

**KENTUCKY SUPREME COURT
DECEMBER 2020**

CRIMINAL LAW:

Ronald Exantus v. Commonwealth of Kentucky

[2018-SC-0241-MR](#)

December 17, 2020

Opinion of the Court by Justice Lambert. All sitting; all concur. Exantus unlawfully entered a home and killed a seven-year-old child. He also assaulted two other children and the father of all three children thereafter. Exantus was found not guilty by reason of insanity of murder and first-degree burglary and was found guilty but mentally ill of two counts of second-degree assault and one count of fourth-degree assault. The Court held: (1) as a matter of first impression, the jury’s verdicts of not guilty by reason of insanity and guilty but mentally ill were not impermissibly inconsistent. (2) The trial court did not err by denying defendant’s motions for directed verdict. (3) The trial court did not err by failing to instruct the jury on the lesser-included offense of fourth-degree assault in relation to the two counts of second-degree assault. (4) The jury instructions’ failure to define the term “dangerous instrument” was harmless error. (5) The trial court did not err by failing to strike three jurors for cause. Further, the defendant’s arguments that the jurors should have been struck for cause based on their responses during “death qualifying” individual voir dire were rendered moot when the defendant was found not guilty by reason of insanity of the capital offense of murder and the aggravating offense of first-degree burglary. (6) The trial court erred by admitting evidence that the defendant had previously shaken his infant daughter resulting in physical injury to her, but that error was harmless. The evidence was introduced to challenge the basis of the defense’s expert witness’ opinion that the defendant was legally insane during the commission of his crimes. The trial court erred by not making the requisite finding under KRS 703(b) that the evidence was trustworthy, necessary to illuminate testimony, and unprivileged. The error was harmless because the evidence could otherwise properly be used to challenge the basis of the expert’s opinion and the defendant was found not guilty by reason of insanity of murder and burglary and guilty but mentally ill of three counts of assault.

Commonwealth of Kentucky v. Keith Jennings

[2019-SC-0248-DG](#)

December 17, 2020

Opinion of the Court by Justice Nickell. All sitting; all concur. Keith Jennings, a registered sex offender, was prohibited from accessing the internet as a term of his probation. After violating this term, Jennings moved the Kenton Circuit Court to remove the restriction. The motion was denied and the trial court sanctioned Jennings for the violation. Jennings appealed to the Court of Appeals which relied on *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) and *Doe v. Commonwealth, ex rel. Tilley*, 283 F.Supp.3d 608 (E.D.Ky. 2017), in its analysis of internet restrictions on sex offender probationers. The Court of Appeals vacated and remanded the matter upon concluding the complete internet ban was not narrowly tailored, burdened more First Amendment rights than necessary to further the government’s interests, did not increase public safety, and was unconstitutionally vague.

On grant of discretionary review, the Supreme Court agreed with the Court of Appeals that complete internet bans may pass constitutional muster in extraordinary circumstances, but held

limited, focused, and rationally-related restrictions are more typically required. Total bans should be exceedingly rare. However, the Supreme Court concluded *Jennings* had not challenged the terms of his probation when imposed as required by *Butler v. Commonwealth*, 304 S.W.3d 78, 80 (Ky. App. 2010)—having done so only after he had violated the internet restriction and was facing revocation. This failure was fatal to the appeal. Accordingly, because the Court of Appeals erred in reaching the merits of the untimely challenge, its decision was reversed.

Karen M. Brafman v. Commonwealth of Kentucky
[2019-SC-0449-MR](#)

December 17, 2020

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Appellant Karen Brafman was arrested and charged with first- and second-degree arson, and six counts of attempted murder, four of which the trial court enhanced as hate crimes. Appellant was found to have set fires at two ends of the victims' trailer while they slept inside, and at a time Appellant alleged she was deeply intoxicated. Appellant was convicted and received the equivalent of a life sentence consistent with the jury's recommendation.

Appellant appealed as a matter of right, claiming (1) she was improperly denied a voluntary intoxication instruction, (2) that the Commonwealth's Attorney committed prosecutorial misconduct when it improperly concealed evidence related to Appellant's intoxication, subsequently opposed the instruction, and made improper closing statement, (3) the trial court's hate-crime designation was insufficiently supported by the evidence, (4) the arson instructions to the jury inadequately instructed on intent and "substantial step" elements, (5) a text message screenshot admitted against her was not authenticated properly, (6) that phone calls admitted against her were unduly prejudicial, and, finally, (7) cumulative error, if nothing else, required reversal.

