PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MARCH 1, 2024 to MARCH 31, 2024

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I. CRIMINAL

A. ***WALKER v. COMMONWEALTH, 2022-CA-0368-MR (Ky. App. 2024)***

2022-CA-0368-MR 3/01/2024 2024 WL 874190
Opinion by LAMBERT, JUDGE; CALDWELL, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appeal from the denial of an application for expungement pursuant to KRS 431.073(1)(c) following a full pardon. This Court upheld the Adair Circuit Court's determination that the decision whether to grant an application was left to its sound discretion due to the General Assembly's use of the permissive word "may" in the statute. And the Court upheld the circuit court's consideration of the factors and balancing test set forth in KRS 431.073(4) in exercising its discretion, although that section is only applicable to applications filed under KRS 431.073(1)(d). There is nothing in the statute that prohibits the use of those factors in considering applications filed under (1)(a) – (c). Finally, this Court held that the circuit court did not abuse its discretion in denying the application based upon the welfare and safety of the public and the interest of justice, as Walker had been convicted of murdering his parents.

B. ***ANGLEA WYNN WORKMAN v. COMMONWEALTH OF KENTUCKY, 2022-CA-1114-MR (Ky. App. 2024)***

2022-CA-1114-MR 3/22/2024 2024 WL 1221256
Opinion by JONES, A., JUDGE; ACREE, J. (CONCURS) AND GOODWINE, J. (CONCURS)

In a direct appeal from a judgment and conviction following Appellant's jury trial, the Court of Appeals affirmed. The trial court sentenced Appellant to a concurrent term of five years' imprisonment after finding her guilty of operating a motor vehicle under the influence of alcohol (DUI) (fourth or subsequent offense with an aggravator) and driving on a DUI-suspended license (first offense). Appellant refused a breath test requested

by the arresting law enforcement officer, but she agreed to a urine screen conducted by the jailer when she was booked into the detention center.

At her trial, the trial court ruled that any testimony about the urine screen was disallowed, as it was not probative as to whether she refused the requested breath test pursuant to KRS 189A. Despite the trial court's ruling, Appellant repeatedly referred to the disallowed subject of the urine screen while on the stand. The Commonwealth moved for a ruling that Appellant had "opened the door" to questioning the Appellant about breath tests she had refused on previous occasions when she was arrested for DUI. The trial court agreed. Appellant then made a number of damaging admissions during the Commonwealth's cross-examination.

On appeal, Appellant argued that a recent Supreme Court case, *Hemphill v. New York*, 595 U.S. 140, 142 S. Ct. 681, 211 L. Ed. 2d 534 (2022), "cast serious doubt on the continued viability of the 'opening of the door' doctrine[.]" She also asserted that the trial court abused discretion when it denied her motion for mistrial following the trial court's ruling which allowed the Commonwealth to question her about her previous DUI experiences.

The Court of Appeals rejected Appellant's arguments. *Hemphill*'s ruling was grounded in a violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. Here, Workman was directly questioned on cross-examination, and so the Confrontation Clause was not implicated. The Court of Appeals also held that the trial court did not abuse its discretion when it denied Workman's motion for mistrial. "Opening the door," *i.e.*, the doctrine of curative admissibility, applies "when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof." *Fairley v. Commonwealth*, 527 S.W.3d 792, 802 (Ky. 2017) (quoting *Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009)). The trial court employed curative admissibility in response to Appellant's own improper conduct, and a mistrial was not warranted in this case.

C. ***H.M. v. COMMONWEALTH OF KENTUCKY, 2022-CA-1016/2022-CA-1195/2022-CA-1196 (Ky. App. 2024)***

2022-CA-1016-MR
2022-CA-1195-MR
2022-CA-1196-MR

3/15/2024

2024 WL 1122572

Opinion by LAMBERT, JUDGE; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

These consolidated appeals from an order of involuntary commitment issued pursuant to KRS Chapter 202C presented numerous matters of first impression. The Court explained that KRS 202C requires a two-step process, a guilt hearing followed by a

