for the FAC who facilitated scoring of the 2020 RFP, testified on deposition that, based on Section 70.1 and the scoring team's consensus scoring, the Commonwealth did not need any additional information to award the contracts. Monroe Deposition at 59:3-7. She further testified "at the conclusion of our technical scoring, had there been a need to gain additional information or clarification, then oral presentations would have been the time that we would have done that." *Id.* at 61:18-21. Given the "presumption of correctness" afforded agency decision-making and the notice given to offerors, and the scoring team's choice not to hold oral presentations where no additional information was needed to assist them in making their decision, there was no error.

Second, the scoring team acted within its authority when it chose to waive scoring of two sections of the 2020 RFP. Sections 60.7(B)(2)(d) and (e) required offerors to "[p]rovide a statement of whether there is any past (within the last ten (10) years) or pending litigation against the Vendor or sanctions[,]" and to "describe any Protected Health Information (PHI) breaches (within the past five years) that have occurred and the response." R. at 134. During scoring, the team realized Sections 60.7(B)(2)(d) and (e) had caused confusion for offerors based on discrepancies in their answers. Section 10.2 of the 2020 RFP gives the Office of Procurement Services, which is responsible for scoring, sole authority to "change, modify, amend, alter, or clarify the specifications, terms and conditions" of the RFP. R. at 110.

The team considered whether to stop the scoring process to allow all offerors to clarify their answers and then proceed with regular scoring or to waive scoring. The team unanimously decided it was in the best interest of the Commonwealth to award all offerors full points for both sections and proceeded with consensus scoring. We must presume the scoring team's decision was correct and that they acted in good faith. *See Pendleton Bros.*, 758 S.W.2d at 30. Anthem provided no evidence or authority to rebut this presumption.

Next, the scoring team's deduction of points from Anthem's score because they failed to submit an electronic copy of the COA was neither arbitrary nor capricious. The team awarded Anthem ten of the possible twenty points for the COA. Section 60.5(A) of the 2020 RFP mandates that each offeror submit both a hard copy and ten electronic copies of their proposal. In response to a question from an offeror, the FAC informed all potential offerors that their proposals must be submitted in their entirety by hardcopy and that the electronic copies must match the hardcopy. Monroe Deposition, Exhibit 1 at 100. The electronic copies are important to the scoring process because they allow all members of the scoring team to have simultaneous access to the proposals. R. at 199.

Anthem has cited to no authority which excuses an offeror from fully complying with the requirements of an RFP. The circuit court is correct that Section 60.5(B) of the 2020 RFP states that "[s]hould differences be determined to exist between the hardcopy proposal and the electronic version, the hardcopy shall prevail." *Id.* at 129. This does not prevent the scoring team from deducting points where an offeror has not complied with the mandates of the RFP. Contrary to the circuit court's conclusion, it is not arbitrary or capricious for an agency to expect an offeror to fully comply with the requirements of an RFP.

Finally, the scoring team's failure to maintain their preliminary notes in their entirety is insufficient to rebut the presumption of correctness of the award. Each member of the scoring team signed an evaluation committee member agreement which states, in part, "[p]reliminary emails, etc. are also subject to [open records requests] and/or discovery. Please keep your comments appropriate and all documentation secure indefinitely, this includes your proposals and any notes." Monroe Deposition, Exhibit 17. Anthem filed an open records request ("ORR") for the Commonwealth to produce all documentation relating to the 2020 RFP.

After receiving the ORR, the FAC requested the members of the scoring team provide all notes. Some team members provided notes and preliminary scoring sheets. Stephanie Bates ("Bates"), a member of the scoring team, testified that she did not keep her preliminary scoring sheets. Bates Deposition at 87:23-25. She further testified to seeing some but not all members of the team take some preliminary notes. *Id.* at 86:5-11. Monroe admitted that, during a meeting, she told the team they could dispose of their notes after scoring was complete. *Id.* at 163:5-13.

Proposals and scoring sheets for all offerors were made public after the contracts were awarded. Anthem speculates without any specificity about improprieties the missing notes might show. Disposal of the scoring team's notes may violate the terms of the agreement that members signed. But, as determined by the circuit court, this irregularity alone is insufficient to invalidate the RFP process in its entirety. In sum, Anthem's four alleged scoring deficiencies are insufficient to rebut the presumption of correctness afforded to agency decisions under the KMPC.

2. The "appearance of impropriety" standard applied by the circuit court to Parento's involvement with the 2020 RFP is without support in law.

The circuit court determined the scoring irregularities in combination with the "appearance of impropriety" created by Parento's work for Molina shortly after leaving Governor Beshear's transition team warranted invalidation of the 2020 RFP. The circuit court's assertion that circumstances which create an "appearance of impropriety" are sufficient to usurp the broad discretion afford the Commonwealth's procurement decisions is completely without support in law.

As previously discussed, the KMPC sets a much

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

higher standard for invalidation of a procurement decision. Nowhere does the KMPC reference the "appearance of impropriety" as justification for nullifying an agency decision. Instead, an agency decision is entitled to the presumption of correctness unless there is proof that it was obtained by fraud or was unsupported by the agency's findings of fact. KRS 45A.280. This deferential standard allows for overturning only those decisions which are arbitrary and capricious. *Yamaha*, 237 S.W.3d at 206 (citation omitted).

Additionally, the EBCE requires an actual violation of the code to occur for the FAC to void a contract with the Commonwealth. KRS 11A.080(5). Furthermore, where a violation of the EBCE has "substantially influenced" an agency's action, a contract may be voided, rescinded, or cancelled. KRS 11A.100(4). In conclusion, the circuit court's application of an "appearance of impropriety" standard is without support in law. On this basis, we will now consider whether Parento's involvement with the 2020 RFP violated any provision of either the EBCE or the KMPC.

3. Parento bound herself by the EBCE by signing the confidentiality agreement to gain access to information regarding the 2019 RFP.

Before reaching the question of whether Parento violated the EBCE, we must first address whether she was bound by its terms. The EBCE was enacted because "[i]t is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth." KRS 11A.005(1). It codifies the standards to which public servants are held to maintain public trust and a well-functioning democratic government. *Id.* Under the EBCE,

> [n]o public servant, by himself or through others, shall knowingly:
>
> (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
>
> (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
>
> (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
>
> (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

KRS 11A.020(1).

"Public servant" is defined, in part, to include "[a]ll employees in the executive branch including officers as defined in subsection (7) of this section and merit employees[.]" KRS 11A.010(9)(h). Transition team members were not specifically categorized as public servants or directly referenced in the version of KRS Chapter 11A which was in effect at the time the 2019 and 2020 RFPs were published and scored or when the MCO contracts were awarded. The statute has since been amended by the legislature to include the "transition team" and set ethical standards for transition team members. KRS 11A.047.[12]

[12] KRS 11A.047 became effective on June 29, 2021.

We need not determine whether transition team members were considered "officers" under the EBCE prior to this amendment because Parento expressly agreed to be bound by its terms. During her time on the transition team, Parento signed a confidentiality statement to give her access to the 2019 RFP. Therein, it states, "I acknowledge that I and all other members of the review team are subject to the provisions of the Executive Branch Code of Ethics (KRS Chapter 11A)." R. at 79.

A confidentiality agreement is a written instrument and, if possible, a court must construe it to give effect to every word and all its terms. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384-85 (Ky. App. 2002) (citation omitted). "[I]n the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (internal quotation marks and citations omitted). One party's intention of a different result is insufficient to interpret the terms of an instrument contrary to their plain and unambiguous meaning. *AnyConnect US, LLC v. Williamsburg Place, LLC*, 636 S.W.3d 556, 562 (Ky. App. 2021) (citation omitted).

There is no ambiguity in the language of the confidentiality statement. It plainly states that Parento agreed to be bound by the EBCE at least with regard to her involvement with the 2019 RFP. Molina's argument that Parento "expressly and unequivocally refuted that interpretation in her affidavit testimony" is insufficient to invalidate the agreement where the language of the instrument is unambiguous.

Individuals, such as Parento, who are subject to the EBCE are prohibited from certain conduct after leaving the executive branch.

> A present or former officer or public servant . . . shall not, within one (1) year following termination of his or her office or employment, accept employment, compensation, or other economic benefit from any person or business that contracts or does business with, or is regulated by, the state in matters in which he or she was **directly involved** during the last thirty-six (36) months of his or her tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he or she was involved prior to taking office or beginning his or her term of employment, or for which he or she received, prior to his or [her] state employment, a professional degree or license, provided that, for a period of one (1) year, he or she personally refrains from working on any matter in which he or she was **directly involved** during the last thirty-six (36) months of his or her tenure in state government.

KRS 11A.040(7) (emphasis added). In sum, Parento was bound by the requirements of the EBCE based on her consent to the terms of the confidentiality statement.

4. The circuit court was without jurisdiction to determine whether Parento violated the EBCE.[13]

[13] CHFS raised this issue in its appellee brief in No. 2021-CA-0819-MR. But, even if it had not done so, "[the] premature filing of an action in circuit court without first exhausting the administrative remedies . . . deprive[s] the circuit court of subject matter jurisdiction to hear [the] claim." *Jefferson Cty. Bd. of Educ. v. Edwards*, 434 S.W.3d 472, 479 (Ky. 2014). And it is well-established that lack of subject matter jurisdiction is not subject to waiver or preservation. It can be raised at any time, even for the first time on appeal. *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 183 (Ky. App. 2014) (citation omitted). *See also Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007) (citation omitted).

We will not address whether Parento violated the EBCE because Anthem did not exhaust administrative remedies before raising this issue before the circuit court. Any person can file a complaint with the Executive Branch Ethics Commission ("Commission") stating the grounds upon which they believe a public servant violated the EBCE. *See* KRS 11A.080(1)(a). The Commission is empowered to either confidentially reprimand the alleged violator or initiate administrative proceedings. KRS 11A.080(4). Furthermore, after an administrative hearing, the Commission may order the violator to cease and desist; recommend to the violator's appointing authority that the violator he removed or suspended; or order the violator to pay civil penalties. KRS 11A.100(3). Additionally, if the EBCE is violated in relation to a contract with the Commonwealth, the secretary of the FAC may void the contract. KRS 11A.080(5).

The circuit court focused its analysis on the portion of the EBCE which states that any violation "which has substantially influenced the action taken by any state agency in any particular matter shall be grounds for voiding, rescinding, or canceling the action[.]" KRS 11A.100(4). Importantly, this is a determination the Commission is empowered to make by statute. In fact, KRS 11A.100 in its entirety pertains to administrative hearings the Commission is authorized to conduct.

It is a settled rule that a party is required to exhaust administrative remedies as a "jurisdictional prerequisite to seeking judicial relief[.]" *Kentucky Executive Branch Ethics Comm'n v. Atkinson*, 339 S.W.3d 472, 476 (Ky. App. 2010). This allows the administrative body the opportunity to first build a factual record and render a final decision. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky. 2004) (citation omitted). "[F]ailure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review." *Puckett v. Cabinet for Health and Family Services*, 621 S.W.3d 402, 407 (Ky. 2021) (citations omitted).

At no time prior to seeking judicial review of the FAC's decision did Anthem file a complaint with the Commission regarding Parento's alleged violation of the EBCE. Anthem argues it was not required to separately file a complaint with the Commission

because the 2020 RFP required certification that that it did not violate the EBCE, making its protest filed with the FAC sufficient. However, this certification did not divest the Commission of its authority under KRS Chapter 11A which is distinct from that of the FAC under KRS Chapter 45A. *See Executive Branch Ethics Comm'n v. Stephens*, 92 S.W.3d 69, 73 (Ky. 2002). Furthermore, Anthem did not specifically allege Parento's violation of the EBCE in its protest, nor did the FAC address the issue in its decision.[14]

[14] We are not suggesting the FAC would have had the authority to determine whether Parento violated the EBCE. That authority rests solely with the Commission. KRS 11A.080. We mean only to emphasize Anthem's disregard for the administrative process.

Instead, Anthem first raised the alleged violation of the EBCE as grounds for disqualification of Molina from the 2020 RFP before the circuit court. Because the issue was not first presented to the Commission, the circuit court was without jurisdiction to determine whether a violation of the EBCE occurred. On this basis, we will not address the merits of the EBCE claim. Our analysis must be limited to whether Parento's involvement with Molina after being a part of Governor Beshear's transition team in any way violates the KMPC.

5. Anthem's protest regarding whether Molina's retention of Parento violated the KMPC was untimely filed with the secretary of the FAC.

The secretary of the FAC has the authority over protests related to any solicitation or award of a contract by the Commonwealth under the KMPC. KRS 45A.285(1). Any aggrieved offeror may file a protest of the award with the secretary. KRS 45A.285(2). "A protest or notice of other controversy must be filed promptly and in any event within two (2) calendar weeks after such aggrieved person knows or should have known of the facts giving rise thereto." *Id.* If a protest alleges deficiencies in the award of a contract, "the facts giving rise to the protest shall be presumed to have been known to the protester on the date the notice of award of a contract" was posted on the same website. 200 KAR 5:380 § 1(1)(b).

As found by the FAC, Anthem relies on information it knew or should have known more than two weeks prior to filing its protest. Specifically, it is undisputed that Parento's participation with Governor Beshear's transition team was publicly announced in November 2019. R. at 202. Her involvement with Molina's 2020 RFP was made public when the scoring sheets and responses were made available on May 29, 2020. R. at 212, 229.[15] Under 200 KAR 5:380 § 1(1)(b), Anthem is presumed to have known these facts on the date of publication of the scoring sheets. Anthem has not rebutted this presumption by showing that these facts were not and should not have been known to them on May 29, 2020. *See* 200 KAR 5:380 § 1(2). Therefore, Anthem's protest should have been filed on or before June 12, 2020, the date on which Anthem's initial protest was filed. Instead, Anthem filed an untimely supplemental protest on June 26, 2020, asserting its claims regarding Parento's involvement.

[15] The executive summary of Molina's proposal references its retention of Parento to assist in implementation of the managed care program. Additionally, the first page of Molina's scoring sheet notes Parento's potential involvement in the comments section for the executive summary.

Furthermore, had the protest been timely, Anthem's allegations do not rebut the agency's presumptively correct decision. Speculation alone cannot invalidate a procurement decision. The record does not prove Parento influenced the scoring team, nor does it show that Parento shared with Molina any confidential information she gained access to as a member of the transition team. At most, Molina's scoring sheet indicates the scoring team was aware Parento was involved in some capacity with Molina's proposal.

Bates testified that Parento's name was only briefly mentioned during the scoring of Molina's proposal. Bates Deposition at 120:19-22. Monroe testified that she was the custodian of the bid file prior to the award of the 2019 MCO contracts, and that, even after Parento signed the confidentiality agreement, Monroe did not give her access to the file. Monroe Deposition at 115:16-19. The record shows only that Parento was given access to the identities of the awardees of the 2019 RFP shortly before they were made public. Anthem has not proven she had access to any confidential information which might have been helpful to Molina in creation of the 2020 proposal. Given the presumption that members of the scoring team have acted honestly and with integrity, we are unconvinced there was any violation of the KMPC. *Pendleton Bros.*, 758 S.W.2d at 30.

In sum, the FAC correctly determined that Anthem produced no evidence which rebuts the presumption of correctness afforded agency decisions in KRS 45A.280. At best, Anthem seeks to substitute its own judgment on scoring for that of the Commonwealth and engages in speculation as to Parento's influence over the procurement process. This is insufficient to support invalidation of the 2020 RFP. Although Monroe's instruction for the scoring team to dispose of their notes may have been unwise, it does not, on its own, invalidate the RFP process in light of the Commonwealth's extensive discretion over procurement.

6. The Commonwealth properly interpreted Section 26.2 of the MCO contract and allowed Molina to retain its membership as a "currently contracting" MCO.

Section 26.2 of the MCO contract states, in relevant part, that "[a]n MCO **currently contracting** with the Commonwealth in the Managed Care Program that remains with the Managed Care Program shall not have its current membership reassigned effective January 1, 2021, with the exception [of] Enrollees who are required to be enrolled in the Kentucky SKY program." R. at 2858 (emphasis added). Thereafter, the contract provides a scheme for reassigning membership where an MCO does not continue with the program. Molina contracted to participate in the MCO program on May 29, 2020. *Id.* at 2757. Molina then acquired Passport's MCO assets on July 17, 2020. At the time of the assignment, Passport had contracted with the Commonwealth as an MCO from July 1, 2019 to December 31, 2020. Under the assignment, Passport agreed to operate the MCO program on Molina's behalf for the remainder of the 2019-2020 contract period. The FAC approved the assignment of Passport's existing contract to Molina and the assignment became effective on September 1, 2020. Molina was then treated as an incumbent MCO under Section 26.2 of the new MCO contract, meaning that Passport's membership was not reallocated among the participating MCOs when the contracts became effective on January 1, 2021.

Because this issue concerns interpretation and enforcement of the terms of a contract with the Commonwealth, we must review the FAC's decision *de novo*. *Kentucky Spirit Health Plan, Inc. v. Commonwealth, Finance and Administration Cabinet*, 462 S.W.3d 723, 728 (Ky. App. 2015) (citation omitted).[16]

[16] The circuit court applied the incorrect standard of review to this issue by finding it was required to "defer to the agency charged by law with administering this complex program, so long as the agency interpretation is not arbitrary and capricious." R. at 5311.

On review, absent ambiguity, we must "give effect to the parties' intent as expressed by the ordinary meaning of the language they employed." *Mostert v. Mostert Group, LLC*, 606 S.W.3d 87, 91 (Ky. 2020) (citation omitted). Mere disagreement about the meaning of terms does not render the contract ambiguous. *Id.* The ordinary meaning of the terms of Section 26.2 clearly indicates that the effective date of the MCO contract is January 1, 2021. Organizations which have contracted as MCOs prior to that date are considered "currently contracting," and, if they continue in the MCO program, will not have their membership reassigned. The circuit court correctly found no ambiguity. Because Molina began participating in the MCO program on September 1, 2020, under the assignment of Passport's prior contract, it was "currently contracting" as of January 1, 2021. Therefore, the Commonwealth properly interpreted the contract and allowed Molina to retain its membership.

7. Whether the circuit court had the authority to order CHFS to award Anthem a MCO contract is moot.

In the October 23, 2020 order granting temporary injunctive relief, the circuit court "balanced the equities" to justify ordering CHFS to award Anthem an MCO contract, making it the sixth awardee. Because Anthem did not rebut the presumption of correctness of the FAC's decision, there is no basis to invalidate the 2020 RFP. Therefore, the contracts originally awarded to the five MCOs will be enforced and the temporary injunction granting Anthem's contract will be vacated.

An issue is moot where, once a decision is rendered, "for any reason, [it] cannot have any practical legal effect upon a *then* existing controversy." *Lincoln Trail Grain Growers Association, Inc. v. Meade County Fiscal Court*, 632 S.W.3d 766, 776 (Ky. App. 2021) (citation omitted). This Court will not render opinions which are merely advisory. *Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014) (citation omitted).

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

Even if we were to invalidate the 2020 RFP and order it rebid, the circuit court was without the authority to compel CHFS to award Anthem a contract. The KMPC prohibits arbitrary and capricious awards. *Yamaha*, 237 S.W.3d at 206 (citation omitted); *see also* KRS 45A.280. But the KMPC does not divest procurement officers of their considerable discretion. *Laboratory Corp. of America Holdings v. Rudolph*, 184 S.W.3d 68, 75 (Ky. App. 2005); *see also Guardian Angel Staffing Agency, Inc. v. Commonwealth*, Nos. 2013-CA-000090-MR, 2013-CA-000143-MR, 2013-CA-000150-MR, 2013-CA-000348-MR, 2015 WL 3826343, *4 (Ky. App. Jun. 19, 2015).[17] The KMPC does not empower disappointed bidders to compel agencies to award them contracts. *See* KRS Chapter 45A; *see also Guardian Angel*, 2015 WL 3826343, at *4. A court may not usurp an agency's authority over procurement to compel a contract be awarded to a specific offeror. A circuit court's authority is limited to invalidating an award where a party successfully rebuts the presumption of correctness afforded agency decisions. *See Pendleton Bros.*, 758 S.W.2d at 30. Thus, the circuit court improperly assumed the Commonwealth's authority when it ordered CHFS to award Anthem an MCO contract.

[17] We cite this unpublished opinion as persuasive, not binding, authority. *See* CR 76.28(4)(c).

8. There is no need to allow for additional discovery on any issue.

> When reviewing a motion for summary judgment the inquiry should be whether, from the evidence of the record, facts exist which would make it possible for the non-moving party to prevail. . . . [T]he focus should be on what is of record rather than what might be presented at trial. When the moving party has presented evidence showing that[,] despite the allegations of the pleadings[,] there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact. However, the hope or bare belief . . . that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

Benningfield v. Pettit Environmental, Inc., 183 S.W.3d 567, 572-73 (Ky. App. 2005) (some internal quotation marks and citations omitted). Herein, Anthem provides only the most speculative assertions that, given more time, they would be able to uncover something which would create a genuine issue of material fact. This is insufficient to merit reversal. Additional discovery was unnecessary to decide any issue.

9. We need not address the merits of any remaining arguments.

Finally, because the 2020 RFP process was valid, we need not address the merits of any remaining arguments. Specifically, CHFS did not award Anthem a contract and, therefore, we need not address the merits of the arguments related to Easley's employment. Additionally, because the 2020 RFP was valid, Aetna will retain the SKY program contract and we need not address the arguments related thereto.

CONCLUSION

In sum, we affirm the Franklin Circuit Court's determinations that (1) the Commonwealth correctly interpreted Section 26.2 of the MCO contract and allowed Molina to retain membership, (2) Parento is bound by the EBCE because she consented to the confidentiality statement, and (3) additional discovery was not necessary. Otherwise, we reverse the court's order invalidating the 2020 RFP and remand this matter to the circuit court for entry of an order vacating the temporary injunction which granted Anthem an MCO contract.

ALL CONCUR.

BEFORE: GOODWINE, JONES, AND MAZE, JUDGES.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

AUGUST 12, 2022 AT 10:00 A.M.

AND SEPTEMBER 16, 2022 AT 10:00 A.M.

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

PETITIONS: None.

MOTIONS for extension of time to file petitions: None.

FINALITY ENDORSEMENTS:

During the period from August 12, 2022, through September 16, 2022, the following finality endorsements were issued on opinions which were designated to be published. The following opinions are final and may be cited as authority in all the courts of the Commonwealth of Kentucky. CR 76.30.

Augenstein v. Deutsche Bank Nat'l Trust Co., 68 K.L.S. 11, p. 9, on 8/18/2022. The Kentucky Supreme Court denied discretionary review on 8/10/2022.

Byrnes v. Nationwide Mutual Ins. Co., 69 K.L.S. 3, p. 12, on 8/16/2022. The Kentucky Supreme Court denied discretionary review on 8/10/2022.

Com., Kentucky Land Conservation Fund Bd. v. Louisville Gas and Electric Co., 69 K.L.S. 5, p. 4, on 8/17/2022. The Kentucky Supreme Court denied discretionary review on 8/10/2022.

D.W. Wilburn, Inc. v. H&H Painting, LLC, 69 K.L.S. 7, p. 26, on 8/24/2022.

T. G.-F. v. J.Y., 69 K.L.S. 7, p. 34, on 8/29/2022.

Mason v. Stikes, 69 K.L.S. 5, p. 26; Finality was reissued on 9/15/2022.

Meadows v. Com., 69 K.L.S. 7, p. 46, on 9/1/2022.

PennyMac Loan Services, LLC v. Lyles, 69 K.L.S. 7, p. 48, on 9/1/2022.

PSC Industries, Inc. v. Toyota Boshoku America, Inc., 69 K.L.S. 7, p. 53, on 9/6/2022.

E.L.T. v. Com., Cabinet for Health and Family Servs., 69 K.L.S. 4, p. 13, on 8/16/2022. The Kentucky Supreme Court denied discretionary review on 8/10/2022.

S.W. v. S.W.M., 69 K.L.S. 4, p. 18, on 8/18/2022. The Kentucky Supreme Court denied discretionary review on 8/16/2022.

RULINGS on petitions previously filed:

Ebu v. Com., 69 K.L.S. 7, p. 6; Petition for rehearing was denied on 9/1/2022.

Geralds v. Geralds, 69 K.L.S. 7, p. 12; Petition for rehearing was denied on 8/30/2022.

OTHER: None.

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

Roberts v. Commonwealth Dodge, 69 K.L.S. 5, p. 21—644 S.W.3d 543.

—END OF COURT OF APPEALS—

SUPREME COURT

ARBITRATION

SALE OF A VEHICLE TO A CONSUMER BY A DEALER WHO REPRESENTED THAT THE VEHICLE WAS A "NEW" VEHICLE

SALES DOCUMENTS THAT INCLUDE AN ARBITRATION AGREEMENT

UNCONSCIONABILITY

Plaintiff purchased truck from dealer — Dealer represented that truck was "new" vehicle with no prior damage — Plaintiff later returned truck to dealer for routine maintenance — While there, plaintiff became interested in another vehicle and discussed possible trade-in of truck — Plaintiff then learned that CARFAX for truck indicated that truck had been damaged prior to plaintiff's purchase of it — Dealer informed plaintiff that its employees wrecked truck on lot prior to its sale to plaintiff and that damage had been repaired — Plaintiff filed instant action against dealer alleging breach of contract, breach of implied and express warranties, violations of Kentucky's Consumer Protection Act, and fraudulent misrepresentation — Dealer filed motion to dismiss for lack of jurisdiction, improper venue, or, in alternative, motion to dismiss to compel and/or direct arbitration — In its motion to compel arbitration, dealer referenced three documents signed or initialed by plaintiff when he purchased truck — First, Purchase Contract included language above signature lines stating that purchaser read and agreed to terms, including Arbitration Agreement, which was set forth in Paragraph 17 — Second, "Green's Toyota of Lexington Applicable Contingency and Arbitration Agreement" (Financing Contingency Agreement) provided for arbitration in Section II — It appears that Financing Contingency Agreement was subscribed by dealer, but initialed by plaintiff — Finally, third document that was in form of questionnaire relating to various items involved in transaction discussed arbitration in Item 12 — Plaintiff initialed at various spots and at bottom of this document — Trial court denied dealer's motions — Trial court found arbitration agreement was unconscionable and unenforceable because Financing Contingency Agreement precluded consequential or punitive damages — Dealer filed interlocutory appeal pursuant to KRS 417.220(1)(a) — Court of Appeals affirmed denial of motion to compel arbitration — Dealer appealed — REVERSED and REMANDED — Validity challenges to arbitration provisions are separated into two types: (1) those challenging specifically the validity of agreement to arbitrate, and (2) those challenging the contract as a whole, either on a ground that directly affects entire agreement, or on ground that illegality of one of contract's provisions renders whole contract invalid — Only first type of challenge is relevant to a court's determination whether arbitration agreement at issue is enforceable — Second class of challenge is within purview of arbitrator — In instant action, since parties clearly agreed to arbitrate, trial court erred in failing to enforce that agreement, leaving all other issues to arbitrator's determination — Discussed procedural and substantive unconscionability — Arbitration provisions were not unconscionable — Procedural unconscionability pertains to process by which agreement is reached and form of agreement, including fine print, convoluted or unclear language, boilerplate, and terms which might not be expected — In instant action, there was no procedural unconscionability — Inconsistencies among various arbitration provisions did not create ambiguity requiring voiding of arbitration agreement — Substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which disfavored party does not assent — Courts look to commercial reasonableness of contract terms, purpose and effect of terms, allocation of risks between parties, and similar public policy concerns — Arbitration provision in Purchase Contract was commercially reasonable — Paragraph 17 of Purchase Contract permitted dealer, but not plaintiff, to file court proceeding to enforce violations of any of purchaser's representations or warranties as to a trade in or to collect on any installment contract — This provision was not grossly or unreasonably favorable to dealer — As long as agreement is otherwise supported by valuable consideration, remedial imbalance does not invalidate contract — In context of instant action, trade-in language does not apply since plaintiff did not trade in a vehicle — Collection provision is not problematic because it does not limit plaintiff's ability to counterclaim in event lawsuit for collection is filed —

Curtis Green and Clay Green, Inc. d/b/a Green's Toyota of Lexington and John Hicks v. Phillip Frazier (2021-SC-0293-DG); On review from Court of Appeals; Opinion by Justice VanMeter, *reversing and remanding*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Parties who enter enforceable arbitration agreements are required to submit their disputes to binding arbitration, subject to limited exceptions, under both federal and Kentucky statutes. In this case, Phillip Frazier signed or initialed three documents agreeing to arbitrate any dispute with Curtis Green and Clay Green, Inc. d/b/a Green's Toyota of Lexington,[1] with respect to the purchase of a 2018 Toyota Tundra pickup truck (the "Truck"). The issue we address in this case is whether the Court of Appeals erred in affirming the Powell Circuit Court's order denying Green's motion to compel arbitration. We hold that the Court of Appeals did err. We therefore reverse its opinion and remand this matter to the trial court with directions to enter an order compelling arbitration.

[1] Frazier also joined Green's Toyota's salesman, John Hicks, as a party defendant. Both defendants are collectively referred to herein as "Green's."

I. Facts and Procedural Background.

In 2018, Frazier, a Powell County resident, purchased the Truck from Green's. Frazier alleges that his salesman, John Hicks, represented that the truck was a "new" vehicle with no prior damage.

The controversy giving rise to this case arose when Frazier, in September 2019, returned the Truck to Green's for routine maintenance. While there, Frazier became interested in another vehicle on the lot. When discussing a possible trade-in, Frazier learned that the CARFAX for the Truck indicated that it had been damaged prior to his purchase. Frazier alleged that Green's general manager informed him employees at Green's had wrecked the Truck on the lot prior to its original sale to Frazier and repaired the damage, but that Green's had failed to disclose this information to Frazier.

In December 2019, Frazier filed a civil complaint against Green's in Powell Circuit Court. Frazier alleged (1) Green's breached its contract with him by selling him a vehicle represented as "new" when in fact the vehicle was not in new condition as it had previously been wrecked; (2) Green's actions constitute a breach of express and implied warranties as it was warranted to Frazier that he was purchasing a new vehicle with no prior damage; (3) Green's Toyota engaged in unfair, false, misleading and/or deceptive acts or practices in violation of Kentucky's Consumer Protection Act, KRS 367.170; and (4) Green's intentionally and fraudulently misrepresented that the Truck was a new vehicle. Frazier sought an award of compensatory and punitive damages.

Green's responded to the complaint by filing a motion to dismiss for lack of jurisdiction, improper venue, or in the alternative motion to dismiss to compel and/or direct arbitration. The motion to compel arbitration was based on provisions contained in three documents signed or initialed by Frazier when he purchased the Truck in June 2018. First, the Purchase Contract for the Truck included incorporation language above the signature lines, that "Purchaser has read and agreed to the terms on the reverse side hereof, including the ARBITRATION AGREEMENT, provided for in paragraph 17. . . ." The referenced paragraph stated, in full:

> 17. Any claim or dispute by Purchaser with Dealer arising out of or in any way relating to this Contract, any installment sale contract for the Vehicle, and any other agreements related to or provided herein, the Vehicle, the negotiations and financing, and the sale by Dealer to Purchaser, of the Vehicle, including, without limitation, any claims involving fraud or misrepresentation, personal injuries, products liability, state or federal laws or regulations affecting or establishing the rights of consumers (without limitation truth in lending laws and regulations or consumer protection laws acts and regulations) shall be resolved by binding arbitration administered by Better Business Bureau Serving Eastern and Central Kentucky, Inc., in accordance with its rules. Dealer and/or its assignee and Purchaser shall execute

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

and deliver all agreements reasonably necessary in connection with such arbitration. All arbitration proceedings shall be held in Lexington Fayette County, Kentucky. The decision of the arbitrator(s) shall be final, conclusive and binding on the parties to the arbitration and no party shall institute any suit with regard to any such claim or dispute, except to compel arbitration or to enforce the arbitration decision. Venue for any action to enforce this Arbitration Agreement or any arbitration decision shall be in Fayette County, Lexington, Kentucky. Provided however, Dealer and/or its assigns may at its option bring or institute litigation in any state or federal court, against Purchaser and the Purchaser hereby consents to the jurisdiction of such courts and agrees to the entry of a judgment by any such court against Purchaser in favor of Dealer, seeking specific performance by Purchaser of Purchaser's obligations hereunder, for any violation or breach of the Purchaser's representations and warranties provided for in paragraphs 3, 10 and 11 hereof[2] and/or on any installment sale contract for the Vehicle between Dealer and/or its assignee and Purchaser.

[2] Paragraphs 3, 10, and 11 addressed matters related to any vehicle that the Purchaser may have traded in.

The second document that appears in the limited record is entitled Green's Toyota of Lexington Applicable Contingency and Arbitration Agreement ("Financing Contingency Agreement"). Specifically, this document, in Section I, purported to make the purchase and sale of the Truck contingent upon Green's arranging financing for the transaction subject to Frazier's acceptance, as shown by Frazier's initials adjacent to the applicable contingency, with a number of additional terms and conditions related to the financing contingency. Section II provided the following:

II. Arbitration Agreement

Any claims or dispute arising out of or in any way relating to this Agreement, the negotiations, the financing, sale or lease of the vehicle which is the subject of the Agreement, including any claim involving fraud or misrepresentation, must be resolved by binding arbitration administered by the Better Business Bureau of Central and Eastern Kentucky, Inc , in accordance with its rules. All arbitration proceedings shall be held in Lexington, Kentucky. The decision of the arbitrator(s) will be final, conclusive and binding on the parties to the arbitration and no party shall institute any suit with regard to the claim or dispute except to enforce the award. Each party shall advance its pro rata share of the costs and expenses of said arbitration proceedings and each shall separately pay its own attorney's fees and expenses. No party to this Agreement shall have the right to recover in any proceeding nor shall the arbitrator(s) have the authority to award any party consequential or punitive damages.

The Financing Contingency Agreement appears to be subscribed by Green's but only initialed by Frazier.

Finally, the third document is in the form of a questionnaire related to twelve items involved in the transaction, *e.g.*, the identification of the vehicle; identification of any applicable trade-in; acknowledgement of receipt of the Purchase/Lease Agreement; acknowledgement of the monthly payment for a financed purchase; acknowledgement that the transaction could not be rescinded or voided. The final item was the following:

12. Any claim or dispute arising out of or in any way relating to this contract, the negotiations [sic] financing, sale or lease of the vehicle which is the subject of this contract, including any claim involving fraud or misrepresentation, must be resolved by binding arbitration administered by the Better Business Bureau or [sic] Central or Eastern Kentucky Inc. in accordance with its rules. All arbitration proceedings shall be held in Lexington, Kentucky. The decision of the arbitrator(s) will be final [sic] conclusive and binding on the parties to the arbitration and no party shall institute any suit with regards to any claim or dispute except to enforce the arbitration decision. Venue for any action to enforce this arbitration decision shall be in Fayette County Court, Lexington, Kentucky.

In addition to the places in which Frazier initialed items numbers 2, 3, 4, 5 and 6, he also initialed the bottom of this document.

The trial court denied Green's motion(s). With respect to Green's venue argument, the trial court agreed with Frazier that his Consumer Protection claim was permitted to be brought in the county of his residence. KRS 367.220. As to the motion to compel arbitration, the trial court agreed with Frazier that because the arbitration clause in the Financing Contingency Agreement precluded consequential or punitive damages, the arbitration agreement was unconscionable and unenforceable. *Mortg. Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351, 352 (Ky. App. 2008).