First, the Supreme Court held the trial court's denial of the voluntary intoxication instruction was not error when the only admitted evidence of intoxication was the defendant's own general assertions of intoxication and self-induced amnesia. However, the Supreme Court reversed on the second issue, finding the Commonwealth's Attorney committed reversible prosecutorial misconduct when, knowing an investigator-witness personally observed Appellant's intoxication at the time of arrest, he argued against the instruction in conference with the court and falsely implied directly to the jury in closing argument that no one had seen Appellant intoxicated. This improperly deprived Appellant of a defense she was entitled to present. Third, it was held that the trial court's hate-crime designation was not supported by a sufficient nexus of racial motivation. Fourth, the arson instructions were held to be technically adequate as a matter of law, but it was recommended on remand that clearer, elemental model instructions should be used. Fifth, the text message was held inadequately authenticated, and the Court discussed the unique issues of authenticating digital phone screenshots. However, being unpreserved and at most mildly cumulative on certain issues, this error was not palpable. Sixth, admitting the phone calls was error for similar lack of foundation, but admitting it was not palpable, reversible error. Finally, the Court passed on any cumulative error analysis, having found prosecutorial misconduct alone warranted reversal.

The Supreme Court therefore reversed the trial court's judgment for prosecutorial misconduct and the hate crime enhancement for lack of evidence of a suspect motivational nexus. The Supreme Court ordered a new trial to be conducted in accordance with its opinion.

FAMILY LAW:

Laura R. Normandin v. Scott W. Normandin

2018-SC-0451-DG

December 17, 2020

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Lambert, Keller, VanMeter, and Wright, JJ., sitting. Minton, C.J.; Hughes, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., not sitting. Laura R. Normandin (Laura) and Scott W. Normandin (Scott) divorced in 2016. The Normandins had a high income, of which a very significant portion was attributable to Restricted Stock Units (RSUs) that Scott received from his employer. Scott's RSUs were normally granted annually but did not vest until three-years after grant. The family court found the RSUs granted during the marriage, but vesting after date of decree, were entirely non-marital property. Furthermore, the family court did not include the income attributable to the RSUs in its child support calculation. The family court found the parties' monthly income to be in excess of the support guidelines and ordered a support obligation from the top of the guideline but declined to adjust upward. Lastly, the trial court set a modest maintenance obligation for forty-eight months. The Court of Appeals affirmed each of the family court's findings and conclusions. Laura appealed to the Kentucky Supreme Court the classification of Scott's RSUs as well as the calculation of child support and maintenance.

The Kentucky Supreme Court granted discretionary review to decide whether restricted stock units granted during marriage but vesting after decree of divorce represented marital or nonmarital property. The Kentucky Supreme Court, applying *Grasch v. Grasch*, 536 S.W.3d 191 (Ky. 2017), found that the RSUs, like *Grasch's* contingency fee contract, represented both marital and nonmarital income. The RSUs granted during the marriage but vesting after decree of dissolution were presumptively marital in proportion to the number of months married during the vesting period. Finally, that presumption may be overcome by either party through contrary evidence.

In addressing the child support calculation, the Supreme Court reiterated to the lower courts that KRS 403.212 includes "income from any source" and that the RSUs represented such income and should have been included in the gross monthly income calculation. Citing *Laymon v. Bohanan*, 599 S.W.3d 351 (Ky. 2020), the Supreme Court stated that the party seeking to use a different income from that recently experienced bears the burden to show that the past income is unlikely to be realized. Therefore, by failing to include the value of the RSUs in calculating income, the family court erred in not including approximately half the Normandins' expected income.

Lastly, the Supreme Court held that the family court did not abuse its discretion in its calculation of maintenance. The family court correctly addressed the factors relevant to such a determination, even if they were not itemized in its opinion. While the award was modest, it was not an abuse of discretion in light of the assets available to each party.

The issues of RSU classification and child support calculation were remanded to the family court to be addressed in light of this opinion.

**Department for Community Based Services, Cabinet for Health and Family Services v.
Rebecca Baker**
[2018-SC-0610-DG](#)

December 17, 2020

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Hughes and VanMeter, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion in which Keller and Nickell, JJ., join. Baker was employed by Livermore Elementary School to watch about ten children daily in an afterschool program. After it was reported by a five-year-old boy that a six-year-old boy had inappropriately touched him during the afterschool program, the Cabinet filed neglect charges against Baker. Baker requested an administrative hearing (CAPTA) to challenge the finding of neglect against her. The hearing officer affirmed the substantiation of the neglect charges which resulted in Baker being placed on the federal registry of persons who have abused or neglected children. The hearing officer found that Baker failed to properly supervise the children, resulting in the boys inappropriately touching each other. Baker appealed to the McLean Circuit Court, arguing that the substantiation of neglect was not based on substantial evidence. The Circuit Court affirmed, and Baker thereafter appealed to the Court of Appeals. Instead of addressing Baker's renewed substantial evidence argument on the merits, the Court of Appeals held *sua sponte* that, under KRS 620.030 and KRS 620.040, the Cabinet lacked the authority to investigate Baker and reversed. The Cabinet appealed to the Kentucky Supreme Court. Though holding that Cabinet did not lack the authority to investigate Baker, the Court held that the neglect charges were not based on substantial evidence, vacating the finding of neglect against Baker.