commitment hearing, but an appeal may be taken only from a final order of commitment issued after the commitment hearing. The Court held that a KRS 202C respondent may raise an insanity defense at the guilt hearing but affirmed the trial court's rejection of that defense here because it was supported by substantial evidence. As to the commitment phase, the Court held that the Commonwealth is not required to show that a respondent has previously been convicted of criminal offenses to satisfy KRS 202C.050(1)(c), which requires proof beyond a reasonable doubt that a respondent "has a demonstrated history of criminal behavior that has endangered or caused injury to others . . . ." The Court also rejected the Commonwealth's argument that a finding of guilt in the first stage of the KRS 202C proceedings is sufficient to satisfy KRS 202C.050(1)(c). Instead, the Commonwealth must present evidence that the respondent engaged in criminal misconduct (which may or may not have resulted in criminal convictions) which injured or endangered others beyond the conduct which led to the filing of charges from which the KRS 202C petition sprang. Finally, the Court rejected an argument that it is improper to house a person ordered committed under KRS 202C in the Kentucky Correctional Psychiatric Center instead of a regional mental health facility.

D. RICHARD GIST v. COMMONWEALTH OF KENTUCKY, 2022-CA-1363-MR (Ky. App. 2024)

2022-CA-1363-MR 3/15/2024 2024 WL 1123466
Opinion by MCNEILL, CHRIS; LAMBERT, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Richard Gist ("Gist") was convicted of fourth-degree assault, violation of a protective order, and first-degree PFO and was sentenced to 18 years' imprisonment. On appeal, Gist argued that: (1) the trial court erred in admitting evidence of prior domestic violence; (2) the court's fourth-degree assault instruction violated his right to a unanimous verdict; and (3) the trial court violated the "rule of completeness" when it did not play a portion of a phone call between Gist and an unidentified woman. As to his first argument, this Court determined that any evidence entered at trial dealing with previous domestic violence was, at least, harmless. Gist's conviction for fourth-degree assault was not substantially influenced by any error in allowing testimony from Gist's previous partner. The only testimony was about previous bouts of aggression from Gist and that his partner had been in a previous abusive relationship. This could all be assumed by the jury due to the domestic violence order in place against Gist. As to Gist's second assignment of error, this Court found no error in the jury instructions because the injuries to Gist's partner occurred on the same night, not during separate instances. KRS 508.030 does not require the jury to determine the precise physical act that caused injury. As to his final argument, the Court found that the part of the recording Gist wanted to enter into evidence did not change the fact that Gist

intentionally pulled out his partner's hair. The trial court did not abuse its discretion, and the judgment was affirmed.

II. FAMILY LAW

A. ***SOUMAYA JABRAZKO v. ERICA A. KLEINMAN, 2023-CA-0336-MR/2023-CA-0353-MR (Ky. App. 2024)***

2023-CA-0336-MR 3/22/2024 2024 WL 1222141
2023-CA-0353-MR

Opinion by MCNEILL, JUDGE; COMBS, J. (CONCURS) AND A. JONES, J. (CONCURS)

This case concerns property division in a divorce. The primary issue on appeal was whether the family court erred in determining Wife's savings account was marital property, and whether it also erred by dividing the account balance evenly between the parties at the time of dissolution. This Court determined that under *Allen v. Allen*, 584 S.W.2d 599 (Ky. App. 1979), it was erroneous for the court to conclude that Wife's savings account was "marital as a matter of law" because the end amount at dissolution was lower than the beginning amount. This Court affirmed in part and reversed in part, remanding with instructions that the family court reconsider the classification and division of Wife's savings account funds in light of Wife's tracing evidence, as well as the Husband's savings account, and to consider other remaining issues concerning the parties' retirement/checking accounts as necessary.