As permitted by KRS 417.220(1)(a), Green's filed an interlocutory appeal with the Court of Appeals as to the denial of the motion to compel arbitration. In a 2-1 decision, the Court of Appeals affirmed the trial court. The majority opinion agreed that the arbitration agreement was both procedurally and substantively unconscionable and was incapable of being severed from the remainder of the contract. The Court of Appeals dissent opined that the challenge to the terms of the arbitration agreement was within the purview of the arbitrator, and would have ordered arbitration. *Curtis Green and Clay Green, Inc. v. Frazier*, No. 2020-CA-781-MR, 2021 WL 2878360, at *8-*9 *Ky. App. July 9, 2021) (Maze, J., dissenting). Green's moved for discretionary review, which we granted.

II. Standard of Review.

Under KRS 417.220(1)(a), an appeal may be taken from an order denying an application to compel arbitration. The standard of review of a trial court's ruling on a motion to compel arbitration is a *de novo* determination of whether the trial judge erred when deciding a factual or legal issue. *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 833 (Ky. 2013); *see Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 590 (Ky. 2012). In *Ping*, we stated "a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate." *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, (1995); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004)). Once prima facie evidence of the agreement has been presented, the heavy burden of avoiding the agreement shifts to the other party. *Louisville Peterbilt*, 132 S.W.3d at 857. Factual findings of the trial court are reviewed under the clearly erroneous standard and are deemed conclusive if supported by substantial evidence. *Energy Home*, 406 S.W.3d at 833 (citation and quotation omitted).[3]

[3] In this case, the trial court entered a terse, two-plus-page order with minimal factual findings. From it, we learn that Frazier was a Powell County resident, and that the parties had an agreement to arbitrate which Green's sought to enforce, with a clause preventing a plaintiff from recovering consequential or punitive damages. From a legalistic perspective, we might be inclined to reverse and remand to the trial court for more complete and adequate factual findings, but the parties' pleadings supply the basic facts of the transaction which are not disputed.

III. Analysis.

The main issue before us is whether the parties' agreement evidences an agreement to arbitrate any disputes. In this regard, our decision in *Dixon v. Daymar Colleges Grp., LLC*, 483 S.W.3d 332 (Ky. 2015) is pertinent:

> Broadly speaking, validity challenges to arbitration provisions can be separated into two types: (1) challenging "specifically the validity of the agreement to arbitrate[ ]" *Rent–A–Center v. Jackson*, 561 U.S. 63, 71 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)); and (2) challenging "the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Id.* (quoting *Buckeye*, 546 U.S. at 444). Per decades of Supreme Court precedent, "only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." *Id.* at 69. The second class of challenge is within the purview of the arbitrator. Indeed, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court noted, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." 546 U.S. at 445–46.

Daymar, 483 S.W.3d at 340. The straightforward application of this holding, as aptly noted by Court of Appeals Judge Maze in his dissent in this matter, compels the conclusion that since the parties clearly agreed to arbitrate, the trial court erred in failing to enforce that agreement, leaving all other issues to an arbitrator's determination.

Frazier seeks to avoid the applicability of this holding by arguing the contract was unconscionable, both procedurally and substantively, to void the arbitration agreement. In *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561 (Ky. 2012), we discussed at length those aspects of unconscionability, both procedural and substantive, that might void a contract. Green's argues that the

Court of Appeals misapplied *Schnuerle*, whereas Frazier argues the contrary.

As an initial matter, written contracts are generally enforceable against a party who had an opportunity to read it. *Id.* at 575 (quoting *Conseco Fin. Serving Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001)). Contractual terms which may appear on the reverse of a contract are similarly binding, so long as the incorporation language appears above the signature line. *Bartelt Aviation, Inc. v. Dry Lake Coal Co. Inc.*, 682 S.W.2d 796, 797 (Ky. App. 1985). In *Schnuerle*, we recognize that unconscionability is a recognized, albeit narrow, exception to this general rule of enforceability. 376 S.W.3d at 575 (stating "the doctrine . . . police[s] the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain[]").

As to procedural unconscionability, or "unfair surprise," *id.* at 576, it "pertains to the process by which an agreement is reached and the form of an agreement," including fine print, convoluted or unclear language, boilerplate, terms which might not normally be expected. *Id.* (citations omitted). The following factors are relevant to consideration of procedural unconscionability: "the bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *Id.* (internal quotations and citations omitted).

Our review of the Purchase Contract, the document that Frazier and Green's both signed, is that it is subscribed at the bottom of the page by both parties. Immediately above Frazier's signature is the provision that "Purchaser has read and agreed to the terms on the reverse side hereof, including the ARBITRATION AGREEMENT, provided for in paragraph 17. . . ." Next, two short provisions address the Purchaser's responsibility for liability insurance, including a statement that Green's is not providing liability insurance. And, the following provision follows, in all capital letters, highlighted by its appearing in white letters in a black box: "PURCHASER ACKNOWLEDGES HAVING READ AND UNDERSTOOD THE FRONT AND BACK SIDES OF THIS CONTRACT." The first full sentence of paragraph 17, states:

> 17. Any claim or dispute by Purchaser with Dealer arising out of or in any way relating to this Contract, any installment sale contract for the Vehicle, and any other agreements related to or provided herein, the Vehicle, the negotiations and financing, and the sale by Dealer to Purchaser, of the Vehicle, including, without limitation, any claims involving fraud or misrepresentation, personal injuries, products liability, state or federal laws or regulations affecting or establishing the rights of consumers (without limitation truth in lending laws and regulations or consumer protection laws acts and regulations) shall be resolved by binding arbitration administered by Better Business Bureau Serving Eastern and Central Kentucky, Inc., in accordance with its rules.

The balance of the paragraph addresses joint agreement to execute documents for the arbitration, arbitration location, finality of any award, and venue for enforcing an award. Admittedly, the paragraph permits Green's to file a court action to enforce violations of any of Purchaser's representations or warranties as to a trade in or to collect on any installment contract.

Paragraph 17 was properly incorporated by reference into the terms of the Purchase Contract. Far from being hidden, it was expressly identified on the front page with underlined capital letters with the paragraph number included. The paragraph's terms are not confusing, easily understandable by persons of ordinary experience and education, and further do not limit damages available or statutory remedies. It merely says any claim or dispute arising out of the Contract is to be submitted to binding arbitration. We conclude that the Contract, including the arbitration provision, was not procedurally unconscionable.[4]

[4] In *Schnuerle*, Justices Schroder and Noble dissented in part as to the Court's holding that an arbitration agreement was not procedurally unconscionable based on the factor of "meaningful choice." 376 S.W.3d at 580 (Schroder, J., concurring in part and dissenting in part). In their view, the defendant involved was the only provider of high-speed broadband cable internet service in Louisville at that time. In other words, the plaintiffs were presented with "no meaningful choice" resulting in an arbitration agreement which was procedurally unconscionable. *Id.* In this case, we are presented with a limited record and minimal factual findings, as noted. Perhaps, we would be justified to take judicial notice, KRE 201, that Green's is one of at least four Toyota dealerships in Central Kentucky, with the others being in Franklin, Jessamine and Madison Counties. As Frazier bears the heavy burden of proving the arbitration agreement was not enforceable, the record would thus not support a finding of "no meaningful choice."

The Court of Appeals erred in its interpretation of this agreement by concluding that the arbitration agreement was inconsistent, impossible to read, and not conspicuous or clear, thereby resulting in unconscionability. The Court of Appeals also ignored the severability clause in the Purchase Contract. We similarly hold the Court of Appeals erred in concluding that inconsistencies among the various arbitration provisions created ambiguity requiring voiding of the arbitration agreement. This issue was addressed in *Louisville Peterbilt*. In that case, Cox, the plaintiff, generally alleged unconscionability based on inconsistencies in the various agreements, that the agreements were contracts of adhesion, and the transaction constituted a failure of the meetings of the minds. 132 S.W.3d at 856. We noted, however, that Cox did "not allege that the documents were inconsistent in that some require arbitration of claims and some do not, or that he was unaware that he was agreeing to submit his claims to arbitration. He simply argues that the documents cannot evidence a meeting of the minds." *Id.* Because Cox signed two separate agreements stating claims would be arbitrated and failed to allege fraudulent inducement to do so, we held that "all other alleged disputes are for an arbitrator." *Id.* That holding applies here as well.

Substantive unconscionability "'refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.'" *Schnuerle*, 376 S.W.3d at 577 (quoting *Conseco*, 47 S.W.3d at 343 n.22 (citation omitted)). As for substantive unconscionability, courts consider "'the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns.'" 376 S.W.3d at 577 (quoting *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 876 (11th Cir. 2005)). Additionally, in *Grimes v. GHSW Enterprises, LLC*, 556 S.W.3d 576, 582-83 (Ky. 2018), we rejected, as a matter of law, any requirement that arbitration agreements must have mutuality of obligation, *e.g.*, both parties equally agree to arbitration, as a condition of enforceability. We held that as long as the requirement of consideration is met, no additional requirement of mutuality of obligation exists. *Id.* at 583.

We conclude that the arbitration provisions in the Purchase Contract are commercially reasonable. Kentucky public policy favors arbitration as a method of dispute resolution. *Schnuerle*, 376 S.W.3d at 574. As a general matter, arbitration can provide a relatively quick and inexpensive means of resolving disputes such as this one. As previously noted, however, the last sentence of Paragraph 17 in the Purchase Contract permits Green's and/or its assigns, but not Frazier, to file a court proceeding to enforce violations of any of Purchaser's representations or warranties as to a trade in or to collect on any installment contract. The question is whether this is grossly or unreasonably favorable to one side, *i.e.*, Green's? We hold that it is not.

First of all, *Grimes* addressed any claim regarding "[a]n imbalance in the respective remedial rights available to the parties under an agreement[.]" 556 S.W.3d at 582. As long as the agreement is otherwise supported by valuable consideration, remedial imbalance does not invalidate the contract. *Id.* Here, Green's sold and Frazier purchased a 2018 Toyota Tundra pickup at approximately $49,000, unquestionably a valuable consideration.[5] Secondly, we noted that "[w]hether a contract provision is unconscionable is 'highly fact specific.'" *Id.* at 583 (quoting *Kegel v. Tillotson*, 297 S.W.3d 908, 913 (Ky. App. 2009)). In the context of this dispute, the trade-in language is simply inapplicable since Frazier did not trade in a vehicle. The provision for collection is likewise not problematic because it does not limit Frazier's ability to counterclaim in the event a lawsuit for collection were to be filed. The Purchase Contract is not substantively unconscionable, and the Court of Appeals erred in concluding otherwise.

[5] We recognize, of course, that Frazier believes he did not receive his bargained-for exchange. Any remedy, however, is to be determined by the arbitrator(s).

Frazier next argues that *Valued Services of Kentucky, LLC v. Watkins*, 309 S.W.3d 256 (Ky. App. 2009), supports his argument that his claims under KRS 190.071 (Prohibited practices on part of new motor vehicle dealer) and Chapter 367 (Consumer Protection) are outside the scope of the arbitration agreement and are thereby not subject to arbitration. Again, we disagree. Watkins involved a broad arbitration agreement in a contract used by a check-cashing company. A dispute arose when

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Watkins, the borrower, was unable to repay the loan and he was held in an office against his will. Watkins' complaint was for false imprisonment. *Id.* at 258-59. Both the trial court and the Court of Appeals held that Watkins' claim, false imprisonment, an intentional tort, was *unrelated* to the transaction. The court's holding was that while

> no requirement [exists] under Kentucky law that claims must relate to the underlying transaction in order to be arbitrable, the nature of the underlying transaction may certainly be considered in assessing whether an arbitration agreement is unconscionable when applied to a particular set of facts. In this case, the arbitration provision is unconscionable because it encompasses an intentional tort with so little connection to the underlying agreement that it could not have been foreseen by Watkins when he signed that agreement.

Id. at 265. Those facts stand in contrast to the facts of this case in which all of Frazier's claims relate to his purchase of the Truck.[6]

[6] Likewise, we reject Frazier's claims against the arbitration agreement that it was procured by fraud, unsupported by adequate consideration, or against public policy. *See Louisville Peterbilt*, 132 S.W.3d at 856; *Grimes*, 556 S.W.3d at 582-83 (holding that as long as the contract is supported by consideration, an imbalance of remedial remedies does not invalidate the agreement).

We might, were we so inclined, write more on the various claims and issues presented, *e.g.*, limitation of damages, terms of the arbitration agreement, venue for enforcing any award (whether in favor of Frazier or Green's). Those issues, however, are more properly decided by the arbitrator.

IV. Conclusion.

In conclusion, the Court of Appeals opinion is vacated, and this matter is remanded to the Powell Circuit Court with directions to enter an Order granting Green's motion to compel arbitration.

All sitting. All concur.

GOVERNMENT

JUDGES

2018 HOUSE BILL (HB) 348

JUDICIAL REDISTRICTING

CONSTITUTIONALITY OF HB 348

CONSTITUTIONAL STANDING

ASSOCIATIONAL STANDING

In 2016, Kentucky Supreme Court issued "Proposed Kentucky Judicial Redistricting Plan for 2022" — Plan recommended appropriate number of judges within each judicial circuit based on results of Judicial Workload Assessment Report — In February 2017, Kentucky Supreme Court issued "Certification of Necessity: Realignment of Judicial Circuits and Districts and Reallocation of Existing Judgeships" — 2017 Certification certified to General Assembly need to realign circuit and district judicial boundaries and reallocate existing judgeships in manner prescribed within Certification — Paragraph VI of 2017 Certification stated, in part, that provisions are non-severable and if any part of redistricting plan is rejected, then entire Certification of Necessity is rendered void and unenforceable — During 2018 Regular Session, General Assembly passed House Bill (HB) 348, which partially adopted Judicial Redistricting Plan — HB 348 eliminated one of divisions of general jurisdiction in 31st Judicial Circuit (Floyd Circuit) effective January 2, 2023 — After HB 348 was passed, Kentucky Supreme Court issued second Certification of Necessity in July 2018 — 2018 Certification certified to General Assembly need to eliminate one circuit division in 31st Judicial Circuit Floyd Circuit Court — 2018 Certification noted delayed effective date and stated that no further Certification of Necessity is required by Kentucky Supreme Court — In October 2020, Former Supreme Court Justice Janet L. Stumbo (Stumbo) and Brandis Bradley (Bradley), individually, and as President of Floyd County Bar Association, filed instant action in Franklin Circuit Court arguing that HB 348's elimination of one division of general jurisdiction in Floyd Circuit Court violated Section 112(3) of Kentucky Constitution — Specifically, plaintiffs alleged that passage of HB 348 before Kentucky Supreme Court's 2018 Certification of Necessity was procedurally improper under Section 112(3) — Commonwealth intervened and moved to dismiss — Plaintiffs filed motion for summary judgment — Franklin Circuit Court simultaneously granted Commonwealth's motion to dismiss and granted, in part, and denied, in part, plaintiffs' motion for summary judgment — Circuit court first dismissed Stumbo for lack of standing — Circuit court then concluded that HB 348 was unconstitutional because it violated purported procedure by which branches must act under Section 112(3) — Even so, circuit court found Sections 6 and 7 of HB 348 to be valid under principles of judicial comity, finding that Kentucky Supreme Court essentially ratified General Assembly's actions by issuing 2018 Certification of Necessity — Bradley, but not Stumbo, appealed to Kentucky Court of Appeals — After case was fully briefed and oral arguments were heard, Court of Appeals recommended transfer to Kentucky Supreme Court — Supreme Court accepted transfer — HELD that Bradley lacked constitutional standing and associational standing; therefore, VACATED judgment of Franklin Circuit Court and REMANDED with instruction to dismiss action in its entirety without prejudice — To have constitutional standing, plaintiff must have suffered injury in fact, *i.e.*, invasion of legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical — Party invoking jurisdiction bears burden of establishing elements of standing — Bradley did not establish constitutional standing in her individual capacity — Bradley's alleged injuries constitute nonjusticiable generalized grievances — Although Bradley is resident, registered voter, and taxpayer in Floyd County, none of these classifications confer constitutional standing for her to challenge elimination of one division of Floyd Circuit Court — Any citizen or voter in Floyd County could assert injuries identical to those advanced in Bradley's complaint — Bradley failed to demonstrate that she is entitled to taxpayer standing — Taxpayer standing is recognized in limited circumstances as matter of equity — Bradley's eligibility as potential candidate for circuit judge in Floyd County does not demonstrate concrete or particularized injury that is personal to Bradley — Bradley failed to demonstrate that she has personal and individual interest in running for circuit judgeship eliminated by HB 348 other than general eligibility or interest — Bradley lacks associational standing as President of Floyd County Bar Association — Floyd County Bar Association was not plaintiff in initial complaint — Bradley cannot add Floyd County Bar Association as plaintiff by simply adding Association to caption of her notice of appeal — Bradley did not attempt to amend her complaint or move to add Association as party — Even suing in her official capacity as President, Bradley has not demonstrated that Association has standing to sue on behalf of its members in instant action — Bradley did not show that Association's members would otherwise have standing to sue in their own right — Association can have standing only if its members could have sued in their own right — Association does not demonstrate that its members will suffer concrete and particularized injury based on speculative harm to unspecified and unnamed clients — Kentucky Supreme Court did not consider Stumbo's standing in instant action — In notice of appeal to Court of Appeals, Stumbo is listed in case caption, but is not listed as appellant in body of notice — Stumbo did not appeal Franklin Circuit Court's ruling regarding her constitutional standing —

Brandis Bradley, Individually and In Her Official Capacity as President of the Floyd County Bar Association v. Com. of Kentucky, ex rel. Daniel Cameron, Attorney General; and Michael Adams, Secretary of State (2022-SC-0076-TG); Franklin Cir. Ct., Wingate, J.; Opinion by Chief Judge Minton, *vacating and remanding with instruction*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Brandis Bradley brings this appeal challenging a ruling of the Franklin Circuit Court concerning the constitutionality of House Bill (HB) 348,[1] which partially adopted this Court's 2016 Proposed Judicial Redistricting Plan, including this Court's recommendation that one of the divisions of general jurisdiction in the 31st Judicial Circuit

(Floyd Circuit) be eliminated based on insufficient workload. We accepted transfer from the Court of Appeals because this case raises important questions regarding the constitutionality of HB 348 and constitutional standing. After careful review, we conclude that Bradley's claims must be dismissed for lack of standing.

[1] Acts of Apr. 2, 2018, ch. 57, 2018 Ky. Acts 255.

I. FACTS AND PROCEDURAL BACKGROUND

In 2016, this Court issued a "Proposed Kentucky Judicial Redistricting Plan for 2022." The plan recommended an appropriate number of judges within each judicial circuit based on the results of the Judicial Workload Assessment Report.

Then, in February 2017, this Court issued a "Certification of Necessity: Realignment of Judicial Circuits and Districts and Reallocation of Existing Judgeships." The 2017 Certification "certifie[d] to the General Assembly of the Commonwealth of Kentucky the need to realign circuit and district judicial boundaries and reallocate existing judgeships" in the manner prescribed within the Certification. Paragraph VI of the 2017 Certification provided that:

> The Supreme Court finds and declares that each section of the judicial redistricting plan set forth in this Certification of Necessity is essentially and inseparably connected with and dependent upon each other. Accordingly, the provisions are nonseverable and if any part of the Judicial redistricting plan is rejected, then the entire Certification of Necessity is rendered void and unenforceable.

During the 2018 Regular Session, the General Assembly passed HB 348, which partially adopted this Court's Judicial Redistricting Plan. HB 348 eliminated one of the divisions of general jurisdiction in the 31st Judicial Circuit (Floyd Circuit) effective January 2, 2023.

After passage of HB 348, this Court issued a second Certification of Necessity in July 2018. The 2018 Certification "certifie[d] to the General Assembly of the Commonwealth of Kentucky the need to eliminate one circuit court division in the 3lst Judicial Circuit Floyd Circuit Court." The 2018 Certification also stated: "Pursuant to HB 348 (2018), Section 9, implementation herein shall have a delayed effective date of January 2, 2023; no further Certification of Necessity shall be required of this Court."

Bradley initiated this action in Franklin Circuit Court in October 2020. The original plaintiffs were Former Supreme Court Justice Janet L. Stumbo and Brandis Bradley, individually, and as President of the Floyd County Bar Association. Stumbo and Bradley argued that HB 348's elimination of one division of general jurisdiction in the Floyd Circuit Court violates Section 112(3) of the Kentucky Constitution, which provides that "the General Assembly having power upon certification of the necessity therefor by the Supreme Court, to change the number of circuit judges in any judicial circuit." Specifically, Stumbo and Bradley contend that passage of HB 348 before this Court's 2018 Certification of Necessity was procedurally improper under Section 112(3) of the Kentucky Constitution.

The Commonwealth intervened as a defendant in this action and moved to dismiss. Then, Stumbo and Bradley filed a motion for summary judgment. The Franklin Circuit Court simultaneously granted the Commonwealth's motion to dismiss and granted, in part, and denied, in part, the plaintiffs' motion for summary judgment. In its mixed ruling, the circuit court first dismissed Stumbo for lack of standing. Then, the court concluded that HB 348 was unconstitutional because it violated the purported procedure by which the branches must act under Section 112(3) of the Constitution. Even so, the circuit court found Sections 6 and 7 of HB 348 to be valid under the principles of judicial comity, reasoning that "the Kentucky Supreme Court essentially ratified the General Assembly's actions by issuing the 2018 Certification of Necessity."

Bradley, but not Stumbo, appealed to the Kentucky Court of Appeals. Stumbo entered a notice of appearance as co-counsel for Bradley before the Court of Appeals. After the case was fully briefed and oral argument was heard, the Court of Appeals recommended transfer to this Court under Kentucky Rule of Civil Procedure (CR) 74.02(5). We accepted transfer and ordered an expedited briefing schedule. We now address the parties' arguments on appeal.

II. STANDARD OF REVIEW

"We review the trial court's issuance of summary judgment de novo and any factual findings will be upheld if supported by substantial evidence and not clearly erroneous."[2] Whether a party has standing is a jurisdictional question of law that is reviewed de novo.[3]

[2] *Adams v. Sietsema*, 533 S.W.3d 172, 177 (Ky. 2017).

[3] *Commonwealth v. B.H.*, 548 S.W.3d 238, 242 (Ky. 2018) ("Jurisdiction is a question of law, and our review is de novo.").

III. ANALYSIS

The Commonwealth raises two threshold—potentially dispositive—issues for our consideration. First, the Commonwealth contends that Bradley's direct brief before this Court does not comply with the Kentucky Rules of Civil Procedure ("CR"). Second, the Commonwealth argues that Bradley lacks standing. We address each argument in turn.

A. We decline to strike Bradley's brief or dismiss for noncompliance with the civil rules regarding the form and contents of briefs.

CR 76.12(4) provides the appropriate form and content for briefs. Parties who cavalierly disregard the requirements of CR 76.12(4) do so at their own peril. "A brief may be stricken for failure to comply with any substantial requirement of [ ] Rule 76.12."[4] Moreover, an appellate court has discretion to either disregard a particular argument[5] or dismiss an appeal altogether for noncompliance with CR 76.12.[6]

[4] CR 76.12(8)(a); *see also Commonwealth v. Roth*, 567 S.W.3d 591, 595 (Ky. 2019).

[5] *See Dixon v. Commonwealth*, 263 S.W.3d 583, 587 n.11 (Ky. 2008); *Smith v. Smith*, 235 S.W.3d 1, 4–5 (Ky. App. 2006).

[6] *See Roth*, 567 S.W.3d at 595; *see also Craig v. Kulka*, 380 S.W.3d 546, 547-49 (Ky. App. 2012) (dismissing appeal for failing to comply with CR 76.12(4)(c)(iv) and (v)); *Simmons v. Commonwealth*, 232 S.W.3d 531, 533 (Ky. App. 2007) ("[D]ismissal for failure to comply with the provisions of CR 76.12 is discretionary[.]"); *Baker v. Campbell Cnty. Bd. of Educ.*, 180 S.W.3d 479, 482 (Ky. App. 2005) (acknowledging dismissal as appropriate upon the failure to comply with CR 76.12).

In granting transfer from the Court of Appeals, we ordered an expedited briefing schedule and stated that each party was permitted to submit a direct brief to this Court. As a result, submission of a direct brief to this Court was left within the parties' discretion. Even so, upon choosing to submit a brief to this Court, the parties were required to comply with CR 76.12, unless the Court directed alternative briefing instructions.

The Commonwealth is correct that Bradley's direct brief does not comply with CR 76.12 in several respects. For instance, the brief does not comply with CR 76.12(4)(c)(iv) and (v), which require "ample" citations "to the record" to support a party's factual assertions. Indeed, Bradley's statement of the case totals only three sentences and includes no citations to the record.

Moreover, CR 76.12(4)(c)(v) requires parties to include an argument section "with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review." But here, Bradley's argument section is less than four pages long, cites only one case, and includes no statement regarding preservation of issues for appellate review.

Instead of complying with the requirements of CR 76.12, Bradley sought to rely on the pleadings filed in the Court of Appeals. The practice of incorporating briefing from other courts by reference is not permitted by our civil rules or caselaw. This Court is not obliged to scour the briefs filed in lower courts to find what arguments the parties advance on appeal, what legal authority supports those arguments, and the factual basis underlying those arguments. If parties choose to file a brief before this Court, they must comply with the substantive requirements outlined in CR 76.12.

Of course, as Bradley points out, this action comes to us in an unusual procedural posture. This case was fully briefed before the Court of Appeals and was transferred to this Court after oral argument before the Court of Appeals but before the Court of Appeals rendered any decision. And we acknowledge Bradley's likely frustration with transfer of the matter after full briefing and oral argument before the Court of Appeals. But upon deciding to file a direct brief in this Court, Bradley

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was required to comply with CR 76.12, and she failed to do so here.

Even so, "[w]hen an appellate advocate fails to abide by [CR 76.12(4)(c)(v)] our options are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions; or (3) to review the issues raised in the brief for manifest injustice only."[7] Considering the unusual procedural posture of this case, we exercise our discretion to overlook the deficiencies in Bradley's direct brief and proceed with review.

[7] *Roth*, 567 S.W.3d at 595 n.9 (citations omitted).

B. Bradley has not established constitutional standing.

"[T]he existence of a plaintiff's standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth."[8] This Court has adopted the federal standard for constitutional standing espoused in *Lujan v. Defenders of Wildlife*.[9] "[A]ll Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable."[10] This practice "conforms to the general understanding of constitutional standing as a predicate for a court to hear a case and the ability of a court, acting on its own motion, to address that issue."[11]

[8] *Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 188 (Ky. 2018); *see also Beshear v. Ridgeway Properties, LLC*, 647 S.W.3d 170, 175–76 (Ky. 2022); *Overstreet v. Mayberry*, 603 S.W.3d 244, 252 (Ky. 2020); *Commonwealth v. Bredhold*, 599 S.W.3d 409, 414 (Ky. 2020).

[9] *Sexton*, 566 S.W.3d at 188 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[10] *Sexton*, 566 S.W.3d at 192 (emphasis in original).

[11] *Id.*

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."[12] The party invoking jurisdiction bears the burden of establishing the elements of standing.[13]

[12] *Lujan*, 504 U.S. at 560 (internal citations and quotations omitted).

[13] *Id.* at 561.

1. Bradley has not established constitutional standing in her individual capacity.

Bradley has not established that the alleged injury—elimination of Division II from the Floyd Circuit Court—harmed her in a concrete and particularized way. Instead, Bradley's alleged injuries constitute nonjusticiable generalized grievances.

"To have standing, a litigant must seek relief for an injury that affects him [or her] in a 'personal and individual way.'"[14] The litigant "must possess a 'direct stake in the outcome' of the case."[15] A litigant raising a generally available grievance about government, no matter how sincere, and claiming only harm to her and every other citizen's interest in the proper application of the laws, does not state a justiciable case or controversy.[16]

[14] *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 560).

[15] *Id.* (quoting *Arizonans for Off. Eng. v. Arizon*a, 520 U.S. 43, 64 (1997)).

[16] *Id*. (citing *Lujan*, 504 U.S. at 573–74).

The complaint in this action alleges that Bradley is a resident, registered voter, and taxpayer in Floyd County. But none of these classifications confer constitutional standing for Bradley to challenge the elimination of one division of the Floyd Circuit Court. Bradley does not argue that she is personally and uniquely impacted by HB 348 as a citizen or voter. Nor could she. Any citizen or voter in Floyd County could assert injuries identical to those advanced in Bradley's complaint. As a result, Bradley's claims constitute generalized grievances.

Additionally, Bradley has failed to demonstrate that she is entitled to taxpayer standing. Kentucky courts recognize taxpayer standing in limited circumstances as a matter of equity.[17] Typical cases invoking taxpayer standing involve litigants suing government entities or their agents to challenge the propriety of city, county, or state expenditure of public funds.[18] Here, Bradley makes no allegation that this action involves a challenge to the propriety of expenditure of government funds.

[17] *See Sexton*, 566 S.W.3d at 194 n.33; *see also Overstreet*, 603 S.W.3d at 263.

[18] *See Overstreet*, 603 S.W.3d at 263.

Moreover, Bradley contends that she has standing as an "eligible" or "interested" candidate for judicial office in the circuit court division eliminated by HB 348. But Bradley's eligibility as a potential candidate for circuit judge in Floyd County does not demonstrate a concrete or particularized injury that is personal to Bradley. Instead, Bradley's asserted harm is hypothetical and conjectural. Any attorney residing in Floyd County and meeting the minimum requirements for the office of circuit judge could assert identical injuries to those advanced by Bradley.

The United States Supreme Court has recently rejected standing arguments under similar facts. In *Carney v. Adams*, the United States Supreme Court held that a plaintiff did not have standing to challenge an eligibility requirement for Delaware state court judges because the plaintiff had not shown that he was "able and ready" to apply to become a judge.[19] Without evidence that the plaintiff was likely to apply to become a judge, the Supreme Court held that his challenges to Delaware's judicial eligibility requirements were nonjusticiable generalized grievances.[20]

[19] 141 S. Ct. 493, 499–500 (2020).

[20] *Id.*

Similarly, Bradley has failed to demonstrate that she has a personal and individual interest in running for the circuit judgeship eliminated by HB 348 other than general eligibility or interest. Instead, the facts reflect a contrary conclusion. The Court of Appeals took judicial notice of the fact that Bradley had filed to run for a position on the *Floyd District Court*, not Floyd Circuit Court, Division II. As a result, Bradley lacks constitutional standing in her individual capacity to challenge HB 348 because she has failed to demonstrate a concrete and particularized injury-in-fact.

2. Bradley lacks representative standing as President of the Floyd County Bar Association.

Bradley also lacks associational standing as President of the Floyd County Bar Association. In her Complaint, Bradley asserts that she "also brings this action in her capacity as President of the Floyd County Bar Association, [which] voted unanimously to institute this litigation on October 2, 2020."

There are two problems with Bradley's assertion of associational standing. First, it does not appear that the association seeking standing, the Floyd County Bar Association, was a plaintiff in the initial complaint. Second, even suing in her capacity as President of the Floyd County Bar Association, Bradley has not demonstrated that she satisfies the requirements for associational standing.

Initially, the Floyd County Bar Association was not explicitly and clearly listed as a named plaintiff in the complaint. The caption of the complaint lists "JANET L. STUMBO and BRANDIS BRADLEY, Individually and as President of the FLOYD COUNTY BAR ASSOCIATION" as plaintiffs. And the first sentence of the Complaint says, "Come the Plaintiffs, Janet L. Stumbo, Brandis Bradley, and the Floyd County Bar Association, by counsel, and state as follows[.]" But the Floyd County Bar Association is not clearly listed as a plaintiff in the case caption. Instead, Bradley is listed as a *plaintiff in her capacity as president of the Association*. More importantly, the Floyd County Bar Association is not listed as a named plaintiff in the substantive text of the Complaint. Instead, the text of the complaint only lists "Brandis Bradley . . . in her capacity as President of the Floyd County Bar Association."

The circuit court twice pointed out that the Association was not properly named as a plaintiff in the complaint. Furthermore, the circuit court correctly stated that the "best practice would have been for Plaintiffs to directly name the Floyd County Bar Association." Of course, when considering a motion to dismiss, pleadings are read in the light most favorable to the plaintiff.[21] But a plaintiff is also the master of his or her complaint.[22] As a result, Bradley was solely responsible for

naming the proper parties in the complaint.

[21] *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

[22] *See Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 312 (6th Cir. 2009).

Moreover, Bradley cannot add the Floyd County Bar Association as a plaintiff by simply adding the Association to the caption of her notice of appeal.[23] Bradley was free to attempt to amend her complaint or move to add the Association as a party. Having done neither, the Association is not a proper party in this appeal.

[23] *See* CR 73.03(1) ("The notice of appeal shall specify by name all appellants and all appellees[.]").

Regardless, even suing in her official capacity as President of the Floyd County Bar Association, Bradley has not demonstrated that the Association has standing to sue on behalf of its members in this action. The United States Supreme Court has espoused three requirements for an association to demonstrate standing in federal court:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.[24]

[24] *Commonwealth ex rel. Brown v. Interactive Media Ent. & Gaming Ass'n, Inc.*, 306 S.W.3d 32, 38 (Ky. 2010) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

This Court has not held that all three elements of this federal associational standing test apply in Kentucky courts.[25] But "at least the first requirement must apply."[26] An association can have standing only if its members could have sued in their own right.[27] "Otherwise the primary requirement for standing, that the party has a real interest in the litigation, would be thwarted."[28]

[25] *See id.* Recently, the United States Court of Appeals for the Sixth Circuit questioned the continued validity of the federal associational standing doctrine, noting that the United States Supreme Court's recent cases demonstrate that a nonparty injury alone does not suffice to confer standing. *See Association of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 537–43 (6th Cir. 2021). But we need not address the continued validity of associational standing in Kentucky courts here because such an analysis would constitute dictum because it is "unnecessary to the resolution of [this] case." *Id.* at 547 (Siler, J., concurring).

[26] *Id.*

[27] *Id.*

[28] *Id.*

Bradley's complaint fails to satisfy the first prong of the three-part test for associational standing. The circuit court concluded that "members of the Floyd County Bar association have a 'real and substantial' interest in maintaining their current judicial structure." But a sincere interest in preserving the current judicial structure of the Floyd Circuit Court, standing alone, does not demonstrate that the members of the Floyd County Bar Association have standing to sue in their own right. For instance, Bradley is the only remaining named plaintiff who is also a member of the Association. Yet we have already established that Bradley has failed to demonstrate constitutional standing in her individual capacity.

Moreover, the Association's members do not have individual standing to sue to remedy alleged injuries to their clients. The circuit court noted that the Association's members "have expressed concern that reducing the number of judges will have a drastic impact on dockets." And, in her motion for summary judgment, Bradley argued that the Association's members were "affected by the loss of Division II because they represent clients in criminal and civil cases who will lose trial dates due to the loss of Division II."

But Bradley's argument is unavailing. The Association does not demonstrate that its *members* will suffer a concrete and particularized injury based on speculative harm to *unspecified and unnamed clients*.[29] Importantly, Bradley does not argue that the elimination of Division II of the Floyd Circuit Court will result in concrete and particularized injuries to the Association's attorney members. Instead, under Bradley's logic, unnamed, third-party clients would be injured by the elimination of Division II, not the members of the Association themselves. This attenuated injury is neither direct nor personal to the Association's members. Importantly, no client or litigant with a court date pending in Floyd Circuit Court, Division II, has been named as a plaintiff on the face of Bradley's complaint. And Bradley has made no argument concerning why those unspecified clients cannot sue to remedy the injuries alleged in the complaint.

[29] *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) ("The assertion of one's own legal rights and interests must be demonstrated and the claim to relief will not rest upon the rights of third persons.") (citing *Warth v. Seldin*, 442 U.S. 490 (1975)).