GOVERNMENTAL IMMUNITY:

Kimberly Howard, as Executrix of the Estate of Emma Jean Hall, Deceased v. Big Sandy Area Development District, Inc.

[2018-SC-0601-DG](#)

December 17, 2020

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The estate of Ms. Emma Jean Hall, represented in this negligence action by and through her executrix, Ms. Kimberly Howard, passed away from a bed sore. Ms. Hall was staying in her home when the bedsore developed. She was able to stay in her own home thanks in part to the part-time help arranged and partially state-funded through a Homecare Program, a non-medical assistance program that helped elders in the region with basic chores and self-care in their own homes. Homecare in Hall's region was implemented by the Big Sandy Area Development District (BSADD). Howard brought the negligence action on behalf of Hall's estate claiming BSADD's Homecare aides were negligent for not identifying Ms. Hall's bedsore and not helping her obtain treatment before it progressed to a lethal state.

Before the case ever reached trial, the trial court granted BSADD's motion for summary judgment on two grounds: (1) that BSADD enjoyed governmental immunity, and (2) that, even if it was not so immune, BSADD did not owe an identifiable duty of care to Ms. Hall. On appeal, the Court of Appeals affirmed the trial court on the same grounds. The Court of Appeals held that BSADD enjoyed governmental immunity because it was a child-entity of the General Assembly, having been established by statute, and because it performed an integral state function in caring for the poor and elderly populations of the state.

The Supreme Court affirmed the grant of summary judgment, but on different grounds than the trial court and the Court of Appeals, namely holding that BSADD did not enjoy governmental immunity. Applying *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 413 S.W.3d 90 (Ky. 2013), the Supreme agreed that BSADD had immune parentage, since it was created directly pursuant to statute passed by the General Assembly, an immune parent. However, the Supreme Court held that BSADD did not perform an integral state function because its basic Homecare services were not truly essential "welfare" services as characterized by the Court of Appeals, BSADD played a proprietary and non-essential role in providing Homecare and its several other services to the region, and because BSADD's operation and effects were exclusively regional, not state-wide. Therefore, the Supreme Court held BSADD did not enjoy governmental immunity. However, the Supreme Court found BSADD's employees did not owe or breach any particular duty to Ms. Hall, as Ms. Hall's homecare services, though helpful, were minimal, non-medical, and not based in agency to Ms. Hall. Summary judgment was, therefore, proper. Accordingly, the Supreme Court affirmed the Court of Appeals, but not on the issue of immunity.

INSURANCE:

Harold Merritt, et al. v. Catholic Health Initiatives, Inc., et al.

2018-SC-0155-DG

December 17, 2020

Opinion of the Court by Justice Hughes. All sitting; all concur. Harold Merritt, individually and as administrator of the Estates of Kimberly Merritt and Harold Merritt, III brought a medical negligence action against various health care defendants following the deaths of his wife and newborn son. The Fayette Circuit Court denied Merritt's motion for declaratory relief as to his bad faith insurance claim against First Initiatives Insurance, Ltd., a foreign captive insurance entity that provides self-insurance for Catholic Health Initiatives, Inc. The trial court determined that the Unfair Claims Settlement Practices Acts (UCSPA) does not apply to a captive insurer pursuant to Kentucky Revised Statute (KRS) 304.49-150(1) and granted Catholic Health and First Initiatives' motion for summary judgment, dismissing all claims against them. The Court of Appeals affirmed both rulings, and Merritt sought discretionary review in the Supreme Court.

The sole issue before the Court was whether First Initiatives, as a captive insurer, is subject to the UCSPA. KRS 304.12-230. The Court held that the Legislature has clearly and unequivocally excluded captive insurers from the requirements of the UCSPA. First Initiatives was not registered and did not pay taxes in Kentucky, and its principal place of business was in the Cayman Islands. Further, First Initiatives was not in the business of insurance as it only provided captive self-insurance for Catholic Health, with no risk shifting or risk distribution. Additionally, the trial court did not abuse its discretion in denying Merritt further discovery because Merritt represented the issue was ripe for decision in his motion for declaratory judgment, and further discovery could have no effect upon the determination that First Initiatives was a foreign captive insurer.

JAILS:

A.H., the Minor Child of James Hatcher, by and through Heidi Gallo, Mother, Guardian, Next Friend and Administratrix of the Estate of James Hatcher, et al. v. Louisville Metro Government, et al.

AND

Jefferson Louisville Metro Government, et al. v. A.H., the Minor Child of James Hatcher, by and through Heidi Gallo, Mother, Guardian, Next Friend and Administratrix of the Estate of James Hatcher, et al.