B. ***J. ALDAVA v. A. BAUM, 2023-CA-1038-ME (Ky. App. 2024)***

2023-CA-1038-MR 3/29/2024 2024 WL 1145869

Opinion by ACREE, JUDGE; CETRULO, J. (CONCURS) AND TAYLOR, J. (CONCURS)

In November 2020, Baum fled Texas to her parent's home in Kentucky with her child. Once here, she filed for an emergency protective order (EPO) in the Jefferson Circuit Court against her boyfriend and father of her child, Aldava. The circuit court granted Baum the EPO and scheduled a hearing to determine whether a domestic violence order (DVO) should issue. Aldava had not been served and did not attend the hearing. Nevertheless, the circuit court granted Baum's petition for a DVO. In addition to prohibitory restrictions (refraining from violence and remaining a distance from Baum and the child), the Jefferson Circuit Court entered affirmative orders awarding sole custody of the child to Baum and denying Aldava's right to possess firearms. Upon learning of the DVO, Aldava filed a Kentucky Rule of Civil Procedure 60.02 motion to

vacate the DVO. The circuit court granted this motion and held a new hearing at which Aldava moved to dismiss the DVO petition for lack of personal jurisdiction over him. The circuit court denied the motion, proceeded with the hearing, and reinstated the DVO against Aldava. On appeal to the Court of Appeals, Aldava argued the circuit court lacked personal jurisdiction over him, and the Court agreed. Aldava had no connections to Kentucky and had never been to Kentucky prior to these proceedings. However, despite lacking personal jurisdiction, Kentucky courts are still empowered to grant DVOs so long as the DVO contains mere prohibitory orders and no affirmative orders, pursuant to the Court's reasoning in *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. App. 2006). The Court determined that the DVO's prohibitory orders consisted of the requirement that Aldava stay away from Baum, not steal or destroy her property, and generally not commit acts of violence against her. The Court determined these provisions where prohibitory because every citizen is afforded those protections under the law. Such restrictions differ in kind from affirmative orders restricting denying constitutional rights such as the right to parent or bear arms. No court can deny constitutional right of an individual over whom the court lacks personal jurisdiction. This offends the very nature of Due Process. The Court reversed and remanded.

III. GOVERNMENT

A. ***RUSSELL COLEMAN, ET AL. v. ANDY BESHEAR, ET AL. AND JONATHAN SHELL v. ANDY BESHEAR, ET AL., AND LEGISLATIVE RESEARCH COMMISSION v. ANDY BESHEAR, ET AL., 2022-CA-0837/2022-CA-0838/2022-CA-0991 (Ky. App. 2024)***

2022-CA-0837-MR
2022-CA-0838-MR
2022-CA-0991-MR

3/01/2024

2024 WL 875611

Opinion by ECKERLE, JUDGE; COMBS, J. (CONCURS AND FILES SEPARATE OPINION) AND A. JONES, J. (CONCURS)

This case follows the General Assembly's reorganization of the membership board of the Executive Branch Ethics Commission ("EBEC"), an inferior state office. At the time of origin, the EBEC's board was composed of five members, all appointed by the Governor to serve four-year, staggered terms. KRS 11A.060. The Governor also had the power to remove any of the members for cause. *Id*. At the core of this appeal is the latest amendment to the statute, via House Bill 334 of the 2022 Regular Session of the General Assembly ("HB 334"). HB 334 proposed to terminate the unexpired terms of the current members and changed the composition of the EBEC's board to seven members of which the Governor would only appoint two (other elected executive officers would appoint the remaining five positions). Moreover, the removal for-cause

provision was amended such that only the appointing authority had the power to remove the member for cause. For example, the Governor could only remove the two members he appointed for-cause, not all seven members.

The Governor filed a declaratory judgment action in Jefferson Circuit Court, believing HB 334 violated multiple provisions of the Kentucky Constitution. The trial court granted summary judgment in favor of the Governor, and found that HB 334 violated Sections 27, 28, 69, and 81 of the Kentucky Constitution. The trial court also denied a motion to dismiss filed by the Legislative Research Commission ("LRC"). This Court reversed and remanded.

First, the Court determined that the LRC's motion to dismiss should have been granted on immunity grounds.