Ultimately, the Floyd County Bar Association has not demonstrated associational standing because the Association is not plaintiff in this action. Regardless of that defect, the Association has also failed to demonstrate that its members would otherwise have standing to sue in their own right. Here, the Association seeks third-party standing to represent unspecified, third-party clients without any argument that these clients are unable to represent their own interests in the courts of this Commonwealth. As such, the Floyd County Bar Association does not have associational standing to bring the claims asserted in this action.

3. We do not consider the standing of Stumbo in this action.

We do not consider whether Stumbo has standing to bring this action. The complaint lists "Janet L. Stumbo" as a plaintiff to this action. The circuit court ruled that Stumbo lacked standing, concluding that her alleged injury was not sufficiently "distinct and palpable" to confer constitutional standing.

In the notice of appeal to the Court of Appeals, Stumbo is listed in the case caption but is not listed as an appellant in the body of the notice. The relevant text of the notice of appeal says, "Comes the Plaintiff, Brandis Bradley, individually and in her official capacity as President of the Floyd County Bar Association and the Floyd County Bar Association, and hereby files their Notice of Appeal. . . . On Appeal, Brandis Bradley, individually, and In her official capacity as President of the Floyd County Bar Association, and the Floyd County Bar Association, will be the Appellants[.]" Stumbo did not appeal the ruling of the Franklin Circuit Court regarding her constitutional standing and is not an appellant in this appeal.[30] As a result, we decline to render an advisory opinion on the Franklin Circuit Court's ruling that Stumbo lacked constitutional standing in this matter.

[30] See CR 73.03(1) ("The notice of appeal shall specify by name all appellants and all appellees[.]").

IV. CONCLUSION

After review, we conclude that Bradley lacks standing on this record. Bradley has not alleged a concrete and particularized injury-in-fact to confer constitutional standing in her individual capacity. Additionally, the Floyd County Bar Association is not a proper party in this appeal and has not demonstrated associational standing. The judgment of the Franklin Circuit Court is vacated, and this matter is remanded with instruction to dismiss the action in its entirety without prejudice.

All sitting. All concur.

CRIMINAL LAW

THEFT OF IDENTITY

OFFENSE OF GIVING A PEACE OFFICER FALSE IDENTIFYING INFORMATION

LESSER-INCLUDED OFFENSE

Offense of giving a peace officer false identifying information is not a lesser-included offense of theft of identity —

Com. v. Kenneth Lamont Boone, Jr. (2021-SC-0494-DG); On review from Court of Appeals; Opinion by Justice Nickell, *reversing and remanding*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The Commonwealth appeals from a decision of the Court of Appeals reversing Kenneth Boone's convictions in Fayette Circuit Court for theft of identity and being a persistent felony offender in the first degree (PFO I). The Commonwealth argues the trial court did not err in refusing to

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

give an instruction for the misdemeanor offense of giving a peace officer false identifying information. Following a careful review of the briefs, the record, and the law, we reverse.

In February 2016, Boone was the driver of a vehicle stopped by police. Boone told Detective Christopher Pope from the narcotics enforcement unit of the Lexington Police Department that his driver's license was suspended and he lacked identification. He gave his name as "Daniel Wharton" with a birthdate of April 17, 1993. The detective warned that giving false information to a law enforcement officer was a crime, but Boone persisted in providing the detective with Wharton's information. Following a search, Boone was arrested and charged with a felony offense, possession of a controlled substance in the first degree; a misdemeanor offense, operating on a suspended or revoked operator's license; and a violation, failure to illuminate rear license. Later, after it was learned at the jail he was not Daniel Wharton, Boone was also indicted for an additional felony offense, theft of identity, and for being a PFO I.

Boone lost two suppression hearings challenging the validity of his traffic stop. Subsequently, the possession charge was severed, and Boone was tried by a jury on the remaining charges. At the close of evidence, Boone requested the trial court instruct the jury on the offense of giving a peace officer false identifying information. During discussion of the jury instructions, the trial court noted the form instruction book indicated giving a peace officer false identifying information is not a lesser-included offense of theft of identity. Boone contended the logic of a Court of Appeals opinion, *Stephenson v. Commonwealth*, No. 2016-CA-00013-MR, 2017 WL 5907976, at *3 (Ky. App. Dec. 1, 2017), an opinion depublished by this Court in its denial of discretionary review on March 14, 2018, entitled him to a lesser-included instruction. The Commonwealth countered pointing to a discussion in *Crouch v. Commonwealth*, 323 S.W.3d 668 (Ky. 2010), standing for the opposite proposition that giving a peace officer false identifying information is not a lesser-included offense, but a separate, distinct charge with an additional fact needing to be proved. The trial court denied Boone's requested instruction. Boone was found guilty of all charges and was sentenced to an aggregate term of ten years' imprisonment.[1]

[1] Boone eventually pled guilty to the severed possession of a controlled substance charge and was sentenced to one year to run concurrently with the ten-year sentence for the other charges.

Boone appealed. The Court of Appeals affirmed the validity of the traffic stop and the resulting convictions for possession of a controlled substance, operating on a suspended or revoked operator's license, and failure to illuminate rear license. However, the Court of Appeals agreed with Boone that the trial court erred by failing to instruct the jury on the misdemeanor offense of giving a peace officer false identifying information as a lesser-included offense to the theft of identity charge and reversed as to that conviction.

KRS[2] 505.020(2) specifies whether a charge constitutes a lesser-included offense. The statute provides:

> (2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
> (a) It is established by proof *of the same or less than all the facts* required to establish the commission of the offense charged; or
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

(Emphasis added).

[2] Kentucky Revised Statutes.

The felony offense of theft of identity is governed by KRS 514.160, which provides, in pertinent part:

> (1) A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:
> . . . .
> (d) Avoiding detection . . . .

The misdemeanor crime of giving a peace officer false identifying information, which Boone asserts is a lesser-included offense, is governed by KRS 523.110(1), which provides:

> A person is guilty of giving a peace officer false identifying information when he or she gives a false name, address, or date of birth to a peace officer who has asked for the same in the lawful discharge of his or her official duties with the intent to mislead the officer as to his or her identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he or she is seeking that giving a peace officer false identifying information is a criminal offense.

Other than the requirement of a warning for giving a peace officer false identifying information, the two crimes are very similar.

The Court of Appeals reasoned the added requirement of a warning was merely a prerequisite, rather than an element, of the misdemeanor crime. Under this theory, which is the same theory found in *Stephenson*, giving a peace officer false identifying information purportedly could be regarded as a lesser-included offense containing the same or fewer number of elements pursuant to KRS 505.020(2)(a), rather than containing an additional element and constituting a distinct or unrelated offense to theft of identity. This appeal by the Commonwealth follows. Boone did not appeal, so the only issue before us is whether the misdemeanor instruction was required.

The Commonwealth contends the trial court properly refused to instruct the jury on the offense of giving a peace officer false identifying information. Specifically, it argues that comparing the elements of the offense of theft of identity with the elements of giving a peace officer false identifying information confirms Boone was not entitled to a lesser-included instruction because the misdemeanor offense had an additional element the felony offense did not contain. Thus, the Commonwealth maintains the Court of Appeals' contrary holding is not persuasive, arguing it is inconsistent with this Court's decision in *Crouch*.

We review the trial court's decision not to give a jury instruction for abuse of discretion. *Hunt v. Commonwealth*, 304 S.W.3d 15, 31 (Ky. 2009); *Sargent v. Shaffer*, 467 S.W.3d 198, 202-03 (Ky. 2015) (overruled on other grounds by *University Medical Center, Inc. v. Shwab*, 628 S.W.3d 112 (Ky. 2021)) (noticing and discussing some confusion over the proper standard of review to use). "Under the familiar standard prescribed in *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999), a trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 203.

"A defendant is entitled to an instruction on any lawful defense which he has." *Hudson v. Commonwealth*, 202 S.W.3d 17, 20 (Ky. 2006) (quoting *Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997)). And while a "lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge." *Id.* "An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense and, yet, believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (citing *Wombles v. Commonwealth*, 831 S.W.2d 172, 175 (Ky. 1992)).

Kentucky courts determine whether a charge is a lesser-included offense by comparing the facts necessary to prove guilt for both offenses. "[I]f the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense." *Hudson*, 202 S.W.3d at 20-21 (quoting *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000)). In other words, a lesser included offense is one which includes proof of the same or fewer facts than for the primary offense. *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999).

The trial court properly performed its analysis, reasoning that the lesser offense of giving false identifying information to a peace officer requires proof of an aspect that theft of identity does not. While the felony crime of identity theft and the misdemeanor offense of giving false information to a police officer are quite similar, the latter requires additional proof of a warning by a peace officer.

As such, pursuant to KRS 505.020(2)(a), giving false information to a peace officer is not a lesser-included offense to theft of identity. Therefore, the trial court acted properly and did not abuse its discretion when it chose not to give jury instructions to a lesser, not-included offense.

Boone and the Court of Appeals' panel make much of a legal theory and distinction espoused in *Stephenson* that the requirement of a warning by a peace officer is merely a prerequisite, not an element, of the offense of giving false identifying information. For purpose of determining whether the aforesaid misdemeanor qualifies as a lesser-included offense *vis-à-vis* the said felony, the Court of Appeals justified its characterization of a warning as a "prerequisite" rather than an element of the misdemeanor by reasoning "[g]enerally, elements of a criminal offense mandate what conduct *the defendant* must engage in to commit that offense." *Boone v. Commonwealth*, No. 2019-CA-0966, 2021 WL 3572864, at *6 (Ky. App. Aug. 13, 2022) (emphasis in original). Because the warning the peace officer must give is conduct the defendant has no control over, the Court of Appeals concluded the required warning is not an element of the misdemeanor. In so doing, the Court of Appeals identified no authority in support of its holding except for *Stephenson*, 2017 WL 5907976, at *3, which itself cited no precedent.

We note there are, in fact, crimes in Kentucky that a criminal can be convicted of based on the conduct of others. For example, the crimes of fleeing or evading police in the first degree[3] and fleeing or evading police in the second degree[4] have the same mental states—knowing or wanton—and both require direction to stop by a person recognized to be an officer. The crime of burglary in the first degree[5] can include conduct of a third-party as a statutory element of the offense. "The plain language of the statute makes clear that in order for the licensee to 'know' his license has been revoked, the owner of the building or one with authority must 'personally communicate[]' the revocation to the licensee." *Lewis v. Commonwealth*, 392 S.W.3d 917, 920-21 (Ky. 2013). For this reason, the Court of Appeals' holding that elements of a crime must be conduct within the defendant's control is unpersuasive and we reject any such distinction.

[3] KRS 520.095.

[4] KRS 520.100.

[5] KRS 511.020.

KRS 505.020(2) governs what is a lesser-included offense and mentions neither "element" nor "prerequisite." The plain language of KRS 505.020(2) sets out that a lesser-included offense "is established by proof of the same or less than all the facts required to establish the commission of the offense charged."[6] It is abundantly clear the requirement of a warning by a peace officer is a fact required to be established for the misdemeanor crime that is not contained in the elements required for a charge of theft of identity. Therefore, giving a peace officer false information is not a lesser-included offense of theft of identity. The Court of Appeals erred in so holding.

[6] The statute mentions lesser-included offenses also can consist of attempts to commit the offenses charged or otherwise included, lesser kinds of culpability sufficient to establish their commission, or differences in a less serious injury or risk of injury to the same person, property or public interest sufficient to establish their commission, none of which apply in the case at hand.

For the foregoing reasons, the decision of the Court of Appeals is reversed and the matter is remanded to that court for further proceedings consistent with this opinion.

All sitting. All concur.

CRIMINAL LAW

UNLAWFUL ACCESS TO A COMPUTER IN THE FIRST DEGREE

PRICE CHANGE INVOLVING THE USE OF A SELF-CHECKOUT REGISTER AND SCANNER

Defendant used self-scanner at Walmart to purchase two items — Defendant switched barcodes on two items she purchased with barcodes on two less expensive items — By switching barcodes, defendant paid $80.80 less than she should have paid based on prices at which items were offered for sale — Defendant was charged with unlawfully accessing a computer in the first degree and second-degree robbery — Robbery charge was amended to fourth-degree assault prior to trial — At trial, defendant moved for directed verdict on charge that she unlawfully accessed a computer in the first degree — Defendant argued that Commonwealth failed to show that she lacked effective consent to access Walmart's self-checkout register — Trial court denied motion for directed verdict — Jury found defendant not guilty on assault charge, but guilty of first-degree unlawful access to a computer — Defendant appealed — Court of Appeals reversed denial of directed verdict — Commonwealth appealed — AFFIRMED — KRS 434.845(1) states, in part, that person is guilty of unlawful access to a computer in the first degree when person, "without the effective consent" of owner, knowingly accesses computer for purpose of (a) devising or executing any scheme to defraud, or (b) obtaining money or property by means of false or fraudulent pretenses — KRS 434.840(9) defines "effective consent" as consent by a person legally authorized to act for the owner — KRS 434.840(9)(d) states that consent is not effective if it is used for purpose other than that for which consent is given — Focus of KRS 434.840(9)(d) is purpose for which consent to use computer was given — Issue is whether individual is accessing computer in the way consented to by owner — In instant action, defendant was entitled to directed verdict on charge of unlawful access to a computer in the first degree — Defendant accessed Walmart's self-checkout register by scanning barcodes and making payment, access specifically created and intended for Walmart shoppers — Changing barcodes on certain merchandise prior to scanning it did not result in defendant accessing Walmart's self-checkout register in a way to which Walmart did not consent — Kentucky's Penal Code has other possibly appropriate charges for defendant's unlawful actions, including theft by deception or theft by unlawful taking —

Com. v. Chasity Shirley (2021-SC-0254-DG); On review from Court of Appeals; Opinion by Justice Hughes, *affirming*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Chasity Shirley used the self-scanner at the Walmart in Somerset to purchase two items, paying $80.80 less than she should have paid based on the prices at which the items were offered for sale. She accomplished this by exchanging the barcodes on the two items she purchased with barcodes on two less expensive items. While Shirley clearly committed a criminal act, the novel issue before us is whether her conduct justifies conviction for unlawful access to a computer in the first degree, a Class C felony. Kentucky Revised Statute (KRS) 434.845 sets forth the elements necessary to establish unlawful access to a computer in the first degree. One of the elements is that the person must not have the "effective consent" of the owner when accessing the computer. While a person may have "effective consent" to begin with, it is lost if the consent is "[u]sed for a purpose other than that for which the consent is given." KRS 434.840(9)(d). In this case of first impression, this Court is required to construe "purpose" in KRS 434.840(9)(d) and more specifically whether purpose refers to an unauthorized computer-related purpose or a broader fraudulent purpose. Based upon our conclusion that KRS 434.840(9)(d) refers to a computer-related purpose, we ultimately conclude, like the Court of Appeals, that the circuit court improperly denied Appellee Chasity Shirley a directed verdict on the unlawful access to a computer in the first-degree charge. Accordingly, we affirm the Court of Appeals' reversal of the circuit court's denial of the directed verdict and remand this case to the Pulaski Circuit Court for proceedings consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 2018, Chasity Shirley shopped at a Walmart store in Somerset, Pulaski County, Kentucky, with her mother and daughter. Shirley checked out using a self-checkout register. Loss prevention personnel, using security cameras, observed Shirley using the register. Specifically, they observed Shirley moving a rug and a couch slipcover across the register's scanner. However, the computer monitoring the register indicated that Shirley was purchasing other less expensive items, a toothbrush or toothbrush holder. The total difference in the price was $80.80.

As Shirley left the store, the loss prevention personnel approached Shirley and escorted her to a nearby office to discuss her purchases. Shirley

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remained in the office for a short period after her mother left with Shirley's restless child. When Shirley later left, she allegedly pushed and elbowed the loss prevention manager as she hurriedly exited the store.

Shirley was charged with unlawfully accessing a computer in the first degree and second-degree robbery. The robbery charge was amended to fourth-degree assault prior to trial. The jury found Shirley not guilty on the assault charge but guilty of first-degree unlawful access to a computer.

At trial, Shirley moved for a directed verdict on the charge that she unlawfully accessed a computer in the first degree. She argued that the Commonwealth failed to show that she lacked effective consent to access Walmart's self-checkout register, an undisputed computer. Shirley argued that she had effective consent to use Walmart's self-checkout register and despite scanning a barcode not reflective of the item with which it was paired and thus engaging in theft behavior, effective consent was maintained because she did not use the register for a purpose other than that for which consent was given—she scanned barcodes and while not paying full price for the items, paid something. The Commonwealth responded that Walmart invites and gives consent to customers to scan and pay for all items, not to scan and pay for some items, and Walmart cannot consent for someone to commit a crime as Shirley did when she paid less than the full price. The circuit court denied Shirley's motion for a directed verdict.

After the jury found Shirley guilty of first-degree unlawful access to a computer, a Class C felony with a minimum sentence of five years, Shirley waived jury sentencing, accepting the Commonwealth's recommendation of a five-year sentence pending presentence investigation. After spending 203 days in jail, Shirley was sentenced to five years in prison, but the sentence was suspended, and Shirley was placed on conditional discharge for a period of thirty days.[1]

[1] Former Justice Venters, serving as a special judge after the prior judge left the circuit court, entered the final judgment and sentence.

On Shirley's appeal, the Court of Appeals in a 2-1 decision reversed the circuit court's denial of the directed verdict. This Court granted the Commonwealth's motion for discretionary review.

ANALYSIS

Kentucky Revised Statutes Chapter 434, titled "Offenses Against Property by Fraud," contains a section dealing with unlawful access to a computer. This section includes: 1) KRS 434.840 Definitions (codified in 1984 and revised in 2002); 2) KRS 434.845 Unlawful access to a computer in the first degree (same);[2] 3) KRS 434.850 Unlawful access to a computer in the second degree (same);[3] 4) KRS 434.851 Unlawful access in the third degree (codified in 2002);[4] 5) KRS 434.853 Unlawful access in the fourth degree (codified in 2002);[5] 6) KRS 434.855 Misuse of computer information (codified in 1984 and revised in 2002); and 7) Venue (same). *See* 2002 Ky. Acts ch. 350 §§ 1-7; 1984 Ky. Acts ch. 210 §§ 1-5.[6] The 2002 revisions and newly-enacted statutes followed the Court of Appeals' decision in *Commonwealth v. Cocke*, 58 S.W.3d 891 (Ky. App. 2001). In *Cocke*, the Court of Appeals affirmed the Jefferson Circuit Court's decision declaring then KRS 434.845(1)(c) void for vagueness.[7]

[2] When codified in 1984, KRS 434.845 stated:

(1) A person is guilty of unlawful access to a computer in the first degree when he knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof, for the purpose of:

(a) Devising or executing any scheme or artifice to defraud; or

(b) Obtaining money, property, or services for themselves or another by means of false or fraudulent pretenses, representations, or promises; or

(c) Altering, damaging, destroying, or attempting to alter, damage, or destroy, any computer, computer system, or computer network, or any computer software, program, or data.

(2) Accessing, attempting to access, or causing to be accessed any computer software, computer program, data, computer, computer system, computer network, or any part thereof, even though fraud, false or fraudulent pretenses, representations, or promises may have been involved in the access or attempt to access shall not constitute a violation of this section if the sole purpose of the access was to obtain information and not to commit any other act proscribed by this section.

(3) Unlawful access to a computer in the first degree is a Class C felony.

[3] When codified in 1984, KRS 434.850 stated:

(1) A person is guilty of unlawful access to a computer in the second degree when he without authorization knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof.

(2) Unlawful access to a computer in the second degree is a Class A misdemeanor.

KRS 434.850 currently states:

(1) A person is guilty of unlawful access to a computer in the second degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof which results in the loss or damage of three hundred dollars ($300) or more.

(2) Unlawful access to a computer in the second degree is a Class D felony.

[4] KRS 434.851 states:

(1) A person is guilty of unlawful access in the third degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof, which results in the loss or damage of less than three hundred dollars ($300).

(2) Unlawful access to a computer in the third degree is a class A misdemeanor.

[5] KRS 434.853 states:

(1) A person is guilty of unlawful access in the fourth degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof, which does not result in loss or damage.

(2) Unlawful access to a computer in the fourth degree is a class B misdemeanor.

[6] Unless context indicates otherwise, "computer" is used to refer to "computer software, computer program, data, computer, computer system, computer network, or any part thereof," which all four degrees of unlawful access to a computer identify as accessible.

[7] Note 2, *supra*, contains the text of KRS 434.845, codified in 1984, at issue in *Cocke*. In *Cocke*, the defendant, a computer programmer, after his employment terminated and he had no authority to do so, allegedly used the modem on his home computer to access his former employer's computer system and then to delete certain data from the system, stop an accounting program in progress, and change a password. *Id.* at 892. The defendant argued primarily that KRS 434.845(1)(c) was too broad in that a prosecutor could indict any person for most normal activities that are conducted on a computer. *Id.* The Court of Appeals concluded: "Clearly, the statute is void for vagueness as an authorized user cannot, from a reading of the statute, ascertain specifically what alteration, damage or destruction is prohibited." *Id.* at 894.

When amending KRS 434.845 and KRS 434.850 and enacting KRS 434.851 and KRS 434.853 in 2002, the General Assembly made the lack of effective consent by the computer's owner an element of each degree of unlawful access to a computer.[8] Thus in addressing this case we are required to determine whether Shirley acted without the effective consent of Walmart when she accessed the Walmart self-scan register.

[8] Along with revising KRS 434.845 by omitting subsection (1)(c) and then section (2), see n.2, *supra*, but maintaining the other prohibited purposes in subsections (1)(a) and (b), the General Assembly distinguished unlawful access to a computer in the first degree from unlawful access in the second, third, and fourth degree by not including within the lesser degrees the fraudulent purpose requirement described in KRS 434.845(1)(a) and (b) and respectively

defining the amount of loss or damage (KRS 434.840(12) defines "loss or damage") caused by the unlawful access to a computer as three hundred dollars or more (a Class D felony), less than three hundred dollars (a Class A misdemeanor), and no loss or damage (a Class B misdemeanor). See nn. 3-5, *supra*.

As amended in 2002 and unchanged since, KRS 434.845 reads:

> (1) A person is guilty of unlawful access to a computer in the first degree when he or she, **without the effective consent** of the owner,[9] knowingly and willfully, directly or indirectly accesses,[10] causes to be accessed, or attempts to access any computer software,[11] computer program,[12] data,[13] computer,[14] computer system,[15] computer network,[16] or any part thereof, for the purpose of:
>
> (a) Devising or executing any scheme or artifice to defraud; or
>
> (b) Obtaining money, property, or services for themselves or another by means of false or fraudulent pretenses, representations, or promises.
>
> (2) Unlawful access to a computer in the first degree is a Class C felony.

(Emphasis added.)

[9] KRS 434.840(13) defines "owner."

[10] KRS 434.840(1) defines "access" as "to approach, instruct, communicate with, manipulate, store data in, retrieve or intercept data from, or otherwise make use of any resources of, a computer, computer system, or computer network." The General Assembly amended KRS 434.840(1) in 2002 by adding "manipulate" to the definition. 2002 Ky. Acts ch. 350 § 1.

[11] KRS 434.840(5) defines "computer software."

[12] KRS 434.840(4) defines "computer program."

[13] KRS 434.840(7) defines "data."

[14] KRS 434.840(2) defines "computer."

[15] KRS 434.840(6) defines "computer system."

[16] KRS 434.840(3) defines "computer network."

"Effective consent" is defined as "consent by a person legally authorized to act for the owner." KRS 434.840(9). The statute further states, however, that consent is not effective if it is:

> (a) Induced by deception or coercion;
>
> (b) Given by a person who the actor knows is not legally authorized to act for the owner;
>
> (c) Given by a person who by reason of age, mental disease or defect, or intoxication is known by the actor to be unable to make responsible property or data dispositions; or
>
> (d) Used for a purpose other than that for which the consent is given.

Id.

This case presents us with the first statutory interpretation issue for KRS 434.845 since its amendment in 2002.[17] Given the facts presented, we focus particularly on the "used for a purpose other than that for which the consent is given" language used in KRS 424.840(9)(d), part of the definition of "effective consent."

[17] Since KRS 434.845's amendment, prior to this case, it has only been considered by the Court of Appeals in the context of whether a conviction both for first-degree robbery and for first-degree unlawful access to a computer violates double jeopardy. *See Day v. Commonwealth*, 367 S.W.3d 616 (Ky. App. 2012).

The Commonwealth contends that the Court of Appeals incorrectly interpreted "effective consent" as defined in KRS 434.840 when it concluded that Shirley retained the effective consent of Walmart when she used the self-checkout register for its intended purpose, i.e., to scan barcodes and to buy items. The Commonwealth argues that the Court of Appeals expanded the definition of "effective consent" to include not only Walmart's consent to use self-checkout registers to purchase items at the listed price, but also for sales as a result of admitted retail fraud. As before the trial court, Walmart emphasizes that it cannot and does not consent to customers using self-checkout registers to commit fraud and steal merchandise.

While review of a directed verdict decision often only entails reviewing the evidence to determine if it would be clearly unreasonable for a jury to find guilt, *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), this case first requires the Court to determine as a matter of law the meaning of statutory language, a de novo review. *See Commonwealth v. Montaque*, 23 S.W.3d 629, 631 (Ky. 2000); *Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 325 (Ky. 2008). Specifically, we must discern the meaning of KRS 434.840(9)(d), the provision the Commonwealth relied on as establishing that Shirley acted "without the effective consent" of Walmart when she used the store's self-checkout register.[18]

[18] While the Commonwealth's brief suggests that KRS 434.840(9)(a) is another basis for finding Shirley did not have effective consent to access Walmart's self-checkout register, KRS 434.840(9)(a) has not been at issue in this case.

When dealing with a question of statutory construction, we begin with the plain text. "The cardinal rule in construing statutes is, if possible, to ascertain the meaning of the Legislature from the language used, and if that be plain, clear, and unambiguous, resort to collateral rules of construction is unnecessary." *Mills v. City of Barbourville*, 117 S.W.2d 187, 188 (Ky. 1938). "Our ultimate goal when reviewing and applying statutes is to give effect to the intent of the General Assembly. We derive that intent from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration." *Commonwealth v. Wright*, 415 S.W.3d 606, 609 (Ky. 2013). When a statute is plain and unambiguous on its face, we are not at liberty to construe the language otherwise. *Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995). "The statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual." *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005). We presume the legislature did not intend an absurd result. *Commonwealth, Cent. State Hosp. v. Gray*, 880 S.W.2d 557, 559 (Ky. 1994). With these principles in mind, we consider the meaning of KRS 434.840(9)(d).

When reading KRS 434.840(9)(d) alone, the language "used for a purpose other than that for which the consent is given" appears ambiguous. Shirley advocates that the meaning of "purpose" is limited to a computer context and in this case refers to using the computer to scan barcodes and pay for merchandise—the purpose for which Walmart made the self-scanner available to shoppers. The Commonwealth advocates that "purpose" refers to the purpose for which the defendant used the scanner—fraudulent activity. The meaning of "purpose" within KRS 434.840(9)(d) becomes clearer when considering the "effective consent" definition in KRS 434.840(9)(d) within the context of KRS 434.845(1) as a whole.

> Incorporating KRS 434.840(9)(d) into KRS 434.845 results in KRS 434.845(1) reading as follows: A person is guilty of unlawful access to a computer in the first degree when he or she, without the effective consent of the owner [due to the computer being "used for a **purpose** other than that for which the consent is given"], knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof, for the **purpose** of:
>
> (a) Devising or executing any scheme or artifice to defraud; or
>
> (b) Obtaining money, property, or services for themselves or another by means of false or fraudulent pretenses, representations, or promises.

(Emphasis added.)

The incorporation of KRS 434.840(9)(d)'s text into KRS 434.845(1) highlights the two express instances in which "purpose" is relevant to proving that a person is guilty of unlawful access to a computer in the first degree—one being the computer-related purpose consented to by the owner (part of the concept of "effective consent") and the other being the fraudulent purpose intended by the criminal actor (the second use of "purpose" in the above quote, the purpose of devising or executing a scheme or obtaining something of value by false or fraudulent means). With the parties to this case focusing on "purpose" in KRS 434.840(9)(d), the "purpose" described in KRS 434.845(1), the fraudulent purpose for which a person must access a computer in order to be found guilty of unlawful access to a computer in

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

the first degree, has been largely ignored. Shifting our attention back to consideration of the statute as a whole brings the Commonwealth's argument into proper perspective.

The Commonwealth argues that effective consent is lost under KRS 434.840(9)(d) when one's "purpose" is to commit fraud when accessing a computer because a retailer cannot consent for a person to commit crime. The Commonwealth's point that a retailer cannot consent for a person to commit crime, stemming from the foundational criminal law principle that the government decides whether to punish an individual for an act or omission in violation of the law, is undisputed. Indeed, as expressed in KRS 434.845(1), the General Assembly decided to punish an individual who, with the prescribed mental state, the method of access—directly or indirectly—being of no consequence, accesses or attempts to access a computer without the effective consent of the owner for a fraudulent purpose as prescribed in KRS 434.845(1)(a) and (b). While the Commonwealth views KRS 434.840(9)(d) as encompassing the fraudulent purpose to which the owner cannot consent, a full reading of KRS 434.845(1) reveals that KRS 434.845(1)(a) and (b) codify that fraudulent purpose plainly. KRS 434.840(9) speaks to the purpose for which the user was granted access to the computer, e.g., a shopper granted access to scan items, an inventory clerk granted access to monitor inventory, or an accounting office employee granted access to maintain accounts receivable.

Statutory construction principles direct that if there is an ambiguity, "purpose" within KRS 434.845(1) and KRS 434.840(9)(d) should be read as not creating a redundancy or an absurdity. *Lewis*, 189 S.W.3d at 92; *Gray*, 880 S.W.2d at 559. The context of this unlawful access to a computer statute leads to the conclusion that KRS 434.840(9)(d)'s language, "used for a purpose other than that for which the consent is given," requires determining the computer access purpose consented to by the owner. Although a computer owner cannot consent to the fraudulent purpose prohibited by statute, and an interpretation otherwise may be considered an absurdity itself, the owner can consent to another person accessing, or making use of, *see* KRS 434.840(1), his computer. The focus of KRS 434.840(9)(d), then, is the purpose for which consent to use the computer was given.

While the General Assembly's use of the term "purpose" within KRS 434.845(1) aids in bringing proper perspective to the arguments presented, even if the term "purpose" were not used within KRS 434.845(1) to introduce subsections (a) and (b) (the prohibited fraud), the Commonwealth's point that one cannot consent to fraud would lead to the same conclusion. So the owner's consent must necessarily be related to a purpose for which consent could be given. With the context of the statute being computer access, the owner's consent would be related to that, not the fraudulent purpose a bad actor desires to achieve. Consequently, if the individual accesses or makes use of the computer in a computer-related manner not consented to, effective consent is lost.

With the determination that KRS 434.840(9)(d) does not refer to whether the individual is accessing a computer to commit fraud but does refer to whether the individual is accessing a computer in the way consented to by the owner, we must conclude that Shirley was entitled to a directed verdict on the charge of unlawful access to a computer in the first degree. Shirley accessed Walmart's self-checkout register by scanning barcodes and making payment, access specifically created and intended for Walmart shoppers. Changing the barcodes on certain merchandise prior to scanning it did not result in Shirley accessing Walmart's self-checkout register in a way to which Walmart did not consent. She used the scanner as intended and consented to by its owner.

Our close reading of the unlawful computer access statute is not unprecedented. Although the language in similar statutes around the country varies, the principle we have identified—for what purpose has the computer owner consented to its use—has surfaced in several jurisdictions. For example, in *State v. Nascimento*, 379 P.3d 484 (Or. 2016), the Supreme Court of Oregon addressed an unlawful computer access statute that used the language "without authorization" rather than our "without effective consent." The defendant was convicted of theft and computer crime for using a terminal located at her convenience store workplace and connected to the Oregon State Lottery system to print lottery tickets for which she did not pay. In reversing the unlawful computer access conviction, the Court stated:

> [T]he text supports defendant's assertion that her use of the lottery terminal to print Keno tickets—as she was trained and permitted by her employer to do—was "authorized" use. The fact that she printed the tickets for her own use and did not pay for them may have violated company policies and other parts of the computer crime statute (in addition to the theft statute), but her use was not "without authorization" as that term is used in ORS 164.377(4) . . . . When defendant physically accessed and used the terminal to print Keno tickets, that access and use was authorized by her employer. Moreover, there was, for example, no evidence that defendant circumvented any computer security measures, misused another employee's password, or accessed any protected data.

Id. at 491-92. The Oregon legislative history also reflected that the statute was intended to criminalize use of a computer by someone with no authority to use it, use by unauthorized third parties commonly referred to as "hackers." *Id.* at 492. The Court concluded that Nascimento's impermissible use of the computer could lead to other criminal charges but not the unlawful access charge. *Id.* at 493. Notably, her companion theft conviction for the lottery ticket misconduct was not even challenged on appeal. *See also State v. Thompson*, 135 A.3d 166 (N.J. Super. Ct. Law Div. 2014) (defendants subject to computer theft statute because they acted "without authorization or in excess of authorization" when they used their lawful access to police department computer system as IT specialists, granted for the purpose of conducting maintenance and correcting problems within email system, for a different purpose, namely accessing and reading private emails of executive staff against whom they had pending litigation).

"When presented with a motion for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury." *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013) (citing *Benham*, 816 S.W.2d at 187–88). A trial court should deny a directed verdict when the "Commonwealth has produced . . . more than a scintilla [of evidence] and it would be reasonable for the jury to return a verdict of guilty based on it." *Id.* "On appellate review, the standard is slightly more deferential; the trial court should be reversed only if 'it would be *clearly unreasonable* for a jury to find guilt.'" *Id.*

Here, the evidence reflected that Shirley scanned barcodes, albeit barcodes which did not reflect the items with which they were paired. The Commonwealth did not present proof that Shirley accessed Walmart's self-checkout register beyond the consented-to barcode scanning for completion of a self-checkout sales transaction. Without that proof, it was clearly unreasonable for the jury to find Shirley guilty of unlawful access to a computer in the first degree. The circuit court erred by denying Shirley's motion for a directed verdict of acquittal.

Finally, we agree with the Court of Appeals that our Penal Code has other possibly appropriate charges for Shirley's unlawful actions at Walmart that day including theft by deception, KRS 514.040(1)(a), or theft by unlawful taking, KRS 514.030(1)(a). The "fit" with both of those crimes is easily seen.[19] As the appellate court also noted, considering the value of property taken in this case (less than $500) either charge would constitute a misdemeanor, a level of criminal offense far more in keeping with the offending conduct than a Class C felony.

[19] As noted above, Shirley admitted to the jury that her behavior constituted a theft.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision reversing the Pulaski Circuit Court's denial of a directed verdict on the unlawful access to a computer in the first degree charge is affirmed.[20] This case is remanded to the Pulaski Circuit Court for proceedings consistent with this Opinion.

[20] Because we affirm the Court of Appeals upon consideration of the primary issue advanced in favor of a directed verdict, whether Shirley maintained effective consent to use Walmart's self-checkout register despite replacing the barcodes on more expensive items with barcodes of less expensive items, we do not reach the alternative issue Shirley advanced. She also presented the argument that the crime of unlawful access to a computer in the first degree does not apply to cases in which the harms are under three hundred dollars. Shirley argued that with the crimes of unlawful access to a computer in the second, third and fourth degree being dependent on the dollar amount of harm involved, see nn. 3-5, the first-degree charge should only apply where the lesser offenses do not. Shirley argued that unlawful access to a computer in the third degree, a Class A misdemeanor, applies when the loss or damage is less than three hundred dollars.