Second, this Court upheld the legislative action that takes away appointive and removal power from the Governor and distributes that power to other elected executive officers. The Governor argued that HB 334 violated the "supreme executive power" and the "Take care" clauses of Sections 69 and 81 of the Kentucky Constitution. The Governor argued that his take care powers under Section 81 are akin to the "Take Care" powers of the President under Article II, Section 3 of the United States Constitution. However, the Kentucky executive power differs from the Presidential executive power—Kentucky law allows for the diffusion of executive power. This Court held that HB 334 does not infringe on constitutionally derived appointive and removal powers that the Governor possesses.

The Governor also argued that HB 334 violated Sections 27 and 28 of the Kentucky Constitution. However, because HB 334 only disburses the appointment and removal powers of the executive branch among members already in the executive branch, there is no violation of the separation of powers.

B. ***NATASHA MOORE AND THOMAS SMITH v. COMMONWEALTH OF KENTUCKY, EX REL. RUSSELL COLEMAN, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY; AND MICHAEL ADAMS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH OF KENTUCKY, 2023-CA-0039-MR (Ky. App. 2024)***

2023-CA-0039-MR 3/22/2024 2024 WL 1221421
Opinion by MCNEILL, CHRIS; LAMBERT, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Natasha Moore ("Moore") and Thomas Smith ("Smith") appealed from the Franklin Circuit Court, arguing that House Bill ("HB") 348's elimination of the Floyd Circuit Court Division II was unconstitutional because no valid certification of necessity existed when HB 348 was passed. The Franklin Circuit Court had ruled that Moore and Smith lacked standing to bring their claim. This Court affirmed. Moore's purported injury that her

pending employment case in Floyd Circuit Court will be delayed by the elimination of Division II is insufficient to confer standing because it is a speculative injury. Furthermore, Smith failed to allege a redressable injury because HB 214 was passed on April 8, 2022. When the General Assembly passed HB 214 with amendments to KRS 23A.040, it also re-enacted the provision allotting two circuit judges to Floyd County. At the time of re-enactment, a previously issued 2018 certification of necessity was still valid. Smith failed to challenge HB 214; thus, he lacked standing to challenge the constitutionality of HB 348.

IV. TORTS

A. ***BOSTON v. COMMONWEALTH HEALTH CORPORATION, INC., 2023-CA-0583-MR (Ky. App. 2024)***

2023-CA-0583-MR 3/29/2024 2024 WL 1335987
Opinion by CALDWELL, JUDGE; CETRULO, J. (CONCURS) AND A. JONES, J. (CONCURS)

Boston tripped and fell outside of a hospital owned and operated by Appellees. Boston suffered injuries which were treated at the hospital. A complaint was then filed, alleging that the Appellees owned, occupied, and maintained the hospital; thus, they had a duty to regularly inspect the property for defects and correct them. Boston alleged in his complaint that the Appellees breached that duty. However, Boston did not file a certificate of merit (or a declaration or affidavit stating that the certificate was not required). Appellees argued that Boston's failure to file a certificate of merit deprived the circuit court of subject matter jurisdiction. The circuit court agreed and granted Appellee's motion to dismiss. This Court reversed and remanded the circuit court's judgment. This case revolves around the interpretation of KRS 411.167. The statute states that "any action identified in KRS 413.140(1)(e) requires a certificate of merit to be filed." KRS 413.140(1)(e) provides: "The following actions shall be commenced within one (1) year after the cause of action accrued:…An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice." The circuit court determined that "negligence" as used in KRS 413.140(1)(e) meant any type of negligence (including premise liability negligence). However, this Court determined that negligence as used in KRS 413.140(1)(e) was to mean medical malpractice negligence. There is a difference between medical malpractice claims and premises liability negligence claims; and, the circuit court's interpretation would be at odds with KRS 411.167(5), which provides that a certificate of merit is not immediately required if there has been a request by the claimant for records of the claimant's medical treatment by the defendants and those documents have not been produced. Furthermore, the title of the legislation from which KRS 411.167 is derived from is "AN ACT relating to medical malpractice." There is a legal difference

between medical malpractice and premises liability negligence. Therefore, this Court reversed and remanded.

V. QUALIFIED IMMUNITY

A. ***CARPENTER v. GOODALL, 2021-CA-1311-MR (Ky. App. 2024)***

2021-CA-1311-MR 3/01/2024 2024 WL 874189
Opinion by ACREE, JUDGE; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)

When a teacher suspected a student was inebriated in class, he called security to escort the student to the principal's office. Because the student suffered from ADHD and PTSD, he had an Individualized Education Program that allowed him, when feeling stress, to go to the principal's office as his safe space to "cool down." Upon reaching the area near the principal's office, accompanied by two security officers at this point, the student resisted entering and tried to leave the school to get to his car in the school parking lot. After verbal commands failed, the security officers used incremental physical assists to obtain his compliance. The student resisted each of these assists until the three fell to the floor and the student was immobilized, after which he voluntarily entered the principal's office. Local police officers soon arrived to conduct breathalyzer tests that showed the student well above the legal limit for blood alcohol content. Charges originally brought against the student for assaulting and injuring one of the security officers were dropped. The student then brought a civil suit for assault against that security officer; the assault claim was combined with student's administrative appeal of the school board's suspension of the student from school. The trial court found qualified official immunity defeated the student's assault claim against the security officer and affirmed the school board's decision to suspend student. On appeal, the Court of Appeals affirmed.

B. ***PORTWOOD v. DOWELL HOSKINS-SQUIER, ET AL., 2023-CA-0439-MR (Ky. App. 2024)***

2023-CA-0439-MR 3/22/2024 2024 WL 1221428
Opinion by CETRULO, JUDGE; ACREE, J. (CONCURS) AND TAYLOR, J. (CONCURS)

In this appeal from a summary judgment in favor of local government employees, the Court again addressed the issue of qualified immunity. We affirmed a judgment of the Fayette Circuit Court entitling local government employees to immunity because failure to install crosswalks before an unfortunate pedestrian accident was a discretionary decision and viewed differently than a failure to maintain such installations. Further, there was ample discovery and no showing of bad faith in this matter.

VI. ZONING

A. ***JIMMY CALHOUN, ET AL. v. TALL OAK, LLC. ET AL., 2022-CA-0144-MR (Ky. App. 2024)***

2022-CA-0144-MR 3/22/2024 2024 WL 1222076
Opinion by ACREE, JUDGE; COMBS, J. (CONCURS) AND ECKERLE, J. (CONCURS)

Appellants are a group of residents adjacent to a former country club in Nicholasville, Kentucky. Tall Oak, LLC, the owner of the former club, sought to develop its land into a residential subdivision. However, the land was zoned as agricultural. Tall Oak applied to the Nicholasville City Commission for a zone amendment. At a Planning Commission hearing on the application, Tall Oak presented evidence of the need for the zoning change and of compliance with Nicholasville's Comprehensive Plan and Code of Ordinances. Appellants objected based on inadequate sanitary sewer and road infrastructure to accommodate the additional homes. The Planning Commission denied the application, and Tall Oak appealed to the City Commission. The City Commission adopted an ordinance rezoning Tall Oak's land from agricultural to residential. Appellants filed a complaint with the Jessamine Circuit Court, appealing the decision to rezone the land and seeking a declaratory judgment. The circuit court affirmed the City Commission's adoption of the ordinance, and Appellants appealed. The Court of Appeals affirmed. First, the Court of Appeals determined the zoning amendment was processed in accordance with KRS Chapter 100, despite Appellants' waiver of this argument by failing to raise it before the Planning Commission. KRS 100.209 permits cities to amend a comprehensive plan and official zoning map if the city annexes territory, so long as the city follows the statute's provided procedure. Appellants argue the city was required to amend its comprehensive plan; however, the Court held the statute does not require amendment to a comprehensive plan where such amendment is already in conformity. Second, the Court of Appeals rejected Appellants' argument that the Nicholasville Code of Ordinances requires developers to submit a storm water management plan before real estate development can be approved. Upon close reading of the applicable chapter of the City's ordinances, the Court of Appeals determined the circuit court had not erred in determining the storm water management plan was not required until a later stage in the development process; rather than requiring a storm water management plan prior to rezoning, the storm water management plan is a prerequisite to land disturbance activities.