All sitting. All concur.

PROBATE

WILLS AND ESTATES

JURISDICTION

DISTRICT COURT v. CIRCUIT COURT

BENEFICIARIES' ALLEGATIONS THAT EXECUTRIX MISUSED HER AUTHORITY

"ADVERSARIAL PROCEEDING INVOLVING PROBATE"

POWER OF ATTORNEY

BENEFICIARIES' ALLEGATIONS THAT ATTORNEY-IN-FACT MISUSED HER AUTHORITY PRIOR TO PRINCIPAL'S DEATH

WRIT OF MANDAMUS

Elbert Goff, Sr. (Elbert) had six children — In 1981, Elbert executed will naming his daughter Debra Goff (Goff) as Executrix and leaving his estate to his six children in equal amounts per stirpes — In 2002, Elbert executed power of attorney naming Goff as his attorney-in-fact — Elbert died in November 2017 — In March 2019, Goff presented Elbert's will for probate in Jefferson District Probate Court — Goff was appointed Executrix — In March 2020, Goff's sisters (sisters), who were beneficiaries, filed complaint against Goff and others in Jefferson Circuit Court — Complaint was amended in April 2021 — Sisters alleged that Goff breached her fiduciary duties to Elbert before he died by self-dealing through misuse of power of attorney and after he died by self-dealing through misuse of her authority as Executrix — Sisters claimed that Goff failed to pursue debts owed to Elbert, particularly mortgage loans made to Goff's son and daughter-in-law — Sisters demanded Goff provide accounting of Elbert's assets and alleged that Goff herself did not report to probate court $400,000 she owed to Elbert — Sisters requested, among other things, imposition of constructive trust upon estate's assets; that Goff be held liable for all money and assets that should be part of estate; punitive damages for Goff's willful and/or reckless misconduct as Elbert's fiduciary; and that Goff be restrained from further administration of estate — Goff moved for dismissal of original complaint, which circuit court denied — Circuit court found that sisters had standing to pursue asserted claims — Further, circuit court found that KRS 395.510(1) allowed sisters to file action in circuit court and that it had subject-matter jurisdiction over sisters' claims under KRS 24A.120(2) — Goff objected to filing of sisters' amended complaint, which asserted claims against other family members alleged to owe money to estate — Circuit court allowed amended complaint to be filed — Goff petitioned Court of Appeals for writ mandating circuit court dismiss sisters' complaint — Court of Appeals denied writ request, finding that circuit court has subject-matter jurisdiction over claims alleged in sisters' complaint, making first-class writ unavailable — Court of Appeals found that even if sisters did not have standing to bring claims, Goff had adequate remedy by appeal, making second-class writ unavailable — Goff appealed — AFFIRMED — First-class writ may be granted when lower court is acting on matters outside its subject-matter jurisdiction — Circuit court has subject-matter jurisdiction of underlying case — Pursuant to KRS 24A.120(2), district court has exclusive jurisdiction in matters involving probate, except matters contested in adversary proceeding — Such adversary proceeding shall be filed in circuit court and shall not be considered an appeal — Pursuant to KRS 24A.020, when jurisdiction over any matter is granted to district court by statute, such jurisdiction shall be deemed to be exclusive unless statute specifically states that jurisdiction shall be concurrent — KRS 24A.120(3) further explains that matters not provided for by statute to be commenced in circuit court shall be deemed to be nonadversarial within meaning of KRS 24A.120(2) and therefore are within jurisdiction of district court — KRS 395.510 allows circuit court jurisdiction for settlement of decedent's estate — While KRS 395.510(1) places a restriction as to when circuit court action may be filed, circuit court jurisdiction extends to action by representative, legatee, distribute or creditor of decedent in order to settle decedent's estate — Actions initiated pursuant to KRS 395.510 are called "settlement suits" — KRS 395.515 provides further guidance for understanding initiation of circuit court action to settle an estate — KRS 395.617(1) and (2) relate to orderly settlement of estates, particularly to filing of proposed settlement in district court and filing of adversarial proceeding in circuit court by person aggrieved by proposed settlement — Sisters' action, including their claims alleging that Goff and other family members owe money to estate, is adversarial proceeding; therefore, it falls within bounds of KRS 395.510 and KRS 395.515, and circuit court has subject-matter jurisdiction — Thus, first-class writ is not available to Goff — Second-class writ is available where lower court is acting within its jurisdiction but in error, and there is no adequate remedy on appeal and there is great and irreparable harm — In instant action, Court of Appeals concluded that even if circuit court acted erroneously, upon entry of final and appealable order, Goff may file direct appeal challenging sisters' standing — Court of Appeals also concluded that Goff has not shown great and irreparable harm caused by defending underlying action — Goff did not challenge either of these findings in instant appeal; thus, Goff does not qualify for second-class writ —

Debra Goff, Individually, and as Executrix of the Estate of Elbert Goff, Sr. v. Hon. Brian C. Edwards, J., Jefferson Cir. Ct. and Brenda Daugherty, Jennifer Lynn Goff Armstrong, Aaron Matthew Goff, Jessica Goff, Travis Eugene Goff, Brandon Grider, Donella Simms Grider, Annette Thompson, and Tina Thompson (2021-SC-0452-MR); On appeal from Court of Appeals; Opinion by Justice Hughes, *affirming*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

This writ action requires us to once again consider the interplay of district and circuit court jurisdiction in matters related to probate. Appellant, Debra Goff (Goff), individually and in her capacity as the personal representative (Executrix) of the Estate of Elbert Goff, Sr., seeks a writ of mandamus directing the Jefferson Circuit Court to dismiss the underlying Jefferson Circuit Court action filed by Annette Thompson, Tina Thompson, and Brenda Daugherty (Goff's sisters, hereinafter referred to as "Sisters"). The underlying complaint brings a cause of action against Goff[1] and against Brandon Grider, Donella Simms Grider, Jennifer Lynn Goff Armstrong, Travis Eugene Goff, Aaron Matthew Goff, and Jessica Goff. Goff contends that the Jefferson Circuit Court does not have jurisdiction over the subject matter of the complaint because it concerns probate matters within the exclusive jurisdiction of the Jefferson District Court. Goff also argues that because the complaint sets forth claims on behalf of the Estate which are actionable only by the personal representative, the Sisters lack standing to bring the action. The Court of Appeals denied the writ. For reasons stated below, we affirm.

[1] She is identified as Debra Goff-Grider in the complaint and amended complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

Goff is the oldest of Elbert Goff, Sr.'s (Elbert) six children. In 1981, Elbert executed his Last Will and Testament, naming Goff as the Executrix and leaving his estate to his six children in equal amounts "per stirpes." In 2002, Elbert executed a Power of Attorney, naming Goff as his attorney-in-fact. Elbert died in November 2017. In March 2019, Goff presented Elbert's Will for probate in Jefferson District Probate Court and Goff was appointed Executrix. In March 2020, the Sisters, beneficiaries, filed a complaint against Goff and others. The complaint was amended in April 2021. The Sisters allege that Goff breached her fiduciary duties to Elbert before he died by self-dealing through the misuse of the Power of Attorney and after he died by self-dealing through the misuse of her authority as Executrix of Elbert's Estate. The Sisters also claim Goff failed to pursue debts owed to Elbert, particularly mortgage loans made to Goff's son and daughter-in-law. The Sisters demanded Goff provide an accounting of Elbert's assets and alleged that Goff herself did not report to the probate court the $400,000 she owed to Elbert. Their demand for relief from the circuit court includes the imposition of a constructive Trust upon the assets of Elbert's Estate, Goff being held liable for all money and assets that should be part of Elbert's Estate, punitive damages for Goff's willful and/or reckless misconduct as Elbert's fiduciary, and Goff's restraint from further administration of Elbert's Estate.

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Goff moved to dismiss the original complaint against her on the basis that the circuit court did not have jurisdiction of the claims, but the circuit court denied the motion. The circuit court concluded that the Sisters, Elbert's heirs, have standing to pursue the asserted claims. While citing Kentucky Revised Statute (KRS) 395.510(1) as allowing the Sisters to file a circuit court action, the circuit court also concluded that it has subject-matter jurisdiction over the Sisters' claims under the provision in KRS 24A.120(2) excluding "an adversarial proceeding involving probate" from district court jurisdiction.

Goff also objected to the subsequent filing of the amended complaint which also makes claims against other family members alleged to owe money to the Estate. Goff argued that claims against third parties do not fall within the purview of a KRS 395.510 settlement action and incorporated her previously-made standing and subject-matter jurisdiction arguments. The circuit court overruled Goff's objections and allowed the amended complaint to be filed.

Goff petitioned the Court of Appeals for a writ mandating the Jefferson Circuit Court dismiss the Sisters' complaint. The Court of Appeals denied the request, concluding first that the Jefferson Circuit Court has subject-matter jurisdiction over the claims alleged in the Sisters' complaint, making a first-class writ unavailable. As for Goff's argument that the Sisters did not have standing to bring the claims, the Court of Appeals concluded that even if that were true, Goff has an adequate remedy by appeal, making a second-class writ unavailable. This appeal followed.[2]

[2] While Goff requested oral argument, the Court finds it unnecessary to resolve this writ case.

II. ANALYSIS

Being an extraordinary remedy, a writ is cautiously and conservatively granted. *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961). One type of writ, commonly known as a first-class writ, may be granted when a lower court is acting on matters outside its subject-matter jurisdiction. *Goldstein v. Feeley*, 299 S.W.3d 549, 551-52 (Ky. 2009). "The 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." *Daugherty v. Telek*, 366 S.W.3d 463, 467 (Ky. 2012) (citation omitted).

> One seeking a writ when the lower court is acting "outside of its jurisdiction" need not establish the lack of an adequate alternative remedy or the suffering of great injustice and irreparable injury. Those preconditions apply [when one seeks a second-class writ, which may be granted] when a lower court acts "erroneously but within its jurisdiction."

Goldstein, 299 S.W.3d at 552. The lower court's grant or denial of a writ is generally reviewed for an abuse of discretion. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). However, when it is alleged that the lower court is acting outside its jurisdiction, a question of law is generally raised, and we review that question de novo. *Id.*

A. The Circuit Court Has Subject-Matter Jurisdiction

Goff insists this is a case in which the Court needs to disentangle the overlap of district and circuit court jurisdiction in probate matters and in doing so define a "settlement" action as referenced in KRS 395.510. The Court of Appeals primarily relied on *Priestley v. Priestley*, 949 S.W.2d 594 (Ky. 1997), and *Myers v. State Bank & Trust Co.*, 307 S.W.2d 933 (Ky. 1957), authority cited within *Priestley*, to conclude the circuit court has subject-matter jurisdiction of this case. Goff contends, citing *Maratty v. Pruitt*, 334 S.W.3d 107 (Ky. App. 2011), that *Priestley*'s subject-matter jurisdiction analysis is only dicta. She also cites *PNC v. Edwards*, 590 S.W.3d 818 (Ky. 2019) (analyzing KRS 386B.8-180); *Karem v. Bryant*, 370 S.W.3d 867 (Ky. 2012) (analyzing KRS 387.520); *Maratty*, 334 S.W.3d 107 (analyzing KRS 395.617); and *Privett v. Clendenin*, 52 S.W.3d 530 (Ky. 2001) (analyzing KRS 385.192(1)), as recent cases which establish with clarity the exclusive jurisdiction of the district court in the management and settlement of probate estates. Upon review of these cases and the various statutes at issue in each, other than *Maratty* perhaps, we do not view the cases as adding to the guidance for resolving district and circuit court jurisdiction disputes in probate matters under KRS Chapter 395 and Chapter 24A. Instead, the plain language of the statutes, the foundation for discerning legislative intent, *Stephenson v. Woodward*, 182 S.W.3d 162, 169-70 (Ky. 2005) ("The most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language: '[r]esort must be had first to the words, which are decisive if they are clear.'" (quoting *Gateway Constr. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962))), leads to the conclusion that the Jefferson Circuit Court has subject-matter jurisdiction of the underlying case. Our analysis requires consideration of the jurisdictional structure of the circuit court and the district court generally and the treatment of probate matters particularly. Goff's focus within this structure is KRS 395.510(1). She asserts that the claims against her, claims related to management or mismanagement of the Estate, do not fall within the boundary of a KRS 395.510(1) "settlement" action.

In 1976, a restructuring of the courts occurred upon amendment of the Kentucky Constitution with the new Judicial Article. *West v. Goldstein*, 830 S.W.2d 379, 381 (Ky. 1992). Within the Kentucky Judiciary Act of 1976, KRS 23A.010(1) was enacted specifying that the "Circuit Court is a court of general jurisdiction; it has original jurisdiction of all justiciable causes not exclusively vested in some other court." *Id.*[3] KRS 24A.120 was enacted specifying the district court's exclusive jurisdiction. *Id.*[4] The district court has exclusive jurisdiction in "[m]atters involving probate, except matters contested in an adversary proceeding. Such adversary proceeding shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal." KRS 24A.120(2). In relation to KRS 24A.120's grant of exclusive jurisdiction, KRS 24A.020 provides, "When jurisdiction over any matter is granted to District Court by statute, such jurisdiction shall be deemed to be exclusive unless the statute specifically states that the jurisdiction shall be concurrent." KRS 24A.120(3) further explains that "[m]atters not provided for by statute to be commenced in Circuit Court shall be deemed to be nonadversarial within the meaning of [KRS 24A.120(2)] and therefore are within the jurisdiction of the District Court."[5, 6]

[3] Section 112(5) of the Kentucky Constitution provides, "The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law."

[4] Section 113(6) of the Kentucky Constitution provides, "The district court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the General Assembly."

[5] KRS 24A.120 was revised in 1980, adding then KRS 24A.120(1)(c) which stated: "Matters not provided for by statute to be commenced in circuit court shall be deemed to be nonadversarial within the meaning of paragraph (b) of this subsection and therefore are within the jurisdiction of the district court." 1980 Ky. Acts ch. 259 § 1. While KRS 24A.120(1)(c) was added, then KRS 24A.120(2) was repealed, which stated: "Papers relating to uncontested probate matters shall be filed in the office of the county clerk. In the event a probate matter is contested, the Supreme Court shall by rule provide for filing duplicate papers in circuit and county clerks' offices." *Id.*

[6] Under KRS 24A.120(3)'s provision, this would include the meaning that matters provided for by statute to be commenced in Circuit Court shall be deemed to be adversarial within the meaning of KRS 24A.120(2) and therefore not within the jurisdiction of the District Court. *See McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998) ("Secondly, this is not a matter contested in an adversary proceeding. *See* KRS 24A.120(2). No statute provides for the renunciation of a will by a guardian to be commenced in circuit court. KRS 24A.120(3).").

KRS Chapter 395 contains the other statutes at issue in this case. KRS 395.510, also acted upon by the General Assembly in 1976[7] and unchanged since, is a statute which allows circuit court jurisdiction for settlement of a decedent's estate. While KRS 395.510(1) places a restriction as to when the circuit court action may be filed, the circuit court jurisdiction extends to an action by "a representative, legatee, distributee or creditor" of the decedent in order to settle the decedent's estate. KRS 395.510(1) states in full:

> A representative, legatee, distributee or creditor of a deceased person may bring an action in circuit court for the settlement of his estate provided that no such suit shall be brought by any of the parties named except the personal representative until the expiration of six months after the qualification of such representative.[8]

Actions initiated pursuant to KRS 395.510 and similar cases brought prior to the Kentucky Revised Statutes codification have long been called "settlement suits." *See Harris v. Harris' Adm'r*, 145 S.W. 369 (Ky. 1912).[9] KRS 395.515, unchanged since 1964, *see* 1964 Ky. Acts ch. 105 § 1, provides further guidance for understanding the initiation of a circuit court action to settle an estate and the circuit court's role in such suit.[10] It states:

> In such an action the petition must state the amount of the debts and the nature and value of the property, real and personal, of the decedent, so far as known to the plaintiff; ***if it appears that there is a genuine issue concerning the right of any creditor, beneficiary or heir-at-law to receive payment or distribution, or if it appears that there is a genuine issue as to what constitutes a correct and lawful settlement of the estate, or a correct and lawful distribution of the assets, such issues may be adjudicated by the court***; and, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts.[11]

(Emphasis added.)

[7] 1976 Ky. Acts ch. 14 § 394 (Special Session) (effective Jan. 2, 1978). KRS 395.510's lineage may be traced from the Kentucky Civil Code of Practice. It was codified in 1918. 1918 Ky. Acts ch. 155.

[8] KRS 395.510(2) states: "The representatives of the decedent, and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

[9] *Harris* quotes then Sections 428 and 429 from the Kentucky Civil Code of Practice relating to the settlement of estates:

> Sec. 428. 1. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate. 2. The representatives of the decedent and all persons having a lien or an interest in the property left by the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants. Sec. 429. In such an action the petition must state the amount of the debts and the nature and value of the property, real and personal, of the decedent, so far as known to the plaintiff; and, if it shall appear that the personal estate is insufficient for the payment of all debts the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts.

Id. at 369.

At the point *Harris* was decided, Section 3847 of the Kentucky Statutes forbid the bringing of an action against a personal representative within six months after his qualification, "except to settle the estate." An action for the settlement of an estate could be brought as soon as the representative qualified. *See id.*

Harris affirmed the circuit court's dismissal of the suit because the suit failed to comply with the Civil Code's requirements. *Id.* at 370. *Harris*, however, noted that the action denominated as a suit to settle the estate of L.G. Harris was in reality merely seeking an accounting by the administrator and calling the action a "settlement suit" would not make it so. *Id. Harris* further explained that the purpose of Section 429 of the Civil Code of Practice was "to bring the entire estate of the decedent, and a statement of his debts, within the jurisdiction of the court, in order that the rights of all parties interested in either may be properly and equitably adjusted." *Id.*

[10] Goff notes that KRS 395.515 sets forth the mandatory content of a KRS 395.510 "settlement" action and in so doing helps to outline its parameters. Goff cites *Gregory v. Hardgrove*, 562 S.W.3d 911, 913 (Ky. 2018) (citing *Smith v. Louisville Trust Co.*, 237 S.W.2d 836, 837 (Ky. 1951)), as suggesting that a settlement action is available only in the event the personal assets are inadequate to pay a creditor or heir. She does not cite or mention KRS 395.515's identification of issues which may be adjudicated by the court.

[11] The procedure codified under KRS 395.515 has served as the means by which a personal representative could sell land if the decedent did not grant him that power. *See Jones v. Keen*, 160 S.W.2d 164, 165 (Ky. 1942) ("The personal estate of a deceased person is responsible for his debts and it is the duty of the administrator to pay out of the personal estate all debts of the decedent whether secured or unsecured. If the personal estate is not sufficient to pay the debts, the administrator may petition the court for sale of the real estate owned by the decedent at the time of his death. Should the administrator fail to file such action within 6 months after his appointment, any creditor may file suit for that purpose." (citing Sections 428 and 429, Civil Code of Practice)).

In 1992, the General Assembly created a new section within KRS Chapter 395,[12] codified in KRS 395.617(1) and (2), related to orderly settlement of estates, particularly the filing of a proposed settlement in district court and the filing of an adversarial proceeding in circuit court by a person aggrieved by the proposed settlement. 1992 Ky. Acts ch. 218 § 1. KRS 395.617(2), pertaining to bringing an action in circuit court, states: "An aggrieved party may, no later than thirty (30) days from the entry of the order upon the proposed settlement, institute an adversary proceeding in Circuit Court pursuant to KRS 24A.120(2)."

[12] Within KRS Chapter 395, KRS 395.600 through KRS 396.657 are the statutes related to district court settlements. Within that range, KRS 395.617 Proposed Settlement and KRS 395.657 Trial Court May Make Settlement are currently the only two statutes which did not originate from or were not acted upon by the Kentucky General Assembly during its 1976 Special Session.

The Court of Appeals relied upon *Priestley* when concluding that the circuit court has subject-matter jurisdiction of the Sisters' claims. Upon review, we agree with *Maratty*, 334 S.W.3d at 112 n.9, that the subject-matter jurisdiction analysis in *Priestley* is dicta. Nevertheless, upon review of the statutes and the other cases which Goff cites in support of her argument that this Court should hold that the Jefferson Circuit Court does not have subject-matter jurisdiction in this case, we conclude the Court of Appeals reached the correct result and thus we affirm that court, albeit for different reasons.

Our conclusion that the Jefferson Circuit Court has subject-matter jurisdiction of the underlying action rests on application of the plain language of the jurisdiction statutes to the facts of this case. As highlighted above, in accordance with KRS 24A.120(2) and (3), the circuit court's jurisdiction provided within KRS 395.510 and KRS 395.515 allows it, as stated in KRS 395.515, to resolve settlement and distribution claims "if it appears that there is a genuine issue as to what constitutes a correct and lawful settlement of the estate, or a correct and lawful distribution of the assets." While the circuit court has described the Sisters' claims as alleging mismanagement and fraud, the claims alleging that Goff and other family members owe money to the Estate satisfy the statute's requirement as there appears to be a genuine issue as to what constitutes a correct and lawful settlement of the Estate and/or a correct and lawful distribution of the assets. This action, an adversarial proceeding, falls within the bounds of KRS 395.510 and KRS 395.515. Having concluded that the Jefferson Circuit Court has subject-matter jurisdiction of the Sisters' claims, a first-class writ is not available to Goff.

B. Standing to Bring Claims Regarding Goff's Misuse of the Power of Attorney Is an Issue Adequately Addressed by an Appeal

Goff argues that the Sisters lack constitutional standing to bring the misuse of the Power of Attorney claims against her because the Sisters are not Elbert's personal representatives, a requirement to prosecute such a claim under KRS 411.140. Based upon this argument, the Court of Appeals viewed Goff as also requesting a second-class writ, the writ which may issue if the circuit court is acting erroneously within its jurisdiction. However, because an adequate remedy by appeal remains available to Goff, the Court of Appeals did not address the merits of Goff's arguments regarding the Sisters' standing.

Goff now argues before this Court that the Court of Appeals erred in holding that the constitutional standing issue does not implicate a first-class writ. She reiterates that the Power of Attorney misuse claims concern personal injury to Elbert during his lifetime, a claim arising under KRS 411.140, and only a personal representative can bring such claims. KRS 411.140 states:

> No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury. **For any other injury an action may be brought or revived by the personal representative**, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract.

(Emphasis added.)

While Goff argues that constitutional standing is implicated, we must disagree. As explained in *Harrison v. Leach*, "subject-matter jurisdiction involves a court's ability to hear a type of case while standing involves a party's ability to bring a specific case." 323 S.W.3d 702, 705 (Ky. 2010). "[S]tanding focuses more narrowly on whether a particular party has the legally cognizable ability to

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bring a particular suit. Although the concepts bear some resemblance to each other, standing is distinct from subject-matter jurisdiction." *Id.* at 706.

As Goff has framed her argument, she essentially asserts that her Sisters do not have

> what courts have referred to as "statutory standing." Standing in this sense has to do with "whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action." *Small v. Federal National Mortgage Association*, 286 Va. 119, 747 S.E.2d 817 (2013) (quoting *CGM, LLC v. BellSouth Telecomm., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011)). The question is whether the plaintiff is among the class of persons authorized by the statute to bring suit, and as such "statutory standing" is not a jurisdictional question, but is essentially a matter of statutory construction.

Lawson v. Office of Atty. Gen., 415 S.W.3d 59, 67 (Ky. 2013) (footnote omitted). With it being established that the circuit court has subject-matter jurisdiction of this case, the Court of Appeals did not err by addressing whether a second-class writ may issue on Goff's behalf.

> [I]n most of the cases under the second class of writ cases, i.e., where the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to issuance of the writ once it finds the existence of the "conditions precedent," i.e., no adequate remedy on appeal, and great and irreparable harm. If these procedural prerequisites for a writ are satisfied, whether to grant or deny a petition for a writ is within the lower court's discretion.

Trude, 151 S.W.3d at 810 (citation, associated quotation marks, and alterations omitted).

The Court of Appeals concluded that even if the circuit court acted erroneously, upon entry of a final and appealable order, as *Priestley*, 949 S.W.2d at 598, demonstrates, Goff may file a direct appeal challenging the Sisters' standing. The Court of Appeals also concluded that Goff has not shown a great and irreparable harm, *see Hoskins v. Maricle*, 150 S.W.3d 1, 19-20 (Ky. 2004), caused by defending the underlying action. Goff does not challenge either of these findings before this Court. Consequently, we conclude that Goff does not qualify for a second-class writ and the Court of Appeals did not abuse its discretion by denying the writ.

III. CONCLUSION

The prerequisite conditions necessary for issuance of a writ of the first or second class are not present in this case. The Jefferson Circuit Court has subject-matter jurisdiction of the underlying action, rendering a first-class writ inapplicable. Further an appellate remedy is available, and great injustice and irreparable injury will not be suffered by Goff, rendering a second-class writ unavailable. Consequently, we affirm the Court of Appeals' denial of Goff's request for a writ of mandamus directing the Jefferson Circuit Court to dismiss the underlying action.

All sitting. All concur.

CRIMINAL LAW

DRIVING UNDER THE INFLUENCE (DUI)

MANSLAUGHTER

IMPLIED CONSENT WARNING

VOLUNTARINESS OF BLOOD DRAW

SEARCH AND SEIZURE

***MIRANDA* WARNINGS**

STATEMENTS MADE TO LAW ENFORCEMENT WHILE DEFENDANT WAS IN THE HOSPITAL

Around 3:30 p.m. on August 6, 2016, defendant crossed center line and collided with motorcycle — Motorcycle driver died at scene of accident — Motorcycle's passenger died six days later — Defendant was airlifted from accident scene in Kentucky to hospital in West Virginia — Kentucky State Police Trooper went to hospital to interview defendant — Defendant had some injuries, but was awake and alert — Nurse confirmed that defendant was not undergoing any medical procedures — Trooper told defendant that he knew very little about accident other than that there was a fatality and that he was sent to talk to her and get blood sample — Trooper told defendant that she was not under arrest — Trooper was in uniform with his badge and gun — Defendant agreed to speak to trooper — Trooper estimated interview lasted about 20 minutes — Trooper recorded interview, although recording quit near the end — Trooper testified that nurses might have entered room during interview, but he could not recall — If nurses did enter room, trooper said they were not distracting — At one point during interview, one of defendant's family members tried to see her — Trooper asked that person to wait in hall for a few minutes until recorded interview was over — Defendant told trooper she could not remember many details about collision, but believed she may have been attempting to overtake another vehicle and thought she may have hit motorcycle, but that she was unsure — Trooper questioned defendant's sobriety because of her slightly slurred speech — Defendant stated that she had taken Xanax and hydrocodone between noon and 2:00 p.m. that day — Defendant did not think her medication affected her driving since she had built up a tolerance — When trooper asked defendant if any other drugs would come back in her blood, defendant admitted taking a puff of marijuana two weeks prior — Trooper did not provide *Miranda* warnings before interviewing defendant — Although defendant had not been charged and was not under arrest, trooper read implied consent warning to defendant and offered her opportunity to consult with attorney — Defendant declined to speak with attorney — Trooper requested blood draw — Defendant agreed to blood draw — Blood test indicated presence of oxycodone and hydrocodone, but not alcohol or marijuana — More than two months after accident, defendant was indicted on two counts of wanton murder based on driving while under the influence (DUI) of drugs — Defendant filed motions to suppress and motion to dismiss indictment — Defendant argued that her statements to trooper at hospital violated *Miranda* — Further, defendant argued that blood evidence should be suppressed since blood sample was taken without a warrant — Trial court denied motions to suppress and motion to dismiss — Defendant entered conditional guilty plea to charges of first-degree manslaughter and second-degree manslaughter, reserving right to appeal denial of motions to suppress — AFFIRMED IN PART, VACATED IN PART, and REMANDED — Trial court did not err in denying defendant's motion to suppress statements obtained without *Miranda* warning — *Miranda* warnings are due only when suspect interrogated by police is "in custody" — Test is whether, considering surrounding circumstances, reasonable person would have believed that he or she was free to leave — Trial court found that defendant was in spacious, enclosed trauma room with door that was closed but not locked — Trooper informed defendant that he was there to interview her and complete drug kit, but that he was not going to arrest her — Trooper did not order anyone to leave or stay out of trauma room, but did request that a family member wait in hallway until recorded interview was over — Trooper was in uniform, wearing his badge and gun — Defendant never asked to stop interview or to take break — Defendant never asked for attorney — Trooper read implied consent warning and reiterated that defendant was not under arrest — Defendant consented to blood draw by phlebotomist — Defense counsel asked defendant what she believed implied consent warning meant — Defendant answered: "If I didn't, I was going to be under arrest." — Trial court's findings of fact were supported by testimony given at suppression hearing and are not clearly erroneous — Environment surrounding interview never became so coercive that reasonable person would have felt they were under arrest and deprived of their freedom, which would have triggered trooper's duty to administer *Miranda* warnings — Trooper's request for "a few minutes" to finish interview before allowing defendant's relative to enter room was reasonable and practical, rather than show of force — Defendant argued that being in out-of-town hospital without vehicle restricted her movement; however, these conditions were not caused by trooper — Trooper repeatedly informed defendant that he was not going to arrest her, and he did not arrest her — Defendant's unsupported declaration at suppression hearing that she thought she was going to be arrested if she did not submit to blood draw was found not to be credible by trial court — Defendant never testified that she felt

restrained, restricted or otherwise compelled to speak with trooper — Under facts, defendant was not "in custody" for *Miranda* purposes — *Com. v. McCarthy* (Ky. 2021) concluded that *Birchfield v. North Dakota* (2016) applies to KRS 189A.105 and recognized coercive nature of implied consent statutory scheme — *Birchfield* requires warrant for blood draw unless exigent circumstances exist or valid consent is given for blood draw — While Commonwealth contends that there is no evidence to support defendant's contention that she was coerced into providing blood sample, review of suppression hearing and trial court's findings of fact regarding defendant's testimony indicate otherwise — Trial court's findings included defendant's statement about blood draw that "If I refuse it would double any jail time." — In light of *Birchfield* and *McCarthy*, remanded to trial court to consider whether defendant's consent was voluntary under totality of circumstances, which included warning that if she refused blood test and if she was convicted of DUI, her mandatory minimum jail sentence would be doubled — Declined defendant's request to overrule interpretation of KRS 189A.105(2)(b) set forth in *Com. v. Morriss* (Ky. 2002) — Overruling *Morriss* would be inconsequential to defendant because she consented to blood draw, either voluntarily or involuntarily — *Morriss* did not involve consent — Defendant's request to overrule *Morriss* is request for advisory opinion — In addition, KRS 189A.105(2)(b) was revised, effective April 6, 2022 — As amended, statutory language at issue in *Morriss* is no longer part of KRS 189A.105(2)(b) —

Teresa Haney v. Com. (2020-SC-0534-MR); Morgan Cir. Ct., Phillips, J.; Opinion by Justice Nickell, *affirming in part, vacating in part, and remanding*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Teresa Haney appeals as a matter of right[1] from the Morgan Circuit Court's judgment after entering a conditional guilty plea[2] to one count of manslaughter in the first degree[3] and one count of manslaughter in the second degree,[4] reserving three issues for appellate review. Upon a careful review of the briefs, the record, and the law, we affirm in part and vacate in part.

[1] Ky. Const. §110(2)(b).

[2] Kentucky Rules of Criminal Procedure (RCr) 8.09.

[3] Kentucky Revised Statutes (KRS) 507.030.

[4] KRS 507.040.

On August 6, 2016, around 3:30 p.m., Thomas Tufts and Janet Caskey were traveling southbound on Highway 7 in Morgan County, Kentucky, on Tuft's motorcycle. Haney was driving northbound in her sports utility vehicle (SUV) and collided head-on with them. After the collision, Haney's SUV continued across the southbound lane into a ditch, stopping at a telephone pole. Tufts and Caskey were not wearing helmets. Tufts died at the scene. Caskey and Haney were airlifted to St. Mary's Hospital in Huntington, West Virginia, where Caskey died six days later.

Kentucky State Police (KSP) Trooper Grant Faulkner responded to the scene of the collision. He made observations and determined Haney crossed the center line before striking the motorcycle. Later, KSP conducted a formal accident reconstruction and examined the event data recorder from Haney's vehicle. During this investigation, the event data recorder revealed Haney did not apply her brakes and satellite photos from Google Earth further showed the skid marks Trooper Faulkner observed existed before the collision.

Trooper Eric Homan was dispatched to St. Mary's Hospital. He was unable to interview Caskey who was in surgery, but he interviewed Haney who was in a hospital bed in the trauma center. Trooper Homan confirmed with the charge nurse Haney was not undergoing any medical procedures. Although Haney had some injuries, she was awake and alert. Trooper Homan told Haney he knew very little other than there was a fatality and he was a state trooper sent to talk to her and get a blood sample. He told her she was not under arrest. Trooper Homan was in uniform with his badge and gun. Haney agreed to speak to him, and he estimated the interview lasted about twenty minutes. Trooper Homan recorded the interview, but the recording quit near the end. He testified nurses might have entered the room during the interview, but he could not recall and, if they did, they were not a distraction. At one point during the interview one of Haney's family members tried to see her. Trooper Homan asked the person to wait in the hall a few minutes until the recorded interview was over.

Haney advised she could not remember many details about the collision, but "believed she may have been attempting to overtake another vehicle and thought she may have hit a motorcycle but was unsure." Trooper Homan questioned Haney's sobriety because of her slightly slurred speech. Haney advised she had taken Xanax and hydrocodone between noon and 2:00 p.m. that day. She did not think her medication affected her driving since she had built up a tolerance, but she could not be sure. When asked if any other drugs would come back in her blood, she admitted taking a puff of marijuana two weeks prior.

Trooper Homan did not provide *Miranda*[5] warnings before interviewing Haney. Although Haney had not been charged and was not under arrest, he read the implied consent warning to her and offered her an opportunity to consult with an attorney which she declined. Trooper Homan also requested a blood draw and Haney acquiesced. A hospital employee drew the blood sample which Trooper Homan sent to the KSP laboratory for testing. The blood test results indicated the presence of oxycodone and hydrocodone but not alcohol. Also, the testing did not show the existence of metabolites in Haney's system which would indicate earlier use of marijuana.

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

Three days after the interview, Haney was discharged from the hospital. More than two months later, she was indicted for two counts of wanton murder[6] based on driving while under the influence of drugs. During pretrial proceedings, Haney's counsel filed motions to suppress and a motion to dismiss the indictment. The trial court held a suppression hearing where Haney argued her statements made to Trooper Homan at the hospital were in violation of *Miranda*. At the same suppression hearing, Haney argued the blood evidence should be suppressed since the blood sample was taken without a warrant. In a detailed written order, the trial court denied the suppression motions, concluding a *Miranda* warning was not required because Haney was not in custody and a warrant was not required for the blood draw because Haney consented. Haney's motion to dismiss the indictment "due to abuse of the grand jury process" asserted "the Indictment was based on false, misleading and/or incomplete material statements made to the Grand Jury." Upon a review of the grand jury transcript and recording, the trial court found the motion to dismiss was without merit.

[6] KRS 507.020.

Haney subsequently entered a conditional plea of guilty on May 20, 2019, to the amended charges of first-degree manslaughter and second-degree manslaughter. She reserved three issues for appeal which were outlined in two accompanying orders addressing the conditional guilty plea, all executed the same day. The trial court sentenced Haney to the agreed upon twenty-five-year sentence. This appeal followed.

Haney asserts the trial court erred by failing to: 1) suppress her statements; 2) suppress the results of her blood test; and 3) dismiss the case due to alleged abuse of the grand jury process. We shall address each argument in turn.

First, Haney argues the trial court erred by failing to suppress her statements obtained without a *Miranda* warning. She asserts Trooper Homan drove across state lines, initiated contact, was alone with her in her hospital room wearing his uniform and with his gun and badge visible, and read her Kentucky's implied consent warning. She alleges all of these factors created a show of authority and a coercive custodial environment which rendered her statements not fully voluntary. She also contends Trooper Homan took advantage of her intoxication.

> The standard of review of a pretrial motion to suppress is twofold. First, we review the trial court's findings of fact under a clearly erroneous standard. Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence. We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law.

Whitlow v. Commonwealth, 575 S.W.3d 663, 668 (Ky. 2019) (citation and internal quotation marks omitted)).

"*Miranda* warnings are due only when a suspect interrogated by the police is 'in custody.'" *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). "[W]hether a defendant is in custody is a mixed question of law

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and fact to be reviewed *de novo*." *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). Custody occurs when an officer, by some means of physical force or show of authority, restrains the liberty of an individual. *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999).

> The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. *Baker*, *supra*, citing *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police. *Baker*.

Lucas, 195 S.W.3d at 405-06.

> A custody determination cannot be based on bright-line rules, but must be made only after considering the totality of the circumstances of each case. In *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the United States Supreme Court stated that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Id.* at 495, 97 S.Ct. at 714. However, the Court went on to state that the somewhat coercive nature of being questioned by a potential adversary does not create the type of risk which warrants a per se requirement to issue *Miranda* warnings every time a suspect is questioned by a police officer in the station house. *Id.* . . . Rather, the pivotal requirement triggering an officer's duty to administer Miranda warnings is whether the environment has become so coercive as to induce reasonable persons to believe that (1) they are under arrest; or (2) they have "otherwise [been] deprived of [their] freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

Jackson v. Commonwealth, 187 S.W.3d 300, 310 (Ky. 2006).

The trial court made various factual findings including that Haney was in a spacious, enclosed trauma room with a door that was closed but not locked. Trooper Homan thought Haney was alert and awake. Upon contact with Haney, Trooper Homan told her he was there to interview her and complete a drug kit, but he was not going to arrest her. Trooper Homan did not order anyone to leave or stay out of the trauma room but did request a family member wait in the hallway until the recorded interview was over. Trooper Homan was in uniform, wearing his badge and gun. Haney never asked to stop the interview nor take a break. She never asked for an attorney. Trooper Homan read the implied consent warning and reiterated Haney was not under arrest. Haney consented to the blood draw by a phlebotomist. The trial court also noted defense counsel asked Haney what she believed the implied consent warning meant and Haney answered, "If I didn't, I was going to be under arrest." The trial court's findings of facts are supported by the testimony given at the suppression hearing. As such, the findings of facts are not clearly erroneous.

Further, we are persuaded the trial court's application of the law to the facts is correct. *Whitlow*, 575 S.W.3d at 668. The environment never became so coercive a reasonable person would have felt they were under arrest and deprived of their freedom, which would have triggered Officer Homan's duty to administer *Miranda* warnings. *Jackson*, 187 S.W.3d at 310. Rather, Haney was able to make free and rational choices when she was questioned by Trooper Homan.

For instance, the trial court's order denying the suppression motion contained several quotes from the recording of the interview repeatedly making clear Haney was not under arrest. First, before Trooper Homan read the implied consent warning, he advised Haney, "I have no intentions of charging you with anything today as it sits right now. I don't even have any circumstances of the collision." Second, when he advised he was reading the implied consent warning, he stated, "You're not under arrest right now." He explained the warning was part of procedure and repeated, "You're not under arrest. I'm not charging you with DUI. I don't know any circumstances. I would not be able to charge you." And third, when Haney asked, "How long would it be," before she might be arrested on any criminal charges, Trooper Homan advised he had no idea and said, "I hope you do not get arrested."

The recording of the interview also indicates when asked if a family member could enter the room, Trooper Homan replied, "Just give me a few minutes. I'm almost done." He testified he wanted to complete the recorded interview and feared a distraction. The trial court held this brief delay seemed reasonable and practical, rather than a show of force, and we agree.

Haney argues the trooper's reading of the implied consent warning was itself a show of force. We disagree, but we note the warning, even if it were coercive, came after the interview and, thus, would not be a reason to suppress her statements which were already given.

Haney argued being in an out-of-town hospital without a vehicle restricted her movement. However, these conditions were not caused by the trooper. He repeatedly told her he was not going to arrest her, and he did not. He never threatened her, never raised his voice, and never implied coercion. No promises were ever made or suggested. She never asked to stop the interview and never chose to ask for an attorney.

Haney's unsupported declaration at the suppression hearing that she thought she was going to be arrested if she did not submit to the blood draw was found not to be credible by the trial court. Haney never testified she felt restrained, restricted, or otherwise compelled to speak with Trooper Homan. She was able to express herself in an understandable fashion. Based on the totality of the circumstances, Haney was not "in custody" for *Miranda* purposes. Thus, the trial court's denial of Haney's motion to suppress her statements was not erroneous.

Second, Haney argues the trial court erred by failing to suppress the blood draw. As noted earlier, the trial court denied Haney's suppression motion, concluding that a warrant was not required because Haney consented to the blood draw. Particularly, the trial court analyzed whether a search warrant was required under KRS 189A.105(2)(b) and Fourth Amendment search and seizure principles in light of *Birchfield v. North Dakota*, 579 U.S. 438 (2016), and then recently-decided *Commonwealth v. Brown*, 560 S.W.3d 873 (Ky. App. 2018).[7] While concluding KRS 189A.105(2)(b)'s plain language negated the warrant requirement because Haney granted consent for the blood draw, the trial court also observed that according to *Commonwealth v. Morriss*, 70 S.W.3d 419 (Ky. 2002), cited in *Brown*, KRS 189A.105(2)(b) is not applicable to Haney's case. *Morriss*, a case which does not involve consent, holds that if the accident involves a death or physical injury, KRS 189A.105(2)(b) does not apply if a charge has not been brought, and instead Fourth Amendment principles apply. *Id.* at 421.

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[7] *Brown* was rendered on May 18, 2018, about one month prior to Haney filing her suppression motion. Once Haney became aware of *Brown*, she filed it as supplemental material, describing *Brown* as distinguishable from her case and noting that as rehearing of *Brown* was being requested, its applicability remained in question. The Court of Appeals denied rehearing on October 8, 2018. *Brown* was final when the trial court entered its opinion and order on May 30, 2019, denying Haney's motion to suppress the blood test.

With the facts of Haney's case being comparable to *Brown*, a case in which the defendant was not under arrest and also consented to the blood draw after being read the implied consent warning, the trial court relied upon *Brown's* holding that in contrast to the North Dakota statutory scheme considered in *Birchfield*, Kentucky's implied consent scheme is not coercive and *Birchfield* did not apply to it. The trial court concluded the implied consent warning did not negate the voluntariness of Haney's consent.[8]

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[8] The trial court also rejected Haney's argument the implied consent warning is inherently coercive when considering *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914 (Ky. 2002). In *Hernandez-Gonzalez*, when evaluating the impact of a defect in KRS 189A.105's implied-consent warning, the Court stated "as consent is implied by law, one cannot claim coercion in consenting to a test." *Id.* at 917. The Commonwealth cites to this Court the preceding quote from *Hernandez-Gonzalez* in support of its argument the language of the implied consent warning by itself is not coercive.

On appeal, Haney asks this Court to overrule the holding in *Morriss* that "where there is death or physical injury but no charge has yet been brought, [KRS] 189A.105(2)(b) does not apply and traditional search and seizure principles control," 70 S.W.3d at 421, and hold KRS 189A.105(2)(b) requires a warrant to be issued for a blood draw even if a charge has not been brought. The basis of Haney's request is KRS 189A.105(2)(b)'s text. Haney argues the text does not state there is an exception to the warrant requirement when no charge has yet been brought. Beyond this KRS 189A.105(2)(b) argument, Haney argues the blood sample was taken without a warrant in violation of her Fourth Amendment rights, the search being

based upon her coerced consent.

The Commonwealth asserts because Haney had not been charged with any offense at the time Trooper Homan interviewed her, as stated in *Morriss*, traditional search and seizure principles apply. Relying on *Brown's* Fourth Amendment analysis, the Commonwealth argues because Haney expressly consented to the blood draw, a warrant was unnecessary and her Fourth Amendment rights were not violated. The Commonwealth points out that when the trial court considered Haney's suppression hearing testimony that she felt coerced to consent to the test due to the belief that she would go to jail for not taking the test, the trial court noted, "[s]ignificantly, the defendant testified to no specific word or action which created this impression." The Commonwealth contends there is no evidence of record to support Haney's contention she was coerced into providing a blood sample.

At the suppression hearing, Trooper Homan testified he read the entirety of the implied consent warning to Haney. The implied consent portion of the interview was played at the suppression hearing. Along with the other mandated warnings, Trooper Homan advised Haney if she were convicted of KRS 189A.010, refusal to submit to the blood draw would subject her to a mandatory minimal jail sentence twice as long as the mandatory minimum jail sentence that would be imposed if she were to submit to the requested blood test. Haney responded that the warning was confusing. Trooper Homan volunteered to read the warning again and began to do so. At this point, the recorder stopped.

As noted earlier, Haney stated at the suppression hearing she took the implied consent warning to mean if she didn't consent to the blood draw, she was going to be under arrest. This led to the Commonwealth asking Haney what she thought she would be arrested for. This exchanged followed:

> Haney: They were doing blood looking for, it was an accident, and they had gave me medicine on the way to the hospital, and he said if I refused that it would double any jail time.
>
> Commonwealth: For what? For what?[9]
>
> Haney: I would presume that it would be DUI from them wanting blood.

[9] Defense counsel's comments and the trial court's admonition and other instruction omitted.

While not cited by either party, *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), is precedent now applicable to Haney's argument that her consent to the blood draw was coerced by the threat of increased jail time if she did not consent to the blood draw.[10] *McCarthy*, in contrast to *Brown*, concluded *Birchfield* applies to KRS 189A.105 and recognized the coercive nature of the implied consent statutory scheme. 628 S.W.3d at 32-34. As this Court clarified in *McCarthy*, *Birchfield* requires a warrant for a blood draw unless exigent circumstances exist or valid consent is given for the blood draw. *Id.* at 22.

[10] *McCarthy* was rendered April 29, 2021. This Court denied the Commonwealth's petition for rehearing August 26, 2021. The United States Supreme Court denied the Commonwealth's petition for a writ of certiorari February 22, 2022. *Kentucky v. McCarthy*, 142 S.Ct. 1126 (2022).

Haney filed her appellate brief in this Court July 6, 2021. The Commonwealth's filed its brief December 3, 2021. Neither party mentions *McCarthy*.

The posture of this case in regard to the coerciveness of the implied consent warning when Haney submitted to the blood draw is similar to that for Beylund, the defendant in *Birchfield* who submitted to the blood test after being read North Dakota's implied consent warning, informing him that his test refusal was itself a crime. 579 U.S. at 454. After the *Birchfield* Court concluded "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense" under the Fourth Amendment's reasonableness standard, *id.* at 477, the Court vacated the judgment against Beylund and remanded the case for further proceedings. *Id.* at 479. The Court stated: "[b]ecause voluntariness of consent to a search must be 'determined from the totality of all the circumstances,' we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory." *Id.* at 478 (internal citation omitted).

While the Commonwealth contends there is no evidence of record to support Haney's contention she was coerced into providing a blood sample, a review of the suppression hearing and the trial court's finding of facts regarding Haney's testimony indicates otherwise. The trial court's findings include Haney's statement about the blood draw: "If I refuse it would double any jail time." In light of *Birchfield* and *McCarthy*, we remand this case to the trial court to consider whether Haney's 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.

In regard to Haney's request that we overrule the interpretation of KRS 189A.105(2)(b) set forth in *Morriss*, we decline to do so. In 2016, the year of Haney's blood draw, KRS 189A.105(2)(b) stated in pertinent part:

> Nothing in this subsection shall be construed to prohibit a judge of a court of competent jurisdiction from issuing a search warrant or other court order requiring a blood or urine test, or a combination thereof, of a defendant charged with a violation of KRS 189A.010, or other statutory violation arising from the incident, when a person is killed or suffers physical injury, as defined in KRS 500.080, as a result of the incident in which the defendant has been charged. *However, if the incident involves a motor vehicle accident in which there was a fatality, the investigating peace officer shall seek such a search warrant for blood, breath, or urine testing unless the testing has already been done by consent.*

(Emphasis added.)

Even if the holding in *Morriss* that "where there is death or physical injury but no charge has been brought, [KRS] 189A.105(2)(b) does not apply" is erroneous, overruling that holding would be inconsequential for Haney because she consented to the blood draw, either voluntarily or involuntarily. If the consent was voluntary, under KRS 189A.105(2)(b) as well Fourth Amendment law, a warrant was not necessary for the blood draw. With that being so, Haney's request is a request for an advisory opinion, and this Court does not issue advisory opinions. *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007).

Furthermore, KRS 189A.105(2)(b) was revised, effective April 6, 2022, 2022 Ky. Acts ch. 83, § 4, to state:

> Nothing in this subsection shall be construed to prohibit a judge of a court of competent jurisdiction from issuing a search warrant or other court order requiring a blood or urine test, or a combination thereof, of a defendant charged with a violation of KRS 189A.010, or other statutory violation arising from the incident. However, if the incident involves a motor vehicle accident in which there was a fatality, the investigating peace officer shall seek such a search warrant for blood testing unless the testing has already been done by consent.

As amended, the language at issue in *Morriss* is no longer part of KRS 189A.105(2)(b). With the version of KRS 189A.105(2)(b) at issue in *Morriss* now superseded, we further find no basis for acting on Haney's invitation to overrule *Morriss*.

Finally, Haney alleges the trial court erred by failing to dismiss the charges due to allegedly false statements made to the grand jury. In particular, Haney claims Trooper Faulkner made incorrect statements on the accident report relating to road condition being "wet" and it was "raining." Trooper Faulkner also noted skid marks, which were later found to be pre-existing. Haney contends Trooper Faulkner presented impact calculations to the grand jury based upon the skid marks. At the suppression hearing, Trooper Faulkner testified the road conditions were "dry" at the time of the collision but "it seemed like it may have rained after." She asserts if the grand jury had not heard incorrect statements about the road conditions and about her admission to having a "puff" of marijuana which might possibly show in her blood results when no trace of marijuana or metabolites subsequently did, she might not have been indicted for murder. Relying on *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000), she argues it was prejudicial for the grand jury to have been presented false or misleading testimony about the road conditions.

"Courts are extremely reluctant to scrutinize grand jury proceedings as there is a strong presumption of regularity that attaches to such proceedings." *Id.* at 588. In *Baker* though, the Court of Appeals held a trial court had the "supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Id.* The defendant must demonstrate "a flagrant abuse of the grand jury process that resulted in both actual prejudice" and that the grand jury was deprived of "autonomous and unbiased judgment." *Id.*

Haney's claims about the grand jury proceedings

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

do not rise to the level warranting the relief she seeks. Although Haney argues Trooper Faulkner incorrectly stated to the grand jury that road conditions were wet and what skid marks at the scene of the crash indicated, we note he testified at the grand jury road conditions were "dry and clear" on the date of the wreck and never discussed skid marks. He explained he documented the skid marks because he was trained to document everything. His actual testimony to the grand jury was the black box information from Haney's vehicle revealed she did not try to avoid the crash as she did not apply her brakes. The trial court did not err in denying Haney's motion to dismiss her indictment.

For the foregoing reasons, the judgment of the Morgan Circuit Court is affirmed in part and vacated in part. This case is remanded to the Morgan Circuit Court for further proceedings consistent with this Opinion.

All sitting. Minton, C.J.; Hughes and Lambert, JJ., concur. Conley, J., concurs by separate opinion, in which Keller and VanMeter, JJ., join.

Conley, J., concurs by separate opinion:

Last year, this Court rendered its decision in *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021). That decision held that the enhancement of a criminal penalty for refusing to submit to a blood test under Kentucky's implied consent law is unconstitutional, following *Birchfield v. North Dakota*, 579 U.S. 438 (2016). *Id.* at 32-34. The Court also held that refusal to submit to a blood test could not be used as evidence against a defendant in a prosecution for DUI, unless by way of rebuttal or impeachment evidence. *Id.* at 34-36. I joined with Justice VanMeter concurring in part and dissenting in part, agreeing that enhancement of criminal penalties for refusing a test is unconstitutional but dissenting as to the prohibition of using that refusal as evidence at trial. *Id.* at 40-41. Consistency demands that I continue to adhere to our holding in *McCarthy*, thus I concur in the decision today. I write separately, however, to express my understanding of the current state of the implied consent law as to blood tests so that some clarity on the issue may be had by law enforcement officers, as well as the bench and bar.

To speak plainly, Kentucky is no longer an implied-consent state for blood tests. Because *McCarthy* holds enhancing criminal penalties for refusing a blood test is unconstitutional, and that refusal cannot even be used as evidence of guilt for driving under the influence, there is no way to effectively enforce the implied consent that Kentucky law ostensibly still holds to. KRS 189A.103(3). Thus, police officers are now required to read to a person suspected of driving under the influence that by using the roadways of Kentucky, they have given implied consent to a blood test. KRS 189A.105(2)(a). But the accused has an unequivocal right to withdraw that consent and refuse the test with no penalties attached save suspension of their driver's license. KRS 189A.105(1).[11] It seems elementary to me that a law incapable of being enforced is not a law at all. Thus, the continued statutory requirement that police officers read the implied consent warning for blood tests is meaningless. And as we hold today, even *reading* the warning raises a question of undue coercion to be considered under the totality of circumstances.

[11] It remains an open question under our jurisprudence whether such a penalty can still be imposed. Normally, being issued a driver's license is considered a privilege. *McCarthy*, *supra*, at 28. But absent a criminal conviction, the suspension of driving privileges for an indefinite amount of time upon a mere charge of driving under the influence raises a question of due process, especially in light of the common law that a citizen has the right to freely travel within the state using the common means of travel. As the Supreme Court of Appeals of Virginia once stated,

> The right of a citizen to travel upon the public highways and to transport his property thereon in the ordinary course of life and business is a common right which he has under his right to enjoy life and liberty, to acquire and possess property, and to pursue happiness and safety. It includes the right in so doing to use the ordinary and usual conveyances of the day; and under the existing modes of travel includes the right to drive a horse-drawn carriage or wagon thereon, or to operate an automobile thereon, for the usual and ordinary purposes of life and business.
>
> *Thompson v. Smith*, 154 S.E. 579, 583 (Va. 1930).

The one saving grace of this ruling is that *McCarthy* was not law when Haney's car crash occurred. She was a read an implied consent warning that included mention of enhanced criminal penalties. After *McCarthy*, there are no penalties, except license suspension, to be mentioned and thus, it is unlikely that an implied consent warning will ever be reasonably considered coercive. But it nonetheless should be made clear that the implied consent to blood testing in Kentucky is functionally non-existent. If the suspected driver can refuse the test, what is the point of implying consent at law? It is precisely to avoid such a circumstance that an implication was statutorily created. Otherwise, a police officer can only politely ask for a blood test to be performed or obtain a search warrant. In both cases, consent is no longer implied. Thus, police officers should no longer seek to obtain blood tests under a non-functional theory of implied consent. They are free to ask for one or seek to obtain a warrant if time permits, as they always have. Fortunately, if officers wish to obtain evidence of alcohol intoxication as quickly as possible, they still may seek a breath test which, under our statutory law and *Birchfield*, a citizen suspected of driving under the influence has "no right to refuse[.]" *Birchfield*, 579 U.S. at 478; KRS 189.105A.

Keller and VanMeter, JJ., join.

ATTORNEYS

Opinion and Order memorializing automatic suspension —

Inquiry Commission v. Bethany L. Stanziano-Sparks (2022-SC-0105-KB); In Supreme Court; Opinion and Order entered 9/22/2022. **[This opinion and order is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.38.]**

This matter originally was filed before us as the Inquiry Commission's Petition for Temporary Suspension of Bethany L. Stanziano-Sparks[1] pursuant to SCR[2] 3.165(1)(b) and (d). Since that filing in March 2022, the Commonwealth's Attorney, 29th Judicial Circuit, has filed notice of Stanziano-Sparks' guilty plea to a criminal felony. We therefore issue the following Opinion and Order memorializing Stanziano-Sparks' suspension from the practice of law.

[1] Stanziano-Sparks was admitted to the practice of law in 2006. Her Bar Roster address is 414 Public Square, Columbia, Kentucky 42728, and her bar member number is 91179.

[2] Kentucky Rules of Supreme Court.

Factual Background

In March 2022, the Inquiry Commission filed its Petition for Temporary Suspension of Stanziano-Sparks under SCR 3.165 alleging probable cause existed that her conduct poses a substantial risk of harm to her clients or the public, and/or that she is addicted to intoxicants or drugs and does not have physical or mental fitness to continue to practice law. The Petition was based, in large part, on the affidavit of Judge Samuel T. Spalding, 11th Judicial Circuit, that Stanziano-Sparks appeared in court for a scheduled jury trial and was under the influence of illegal substances or drugs. Judge Spalding averred that Stanziano-Sparks refused multiple requests to submit to a drug screen.

Following the filing of the Petition, this Court, on March 29, entered an Order to Show Cause as to why Stanziano-Sparks should not be suspended from the practice of law. Her response was due on or before April 18. Stanziano-Sparks did not file a response.

Next, by letter dated April 27, 2022, Brian Wright, Commonwealth's Attorney for the 29th Judicial Circuit, Adair and Casey Counties, filed notice that Stanziano-Sparks had entered a guilty plea on April 26 to the following criminal offenses with indicated sentences:

> Possession of a Controlled Substance in the First Degree, First Offense (methamphetamine), a Class D felony, two-year sentence with a recommendation of pretrial diversion for three years;
>
> Possession of Marijuana, a Class B misdemeanor, thirty-day sentence, probated for two years; and
>
> Possession of Drug Paraphernalia, a Class A misdemeanor, twelve-month sentence, probated for two years.

Commonwealth's Attorney Wright attached copies of pertinent pleadings in Stanziano-Sparks' case, *Commonwealth v. Stanziano*, Adair Circuit Court, Docket No. 22-CR-00112, including Order Granting Pretrial Diversion of a Class D Felony and Misdemeanor Judgment. The Pretrial Diversion Order and Misdemeanor Judgment were both signed by Adair Circuit Judge Judy D. Vance Murphy.

SCR 3.166(1) provides:

Any member of the Kentucky Bar Association who pleads guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this State or in any other jurisdiction, shall be automatically suspended from the practice of law in this Commonwealth. "Felony" means an offense for which a sentence to a term of imprisonment of at least one (1) year is authorized by law. The imposition of probation, parole, diversion or any other type of discharge prior to the service of sentence, if one is imposed, shall not affect the automatic suspension. The suspension shall take effect automatically beginning on the day following the plea of guilty or finding of guilt by a judge or jury or upon the entry of judgment whichever occurs first. The suspension under this rule shall remain in effect until dissolved or superseded by order of the Court. Within thirty (30) days of the plea of guilty, or the finding of guilt by a judge or jury, or entry of judgment, whichever occurs first, the suspended attorney may file a motion with the Clerk of the Supreme Court of Kentucky setting forth any grounds which the attorney believes justify dissolution or modification of the suspension.

We take notice that Stanziano-Sparks pled guilty to Possession of a Controlled Substance in the First Degree, First Offense (methamphetamine), a Class D felony, on April 26, 2022. No motion has been filed to dissolve or modify the suspension pursuant to SCR 3.166(1).

Order

1. Respondent, Bethany L. Stanziano-Sparks, having been automatically suspended from the practice of law in this Commonwealth on April 27, 2022, incident to her felony conviction, this Order is entered to memorialize such suspension for the purpose of notice to the members of the legal community and to the public.

2. Pursuant to SCR 3.166(1), Stanziano-Sparks' suspension shall remain in effect until dissolved or superseded by order of this Court.

3. To the extent that she has not already done so, Stanziano-Sparks shall, under this rule, notify all clients in writing of her inability to continue to represent them and shall furnish copies of all such letters to the Director of the Kentucky Bar Association. These notices shall be mailed or emailed to the respective clients within ten (10) days or the entry of this Order, if not already mailed. Stanziano-Sparks shall make arrangements to return all active files to the client or new counsel and shall return all unearned attorney fees and client property to the client and shall advise the Director of such arrangements within the ten (10) day period.

All sitting. All concur.

ENTERED: September 22, 2022.

ATTORNEYS

Opinion and Order denying motion to vacate Character and Fitness Committee's decision —

Christopher D. Jefferson v. Kentucky Office of Bar Admissions (2022-SC-0298-KB); In Supreme Court; Opinion and Order entered 9/22/2022. **[This opinion and order is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.38.]**

Under SCR[1] 2.014, persons seeking admission to the Kentucky Bar generally must have graduated from a law school which is accredited by either the American Bar Association[2] or the Association of American Law Schools.[3] In this case, Christopher D. Jefferson, a 2011 graduate of The Birmingham School of Law, a law school not so accredited, moves that we vacate the Character and Fitness Committee's determination that Jefferson was thereby ineligible for admission by reciprocity. SCR 2.110. Having reviewed the limited record presented, we deny his motion.

[1] Kentucky Rules of Supreme Court.

[2] ABA.

[3] AALS.

I. Facts and Procedural Background.

At some point prior to July 5, 2022, Jefferson applied to the Office of Bar Admissions for admission to the Kentucky bar by reciprocity. SCR 2.110. On that date, Valetta H. Browne, Director and General Counsel of the Office of Bar Admissions, advised Jefferson by letter that

> Your application for admission without Examination pursuant to SCR 2.110 has been under review by members of the of the Character and Fitness Committee. . . . The Committee members have determined that due to the fact that you did not earn a J.D. degree from a law school accredited by the [ABA], you are not eligible for admission without examination.

Ms. Browne further advised Jefferson that the Supreme Court Rules provided a path for admission to the bar by examination for graduates of non-accredited law schools and that the Board of Bar Examiners was the appropriate body under Kentucky rules to make the determination of quality of the legal education. SCR 2.014(3)(a).

Jefferson appeals the Committee's determination to this Court. SCR 2.060.

II. Analysis.

Jefferson argues that the Committee impermissibly interposed into SCR 2.110 the requirement that he was required to have graduated from either an ABA or AALS accredited law school. He further argues that he has met all the requirements of admission by reciprocity, set forth in SCR 2.110, by having earned a degree in "Doctorate of Jurisprudence from The Birmingham School of Law" in 2011; passed the "Alabama Universal [sic] Bar Exam (UBE)" with a score of 269.4;[4] been admitted to the Alabama State Bar in 2013; and practiced law in five of the last seven years. He further states that Alabama grants reciprocity to Kentucky lawyers.

[4] Jefferson is not eligible for Admission by Transferred Uniform Bar Examination score under SCR 2.090 because his UBE score was earned more than five years before his date of application. SCR 2.090(2)(b).

Jefferson, however, ignores an important rule governing our bar licensing process: SCR 2.010. This rule states, in full:

> **All applicants for admission to the bar of this state must meet certain basic requirements regardless of whether admission is sought** by examination (SCR 2.022), by transferred Uniform Bar Examination score (SCR 2.090), **without examination (SCR 2.110)**, for a limited certificate (SCR 2.111) or as an attorney participant in a defender or legal services program (SCR 2.112). **Those requirements are set forth in the following sections SCR 2.011 through SCR 2.017.**

(Emphasis added).

In this regard, SCR 2.014(1) clearly and unambiguously states that "[e]very applicant for admission to the Kentucky Bar must have completed degree requirements for a J.D. or equivalent professional degree from a law school approved by the American Bar Association or by the Association of American Law Schools." The fact that The Birmingham School of Law may be regulated and "accredited" by the Alabama legislature or the Alabama Supreme Court, as argued by Jefferson, does not meet the requirements of our rules.[5]

[5] While not determinative of our holding in this matter, Alabama appears to have the same requirement for bar admission without examination by reciprocity, that "[t]he applicant shall . . . hold a first professional degree in law (J.D. or L.L.B.) from a law school that was on the approved list of the American Bar Association at the time the degree was conferred[.]" Ala. Bar Admission Rule III.A.(b).

Finally, Jefferson argues that we should remand this matter to the Committee with directions for it to determine whether his degree meets the educational requirement "that is the substantial equivalent of the legal education provided by approved law schools located in Kentucky." SCR 2.014(3)(a). Unfortunately for Jefferson, the appropriate body within the Office of Bar Admissions to evaluate his legal education is the Board of Bar Examiners, not the Committee.[6] *Id.* And, even assuming that the Board were to evaluate Jefferson's legal education favorably, that positive review would permit Jefferson to apply for admission to the bar by examination, not by reciprocity. See SCR 2.014(3) (stating "[a]n attorney who received a legal education in the United States but is not eligible for admission by virtue of not having attended a law school approved by the American Bar Association or the Association of American Law Schools may nevertheless be considered for admission by examination. . . .").

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

[6] The Office of Bar Admissions is comprised of two separate bodies, the Kentucky Board of Bar Examiners and the Character and Fitness Committee, SCR 2.000, which have distinct membership and responsibilities, as set forth in SCR Part II. Admission of Persons to Practice of Law.

III. Conclusion.

In conclusion, the Character and Fitness Committee of the Office of Bar Admissions appropriately evaluated Christopher D. Jefferson's application for admission without examination and correctly determined that by virtue of his not having "completed degree requirements for a J.D. or equivalent professional degree from a law school approved by the American Bar Association or by the Association of American Law Schools[,]" SCR 2.014(1), he is ineligible for admission without examination.

IV. Order.

The Petition of Christopher D. Jefferson to vacate the Character and Fitness Committee's decision with respect to his application under SCR 2.110 is hereby DENIED.

All sitting. All concur.

ENTERED: September 22, 2022.

WORKERS' COMPENSATION

MOTION TO REOPEN

MOTION TO REOPEN A PRIOR CLAIM IN WHICH NO PERMANENT PARTIAL DISABILITY OR FUTURE MEDICAL BENEFITS WERE AWARDED

Pursuant to KRS 342.125(1)(d) and (2), claimant can reopen prior workers' compensation claim in which no permanent partial disability or future medical benefits were awarded — KRS 342.125(1) allows reopening and review of any award or order, including reopening of temporary total disability award, provided one of grounds for reopening contained in subsections (a) through (d) is satisfied —

Lakshmi Narayan Hospitality Group Louisville v. Maria Jimenez; Hon. Jonathan R. Weatherby, ALJ; and Workers' Compensation Board (2021-SC-0449-WC); On appeal from Court of Appeals; Opinion by Justice Hughes, *affirming*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Maria Jimenez was employed by Lakshmi Narayan Hospitality Group (Holiday Inn) on June 6, 2014, when she slipped and sustained injuries to her neck, head, left shoulder, and back. The Chief Administrative Law Judge (CALJ) awarded temporary total disability benefits on May 1, 2017. In 2019, Jimenez's claim was reopened pursuant to Kentucky Revised Statute (KRS) 342.125(1)(d) after she alleged a worsening of her condition. Holiday Inn objected and asserted that *res judicata* barred reopening. Relying on Jimenez's deposition testimony and medical evidence, a different Administrative Law Judge (ALJ) awarded Jimenez permanent partial disability benefits and future medical benefits for treatment of her cervical spine. The Workers' Compensation Board (Board) disagreed and determined that Jimenez's claim was barred by *res judicata*. The Court of Appeals concluded that Jimenez's claim was not barred and that the Board misconstrued the reopening statute, KRS 342.125(1)(d) and (2), because nothing in the statute precludes the reopening of an award of temporary disability benefits. This appeal followed. For the reasons stated below, we affirm the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

Maria Jimenez was employed by Holiday Inn and performed housekeeping services at a Holiday Inn in Louisville, Kentucky. On June 6, 2014, Jimenez injured her head, neck, left shoulder and back when she slipped and fell while cleaning a bathroom. Jimenez stated she hit her head and lost consciousness. Jimenez filed a workers' compensation claim on September 22, 2015, and at a June 20, 2016 Benefit Review Conference, the parties stipulated that Jimenez sustained a work-related injury, that no temporary total disability benefits had been paid, and that the defendant-employer had paid $11,322.43 in medical expenses.

On May 1, 2017, the CALJ awarded temporary total disability benefits from August 15, 2014, through April 22, 2015. The CALJ determined that Jimenez did not sustain a permanent injury and was not entitled to future medical benefits.[1] On July 25, 2019, Jimenez filed a motion to reopen due to a change in disability after being diagnosed with cervical disc disease and depression on April 24, 2018. She also sought an award of permanent partial disability benefits. In an affidavit, Jimenez maintained that her condition deteriorated since May 2017 and that her pain level had increased. Holiday Inn objected to reopening, citing the CALJ's previous findings, including the finding that Jimenez did not sustain a permanent injury, and *res judicata*.

[1] According to the testimony given during the hearing before the ALJ on July 25, 2016, and the ALJ's September 5, 2019 order to reopen, Jimenez did not make any claims for permanent income benefits or future medical benefits in her original claim.

On September 5, 2019, the CALJ granted Jimenez's motion, recognizing Holiday Inn's *res judicata* argument but nevertheless determining that Jimenez was entitled to pursue her claim of the subsequent development of work-related depression and worsening of her physical injuries. Because Jimenez made a *prima facie* claim by a showing of grounds to reopen due to change in disability, her claim was reopened and assigned to a different ALJ.

On December 10, 2020, the ALJ entered an Opinion and Order finding that *res judicata* was inapplicable, that Jimenez had sustained her burden on reopening, and that she established worsening of her condition. The ALJ awarded permanent partial disability benefits based on a 4% impairment rating, as well as medical expenses that might reasonably be required for the cure and relief from the effects of the work-related injury.

Holiday Inn appealed to the Board and on April 9, 2021, the Board reversed and remanded the claim to the ALJ with direction "to dismiss this reopening claim as barred by *res judicata*." The Board determined that the express and unambiguous language of KRS 342.125(2) is controlling. That statute generally allows for the reopening of workers' compensation claims for various reasons, including a change in disability. However, because the original ALJ only awarded temporary total disability benefits for a specific period, the Board held that the claim is not subject to reopening. The Board concluded that although more recent evidence may support a conclusion that Jimenez's neck condition has deteriorated, the grounds for reopening were insufficient. The Board held the ALJ's original decision was supported by substantial evidence and therefore was *res judicata* given the identity of the parties, identity of the facts, and identity of the issues leading to the final decision on the merits. *BTC Leasing, Inc. v. Martin*, 685 S.W.2d 191 (Ky. App. 1984). Relitigation of the issue of permanency was precluded pursuant to KRS 342.125.

On Jimenez's appeal to the Court of Appeals, the appellate court held that the Board misconstrued KRS 342.125 and erred in its *res judicata* analysis. The Court of Appeals held that nothing in the plain language of KRS 342.125(2) precludes the reopening of a temporary total disability award and, citing prior cases, noted the difference in the application of *res judicata* in judicial proceedings and workers' compensation proceedings. The appellate court noted, quoting *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky. 1972), that "[w]here the statute expressly provides for reopening under specific conditions, the rule of res adjudicata has no application when the prescribed conditions are present." Holiday Inn appealed.

ANALYSIS

The sole issue is whether, under KRS 342.125(1)(d) and (2) a claimant can reopen a prior workers' compensation claim in which no permanent partial disability or future medical benefits were awarded. "Reopening is the remedy for addressing certain changes that occur or situations that come to light after benefits are awarded." *Dingo Coal Co. v. Tolliver*, 129 S.W.3d 367, 370 (Ky. 2004). KRS 342.125 provides, in pertinent part:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review **any award or order** on any of the following grounds:
>
> (a) Fraud;
>
> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
>
> (c) Mistake; and
>
> (d) **Change of disability as shown by objective medical evidence of worsening**

> **or improvement of impairment due to a condition caused by the injury since the date of the award or order.**
>
> (2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.

(Emphasis added.) Holiday Inn argues that Jimenez's reopening claim is barred by *res judicata* because the ALJ did not initially award permanent income benefits or future medical benefits. It asserts that because the CALJ held that Jimenez sustained only a temporary injury from the June 2014 fall, the reopening is merely an attempt to relitigate the same issue of whether she sustained a permanent injury from the work incident.[2] Given the plain language of KRS 342.125(1)(d), we disagree.

[2] Holiday Inn also asserts that the Court of Appeals misconstrued its argument by focusing on permanent partial disability benefits. The appellate court stated that "[t]he sole issue on appeal is whether under KRS 342.125(1)(d) and (2) a claimant can open a prior workers' compensation claim in which no PPD was awarded." Holiday Inn concedes that *res judicata* does not always bar reopening under KRS 342.125 if permanent partial disability benefits were not awarded in the underlying claim. Further, it asserts that a claimant could reopen a claim under KRS 342.125 if permanent partial disability benefits were dismissed but future medical benefits were awarded. However, because we ultimately hold that neither an award of future income benefits nor future medical benefits is a pre-requisite to reopening pursuant to the plain language of KRS 342.125(1)(d), Holiday Inn's allegation that the Court of Appeals misconstrued its argument is immaterial.

KRS 342.125(1) allows the reopening and review of **any award or order**, provided one of the grounds for reopening contained in subsections (a) through (d) is satisfied. Jimenez sought to reopen her workers' compensation claim due to a change in her disability, satisfying subsection (d). In *Dingo Coal*, the Court explained that KRS 342.125 outlines the proof required to grant a motion to reopen while KRS 342.730 governs "the merits of a worker's right to receive additional income benefits at reopening . . . ." 129 S.W.3d at 370. The statute does not restrict or limit reopening to particular types of claims or awards. It does not, for example, allow reopening in claims in which permanent income benefits were awarded but prohibit reopening in claims in which only temporary income benefits were awarded.

By its very language, reopening of a claim under KRS 342.125(1)(d) involves the determination of a claimant's disability at two different times—the degree of disability when the claim is originally filed and the degree of disability when the claim is reopened. This ground for reopening involves a change in impairment "since the date of the award or order." KRS 342.125(1)(d). Obviously, if ALJs were permitted to dismiss claims in those instances where a seemingly temporary injury progresses into a permanent injury then it would create an exception to KRS 342.125(1)(d) that is not expressed in the statute. The statute clearly allows the reopening of a claim if there has been a change in disability without limitations regarding the type of benefits originally awarded. KRS 342.125(1)(d).

As this Court's predecessor recognized in *Messer v. Drees*, 382 S.W.2d 209, 212-13 (Ky. 1964):

> Time often tells more about medical cases than the greatest of experts are able to judge in advance . . . . [E]ven the permanence of a disability theretofore thought to be temporary "is of itself in the nature of a change." When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a "mistake" or a "change in conditions" is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it.

(Internal citations omitted.) In short, the observable symptoms necessary to support a permanent disability award can become more manifest over a period of time extending beyond the original proceedings.

When interpreting a statute, the Court must "assume 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). If the plain language of the statute is clear, our inquiry ends. *Id.* If the legislature intended to restrict the reopening of workers' compensation claims to only claims in which distinct types of benefits were awarded, it could have included such language. It did not. KRS 342.125(1) contains clear limitations on the reopening of claims by only allowing reopening in instances of fraud, newly-discovered evidence, mistake, or change in disability, demonstrating legislative intent. If further limits on reopening were preferred or intended by the legislature, they could have and should have been stated.

Holiday Inn also emphasizes the fact that the permanency of Jimenez's injury was already litigated because the original CALJ dismissed Jimenez's claim for all future and permanent income and medical benefits. The original order and award states that "[t]here is no evidence of permanent injuries so there is no basis for an award of permanent income benefits" and "[b]ecause Jimenez does not have a permanent injury, or otherwise have evidence to support the need for permanent income benefits, no such award will be made."[3] Therefore, Holiday Inn argued, and the Board concluded, that reopening of Jimenez's claim was barred by *res judicata*.

[3] The first reference to any issue of permanency arose in the independent medical examination report by Dr. Michael Best, who evaluated Jimenez at Holiday Inn's request. His report, dated August 20, 2015, states that 2014 MRI images show "no objective evidence of a permanent harmful change in the human organism" and that Jimenez met "no criteria for permanent impairment—0% whole person." Dr. Disha Shah, who treated Jimenez for her neurological symptoms, also opined that Jimenez was not permanently impaired. In a statement of proposed stipulations submitted by Holiday Inn, it stipulated that Jimenez sustained only a temporary injury but contested whether her injury was temporary or permanent.

To the extent that Holiday Inn suggests or implies that Jimenez initially alleged a permanent injury or put that in issue, the record establishes that she did not. While Jimenez's introduction of the permanent injury issue, or lack thereof, is indeterminative of the resolution of this appeal, given our interpretation of KRS 342.125, it bears mentioning that she did not initially claim a permanent injury and the reopening does not constitute her attempt to relitigate an issue she previously raised.

Res judicata is basic to our legal system. As this Court held in *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464-65 (Ky. 1998), "[t]he doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. . . ."

> The application of these principles to final workers' compensation decisions is grounded in the fact that because there is an extensive procedure for taking appeals, a final decision should not be disturbed absent fraud, mistake, or other very persuasive reason that would warrant reopening. KRS 342.125 grants some relief from the principles of the finality of judgments by permitting a reopening in instances of fraud, mistake, newly-discovered evidence, or a change of condition that causes a change of occupational disability.

Slone v. R & S Mining, Inc., 74 S.W.3d 259, 261 (Ky. 2002).

> Workers' compensation is a creature of statute. As set forth in Chapter 342, workers' compensation proceedings are administrative rather than judicial. Although the principles of error preservation, *res judicata*, and the law of the case apply to workers' compensation proceedings, they apply differently than in the context of a judicial action. For that reason, authority based upon judicial proceedings is not necessarily binding in the context of proceedings under Chapter 342.

Whittaker v. Reeder, 30 S.W.3d 138, 143 (Ky. 2000). Our predecessor Court held that "[w]here the statute expressly provides for reopening under specified conditions, the rule of res adjudicata has no application when the prescribed conditions are present." *Stambaugh*, 488 S.W.2d at 682. The ALJ determined that a condition prescribed by KRS 342.125(1) for reopening was present.

In addition, the application of *res judicata* in this context in which a claimant seeks to reopen their claim due to a change in disability would undermine the purpose of the workers' compensation system.

> The primary purpose of the Workers' Compensation Act is to aid injured or deceased workers and statutes are to be interpreted in a manner that is consistent with their beneficent purpose. The overarching purpose of the workers' compensation chapter is to compensate workers who are injured in the course of their employment for necessary medical treatment and for a loss of wage-earning capacity, without

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

> regard to fault, thereby enabling them to meet their essential economic needs and those of their dependents.

Kindred Healthcare v. Harper, 642 S.W.3d 672, 679 (Ky. 2022) (quotations and citations omitted). Larson's *Worker's Compensation Law* states

> It is almost too obvious for comment that res judicata does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases. A moment's reflection would reveal that otherwise there would be no such thing as reopening for a change in condition.

12 Larson's Workers' Compensation Law § 127.07[7] (2022) (footnotes omitted). As such, *res judicata* does not bar the reopening of Jimenez's claim for a change in disability.

CONCLUSION

We conclude that the Board misconstrued KRS 342.125 because nothing in the plain language of that statute precludes reopening of a temporary total disability award. A determination that a claimant has a permanent injury or awards of future medical or income benefits also are not prerequisites to reopening. Therefore, we affirm the Court of Appeals.

All sitting. All concur.

MEDICAL MALPRACTICE

DISCOVERY

REQUEST FOR PRODUCTION OF ALL DOWNLOADABLE INFORMATION FROM PLAINTIFF'S SOCIAL MEDIA ACCOUNTS

WRIT OF PROHIBITION

WRIT OF MANDAMUS

Plaintiffs' son suffered severe hypoxic-ischemic brain injury during his birth in 2012, which plaintiffs alleged caused his death in 2017 — After son's death, plaintiffs filed medical malpractice action against various healthcare providers — During discovery, defendants asked plaintiffs to identify all social media accounts in their possession dating from son's birth to present — Further, defendants requested production of all data downloaded from their Facebook accounts — Plaintiffs confirmed that each parent had personal Facebook account, but objected that request was overbroad, unduly burdensome, harassing, beyond scope of proper discovery, and not reasonably calculated to lead to discovery of admissible evidence — Defendants filed motion to compel production of all downloadable Facebook data — Trial court entered order compelling plaintiffs to turn over requested Facebook data — Plaintiffs filed instant action in Court of Appeals seeking writ of prohibition to prohibit enforcement of order directing plaintiffs to provide defendants with nine years of Facebook date and writ of mandamus directing trial court to enter different, and severely constrained, discovery order — Court of Appeals denied writ petitions — Plaintiffs appealed — AFFIRMED denial of writs — Plaintiffs concede that only second type of writ is at issue in instant action — Thus, plaintiffs must show that lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result — In certain special cases, petitioners are not required to show "specific great and irreparable injury," but instead that nature of error is one in which substantial miscarriage of justice will result if lower court is proceeding erroneously, and correction of error is necessary and appropriate in interest of orderly judicial administration — With respect to orders allowing discovery, courts have recognized that adequate remedy will rarely exist on appeal if alleged error is an order that allows discovery — Regardless, certain special cases exceptions are reserved for instances involving invasion of recognized privilege or some other important privacy interest of party resisting discovery — In instant action, plaintiffs can point to no specific privilege which discovery order would violate — Inclusion of irrelevant, and possibly embarrassing, information on its own is not enough to merit "special circumstances" — CR 26.02(1) permits discovery of any matter, not privileged, which is relevant to subject matter involved — Parties cannot object simply because information may not be admissible at trial so long as information sought appears reasonably calculated to lead to discovery of admissible evidence — Since plaintiffs have put their mental and emotional state directly at issue, defendants' discovery request for their social media accounts is reasonable — In addition, trial court ordered all Facebook data to be treated as "strictly confidential," which minimized potential to misuse or abuse any irrelevant information turned over by plaintiffs —

Latrice Marie Leslie-Johnson and Anthony Antious Johnson, Sr., Individually, and as Co-Administrators of the Estate of Anthony Antious Johnson, Jr. v. Hon. Audra Eckerle, J., Jefferson Cir. Ct., and Norton Hospitals, Inc. d/b/a Norton Hospital; Norton Healthcare, Inc.; Marcello Pietrantoni, M.D. and Kentuckiana Perinatology, P.S.C. (2021-SC-0450-MR); On appeal from Court of Appeals; Opinion by Justice VanMeter, *affirming*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Petitioners, Latrice and Anthony Johnson, Sr. (the Johnsons), filed a petition seeking a writ of prohibition in the Kentucky Court of Appeals to prohibit the enforcement of a July 30, 2020, Jefferson Circuit Court order directing the couple to provide defendants Norton Healthcare (Norton) with nine years of Facebook data. Concurrently, the Johnsons sought a writ of mandamus directing the Jefferson Circuit Court to enter a different, and severely constrained, discovery order. Following a close review of the record and the issues, we affirm the Court of Appeals' order denying the motion for writs of prohibition and mandamus.

I. Background.

In 2012, Latrice Johnson gave birth to her son, Anthony, Jr., by way of an emergency c-section. Unfortunately, Anthony, Jr. suffered a severe hypoxic-ischemic brain injury, which the Johnsons allege ultimately caused his death in 2017. Shortly thereafter, the Johnsons, acting as co-administrators of their deceased son's estate, filed a medical negligence claim against the real parties in interest in Jefferson Circuit Court.

Less than a month after they filed the case against Norton, the defendants presented the Johnsons with interrogatories and requests for production of documents in July 2017. Interrogatory number 32 asked the Johnsons to identify all of the social media accounts in their possession dating from September 20, 2012 (Anthony, Jr.'s birthdate) to the present. Request for production number 14 asked the Johnsons to:

> Produce all data downloaded from your Facebook account, including but not limited to, all postings, profile information, wall posts, photos, videos, notes, information concerning events to which you have RSVP'd, messages sent and received by you and others, and comments made by you and others relating to wall posts, photos, videos, or any other content.

By rule, discovery responses were due within thirty days. CR[1] 33.01(2), 34.02(2). Approximately a year later, Norton's counsel followed up to request when discovery might be answered. Finally, in February 2020, the Johnsons confirmed that each parent operated a personal Facebook account; but objected that the request was overbroad, unduly burdensome, harassing, beyond the scope of proper discovery, and not reasonably calculated to lead to the discovery of admissible evidence. Norton filed a motion in May 2020 to compel the Johnsons to produce all downloadable Facebook data. The trial court entered an order compelling the Johnsons to turn over the requested Facebook data. After receiving an extension to review the data, the Johnsons filed a motion to reconsider, or alter, amend, or vacate, the order for production. The trial court denied their motion, after which the Johnsons filed an original action in the Court of Appeals seeking writs of prohibition and mandamus. The Court of Appeals denied the petition, which the Johnsons have now appealed.

[1] Kentucky Rules of Civil Procedure.

II. Standard of Review.

Writs are extraordinary remedies, which interfere with "both the orderly, even if erroneous, proceedings of a trial court and the efficient dispatch of our appellate duties[.]" *Hoskins v. Maricle*, 150 S.W.3d 1, 5 (Ky. 2004). "The decision to issue a writ is entirely within this Court's discretion" and applied with "great caution." *Thompson v. Coleman*, 544 S.W.3d 635, 637 (Ky. 2018). Although we have recognized two circumstances in which writs are

an appropriate form of relief, the Johnsons concede only the second type of writ is at issue in this case. Consequently, the Johnsons must show that "the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result." *Hoskins*, 150 S.W.3d at 6 (citation omitted). On appeal, this Court reviews the Court of Appeals' legal reasoning *de novo*, while assessing its factual findings for clear error. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

III. Analysis.

Writs of the second class generally require petitioners to satisfy two elements: (1) that "no adequate remedy by appeal or otherwise" exists; and (2) that the petitioner "would suffer great and irreparable injury (if error has been committed and relief denied)." *Id.* at 808. While we always require petitioners to satisfy the first element, this Court has recognized some exceptions in "certain special cases" in which petitioners are not required to show "specific great and irreparable injury[,]" but instead that the nature of the error is one in which "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." *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 801 (Ky. 2000) (quoting *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961)). With regards to orders allowing discovery, we have recognized that an adequate remedy will rarely exist "on appeal if the alleged error is an order that allows discovery." *Grange*, 151 S.W.3d at 810. Regardless, we have reserved invoking these exceptions for instances involving the invasion of a recognized privilege "or some other important privacy interest of the party resisting discovery." *Inverultra, S.A. v. Wilson*, 449 S.W.3d 339, 345 (Ky. 2014); *see also Richmond Health Facilities-Madison, LP v. Clouse*, 473 S.W.3d 79, 82–83 (Ky. 2015) ([O]ur application of this exception is rare, however, limited primarily to circumstances where the action for which the writ is sought would violate the law, e.g.[,] by breaching a tightly guarded privilege or by contradicting the requirements of a civil rule." (internal quotation omitted)).

We addressed a nearly identical factual circumstance in *Thompson v. Coleman*, 544 S.W.3d 635 (Ky. 2018). In that case, a decedent's estate sued a physician and others for medical negligence. 544 S.W.3d at 637. During discovery, the defendants sought broad access to the decedent's social media accounts dating to one year prior to her death. *Id.* at 639. The estate objected, arguing that most of the information on her social media would be irrelevant. *Id.* In denying a writ petition challenging the trial court order granting the defendants' discovery request, this Court reasoned that CR 26.02[2] is to be "read liberally" in order to ensure that both parties "have access to evidence or information leading to evidence, allowing a full case to be brought to trial." *Id.* Additionally, the Court noted that the trial court took several steps to safeguard the social media data, such as limiting the period sought, providing a protective order, requiring all information be treated as "strictly confidential," and listing several restrictions on how the information could be used. *Id.*

[2] CR 26.02(1) reads:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

While social media is obviously a relatively new phenomenon, its inputs are reducible to documents. In essence, Norton has requested production of documents as contained in the Johnsons' social media accounts. The civil rules and our case law provide guidance as to the discovery of such documents. As previously stated, CR 26.02(1), being read liberally, tilts in favor of production. The party seeking to prevent discovery bears the burden of showing not only the nonrelevance of the material, *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 727 (Ky. 1997), but also that it is privileged. *Thompson*, 544 S.W.3d at 638; *Collins v. Braden*, 384 S.W.3d 154, 163 (Ky. 2012). As in *Thompson*, the Johnsons in this case can point to no specific privilege which the discovery order would violate, nor is the mere inclusion of irrelevant, and possibly embarrassing, information on its own enough to merit "special circumstances."[3]

[3] This court has held that "[a] protective order is within the full discretion and authority of the trial court and is appropriate only to prevent a party from 'annoyance, embarrassment, oppression, or undue expense or burden.'" 473 S.W.3d at 83 (quoting *Ewing v. May*, 705 S.W.2d 910, 913 (Ky.1986)). In this case, the apparent ease with which the Facebook record was produced indicates no burden or expense was involved. As to annoyance or oppression, those items involve continuous, repetitive discovery tactics. *See Britton v. Garland*, 335 S.W.2d 329 (Ky. 1960) (holding that trial court could protect litigants from such number and nature of depositions as to seriously interfere with litigant's proof and usurp time to present case). This case involves one request for social media data. As to embarrassment, clearly the Johnson might not want certain matters disclosed, but the trial court addressed that concern in requiring non-dissemination.

In *Collins*, we outlined three means by which a party could resist discovery of privileged material:

> Parties asserting privileges have numerous ways to establish the existence of . . . privilege when an opposing party challenges its existence.
>
> One common method is an *in camera* review by the trial court of the documents in question. This was the method employed in [*Lexington Publ. Lib v.*] *Clark*, 90 S.W.3d [53,] 63 [(Ky. 2002)]. But this method can have its limitations. For example, it requires the trial court to "describe the documents" or "recite any factual bases" supporting its decision to facilitate appellate court review. *Id.* More importantly, *in camera* review can overly burden a trial court, especially in litigation where many documents are claimed to be privileged. Thus, instead of *in camera* review, a party claiming the privilege could produce a detailed privilege log with descriptions of the documents sufficient to establish the existence of the privilege (i.e., more than their titles). Or a party could make an "offer of proof" or proffer, like the process in KRE[4] 105(b), describing the documents (without going into the content of any statements or legal advice they contain, of course).
>
> How a party proceeds is up to it, unless the trial judge prefers one approach over the others or declines to allow the use of one in a given case. That call falls within the trial court's sound discretion. The only requirement is that when challenged, the party claiming the privilege must do more than merely assert the privilege. It must provide the court with sufficient information to show the existence of the elements of the privilege and to allow review of that decision by higher courts.

384 S.W.3d at 164–65. If a party claims that social media matter is nonrelevant, no reason exists as to why one of the processes summarized in *Collins* could not be utilized.

[4] Kentucky Rules of Evidence.

CR 26.02(1) clearly permits discovery of "any matter, not privileged, which is relevant to the subject matter involved" and that parties cannot object simply because the information may not be admissible at trial so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." "Relevancy is more loosely construed upon pre-trial examination than at the trial, and the Rule requires only relevancy to the subject matter involved in the action." *Richmond Health Facilities*, 473 S.W.3d at 83 (quotation and citation omitted). Given that the Johnsons have put their mental and emotional state directly at issue in this litigation, Norton's discovery request for their social media accounts is reasonable.[5] Moreover, the Johnsons' objection that the period Norton seeks access to is overly broad is a direct result of their own failure to move the litigation along in a timely fashion. Originally, Norton only sought the Facebook data from September 20, 2012 (the deceased child's birthdate) to the present (which at the time of the original complaint was 2017). Consequently, the Johnsons' own tardiness in responding to the interrogatories and requests for production is responsible for the extended time period of data sought by Norton.[6] Finally, we note that the trial court ordered all Facebook data to be treated as "strictly confidential" thereby minimizing the potential to misuse or abuse any irrelevant information turned over by the Johnsons. We are constrained therefore, as we were in *Thompson*, to conclude that the Johnsons have failed to show irreparable harm and have not demonstrated that any error which may have occurred at the trial level requires the invocation of our "special circumstances" exception to writs of the second class.

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[5] The Johnsons' pleadings explicitly recognize that information concerning their relationship with their son and emotional well-being is fair game, as is the identity of others with knowledge that may substantiate or negate plaintiffs' claims. Plaintiffs' Motion to Reconsider or Alter, October 30, 2020, p. 4.

[6] The following timeline shows that the Johnsons' counsel repeatedly failed to produce the documents, or object to them, for nearly three years.

July 5, 2017: Norton serves the interrogatories and request for production.

October 23, 2018: Norton requests the discovery answers and the Johnsons' counsel promises to "put the wheels in motion."

April 12, 2019: The Johnsons' counsel emails defense counsel and promises the answers "shortly."

July 23, 2019: Defense counsel reminds plaintiffs' counsel the responses are two years late and plaintiffs' counsel promises to have them "next week."

September 9, 2019: Plaintiffs' counsel promises to have the responses "finish[ed] this week."

February 21, 2020: Plaintiffs' counsel finally provides defense counsel with the answers.

IV. Conclusion.

We find the Johnsons' series of general objections to be without merit and affirm the Court of Appeals' denial of the writ.

All sitting. All concur.

PROBATE

WILLS AND ESTATES

WILL CONTEST

CIVIL PROCEDURE

MOTION FOR LEAVE TO AMEND AN ANSWER TO ASSERT A CROSS-CLAIM

JURISDICTION

DISTRICT COURT v. CIRCUIT COURT

ALLEGED DEFICIENCIES WITH SIGNATURES AND VERIFICATION OF PROBATE PETITION

Leon McGaha was married to June McGaha, his second wife — Leon had three adult children from his first marriage, Mark, Damon, and Suzanne, and one grandson, Cliff — In September 2013, Leon, who was in failing health, executed durable power of attorney (DPOA) naming June and Mark as his attorneys-in-fact — According to some family members, Leon expressed desire upon his passing to divide his estate equally among his grown children — On April 4, 2014, Leon executed will nominating June and Mark as co-executors of his estate — Will gave Leon's tire business, including real and personal property associated with it, to Mark — June was to receive residence and farm where she and Leon lived, farm bank account, and some personal property — Will bequeathed to Suzanne and Cliff part of proceeds from sale of cattle and some personal property — Will made bequests for June's children from prior marriage — June, Mark, and Suzanne shared equally under will the division of residual estate — Damon received nothing under will — On April 4, 2014, DPOA was recorded — That same day, June, acting as Leon's attorney-in-fact, conveyed real property associated with tire business to Mark and Mark's wife — Leon died on April 7, 2014 — In May 2014, district court entered order probating Leon's will and appointing June as executor of Leon's estate — Probate petition listed Mark and June as petitioners and provided contact information for their attorney — Petition was not signed — June and Mark filed fiduciary bond and filed inventory and appraisement of estate — In November 2014, Damon filed action in circuit court challenging validity of Leon's will and asserting claims of undue influence and breach of fiduciary duty by June and Mark — Damon also named other defendants in complaint, including Suzanne and Cliff — Damon alleged that probate petition was defective because it was neither signed nor verified, among other reasons — Damon requested declaration that will was invalid, accounting of estate assets, and setting aside of certain transactions — Suzanne and Cliff filed joint answer to complaint, asking trial court to protect their interests under will and to declare that they did not violate any provision of will, including no-contest clause — Their joint answer did not expressly assert any cross-claims or counterclaims — In 2017, Suzanne and Cliff filed motion for partial summary judgment against June and Mark — Specifically, motion requested that circuit court set aside transfer of real estate related to tire business and allegedly premature transfer of tractor to Mark; order certain proceeds and personal property be returned to estate; and require Mark to account for all profits and receipts from tire business since Leon's death — June and Mark responded to motion for partial summary judgment by arguing, among other things, that Suzanne and Cliff lacked standing to seek relief because they had asserted no claims against June and Mark — Damon also responded by agreeing with arguments Suzanne and Cliff made in their motion — After hearing, circuit court denied motion as premature — In August 2019, Damon settled his claims against June and Mark — Notice of dismissal acknowledging settlement was filed by Damon's counsel with circuit court on August 1, 2019 — On August 6, 2019, Suzanne filed motion for leave to amend her answer and to assert cross-claims and her objection to dismissal of action — Cliff did not join Suzanne's motion — Suzanne stated in motion that neither she nor Cliff consented to dismissal of action — Affidavit from Damon's counsel averred that counsel signed notice of dismissal based on representations from June and Marks' counsel that June and Mark would delay filing notice of dismissal, pending settlement negotiations with Suzanne and Cliff — In her tendered amended answer, Suzanne alleged that June and Mark tortiously interfered with valid devise and breached fiduciary duties — Suzanne also sought declaration that Leon lacked testamentary capacity and that June and Mark exercised undue influence — Circuit court held several hearings, then issued order denying Suzanne's motion for leave to amend — Further, circuit court found that there were no other issues before it since Damon had settled his claim; therefore, circuit court dismissed action as settled — Suzanne and Cliff appealed — Noting "terse" nature of circuit court's order, Court of Appeals presumed circuit court must have concluded that cross-claim Suzanne wished to assert via amended answer was time-barred, given five-year-plus age of circuit court action — Court of Appeals found that district court lacked jurisdiction over probate of Leon's will because probate petition was not properly verified — As result, Court of Appeals found that statute of limitations had not begun to run on Suzanne's potential claims so that circuit court, presumably acting under mistaken impression that Suzanne's claims were time barred, abused its discretion by denying Suzanne's motion to amend to assert her claims — June and Mark appealed — HELD that Court of Appeals failed to give proper deference to circuit court's decision to deny Suzanne's leave to amend pleading and that Court of Appeals erred in finding that district court lacked jurisdiction to probate Leon's will; therefore, REVERSED and REINSTATED circuit court's order dismissing action — Pursuant to KRS 24A.120(2), district courts are empowered with "exclusive" jurisdiction in non-adversarial probate matters — In addition, KRS 24A.120 requires that adversarial probate proceedings must be filed in circuit court — KRS 394.145 requires that verified petition be filed by person offering will for probate — However, lack of proper verification of probate petition does not divest district court of subject-matter jurisdiction to entertain petition to probate will — In addition, alleged lack of proper verification did not divest lower courts of jurisdiction over this particular case — Damon properly filed original action in circuit court to challenge district court's decision to admit will to probate — Circuit court did not abuse its discretion by denying Suzanne's motion for leave to amend her answer to assert cross-claims — Pursuant to CR 15.01, leave to amend shall be freely given when justice so requires; however, decision on whether to allow amendment to answer is within trial court's discretion — Court of Appeals failed to give appropriate deference to circuit court's ruling —

Since district court had jurisdiction over probate petition, Kentucky Supreme Court reviewed circuit court's denial of Suzanne's motion for leave to amend for abuse of discretion — In 2014, Suzanne and Cliff's joint answer to Damon's complaint expressly disclaimed any challenge to Leon's will; stated that they did not join Damon's challenge, which included claim that probate petition was defective because it was not properly verified; and did not assert any cross-claims or counterclaims — Suzanne and Cliff were seemingly content to sit on their rights and allow Damon to prosecute alleged improper verification of probate petition — Suzanne and Cliff moved for partial summary judgment in 2017, but did not assert any cross-claims or counterclaims against June and Mark at that point — In 2019, after Damon reached extrajudicial settlement of his claims against June and Mark, Suzanne sought to amend her initial answer to assert cross-claims that were available to her when she filed her initial answer in 2014 — Under instant facts, circuit court did not abuse its discretion in denying Suzanne's motion to amend her answer to assert cross-claims — Dismissal of action was proper as there were no other issues remaining before court for its consideration — Damon was only plaintiff in action as of August 2, 2019, when he filed notice of dismissal — CR 41.01(2) applied since Damon's notice of dismissal was filed after defendants answered his complaint — Suzanne did not file motion to amend her answer to assert cross-claims until August 6, 2019 — It was irrelevant that Damon's counsel averred that he signed notice of dismissal based on representations from June and Mark's counsel that they would delay filing notice pending settlement negotiations with Suzanne and Cliff — Under CR 15.01, Suzanne was permitted to amend her answer only by leave of court or by written consent of adverse party — Suzanne did not meet these requirements —

June McGaha and Mark McGaha v. Suzanne McGaha and Cliffman McGaha (2021-SC-0351-DG); On review from Court of Appeals; Opinion by Chief Justice Minton, *reversing*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Appellants bring this appeal to challenge a decision of the Court of Appeals that reversed the circuit court's order in a will-contest case denying Appellees' motion for leave to file an amended answer to assert a cross-claim and dismissing the underlying case. The Court of Appeals remanded the matter back to the circuit court for further proceedings, holding that the circuit court erred in denying Appellees' motion for leave to amend.

On discretionary review, we reverse the Court of Appeals' decision for failing as a reviewing court to give proper deference to the trial court's decision to deny Appellees leave to amend a pleading. In reaching this holding, we also hold that the Court of Appeals erred when it found that the district court lacked jurisdiction to probate the will at issue in this action. Accordingly, we reverse the opinion of the Court of Appeals and reinstate the circuit court's order dismissing this action.

I. FACTS AND PROCEDURAL BACKGROUND

At the time of his death, Leon McGaha was married to June McGaha, his second wife. Leon[1] had three adult children from his first marriage, Mark, Damon, and Suzanne McGaha, and a grandson, Cliffman "Cliff" McGaha.

[1] We refer to each member of the McGaha family by his or her first name for clarity.

In September 2013, Leon, who was in failing health, executed a Durable Power of Attorney (DPOA) naming June and Mark his attorneys-in-fact. According to some family members, Leon expressed a desire upon his passing to divide his estate equally among his grown children.

On April 3, 2014, Leon executed a will nominating June and Mark as co-executors of his estate. The will gave Leon's tire business, including real and personal property associated with it, to Mark. June was to receive the residence and farm where she and Leon lived, a farm bank account, and some personal property. The will bequeathed to Suzanne and Cliff part of the proceeds from the sale of cattle and some personal property. And the will made bequests for June's children from a prior marriage. June, Mark, and Suzanne shared equally under the will the division of the residual estate. Damon received nothing under the will.

On April 4, 2014, the DPOA was recorded. That same day, June, acting as Leon's attorney-in-fact, conveyed the real property associated with the tire business to Mark and Mark's wife.

Leon died on April 7, 2014. In May 2014, the Russell District Court entered an order probating Leon's will and appointing June as executor of Leon's estate. The probate petition listed Mark and June as petitioners and provided contact information for attorney Matthew DeHart. The petition was not signed. June and Mark filed a fiduciary bond and filed an inventory and appraisement of Leon's estate.

In November 2014, Damon filed an action in Russell Circuit Court challenging the validity of Leon's will and asserting claims of undue influence and breach of fiduciary duty by June and Mark. He also named other defendants in the complaint, including Suzanne and Cliff. Damon contended that the probate petition was defective because it was neither signed nor verified, among other reasons. Damon requested a declaration that the will was invalid, an accounting of estate assets, and the setting aside of certain transactions.

Suzanne and Cliff filed a joint answer to the complaint. They asked the trial court to protect their interests under the will and asked the trial court to declare that they did not violate any provision of the will, including the no-contest clause. The joint answer did not expressly assert any cross-claims or counterclaims.

In 2017, Suzanne and Cliff filed a motion for partial summary judgment against June and Mark. Specifically, the motion requested that the circuit court set aside the transfer of the real estate related to the tire business and an allegedly premature transfer of a tractor to Mark; asked the court to order certain proceeds and personal property be returned to Leon's estate; and sought the aid of the court to require Mark to account for all profits and receipts from the tire business since Leon's death.

June and Mark responded to the motion for partial summary judgment, arguing, among other things, that Suzanne and Cliff lacked standing to seek relief because they had asserted no claims against June and Mark. Damon also responded, indicating his agreement with the arguments Suzanne and Cliff made in their motion. After a hearing, the circuit court denied the motion as premature.

In August 2019, Damon settled his claims against June and Mark. A notice of dismissal acknowledging the settlement was filed with the circuit court by Damon's counsel on August 1, 2019.[2]

[2] In its opinion below, the Court of Appeals acknowledged that there was no dispute as to the filing of the notice of appeal but stated that it was neither provided with a copy of the notice of dismissal nor did the notice appear in the record. The notice of appeal appears in the record before this Court as Appendix 6 to Appellants' principal brief.

On August 6, 2019, Suzanne filed a motion styled as a motion for leave to amend her answer and to assert cross-claims and her objection to a dismissal of the action. Cliff did not join Suzanne's motion, but Suzanne stated in the motion that neither she nor Cliff consented to dismissal of the action. An affidavit from Damon's counsel was attached to Suzanne's supporting memorandum in which Damon's counsel averred that counsel signed a notice of dismissal based on representations from June and Mark's counsel that June and Mark would delay filing the notice of dismissal, pending settlement negotiations with Suzanne and Cliff. In her tendered amended answer, Suzanne alleged that June and Mark tortiously interfered with a valid devise and breached fiduciary duties. She also sought a declaration that Leon lacked testamentary capacity and that June and Mark exercised undue influence.

After several hearings on Suzanne's motion for leave to amend, the circuit court took the matter under advisement without issuing any oral ruling. Then, on November 7, 2019, the circuit court issued the following order:

> Comes the Court on the defendant, Suzanne McGaha's, Motion to Amend Answer and to add Crossclaim against the defendants, June McGaha and Mark McGaha. The Court having read the memorand[a] and briefs of the parties in support thereof and against the motion, and the Court being sufficiently advised, it is hereby **ORDERED** and **ADJUDGED** that Suzanne McGaha's motion is hereby **OVERRULED** and consequently, as a result, there are no other issues before the Court in this matter with the plaintiff having settled his claim, and therefore, this action is hereby **DISMISSED AS SETTLED**. This is a final and appealable order and there is not just cause for delay.

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Suzanne and Cliff appealed. Noting the "terse" nature of the circuit court's order, the Court of Appeals "presume[d] the trial court must have concluded that the cross-claim [Suzanne] wished to assert via amended answer was time-barred, given the five-year-plus age of the circuit court action." Importantly, the Court of Appeals concluded that the district court lacked jurisdiction over the probate of Leon's will because the probate petition was not properly verified. Consequently, the Court of Appeals reasoned that the statute of limitations had not begun to run on Suzanne potential claims so that the trial court—presumably acting under the mistaken impression that Suzanne's claims were time barred—abused its discretion by denying Suzanne's motion to amend to assert her claims.

We granted June and Mark's motion for discretionary review and this matter is ripe for our review.

II. STANDARD OF REVIEW

Jurisdiction is a question of law that we review de novo.[3] "Though CR[4] 15.01 provides that leave to amend "'shall be freely given when justice so requires,' it is still discretionary with the trial court[.]"[5] As such, we review the trial court's denial of a motion for leave to amend for abuse of discretion.[6]

Finally, when reviewing a motion to dismiss, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true."[7] This eliminates the need for the trial court to make any findings of fact; "rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?"[8] As such, a reviewing court owes no deference to the trial court's determination and reviews a motion to dismiss de novo.[9]

III. ANALYSIS

This case raises three primary issues for this Court's consideration: (1) did the district court lack jurisdiction over the probate action because of the alleged deficiencies with signatures and verification of the probate petition; (2) did the circuit court abuse its discretion by denying Suzanne's motion for leave to amend her answer to add new claims; and (3) did the circuit court err in dismissing this action? We address each issue in turn.

A. The Court of Appeals erred in concluding that the district court lacked jurisdiction over the probate matter because of an alleged defect with verification of the probate petition.

Jurisdiction may well be a word of too many meanings.[10] At bottom, "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[11]

KRS[12] 24A.120 gives the district court subject-matter jurisdiction in certain civil and probate matters. KRS 24A.120 provides, in pertinent part:

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

As a result, district courts are statutorily empowered with "exclusive" jurisdiction in non-adversarial probate matters.

Here, the Court of Appeals held that the district court lacked jurisdiction to probate the will because the probate petition was unsigned and unverified. Citing *Kentucky Unemployment Insurance Commission v. Wilson*[13] for support, the Court of Appeals concluded that strict compliance with the specific statutory requirement for verification was necessary to invoke the district court's jurisdiction.[14]

But the Court of Appeals' reliance on *Wilson* is an incongruous application of this Court's precedent regarding verification and its effect on jurisdiction. In *Wilson*, this Court held that strict compliance with a statutory requirement for verification for a petition for judicial review was required to invoke the circuit court's jurisdiction to review an administrative ruling.[15] But that legal conclusion in *Wilson* is grounded on the premise that "there is no appeal to the courts from an action of an administrative agency as a matter of right."[16] "When grace to appeal is granted by statute, a strict compliance with its terms is required."[17] So our holding in *Wilson* applies to review of administrative rulings in which there is no appeal in the courts as a matter of right. As a result, *Wilson* provides no support for the Court of Appeals' conclusion that the district court lacked jurisdiction in a matter unrelated to review of administrative appeals.

Relevant here, KRS 24A.120(2) grants district courts *exclusive jurisdiction* in non-adversarial probate matters. And the same statute requires that adversarial probate proceedings must be filed in the circuit court. So KRS 24A.120(2) grants district courts jurisdiction over non-adversarial probate matters; it does not, however, extend legislative grace to appeal where an appeal is otherwise not available as a matter of right.

It is true, of course, that KRS 394.145 requires that a verified petition be filed by a person offering a will for probate. But lack of proper verification of the probate petition did not divest the district court of subject-matter jurisdiction to entertain the petition to probate the will. The district court had subject-matter jurisdiction to probate the will under KRS 24A.120(2).

Nor did the alleged lack of proper verification divest the lower courts of jurisdiction over this particular case. We have acknowledged "that the use of the word 'jurisdiction' in this context is confusing."[18] In *Spears v. Goodwine*,[19] we clarified that "[t]he deficiency [of an unverified complaint seeking judicial review of an administrative order] has no effect on the circuit court's subject matter jurisdiction."[20] Instead, a deficiency in the verification of a complaint seeking judicial review of an administrative ruling leaves the "court without jurisdiction in this particular case."[21]

KRS 394.145 does not grant jurisdiction to the lower courts in probate matters. KRS 24A.120(2) does. That is not to say that the missing verification has no impact on lower courts' consideration of a probate petition. Here, the lower courts had jurisdiction to consider issues related to verification of the probate petition. In fact, Damon raised this

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[3] *Commonwealth v. B.H.*, 548 S.W.3d 238, 242 (Ky. 2018).

[4] Kentucky Rule of Civil Procedure.

[5] *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961) (quoting CR 15.01).

[6] *See id.*; *see also Bank One, Ky., N.A. v. Murphy*, 52 S.W.3d 540, 550 n.5 (Ky. 2001) (Keller, J., concurring in part and dissenting in part); *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998) ("A trial court's ruling on a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion.").

[7] *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

[8] *Id.* (quoting *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002)).

[9] *Id.*

[10] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

[11] *Id.* (quoting *Ex Parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868)).

[12] Kentucky Revised Statutes.

[13] 528 S.W.3d 336 (Ky. 2017).

[14] *See id.* at 339.

[15] *See Wilson*, 528 S.W.3d at 339.

[16] *Id.* (internal alteration and citation omitted).

[17] *Id.* (internal citation omitted).

[18] *See Wilson*, 528 S.W.3d at 339 n.2.

[19] 490 S.W.3d 347 (Ky. 2016).

[20] *Id.* at 352.

[21] *Id.* (citation omitted).

very issue—claiming that the probate petition was defective because it was not properly verified. Again, KRS 24A.120(2) states that adversary proceedings involving probate matters "shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal." As a result, the district court had jurisdiction to probate the will at issue here and the circuit court had jurisdiction to review the impact of the alleged ineffective verification of the probate petition on the probate proceedings.[22] Importantly, we note that Damon properly filed this original action in circuit court to challenge the district court's decision to admit the will to probate.[23]

[22] *See Vater v. Vater's Adm'rs*, 113 S.W.2d 1145, 1146 (Ky. 1938) ("There is a rule of general application in this jurisdiction that an objection to a petition, answer, or other pleading for want of verification should be by rule against the pleader to verify and on his failure to do so to have it stricken."). It is undisputed, however, that neither Suzanne nor Cliff objected to the alleged lack of verification until Suzanne attempted to amend her answer near the end of the proceedings in the trial court, years after Damon first raised this issue in his complaint.

[23] KRS 394.240(1).

Ultimately, the Court of Appeals' conclusion that the district court lacked jurisdiction to probate Leon's will was error. Indeed, the Russell District Court had exclusive jurisdiction over any non-adversarial proceedings involving probate. And the circuit court had jurisdiction over any adversarial proceedings, including whether the probate petition was properly verified. As such, we reverse the Court of Appeals' holding that the district court lacked jurisdiction in this matter based on the allegedly ineffective verification of the probate petition.

B. The circuit court did not abuse its discretion by denying Suzanne's motion for leave to amend her answer to assert cross-claims.

We cannot conclude that the trial court clearly erred by denying Suzanne's motion to amend her answer. While it is true that leave to amend "shall be freely given when justice so requires,"[24] the decision on whether to allow an amendment to an answer is within the trial court's discretion.

[24] CR 15.01.

Here, the Court of Appeals erred by failing to give appropriate deference to the circuit court's ruling. The Court of Appeals concluded that the circuit court abused its discretion by denying Suzanne's motion to amend because the statute of limitations had not begun to run, the original probate petition being defective. But in so doing, the Court of Appeals "presumed" to know—without actually knowing—why the trial court denied Suzanne's motion for leave to amend and then proceeded to engage in its own de novo legal analysis concerning denial of the motion for leave to amend.

Having concluded that the district court had jurisdiction over the probate petition despite the alleged lack of proper verification, we must review the circuit court's denial of Suzanne's motion for leave to amend for abuse of discretion. "The test for abuse of discretion is whether the [ ] judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[25]

[25] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On this record, we cannot conclude that the circuit court clearly erred by denying Suzanne's motion for leave to amend her complaint. In 2014, Suzanne and Cliff's joint answer to Damon's complaint expressly disclaimed any challenge to Leon's will, stated that they did not join Damon's challenge, which included a claim that the probate petition was defective because it was not properly verified, and did not assert any cross-claims or counterclaims. Seemingly content to sit on their rights and allow Damon to prosecute the alleged improper verification of the probate petition, it was years later, in 2017, when Suzanne and Cliff moved for partial summary judgment. But neither Suzanne nor Cliff had asserted any cross-claims or counterclaims against June and Mark at that point. It was two years later, in 2019, and only after Damon reached extrajudicial settlement of his claims against June and Mark, that Suzanne sought to amend her initial answer to assert cross-claims that were available to her when she filed her initial answer in 2014.

Of course, we acknowledge, as the Court of Appeals did, the circuit court's November 2019 order was bare-bones. Even so, the circuit court was most familiar with the factual background and procedural history of this case. So the circuit court was best positioned to determine whether an amendment of Suzanne's complaint served the interests of justice. On these facts, even if we might have reached a different conclusion on de novo review, we cannot conclude that the circuit court abused its discretion in denying Suzanne's motion to amend her answer to assert cross-claims.

C. Dismissal of this action was proper.

On de novo review, we hold that dismissal of this action was proper. The circuit court's November 2019 order ruled that this action was dismissed as settled and noted that there were no other issues remaining before the court for consideration. On August 2, 2019, Damon filed a notice of dismissal, which stated, in relevant part, as follows:

> The Plaintiff acknowledges that the above styled action has been dismissed as settled and that this effectively rescinds the **"Notice of Action Pursuant to KRS 394.240(2)"** filed in the office of the Russell County Circuit Court Clerk on November 10, 2014[,] and same being recorded in Miscellaneous Records Book 21, Page 63 and 64.
>
> This is a notice that the previous filing is of no longer any force or effect in regard to any of the parties herein set forth above.

CR 41.01 deals with voluntary dismissal of an action by the plaintiff. Since Damon's notice of dismissal was filed after the defendants answered his complaint, the operative rule if CR 41.01(2), which states as follows:

> **(2) By order of court.**
>
> Except as provided in paragraph (1) of this rule, an action, or any claim therein, shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this section is without prejudice.

Here, dismissal of this action was proper because there were no active claims before the circuit court for consideration once Damon settled his claims against June and Mark. Again, Damon was the only plaintiff in this action as of August 2, 2019. That is so because Suzanne and Cliff expressly disclaimed any challenge to Leon's will and chose not to assert any counterclaims or cross-claims in their initial joint answer to Damon's complaint. And Suzanne did not file a motion to amend her answer to assert cross-claims until August 6, 2019. As such, once Damon settled his claims with June and Mark, there were no remaining claims, counterclaims, or cross-claims for the circuit court to consider.

It is of no moment that the circuit court denied Suzanne's motion to amend her answer to assert cross-claims in the same order that dismissed the action. Again, we do not find that the circuit court's denial of Suzanne's motion to amend constituted abuse of discretion. Ultimately, upon denying Suzanne's motion to amend her answer to assert cross-claims, the only claims were those brought by Damon in his initial complaint, which had been dismissed.

Nor does it matter that Damon's counsel averred that he signed the notice of dismissal based on representations from June and Mark's counsel that they would delay filing the notice pending settlement negotiations with Suzanne and Cliff. Under CR 15.01, Suzanne was permitted to amend her answer "only by leave of court or by written consent of the adverse party." Suzanne had neither. So, upon settlement of Damon's claims, there was nothing for the remaining parties to settle.

Finally, contrary to Suzanne's characterizations, the claims she attempted to bring in her amended answer were not already before the court in her initial complaint. In their joint answer, Suzanne and Cliff asked the circuit court to generally protect their legal interests and declare the parties' rights under the will. But these general recitations are insufficient to bring adversarial claims under Leon's will, especially where Suzanne and Cliff initially explicitly disclaimed any challenge to the will. At bottom, in order to advance the claims she now wishes to bring, Suzanne had to receive leave to amend her answer.

We acknowledge that this may seem to be a harsh result, especially since leave to amend should be freely given when justice so requires. But parties who sit on their rights do so at their own peril. The cross-claims Suzanne sought to assert in her amended answer were available to her when she

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filed her first joint answer in 2014. Suzanne sought to amend her answer in 2019 and only after Damon filed a notice of dismissal with the circuit court. As such, Suzanne's delay in litigating her claims justifies both denial of her motion for leave to amend and dismissal of the action generally.

In sum, once Damon's claims against June and Mark were settled as demonstrated by the notice, there were no active claims left in this action. Upon denial of Suzanne's later-filed motion to amend answer to assert cross-claims, there were similarly no active issues for the circuit court to resolve. As a result, dismissal without prejudice[26] was appropriate under CR 41.01(2).

[26] CR 41.01(2) ("Unless otherwise specified in the order, a dismissal under this section is without prejudice.").

IV. CONCLUSION

After review, the district court properly exercised jurisdiction to probate the will in this action despite an allegedly improper verification of the probate petition and the circuit court had jurisdiction to consider adversarial claims arising from the probate action. Furthermore, we conclude that the circuit court did not abuse its discretion in denying Suzanne's motion for leave to amend and assert cross-claims. Lastly, the circuit court properly dismissed this action because no claims remained for the circuit court to resolve upon settlement of Damon's claims with June and Mark. As a result, we reverse the decision of the Court of Appeals and reinstate the circuit court's order dismissing the action.

All sitting. All concur.

EMPLOYMENT LAW

UNFAIR LABOR PRACTICES

LAW ENFORCEMENT

RIGHT OF POLICE OFFICERS IN CONSOLIDATED LOCAL GOVERNMENT TO ORGANIZE FOR PURPOSE OF COLLECTIVE BARGAINING UNDER KRS CHAPTER 67C

FRATERNAL ORDER OF POLICE (FOP)

COMMUNICATIONS BETWEEN FOP OFFICER AND FOP MEMBER

CONFIDENTIALITY SET FORTH IN KRS 67C.402

KRS Chapter 67C creates right of police officers in consolidated local governments to organize for purpose of collective bargaining — KRS 67C.402 broadly protects ability of police officer to work with their union representative on questions related to conditions of their employment — Fraternal Order of Police (FOP) is labor organization for its police officer members which exists for primary purpose of dealing with consolidated local governments concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of employment — Pursuant to KRS 67C.402, officers have right to be protected in exercise of their right to self-organization for collective bargaining purposes free from "interference, restraint, or coercion" — If, during internal investigations or negotiations, local consolidated government could compel union representative to divulge sensitive information, then power of protection within KRS 67C.402 becomes illusory — "Free from interference" includes interference with an active disciplinary case, which is a condition of employment — A "privilege" is invoked to exclude relevant evidence — Privileges are exclusively within power of legislature to create, and they apply at all stages of all actions, cases, and proceedings — Protection afforded by KRS 67C.402 is better understood as a "confidence," not a "privilege" — It operates only against consolidated local government, such as, Louisville Metro, and only under circumstances covered by KRS 67C.402 — Confidentiality created by KRS 67C.402 is limited to communications between union member and officer of union, and operates only as against public employer, on matter where member has right to be represented by union representative, and then only where observations and communications are made in performance of a union duty — Confidentiality does not and cannot apply to legal proceedings — Because KRS 67C.402 creates limited confidentiality for union representative communications with members, it cannot be unilaterally waived — Both individual members of FOP and FOP itself are entitled to confidentiality — FOP is so entitled because of its function as collective bargaining unit representing many individuals — FOP's sole purpose is to advocate for best interests of group — Individual member may choose to breach confidence themselves, but they cannot waive it for organization — FOP is entitled to its own protection of confidentiality —

River City Fraternal Order of Police Lodge No. 614, Inc. v. Louisville/Jefferson County Metro Government and Kentucky Labor Cabinet (2021-SC-0159-DG); On review from Court of Appeals; Opinion by Justice Keller, *reversing and remanding*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The River City Fraternal Order of Police Lodge No. 614, Inc. (FOP) filed an unfair labor practice claim against the Louisville-Jefferson County Metro Government (Louisville Metro). The FOP alleged that the Louisville Metro Police Department (LMPD) engaged in an unfair labor practice by coercing Sergeant David Mutchler, the FOP President, to reveal communications he had with Sergeant Armin White[1] that the FOP asserted were protected by a "union business privilege." The Kentucky Labor Cabinet found that because no union business privilege exists in the Commonwealth, LMPD did not engage in an unfair labor practice. Both the Jefferson Circuit Court and the Court of Appeals affirmed. This Court granted discretionary review. After a thorough review of the record and arguments of the parties, we reverse and remand to the Labor Cabinet.

[1] The record reflects that since the events pertinent to this case occurred, White has been promoted to the rank of Lieutenant. However, for the sake of consistency and clarity, we will refer to White as a sergeant.

I. BACKGROUND

On January 11, 2017, LMPD Officer Sergeant Armin White met with his direct supervisor, Lieutenant Donald George, to discuss issues he was experiencing in the workplace. Sgt. White reported directly to Lt. George, but he also had certain administrative duties under a different lieutenant. Sgt. White claimed that he was receiving conflicting orders from Lt. George and the other lieutenant and needed a resolution. Following this meeting, Lt. George submitted a memorandum to his superior, Major Thomas Dreher, alleging that Sgt. White complained to him of a "hostile work environment." LMPD's Professional Standards Unit (PSU) began investigating. During this investigation, Sgt. White denied making a hostile work environment accusation. Thus, the PSU also began investigating whether Lt. George filed a false report.

Lt. George sought guidance from Sgt. David Mutchler, in Sgt. Mutchler's capacity as President of the FOP, both after his initial conversation with Sgt. White and after he was given notice by the PSU that he was being investigated. Additionally, he met with Sgt. Mutchler and the FOP's legal counsel to prepare for his interview with the PSU. Sgt. Mutchler also sent one email to and had one brief telephone conversation with Sgt. White concerning the matter.

In May 2017, the PSU notified the FOP that it wanted to interview Sgt. Mutchler regarding his conversations with Lt. George and Sgt. White. The FOP objected to any interview of Sgt. Mutchler, asserting a "union business privilege" that completely protected those conversations from disclosure. After discussion between counsel for the parties, the PSU narrowed its requested interview scope to only Sgt. Mutchler's conversation with Sgt. White. At the request of the PSU, Sgt. White had initialed a document purporting to "waive any client privilege that may or may not exist regarding [his] conversations with" Sgt. Mutchler. The FOP continued to object to the interview and filed a charge of Unfair Labor Practice against Louisville Metro with the Kentucky Labor Cabinet. The FOP alleged that the LMPD's effort to interrogate Sgt. Mutchler regarding his actions in his role as President of the FOP, including his conversations with Sgt. White and Lt. George, was unlawful coercion and therefore an unfair labor practice.

Despite the FOP's objection, the PSU went forward with Sgt. Mutchler's interview on August 2, 2017. At the beginning of the interview, Sgt. Mutchler was warned that he was required to answer the questions completely and truthfully and

that failure to do so could lead to discipline, up to and including termination. Sgt. Mutchler responded that he was answering the questions "under protest," believing that any conversations he had as FOP President were privileged. The PSU then questioned Sgt. Mutchler about his conversation with Sgt. White. Sgt. Mutchler told the PSU that Sgt. White told him that he did not want to be in the middle of conflicts between those above his rank. Sgt. Mutchler, however, could not remember if they discussed the filing of the hostile work environment claim. The PSU did not ask him any questions about his conversations with Lt. George.

On October 5, 2017, a hearing was held before a hearing officer from the Labor Cabinet. At that hearing, both Sgt. Mutchler and Sgt. White testified that Sgt. Mutchler scheduled a meeting with Lt. George and FOP counsel and that Sgt. Mutchler sent Sgt. White an email inviting him to that meeting. Both testified that Sgt. White called Sgt. Mutchler to decline the invitation and that they engaged in a short conversation. Sgt. White testified that he did not consider his conversation with Sgt. Mutchler confidential and that he never asked for assistance from the FOP. Sgt. White acknowledged that he voluntarily signed[2] the waiver allowing the PSU to question Sgt. Mutchler about their conversation.

[2] Although Sgt. White testified that he "signed" the waiver, he only initialed it.

In its briefs to the hearing officer, the FOP again asserted a union business privilege. It argued that the union business privilege belongs not only to the members of the union, but to the union itself. The FOP argued that an individual has no standing to waive the union's privilege, and thus, White's waiver was ineffectual. The FOP asserted that Sgt. Mutchler's conversation with Sgt. White was conducted in furtherance of Sgt. Mutchler's representation of Lt. George and thus was covered by the privilege. The FOP acknowledged, however, that the union business privilege is limited in scope, applying only in the collective bargaining context and not in other contexts such as litigation unrelated to collective bargaining.

Louisville Metro, on the other hand, argued that there was no justiciable controversy. Specifically, Louisville Metro argued that Kentucky Revised Statutes (KRS) Chapter 67C, which in part creates the right of police officers in consolidated local governments to organize for the purpose of collective bargaining, does not expressly provide for a union business privilege and that the Labor Cabinet lacks the authority to make such a privilege. Louisville Metro further asserted that even if a union business privilege exists, it only applies to conversations Sgt. Mutchler had in his representative capacity, and Sgt. Mutchler was not acting in that capacity in his conversation with Sgt. White.

In his recommended order, the hearing officer found that Sgt. Mutchler's conversation with Sgt. White took place while Sgt. Mutchler was acting in his representative capacity as President of the FOP. He further found that Sgt. Mutchler was compelled by the LMPD to disclose the substance of that conversation. The hearing officer opined that he believed a privilege should protect the substance of this conversation but asserted that he could not make that policy decision in his role as hearing officer. The hearing officer then recommended that the Labor Cabinet yield to the courts to determine if the privilege exists.

In its final order, the Labor Cabinet accepted the factual findings of the hearing officer, specifically finding that Sgt. Mutchler's conversation with Sgt. White occurred within the course of Sgt. Mutchler's duties as FOP President and that this conversation could have been relevant to the advice Sgt. Mutchler gave to Lt. George. The Labor Cabinet also found that Sgt. Mutchler was compelled by the LMPD to disclose the substance of his conversation with Sgt. White.

Like the hearing officer, the Labor Cabinet found that the explicit language of KRS Chapter 67C does not create a union business privilege and that Kentucky has yet to recognize the privilege. Finally, the Labor Cabinet stated that it did not have the authority to create the privilege under these circumstances. Thus, the Labor Cabinet found that Louisville Metro did not engage in an unfair labor practice when the LMPD compelled Sgt. Mutchler to reveal the substance of his conversation with Sgt. White.

The FOP filed a petition for judicial review in Jefferson Circuit Court against both Louisville Metro and the Labor Cabinet. The petition alleged that Louisville Metro engaged in an unfair labor practice by interfering, restraining, and coercing police officers in the exercise of their rights under KRS 67C.402. It further alleged that the Labor Cabinet's final order was arbitrary, capricious, an abuse of discretion, and deficient because it failed to recognize that the legislature had adopted the union business privilege and failed to find that the questioning of Sgt. Mutchler was an unfair labor practice.

The FOP asserted the importance of the union business privilege is that it protects communications which, if involuntarily disclosed, would have a chilling effect on the union's ability to investigate disciplinary matters. The FOP further acknowledged that the privilege applies only in the collective bargaining context and not in unrelated litigation.

Louisville Metro, on the other hand, argued that there was no justiciable controversy because no union business privilege exists and, even if it does exist, it was waived. Regarding waiver, Louisville Metro asserted that if the privilege exists, it belongs to the union member, in this case White, and can be waived by that member. Louisville Metro acknowledged that if the privilege exists the FOP can claim it on the member's behalf, but can only do so if the member does not waive the privilege. According to Louisville Metro, White waived any purported privilege. The Labor Cabinet adopted the arguments of Louisville Metro.

The circuit court affirmed the Labor Cabinet's order finding that Louisville Metro did not commit an unfair labor practice when it compelled Sgt. Mutchler to reveal his conversation with Sgt. White. The circuit court stated that the legislature has the sole authority to create a privilege and that the statutes at issue do not do so.

The FOP then appealed to the Court of Appeals. Notably, to the Court of Appeals, the FOP further refined the bounds of the union business privilege for which it advocated. The FOP asserted that the privilege applies only in the collective bargaining context and only when the union agent in question (in this case, Sgt. Mutchler) is employed by the agency compelling disclosure (in this case, LMPD). The FOP further asserted that the privilege only applies to information the union agent has gathered in order to assist an officer in "anticipated or ongoing disciplinary proceedings." The FOP stated that the privilege has no application in court proceedings or administrative proceedings other than the disciplinary proceedings about which the communications were made.

In its opinions, the Court of Appeals was severely fractured. The plurality opinion, acknowledging strong reservations about the existence of a union business privilege, refused to directly answer the question of whether one exists. It reasoned that even if it does exist, it belonged to Sgt. White, who waived any privilege that may exist. The plurality opinion further noted that the recognition of any privilege lies with this Court or the legislative branch, that this Court has not promulgated a rule creating the privilege, and that KRS Chapter 67C does not explicitly recognize a privilege. Thus, the Court of Appeals affirmed the circuit court.

A separate concurring opinion agreed with the reasoning and result of the plurality opinion but emphasized that the FOP did not have standing to assert the privilege. The separate opinion further emphasized that Sgt. White made a knowing and voluntary waiver of any privilege that may exist. The concurring opinion also opined that an intermediate appellate court was not authorized to adopt the broad reading of the relevant statutes that would be necessary to infer a union business privilege, as only the legislature and this Court have the authority to do so.

The dissenting opinion by contrast would have held that KRS Chapter 67C "implicitly creates a limited 'privilege' such that the FOP representative cannot be compelled to disclose the content of communications with union members about internal disciplinary proceedings to the employer." The dissent agreed that the privilege belongs to the union member, but noted that the Labor Cabinet did not make a finding that Sgt. White had validly waived the privilege, and thus, the dissent would have remanded to the Labor Cabinet for that determination. Although the dissent referred to it as the "union business privilege" for ease of reference, the dissent opined that the word "privilege" "imbues a meaning of consequence far more reaching than" what is really sought. The dissent asserted that what exists is actually a confidence, as the communications between an employee and his union representative regarding internal disciplinary proceedings within the context of KRS Chapter 67C are confidential and disclosure cannot be compelled by the employer.

The FOP then sought discretionary review by this Court, which we granted. To this Court, the FOP seemingly adopts the view of the Court of Appeals' dissent that what it has been calling a privilege is actually a confidence. Regardless, the FOP advocates to this Court the same bounds of protection that it advocated to the Court of Appeals. Louisville Metro and the Labor Cabinet argue to this Court consistently with their arguments to the lower tribunals.

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

II. STANDARD OF REVIEW

Generally, "our review of the decision of an administrative agency is highly deferential, and we reverse only if the decision was arbitrary, unsupported by substantial evidence, or otherwise erroneous as a matter of law." *Jefferson Cnty. Sheriff's Off. v. Kentucky Ret. Sys.*, 626 S.W.3d 554, 558 (Ky. 2021) (citations omitted). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 270 (Ky. 2018) (citation omitted). However, we review questions of law de novo, including the application and interpretation of statutes. *Jefferson Cnty. Sheriff's Off.*, 626 S.W.3d at 558 (citation omitted).

"[T]he cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009) (citation omitted); *Saxton v. Commonwealth*, 315 S.W.3d 293, 300 (Ky. 2010) ("Discerning and effectuating the legislative intent is the first and cardinal rule of statutory construction."). This fundamental rule is underscored by KRS 446.080(1), which states in relevant part, "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." The basic principles of statutory construction have been summarized as follows:

> In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. . . . We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. . . . We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. . . . Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts.

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

With these standards in mind, we review the issues presented to us in the case at bar.

III. ANALYSIS

At the center of this case is the function of the FOP as a labor organization for its police officer members. A labor organization in this context is "any chartered labor organization of any kind in which police officers participate and which exists for the primary purpose of dealing with consolidated local governments concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of employment." KRS 67C.400(2). Labor organizations such as the FOP have the exclusive "authority and the duty to bargain collectively" on behalf of their police officer members. KRS 67C.404. Collective bargaining consists of good faith negotiations regarding a variety of workplace concerns, including negotiating conditions of employment, wages, and hours. KRS 67C.406. They do this through representatives like Sgt. Mutchler who are elected to act on behalf of the labor organization and its members to a consolidated local government. See KRS 67C.402, 67C.404.

The legal question before this Court is whether Louisville Metro committed an unfair labor practice when it compelled Sgt. Mutchler to disclose the substance of his conversation with Sgt. White. Specifically, the FOP asks this Court to find that Louisville Metro violated KRS 67C.402 by violating the officers' right to "be protected in the exercise of[] the right of self-organization . . . free from interference, restraint, or coercion."

KRS 67C.402 broadly protects the ability of a police officer to work with their union representative on questions related to the conditions of their employment. Some negotiations are only possible through the representation of a union representative and the anonymity of the complainant. If, during internal investigations or negotiations, the metro government could compel a union representative to divulge sensitive information, then the power of the protection within KRS 67C.402 becomes illusory. Allowing Louisville Metro to compel information under threat of discipline will severely discourage other FOP members from candidly discussing their own problems with FOP presidents or representatives in the future.

We need look no further than the statute itself to determine that the legislature could not have intended for the protection to lack force or meaning as it relates to conditions of employment such as the disciplinary hearing at the center of this case. "Free from interference" certainly includes interference with an active disciplinary case—a "condition[] of employment"—for which Sgt. Mutchler was consulted. KRS 67C.402. To preserve the intent of the legislature to prevent interference with collective bargaining, we must acknowledge the protection of union communications inherent within the statutory scheme.

In outlining the boundaries of our protection, we find it instructive to look to similar protections in other jurisdictions. A version of the union business privilege was first considered by New York in *City of Newburgh v. Newman*, 421 N.Y.S.2d 673 (N.Y. App. Div. 1979). The facts of that case are quite similar to those in the one at bar. In *City of Newburgh*, a police officer contacted his union representative regarding a disciplinary matter. *Id.* at 674. Later, the city attempted to question the representative about communications with the officer at the center of the disciplinary matter. *Id.* at 674–75. New York had a law granting employees "the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder." *Id.* at 675 (citation omitted). Under that law, the state's Public Employment Relations Board held that it was unlawful to compel the union representative's communications with the officer. *Id.* On appeal, the Appellate Division affirmed. In doing so, the court recognized both the necessity and limits of what it called a union privilege:

> Any privilege established by the decision of the board is strictly limited to communications between a union member and an officer of the union, and operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty. The purpose is the protection of the right to fully participate in an employee organization, with the full benefits thereof and inquiries such as the one herein would seriously hamper such participation.

Id. at 676.

The reasoning behind New York's privilege is similar to those outlined in *Cook Paint & Varnish Co.*, 258 N.L.R.B. 1230 (1981). *Cook Paint* established a union business privilege in the context of collective bargaining and arbitration, reasoning that "[t]o allow Respondent here to compel the disclosure [of communications between an officer and a union representative] under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives." *Id.* at 1232. That protection applies only as to the employer, and only where the union is representing union member interests. *Id.*

While these cases are instructive, we must look to the law of the Commonwealth to correctly determine the nature of this protection in Kentucky. First, we must determine whether the protection at issue constitutes a privilege. A privilege is invoked to exclude relevant evidence. *Stidham v. Clark*, 74 S.W.3d 719, 725 (Ky. 2002). Privileges are exclusively within the power of the legislature to create, and they "apply at *all* stages of all actions, cases, and proceedings" of law. *Commonwealth, Cabinet for Health & Fam. Servs. v. Chauvin*, 316 S.W.3d 279, 284–86 (Ky. 2010) (emphasis added); KRE 1101(c). For that reason, the kind of protection over communications at issue between the FOP and Louisville Metro is clearly not a privilege. Rather than a privilege, the protection afforded by KRS 67C.402 is better understood as a *confidence*. It operates only against Louisville Metro, and only under circumstances covered by KRS 67C.402. Like the protection in *City of Newberg*, however, we hold that the confidentiality created by KRS 67C.402 is

> limited to communications between a union member and an officer of the union, and operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty.

City of Newburgh, 421 N.Y.S.2d at 676. The confidentiality does not and cannot apply to legal proceedings.

Because KRS 67C.402 creates a limited confidentiality for union representative communications with members, it cannot be unilaterally waived. Both the FOP's individual members and the FOP are entitled to confidentiality. The FOP is so entitled because of its function as a collective bargaining unit representing many individuals, and its sole purpose is to advocate for the best interests of the group. An individual member may choose to breach the confidence themselves, but they cannot waive it for the

organization. Thus, the FOP is entitled to its own protection of confidentiality. While Sgt. White can personally and voluntarily recount conversations in which he was involved, no waiver from him could be effectual to breach the FOP's protections over the same matter.

If local governments could strategically select one officer at a time and obtain waivers for confidential information sought from the FOP, then the function of the union is effectively diluted. This dilution is caused by the imbalance in negotiations created by one party having access to both sides' information, while the other party only has access to its own. The consequences of this dilution are borne by the FOP itself because it inhibits its ability to collectively bargain, which it has a legal duty to do under the statutes. KRS 67C.404. These consequences are all the more significant given that the FOP is, by law, the *exclusive* representative of its police officer members. *Id.* Without the FOP, police officers would have no ability to organize to collectively address problems in the workplace. Allowing for interference with this ability cannot be the intent of the legislature as it is in direct contradiction with KRS 67C.402.

The Cabinet found that Sgt. Mutchler was compelled to disclose the content of a conversation that occurred while he was acting in a representative capacity. A thorough review of the record reveals that these findings are supported by substantial evidence. Because Sgt. White could not have waived confidentiality for the FOP, and because the statute clearly requires a limited confidence in order to be effectual, Sgt. Mutchler should not have been compelled to disclose the substance of his communications with Sgt. White. In compelling him to do so, Louisville Metro unlawfully interfered with the right of the police officers to bargain collectively regarding conditions of employment under KRS 67C.402(1). Accordingly, Louisville Metro committed an unfair labor practice under KRS 67C.410.

IV. CONCLUSION

For the foregoing reasons, we reverse the decision below and remand to the Labor Cabinet to enter a cease and desist order pursuant to KRS 67C.410(2) in accordance with our Opinion.

All sitting. All concur.

CRIMINAL LAW

DRIVING UNDER THE INFLUENCE (DUI)

MANSLAUGHTER

IMPLIED CONSENT WARNING

VOLUNTARINESS OF BLOOD DRAW

SEARCH AND SEIZURE

***MIRANDA* WARNINGS**

JURY SELECTION

EXCUSE OF A JUROR FOR CAUSE

Defendant's vehicle crossed center line and collided with another vehicle — Driver of second vehicle was killed instantly — Passenger of second vehicle died shortly thereafter — Defendant was apparently unharmed — Troopers obtained blood sample from defendant — Blood test found 7-aminoclonazepam, methamphetamine, and amphetamine in defendant's system — Commonwealth believed that defendant was impaired as result of his use of methamphetamine — Defendant argued that collision was tragic accident due to his vision being diminished by combination of direct sunlight, bad eyeglasses, and ill-timed attempt to pull down his minivan's sun visor — Jury found defendant guilty of two counts of second-degree manslaughter, driving under the influence (DUI) of controlled substances, and being persistent felony offender first degree — Defendant appealed — AFFIRMED convictions and sentence — Defendant argued that police failed to give him *Miranda* warnings prior to questioning him at scene and had no probable cause to request blood draw — Sergeant was lead officer at scene — Sergeant explained Kentucky State Police (KSP) policy relating to fatal accidents to defendant — Sergeant then requested blood draw, to which defendant agreed — Defendant also agreed to brief interview prior to being transported to hospital — Sergeant reiterated to defendant that he was not under arrest and was not in custody — Sergeant described defendant as "very cooperative" and admitted that it was not obvious that defendant was intoxicated at scene — Detective interviewed defendant at scene — Detective placed defendant in passenger seat of unmarked official vehicle for interview — Detective sat in driver's seat, with sergeant standing near open passenger-side door — During interview, defendant admitted taking Wellbutrin, as well as other medications including Lortabs, Xanax, and Klonopin — Detective noted defendant's pupils were "small and pinpointed" and his eyes were droopy — Only medication defendant admitted taking on day of accident was muscle relaxer — Interview lasted approximately 9 minutes since KSP needed to take defendant to hospital for blood draw — Detective did not perform any field sobriety tests, but explained that KSP's policy in fatal accident is to request all involved drivers submit to blood draw — Trooper transported defendant to hospital — Trooper did not handcuff defendant before placing him in cruiser — At hospital, trooper read Kentucky's implied-consent warning to defendant, observed blood test, and drove defendant back to his home afterwards — Trial court found that defendant was not in custody for purposes of *Miranda* — Trial court found probable cause existed for blood draw since defendant had just been involved in major collision, was unsure of his role in that collision, had admitted to taking medications, and had pinpoint pupils — For purposes of *Miranda* warnings, person is "seized" only when, by means of physical force or show of authority, his freedom of movement is restrained — Under facts, defendant was not in custody — KRS 189A.103 does not cover all forms of consent, only implied consent — KRS 189A.105(2)(b) addresses situations where officers lack immediate suspicion of violation of DUI statutes — KRS 189A.105(2)(b) states that if incident involves motor vehicle accident in which there was fatality, investigating officer shall seek search warrant for blood testing unless testing has already been done by consent — Legislature did not intend to create requirement of probable cause whenever officer merely seeks express consent, as was sought in instant action — KSP's policy concerning fatal motor vehicle accidents adheres to legislative directive set forth in KRS 189A.105(2)(b) — Officers in instant action appropriately followed KSP policy in asking defendant for consent in immediate aftermath of fatal accident — Record supports finding that defendant voluntarily consented to blood draw — Trial court did not err in excusing juror for cause — Juror stated from outset that she would be sympathetic to defendant because her grandfather had been convicted of vehicular manslaughter in past, which occurred before juror was even born — Juror indicated that she thought she could overcome her biases, but ultimately reiterated her belief that her experience with her grandfather would unavoidably sway her judgment —

Thomas Simpson v. Com. (2021-SC-0344-MR); Muhlenberg Cir. Ct., Wiggins, J.; Opinion by Justice VanMeter, *affirming*, rendered 9/22/2022. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Thomas Simpson appeals as a matter of right[1] from the Muhlenberg Circuit Court judgment sentencing him to twenty-years' imprisonment for his convictions of manslaughter second degree (two counts), driving under the influence of controlled substances first offense, and persistent felony offender first degree. On appeal, Simpson raises three claims of error, none of which merit reversal. Accordingly, we affirm his judgment of conviction and sentence.

[1] Ky. Const. § 110(2)(b).

PLEASE SEE NOTE ON PAGE 69 CONCERNING FINALITY OF DECISIONS DIGESTED.

I. Facts and Procedural Background

On July 1, 2019, Karen Leach and Linda Embry were travelling along U.S. Route 431. The weather was clear. Simpson was driving in the opposite direction. Near South Carrolton, Simpson's vehicle crossed the center line and collided with the sedan driven by Leach. Leach was killed instantly. Embry was fatally injured and died shortly thereafter. Simpson was apparently unharmed.

As part of the investigation, Kentucky State Police ("KSP") troopers obtained a blood sample from Simpson. The results of the blood test found present in Simpson's blood 36 ng/mL of 7-aminoclonazepam, 99 ng/mL of methamphetamine, and 9.5 ng/mL of amphetamine.[2] Simpson was indicted by a Muhlenberg grand jury on two counts of wanton murder, and a single count of driving under the influence of drugs. By subsequent indictment, Simpson was charged with persistent felony offender first degree.

[2] Testimony adduced was that the drug tests were accurate to plus or minus 4 ng/mL.

The Commonwealth's theory of the case was that Simpson was impaired as a result of his use of methamphetamine. Simpson's defense was that the collision was a tragic accident due to his vision being diminished by a combination of direct sunlight, bad eyeglasses, and an ill-timed attempt to pull down his minivan's sun visor.

The Commonwealth called the KSP troopers who were present at the scene of the collision. Their testimony will be further described as necessary. The Commonwealth also called Courtney Carver and Dr. Gregory J. Davis to explain the process and meaning of the blood test. Carver, Forensic Scientist Specialist with the Central Forensic Laboratory, testified amphetamine is most likely a metabolite of methamphetamine when the latter drug is present in an individual's blood. Dr. Davis, Professor and Director of the University of Kentucky's Forensic Consultation Service, testified that the amount of methamphetamine present in Simpson's blood was nearly twice the limit of the therapeutic range. Dr. Davis further opined that individuals with high levels of methamphetamine in their bodies are at a higher risk of erratic driving and that the investigative evidence and toxicology laboratory evidence were consistent with Simpson "being under the influence of a combination of methamphetamine/amphetamine and 7-aminoclonazepam at the time of the collision." Dr. Davis reserved his opinion of whether Simpson was impaired at the time of the accident, drawing a distinction between "intoxication" and "impairment."[3]

[3] In Dr. Davis' opinion, any amount of drugs is equivalent to a person being intoxicated, but that does not equate to impairment.

After a three-day jury trial, Simpson was found guilty of two counts of manslaughter second degree,[4] of driving under the influence of controlled substances, and of persistent felony offender first degree. The jury recommended Simpson be sentenced to two consecutive terms of ten years, a recommendation that was adopted by the trial court in its judgment. Simpson now appeals from that judgment.

[4] Manslaughter in the second degree is a lesser offense of wanton murder.

I. Analysis

Simpson advances three arguments. First, the KSP failed to give Simpson *Miranda*[5] warnings prior to questioning him at the scene and had no probable cause to request a blood draw. Second, the trial court erred in excusing a prospective juror. And, finally, various errors occurred during the Commonwealth's examination of Detective Brandon McPherson. We address these arguments in turn.

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

A. Simpson's Blood Draw and Statements.

Simpson first claims the trial court erred in denying his motion to suppress the results of the blood draw and the statements he made to McPherson during their interview. Review of a suppression motion involves a two-step process. First, we review the trial court's factual findings, which are conclusive if supported by substantial evidence. *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011). Second, we conduct a de novo review of the trial court's conclusions of law. *Id.*; *see also Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006) ("When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.").

Prior to trial, Simpson moved to suppress any statements he made while at the accident scene as well as the blood draw. Before the trial court, Simpson made much the same argument now before us: that he was in custody when he spoke to the troopers, that he was never read his *Miranda* rights, and that officers lacked probable cause to subject him to a blood test. The Commonwealth countered that Simpson was not in custody for purposes of *Miranda*, and that the blood draw was properly obtained either by Simpson's consent or by probable cause under Kentucky's implied consent law.

The Commonwealth called Sergeant Nick Rice, Detective Brandon McPherson, and Trooper Matt Jordan. Rice was the lead officer at the collision scene. Rice explained KSP policy as it relates to fatal accidents.[6] Following the accident, Rice explained that policy to Simpson and requested a blood draw, to which Simpson agreed. Simpson further agreed to a brief interview prior to transport to the hospital. Rice reiterated to Simpson that he was not under arrest and not in custody. Rice described Simpson as "very cooperative" and admitted it was not obvious that Simpson was intoxicated at the scene.

[6] At the suppression hearing, Simpson introduced Kentucky State Police General Order OM-E-1, addressing Traffic Collision Investigations. Pertinent to this case is Section F. Requests for Alcohol/Drug Testing in Fatalities/Felony Charges:

> 1. When a collision involves a fatality or there exists the possibility of a driver being charged with a felony as a result of the collision, the investigating officer shall request alcohol/drug testing of all involved drivers.
>
> a. If an operator is deceased, the investigating officer shall make the request known to the coroner before removal of the body from the scene, as well as requesting a full autopsy be performed.
>
> b. If the investigating officer suspects that any operator is under the influence of any illegal substance and the operator refuses the request of blood or urine testing, the officer shall immediately petition the court for a search warrant.

At Rice's direction, McPherson interviewed Simpson, placing him in the passenger seat of an unmarked official vehicle for that purpose. McPherson sat in the driver's seat, with Rice standing near the open passenger-side door. During the interview, Simpson admitted taking Wellbutrin, a psychological medication, as well as other medications including Lortabs, Xanax and Klonopin. McPherson noted Simpson's pupils were "small and pinpointed" and his eyes were droopy. The only medication Simpson admitted to taking the day of the accident was a muscle relaxer. The interview with Simpson was brief—lasting approximately nine minutes—as the KSP needed to take Simpson to the hospital for the blood draw. McPherson did not perform any field sobriety tests on Simpson but explained that KSP's policy in a fatal accident is to request all involved drivers to submit to a blood draw.

Trooper Jordan testified that he transported Simpson to the hospital for the blood draw. Jordan did not handcuff Simpson before placing him in the cruiser, as was procedure for individuals under arrest. At the hospital, Jordan read Kentucky's implied-consent warning to Simpson, observed the blood test, and drove Simpson back to his home afterwards.

Based on the testimony of the officers, the trial court overruled Simpson's motion, finding that Simpson was not in custody for purposes of *Miranda* and determining that the question of the blood draw's legality turned on the existence of probable cause. In finding the existence of probable cause, the court pointed to the facts that Simpson had just been involved in a major collision, was unsure of his role in that collision, had admitted to taking some medications, and had pinpoint pupils. All these factors, in the trial court's view, supported a finding of probable cause. The trial court accordingly denied Simpson's motion.

1. Custodial Interrogation. As to whether Simpson was in custody such that he needed to be provided with *Miranda* warnings prior to his interview, "the question of 'custody' is reviewed de novo." *Peacher v. Commonwealth*, 391 S.W.3d 821, 846 (Ky. 2013) (citing *Alkabala–Sanchez v. Commonwealth*, 255 S.W.3d 916, 920 (Ky. 2008)).

The Supreme Court "adhere[s] to the view that a person is "seized" only when, by means of physical

force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *United States v. Mendenhall*, 446 U.S. 544, 553, (1980).

> Relevant circumstances include the place, time, and duration of the questioning; the questioning's tenor, whether cordial and neutral or harsh and accusatory; the individual's statements; the presence or absence of physical restraints; whether there was a threatening presence of several officers and a display of weapons or physical force; and the extent to which the questioner sought the individual's cooperation or otherwise informed him that he was not under arrest and was free to leave.

Peacher, 391 S.W.3d at 846.

We agree with the trial court's conclusion that Simpson was not in custody during his interview with McPherson. The interview was brief, only about nine minutes long, and consisted of McPherson asking Simpson general questions regarding where he lived, what he thought happened, and what medications he was on. The interview occurred with McPherson in the driver's seat of an unmarked SUV, Rice near the open passenger door, and Simpson unrestrained in the passenger seat. McPherson reiterated to Simpson prior to the interview that he was not under arrest nor was he being detained. Only when "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave" can they be said to have been in custody. *Howes v. Fields*, 565 U.S. 499, 509 (2012). Here, the troopers made clear that Simpson was free to leave at any time and did not otherwise coerce him into remaining by their actions.

Simpson argues that Rice wanted to gather information through the interview about Simpson's actions during the wreck. While this characterization is undoubtedly true, the question "is not whether [Simpson] was interrogated[.] The question, rather, is whether he was in custody at the time. *Miranda* does not forbid non-custodial interrogation." *Peacher*, 391 S.W.3d at 847 (citing *Stansbury v. California*, 511 U.S. 318 (1994)). The fact that the interview occurred in McPherson's official vehicle is similarly not dipositive. *See Oregon v. Mathiason*, 429 U.S. 492 (1977) (*Miranda* warning not required simply because suspect was in station house); *Peacher*, 391 S.W.3d at 848 (interview not custodial only because suspect did not initiate interview and it occurred in the police station); *Cecil v. Commonwealth*, 297 S.W.3d 12, 15–16 (Ky. 2009) (suspect not in custody at police station where he appeared voluntarily, was told he could leave, and was not under arrest); *Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008) (suspect not in custody when transported in back of cruiser without handcuffs and interviewed at station house where he was otherwise free to come and go).

Here, a brief interview transpired in which Simpson was not threatened either explicitly or implicitly, was unrestrained, and told on multiple occasions that he was neither under arrest nor being detained. Accordingly, Simpson had not been seized such that troopers were required to read *Miranda* rights prior to engaging in the interview. The trial court was correct in declining to suppress Simpson's statements.

2. Blood draw. As to whether suppression of the blood test was required in this instance, "the 'principal components' a reviewing court must examine are 'the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.'" *Commonwealth v. Jones*, 217 S.W.3d 190, 196 (Ky. 2006) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). The probable cause standard, however, is incapable of strict definition, and "is a flexible, common-sense standard." *Williams v. Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004). Furthermore, probable cause "deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (internal quotation marks and citations omitted).

Simpson argues that KSP lacked the requisite probable cause to request Simpson submit to a blood draw because "KRS[7] 189A.103(1) requires an officer to have reasonable grounds the driver violated KRS 189A.010 before he can seek a blood sample from the driver." Simpson contends that reasonable grounds for the draw needed to exist at the time Rice requested Simpson submit to the draw.

[7] Kentucky Revised Statutes.

KRS 189A.103(1) states that a person

> who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth . . . has given his or her consent to one (1) or more tests of his or her blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which may impair one's driving ability, if an officer has reasonable grounds to believe that a violation of KRS 189A.010(1) or 189.520(1) has occurred. . . ."[8]

Simpson appears to believe that this provision means an officer cannot approach a suspect and request voluntary consent to a blood draw unless the officer believes a violation has occurred. In support, Simpson cites to *Helton v. Commonwealth*, 299 S.W.3d 555 (Ky. 2009).[9]

[8] In *Birchfield v. North Dakota*, 579 U.S. 438, 474 (2016), the Supreme Court held that warrantless blood tests incident to arrest for drunk driving are not permitted under the Fourth Amendment. In *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), we applied its holding to issues arising under KRS Chapter 189A.

[9] We address Simpson's arguments raised under *Helton*, but following *Birchfield* and *McCarthy*, *supra* n. 8, we conclude that the result in *Helton*, remand to the trial court, would not suffice since a warrant would have been required for the defendant's blood draw. That result does not follow in this case, because as noted *infra*, the KSP pursuant to policy properly requested Simpson submit to a blood draw following a fatal accident, and consent remains a valid exception to the warrant requirement.

In *Helton*, the intoxicated driver drove her van off the road causing the deaths of four people, her passengers, after the driver struck a tree. After the accident, while the driver was unconscious in the hospital, sheriff's deputies visited her and took a blood sample which showed a blood alcohol content of 0.16%. The trial court denied the driver's suppression motion, finding statutory consent under KRS 189A.103. We reversed the ruling of the trial court based on "the interplay between the consent provision and the possibility of a refusal to submit to testing by a suspect." *Helton*, 299 S.W.3d at 558. While we acknowledged Helton had impliedly consented to a blood draw pursuant to KRS 189A.103, we held the trial court failed to engage sufficiently in the probable cause analysis necessary to satisfy the statute's "reasonable grounds" requirements and overcome the Fourth Amendment's prohibition on unreasonable search and seizure. *Id.* at 564.

Helton, however, simply does not stand for Simpson's proposition that probable cause must exist before a blood draw is requested of a driver. We read the opinion more narrowly since procedurally the *Helton* trial court failed to make findings regarding probable cause so as to bring the blood draw within KRS 189A.103. 299 S.W.3d at 564.

Support for this can be further found in the statutory scheme. KRS 189A.103 does not cover all forms of consent, only *implied* consent. KRS 189A.105(2)(b) addresses situations when officers lack immediate suspicion of a violation of the DUI statutes and explicitly states, "if the incident involves a motor vehicle accident in which there was a fatality, the investigating peace officer shall seek such a search warrant for blood testing **unless the testing has already been done by consent**." (Emphasis added). Clearly the legislature did not intend to create a requirement of probable cause whenever an officer merely seeks *express* consent, as was sought with Simpson. KSP policy, as set forth in its General Order OM-E-1, Section F, thus adheres to the legislative directive as set forth in KRS 189A.105(2)(b). The KSP officers appropriately followed that policy in asking Simpson for consent in the immediate aftermath of a fatal accident.

The Commonwealth argues that the record also supports a finding that Simpson voluntarily consented to the blood draw. The trial court's suppression ruling was limited to the argument Simpson presents to this Court. While the Commonwealth invites this Court to address the voluntariness of Simpson's consent as another basis to affirm the trial court, that issue was not raised by Simpson and is viewed as conceded. As Simpson states in his reply brief, he relies on the issue of whether probable cause existed for police to ask him for a blood test.

B. Excusing Juror L.M.

Simpson next argues that the trial court erred in excusing juror L.M. for cause. "[W]hether to excuse a juror for cause rests upon the sound discretion of the trial court and on appellate review, we will not reverse the trial court's determination 'unless the action of the trial court is an abuse of discretion or

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is clearly erroneous.'" *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 192 (Ky. 2017) (quoting *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013)).

The right to "an impartial jury is protected by Section 11 of the Kentucky Constitution, as well as the Sixth and Fourteenth Amendments to the [United States] Constitution." *Fugett v. Commonwealth*, 250 S.W.3d 604, 612 (Ky. 2008). The decision to excuse a juror for cause shall be made when the trial court has "reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence[.]" RCr[10] 9.36(1); *Sturgeon*, 521 S.W.3d at 192. That determination, however, "is based on the totality of the circumstances, [and] not on a response to any one question." *Fugett*, 250 S.W.3d at 613. We have in the past cautioned judges that in the event of uncertainty as to "whether a prospective juror should be stricken for cause, the prospective juror should be stricken." *Ordway*, 391 S.W.3d at 780.

[10] Kentucky Rules of Criminal Procedure.

The trial judge struck juror L.M. after the following colloquy sparked concerns about her ability to be impartial:

L.M.: My grandfather was convicted of vehicular manslaughter. That was several years ago, but I do remember that and hearing that so I'm a little worried that I may be just slightly impartial[11] to the defendant in that case.

Judge Wiggins: I'm sorry, you-

L.M.: I'm just a little concerned that I may be slightly impartial just with that case, just with my family history and just knowing that.

Judge: Mr. Adams, do you want to question her any about this?

Prosecutor: Ma'am, you said that you're gonna be impartial to the Defendant, does that mean that you-

L.M.: Not necessarily but I just would have concerns.

Prosecutor: Would it be difficult for you to hear this case?

L.M.: I believe it may be, yes.

Prosecutor: Let me ask you this: I take it from what you said, but you would be more sympathetic to the Defendant?

L.M.: Right.

Prosecutor: And more likely to find him not guilty? Even if I showed you everything I'd need to show you'd be more likely to find him guilty of a lesser charge than murder?

L.M.: Right, the second, just a lesser charge.

Prosecutor: And that's because of your-

L.M.: Yes, just for that sympathy.

Prosecutor: And how long ago was that?

L.M.: I wasn't even alive. It was when he was younger and I've only heard stories of it and the situation so I'm not sure-

Prosecutor: But obviously it has had some bearing and effect on you and your life.

L.M.: Right.

Prosecutor: Did he go to prison for that?

L.M.: Yes, he did.

Prosecutor: Was he outside of your life while in there?

L.M.: Right.

Prosecutor: Your honor, I don't have any further questions.

Judge: Mr. Sherman, do you?

Defense: Yes, briefly. Do you think that if the court were to instruct you on the law and you were to sit on the jury and see the facts that you could enter judgment either for or against the Defendant based on the facts and the law only?

L.M.: Yes, just with the facts and the law, I could.

Defense: Could you put aside your biases and the fact that your grandfather was convicted and sit and make those decisions? I know it would be hard for you.

L.M.: It would be.

Defense: Could you do it? If instructed to do so, could you do it?

L.M.: Yes, I think I could, but I do to an extent think that personal judgment judges all of us.

Judge: I'm sorry?

L.M.: I do think that to an extent that personal experiences kind of lead all of us to a thing. I mean, of course I would try my best, but [trails off].

The trial court elected to strike L.M. "out of an abundance of caution" based upon her experience with her grandfather.

[11] Context suggests juror L.M. meant "partial" as opposed to "impartial."

Simpson argues L.M. was improperly excused and that she had shown through her responses to defense counsel's questions that she could put aside her biases and decide the case based upon the law and the facts. However, given the exchange between counsel and L.M., the trial judge did not err in excusing L.M.

L.M.'s hesitancy to approach the trial with an open mind as to possible verdicts was apparent from her statements. She stated clearly that she would be sympathetic to Simpson and that, from the outset, would be more inclined to find for a lesser charge. Defense counsel's attempts at rehabilitation failed to overcome these expressions. "[A] juror might say [s]he can be fair, but disprove that statement by subsequent comments or demeanor so substantially at odds [with her statement of fairness]." *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). Here, L.M. indicated she thought she could overcome her biases, but ultimately reiterated her belief that her experience with her grandfather would unavoidably sway her judgment. For these reasons, we find the decision of the trial judge to excuse L.M. for cause was not error.

C. Errors during Commonwealth's Examination of Det. McPherson.

1. Prosecutor's question describing victims as "murdered." Simpson claims the phrasing of a question asked during direct examination of McPherson amounted to prosecutorial misconduct not cured by the trial court's admonition. During the Commonwealth's questioning of McPherson, the following exchange occurred with regard to Simpson's behavior during his interview with McPherson:

Prosecutor: Did the Defendant exhibit anything normal that you would expect in this case?

McPherson: Not at all.

Prosecutor: In fact, did he seem to be phased by the fact that he just murdered two people?

McPherson: No.

Defense counsel objected as McPherson was responding and the trial judge immediately sustained the objection and called counsel to the bench. At the bench, defense counsel moved for a mistrial. The court found the question to be accusing, conclusory, and inappropriate. However, the court declined to declare a mistrial and instead admonished the jury to disregard the question and not consider it in deliberations. Simpson asserts the trial court erred in not granting a mistrial.

"On review, we note 'the decision to grant a mistrial is within the sound discretion of the trial court, and such a ruling will not be disturbed absent an abuse of that discretion.'" *Major v. Commonwealth*, 275 S.W.3d 706, 716 (Ky. 2009) (quoting *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky.2004)). "[T]he trial court, in its discretion, may choose to admonish the jury instead of granting a mistrial; this is so because an admonition is presumed to cure a defect in testimony." *Id.* (citing *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky.1993)).

> This presumption is only overcome 1) when an overwhelming probability exists that the jury is incapable of following the admonition and a strong likelihood exists that the impermissible evidence would be devastating to the defendant; or 2) when the question was not premised on a factual basis and was inflammatory or highly prejudicial.

Id.

The trial court did not abuse its discretion in declining to grant a mistrial. The sole issue upon which Simpson sought a mistrial was the prosecutor's use of the word "murdered" in his question. Certainly, the question was impermissible, and whether the victims were "murdered" or their

deaths due to some lesser degree of fault was a question within the sole province of the jury. *Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky. 1998). However, the court's subsequent admonition was sufficient to dispel whatever taint the question created.

The presumption that the admonition was curative cannot be overcome by application of either of the possibilities described in *Major*. The question may well have been prejudicial to the defendant, but not significantly more prejudicial than any of the prosecutor's other questions during the trial. Indeed, the jury could hardly have been inflamed or Simpson highly prejudiced by a question that suggested Simpson had murdered Leach and Embry while the jury sat in judgment of Simpson upon two counts of murder. Given the context of the question, we do not see an "overwhelming probability" the jury could not follow the admonition and we do not believe the question sufficiently prejudicial to warrant the relief Simpson seeks. Furthermore, we note the jury, in fact, found Simpson guilty not of wanton murder but instead the lesser offense of manslaughter second degree. Accordingly, the trial court did not err in denying Simpson's motion for a mistrial.

2. Mischaracterization of the interview. Simpson next argues that McPherson's characterization of the interview at the scene was so improper that it was highly prejudicial to his defense. Because defense counsel did not object to McPherson's responses at trial, Simpson requests palpable error review under RCr 10.26.[12] To establish palpable error, an appellant must show "the probability of a different result or error so fundamental as to threaten his entitlement to due process of law." *Brooks v. Commonwealth*, 217 S.W.3d 219, 225 (Ky. 2007) (citation omitted). Such an error "must be 'easily perceptible, plain, obvious and readily noticeable.'" *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (citing Black's Law Dictionary (6th ed. 1995)). "It should be so egregious that it jumps off the page . . . and cries out for relief." *Chavies v. Commonwealth*, 374 S.W.3d 313, 323 (Ky. 2012).

[12] RCr 10.26 states

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

During the trial, the Commonwealth played McPherson's interview with Simpson for the jury. Immediately following, the prosecutor asked McPherson to characterize Simpson's behavior during their interaction:

> **Prosecutor**: How would you describe the Defendant's speech in that video as pressured, rushed, like you spoke of earlier?
>
> **McPherson**: Yes, I would even say excited and, again, erratic. He was kind of everywhere with it, couldn't put together his thoughts with his words.
>
> **Prosecutor**: Is that consistent with—in your training and experience involving narcotics and controlled substances such as methamphetamine—are those actions of his speech, are those indicators that he was impaired on controlled substances like methamphetamine?
>
> **McPherson**: Yes. His actions and speech, and again with my experience in the seventeen years of doing this, when you come across one who is high on methamphetamine or a stimulant or an upper they cannot quit talking.
>
> **Prosecutor**: Could the Defendant quit talking that day?
>
> **McPherson**: No, I was even telling him "you're free to go" and he kept talking and making jokes and just kept going with it. As we all heard.
>
> **Prosecutor**: How would you describe his demeanor?
>
> **McPherson**: [Simpson] didn't care. He was joking and just wasn't bothered. Excited at the same time. He just wasn't bothered at all.
>
> **Prosecutor**: All over the place?
>
> **McPherson**: Yeah, everywhere.
>
> **Prosecutor**: Telling you about his personal life, family history?
>
> **McPherson**: Correct. That I didn't ask about.

Upon review of McPherson's comments, we find no error, let alone an error so fundamental as to threaten Simpson's entitlement to due process of law. KRE[13] 702 permits a witness not testifying as an expert to opine on matters 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." Here, McPherson provided the jury with testimony about the interview that was based on his perception of Simpson's behavior during that interview, was helpful to understanding how troopers perceived Simpson on the day of the collision and was not based on specialized knowledge. In short, McPherson's testimony fully comported with KRE 702.

[13] Kentucky Rule of Evidence.

Insofar as Simpson argues that because the case turned on his state of intoxication and McPherson's characterization made it seem more likely that Simpson was intoxicated, we note such testimony is not improper.

> Kentucky law permits witnesses to give opinion testimony regarding a person's apparent intoxication; the apparent age of a person; and a person's apparent mental or emotional state. The principle connecting each of these cases is that a witness may testify as to a conclusion they drew about a person's behavior from their personal observation of certain facts.

Carson v. Commonwealth, 621 S.W.3d 443, 446-47 (Ky. 2021). *See also Burton v. Commonwealth*, 300 S.W.3d 126, 140 (Ky. 2009) (holding that "[p]olice officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct and appearance, and also to give an opinion on the defendant's state of impairment based upon those observations.").

Additionally, Simpson's trial counsel cross-examined McPherson as to other possible causes of Simpson's behavior: other psychological disorders, such as ADHD; recent traumatic events, in this case a car collision and an altercation with members of one victim's family; general nervousness in speaking to police officers; and different people reacting differently to certain circumstances. Whatever truth was to be found in the interview was "left to the rigorous exchange of cross examination, and ultimately the collective decision of the jurors." *Brown v. Commonwealth*, 226 S.W.3d 74, 87 (Ky. 2007) (Cunningham, J., concurring).

McPherson's testimony was undoubtedly prejudicial to Simpson, in the same sense that Simpson was prejudiced by most of the actions of the Commonwealth. *See Ware v. Commonwealth*, 537 S.W.3d 174, 177 (Ky. 1976) ("A defendant is prejudiced, of course, by being tried at all.") (overruled on other grounds by *Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016)). However, this prejudice is not of the sort that mandates reversal had it been preserved and reversal certainly is not warranted under palpable error review. McPherson was permitted to testify as to his perceptions of Simpson during the interview and Simpson contested those perception on cross-examination. If those perceptions were harmful to Simpson then that harm is simply the result of the adversarial system working as designed.

3. Describing Simpson's behavior as atypical. Finally, Simpson claims that palpable error occurred when McPherson told the jury that Simpson's behavior after the collision was atypical of others who had been involved in fatal collisions. As with the prior claim of error, this testimony was not objected to during the trial. Accordingly, Simpson seeks review under RCr 10.26. As noted above, "[o]n appellate review, our focus is on whether 'the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.'" *Huddleston v. Commonwealth*, 542 S.W.3d 237, 245 (Ky. 2018) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006)).

During his testimony on direct examination, McPherson was asked about his prior experience working vehicle collisions:

> **Prosecutor**: Have you worked collisions involving death or injury before?
>
> **McPherson**: Yes.
>
> **Prosecutor**: [Referring to Simpson's behavior during the interview:] Is that the typical reaction of a driver after they've just been in a motor vehicle collision that resulted in serious injuries, much less death?
>
> **McPherson**: Not typical at all. Typically, they're usually concerned about the other driver or if [the other driver] is deceased, they're mournful or, just more grieving than they are excited and cutting jokes up with me.

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Prosecutor: Did the Defendant exhibit anything normal that you would expect in this case?

McPherson: Not at all.[14]

[14] The prosecutor then asked the question describing the victims as "murdered" that has already been discussed.

Simpson argues that this line of questioning runs afoul of the general rule that prohibits questioning as to the habits of a class of individuals of which the defendant belongs. *Ordway*, 391 S.W.3d at 776-77; *Miller v. Commonwealth*, 77 S.W.3d 566, 572 (Ky, 2002); *Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky. 1994). In *Johnson*, we stated the rationale that "[t]o permit the Commonwealth to cross examine about the habit of a class of individuals [to show] how one unique individual in that class might have acted on a given occasion would invite the jury to arbitrarily hold an individual responsible based on his membership in the class." 885 S.W.2d at 953. In *Orway*, we stated "[w]e do not recognize as legitimate subjects of expert opinion, 'how guilty people typically behave' or 'how innocent people do not act.'" 391 S.W.3d at 776-77. By comparing Simpson's behavior to the behavior of others involved in fatal collisions, Simpson believes the Commonwealth has violated this principle.

If we were reversing this case on other grounds, we would admonish the trial court on retrial that these few questions were irrelevant under *Ordway*, *Miller* and *Johnson*. Simpson, however, has conceded non-preservation and requested palpable error review. In other words, was this defect so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process? We hold that it does not. Here, the Commonwealth's questioning and McPherson's answers were not the sole proof of intoxication. The case against Simpson involved much more than these short questions and answers, occurring in a three-day trial. Specifically, the drug tests confirmed Simpson's ingestion of methamphetamine and his driving under the influence of controlled substances, which were present at more than therapeutic levels. Thus, and while the comparison of Simpson's behavior to others involved in fatal wrecks was not properly admissible, we hold that it does not rise to the level of palpable error resulting in manifest injustice in this case.

III. Conclusion

For the foregoing reasons, the judgment of the Muhlenberg Circuit Court is hereby affirmed.

All sitting. All concur.

SUPREME COURT RULINGS

DEPUBLISHING OPINIONS OF

THE COURT OF APPEALS

Hunt v. Com., 69 K.L.S. 4, p. 7; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/14/2022.

Kentucky Ret. Sys. v. Wagner, 69 K.L.S. 5, p. 50; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/14/2022.

Moreland v. Com., 69 K.L.S. 4, p. 24; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/14/2022.

Windus v. Buffalo Const., Inc., 69 K.L.S. 5, p. 52; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/14/2022.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

AUGUST 18, 2022 AT 10:00 A.M.

AND SEPTEMBER 22, 2022 AT 10:00 A.M.

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

PETITIONS:

Primal Vantage Co., Inc. v. O'Bryan, 69 K.L.S. 8, p. 26; Petition for rehearing was filed on 9/8/2022.

Violett v. Grise, 69 K.L.S. 8, p. 34; Petition for rehearing was filed on 9/14/2022.

MOTIONS for extension of time to file petitions: None.

RULINGS on petitions previously filed:

Ward v. Sec. of State, ex rel. Adams, 69 K.L.S. 4, p. 75; Petition for rehearing was denied on 9/22/2022. Finality endorsement was issued on 9/22/2022.

FINALITY ENDORSEMENTS:

During the period from August 18, 2022, through September 22, 2022, the following finality endorsements were issued on opinions which were designated to be published. The following opinions are final and may be cited as authority in all the courts of the Commonwealth of Kentucky. CR 76.30.

Com., Cabinet for Health and Family Servs. v. L.G., 69 K.L.S. 8, p. 2, on 9/8/2022.

Jerome III v. Com., 69 K.L.S. 8, p. 7, on 9/8/2022.

KBA v. Denton, 69 K.L.S. 8, p 11, on 8/30/2022.

KBA v. Morgan, 69 K.L.S. 8, p. 12, on 8/30/2022.

KBA v. Weiner, 69 K.L.S 8, p. 14, on 8/30/2022.

Martin v. Wallace, 69 K.L.S. 8, p. 15, on 8/18/2022.

Mouanda v. Jani-King Int'l, 69 K.L.S. 8, p. 17, on 9/8/2022.

Price v. KBA, 69 K.L.S. 8, p. 23, on 8/30/2022.

Roach II v. KBA, 69 K.L.S. 8, p. 33, on 8/30/2022.

Ward v. Sec. of State, ex rel. Adams, 69 K.L.S. 4, p. 75; Petition for rehearing was denied on 9/22/2022. Finality endorsement was issued on 9/22/2022.

Zepeda v. Central Motors, Inc., 69 K.L.S. 8, p. 36, on 9/8/2022.

DISCRETIONARY REVIEW:

MOTIONS granted:

Moreland v. Com., 69 K.L.S. 4, p. 24; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/14/2022.

MOTIONS denied:

Bennche, Inc. v. Silver Creek Transport, LLC, 69 K.L.S. 5, p. 47; Motion for discretionary review was denied on 9/14/2022.

Cunningham v. Kroger Ltd. P'ship I, 69 K.L.S. 4, p. 3; Motion for discretionary review was denied on 9/14/2022.

Hunt v. Com., 69 K.L.S. 4, p. 7; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/14/2022.

Kentucky Ret. Sys. v. Wagner, 69 K.L.S. 5, p. 50; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/14/2022.

Lewis v. Fulkerson, 69 K.L.S. 5, p. 17; Motion for discretionary review was denied on 9/14/2022.

Thomas v. Allen, 69 K.L.S. 5, p. 31; Motion for discretionary review was denied on 9/14/2022.

Windus v. Buffalo Const., Inc., 69 K.L.S. 5, p. 52; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/14/2022.

MOTIONS filed:

Iola Capital v. Public Service Comm'n of Kentucky, 69 K.L.S. 7, p. 40, on 8/16/2022.

Killary v. Thompson, 69 K.L.S. 7, p. 14, on 8/25/2022.

Roark v. Com., 69 K.L.S. 7, p. 2, on 9/7/2022.

Tipton v. St. Joseph Health Systems, Inc., 69 K.L.S. 7, p. 38, on 8/15/2022.

MOTIONS for extension of time to file motions for discretionary review: None.

OTHER: None.

WEST Official Cites on Supreme Court opinions upon which Finality Endorsements have been issued: None.

—END OF SUPREME COURT—

FINALITY OF DECISIONS

When using K.L.S. with respect to decisions which are not yet final, care should be taken to give the case status, as, for example, hypothetically, "*Doe v. Roe*, Ky., 27 K.L.S. 54, p. 14 (11/3/80), petition for rehearing pending." Cases not yet final shall not be cited as authority in any courts of the Commonwealth of Kentucky. As to finality in civil and criminal matters *see* Civil Rules 76.20, 76.30, 76.32, 76.38, 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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PN 003-385

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Kentucky Law Summary
5105 Rushing Water Road
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502-475-1904
www.kentuckylawsummary.com

The *Kentucky Law Summary* (PN-003-385), published monthly by the Summary Corporation, 5105 Rushing Water Road, Louisville, KY 40241; Patricia K. Wagner, Owner and President; Susan Wagner Hynes, Publisher; and Susan Wagner Hynes, Editor. Periodical postage paid at Louisville, Ky. Annual subscription rate $320.00 plus sales tax.

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