[2018-SC-0359-DG](#)

[2019-SC-0158-DG](#)

December 17, 2020

Opinion of the Court by Justice Nickell. All sitting; all concur. James Hatcher presented himself to the Louisville Metro Department of Corrections (LMDC) to serve time for civil contempt for falling behind on child support. During intake he identified no required prescription medication and mentioned only one active medical condition—a cold making it difficult for him to hear and causing him to snuffle. Less than 24 hours later, he died of ischemic cardiac disease and coronary artery atherosclerosis. His Estate maintains he died from an unwritten LMDC policy preventing inmates from receiving habit-forming, lawfully-prescribed narcotic or psychotropic drugs, and guards routinely ignoring inmate health issues and showing deliberate disregard and indifference for inmate lives and rights in violation of KRS 71.040 which requires jailers to treat inmates humanely.

Hatcher’s Estate filed suit in Jefferson Circuit Court claiming negligence and gross negligence; intentional infliction of mental and emotional distress amounting to the tort of outrage; medical and nursing malpractice; personal injury, wrongful death; loss of parental consortium on behalf of Hatcher’s two minor daughters; and constitutional violations for which it sought compensatory and punitive damages from Louisville Metro Government (LMG); LMDC Director Tom Campbell (Campbell) in both his official and individual capacities; and six LMDC guards. Ultimately, the circuit court granted summary judgment and dismissed all claims with prejudice. The Court of Appeals unanimously affirmed. After granting requests for discretionary review from both sides, the Supreme Court unanimously affirmed in part and vacated in part.

Held: LMG may invoke sovereign immunity for alleged violation of KRS 71.040. Louisville and Jefferson County merged in 2003 forming a “consolidated local government” covered by the same sovereign immunity afforded counties under KRS 67C.101(2)(d) and (e). Housing state prisoners—one of LMDC’s responsibilities—is a governmental function to which sovereign immunity applies. KRS 71.040 applies uniquely to “jailers,” but LMG does not have a jailer. Instead, duties relating to prisoners previously performed by the Jefferson County Jailer and Sheriff were transferred to LMDC, as a “department,” but not to LMDC employees. Thus, LMG—through LMDC—must humanely treat prisoners, but because sovereign immunity has not been explicitly waived by KRS 67C.101(2)(e), the Estate could not create a waiver by claiming money damages under KRS 446.070 in connection with an alleged violation of KRS 71.040. The most that can be sought from LMG is equitable relief.

Campbell, in his official capacity as appointed Director of LMDC under KRS 67B.040, is covered by the same sovereign immunity insulating LMG. Despite the Estate calling Campbell an “acting jailer” and a “*de facto* jailer,” he is neither, having never run for, nor been elected, jailer. Thus, he could not be held legally responsible in his official capacity for treating a prisoner inhumanely and violating KRS 71.040. Campbell was also not subject to liability in his individual capacity. Having had no contact with Hatcher, and being unaware of his incarceration or medical distress, Campbell was protected by qualified official immunity in his individual capacity.

The Estate alleged violation of the Jural Rights Doctrine based on a denial of money damages for the alleged violation of KRS 71.040. The Supreme Court did not review this claim due to the Estate’s failure to notify the Attorney General of the constitutional challenge as required by KRS 418.075. The Court of Appeals reviewed, and rejected, this claim rather than enforcing strict statutory compliance, resulting in the panel’s Opinion being partially vacated.

Citing *St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 536 (Ky. 2011), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Estate sought to create new causes of action for four state constitutional violations and allowing inmates to sue for money damages for violation of KRS 71.040. All requests were denied because adequate claims, including multiple torts, already exist; the Estate argued lawfully prescribed medication was withheld from Hatcher but identified no physician-diagnosed medical need or prescribed medication linking Hatcher’s death to an allegedly flawed LMDC policy; the Estate had filed a 42 U.S.C. § 1983 action in federal court but dismissed it; and, there was no need to create a remedy when the legislature had chosen not to act.

Finally, the General Assembly has not waived sovereign immunity to bring a claim for loss of parental consortium. Unless and until it does, such a claim is barred.

JUDICIAL CONDUCT:

Beth L. Maze v. Judicial Conduct Commission

[2019-SC-0691](#)

December 17, 2020

Opinion of the Court by Justice VanMeter. Minton, C.J.; Hughes, Nickell, VanMeter, and Wright, JJ., sitting. Beck and Collins, S.J., sitting. Minton, C.J.; Beck, Collins, Hughes, Nickell, concur. Wright, J., concurs in result only. Lambert and Keller, JJ., not sitting. Beth Lewis Maze appealed the Judicial Conduct Commission’s order finding that Judge Maze had violated the judicial canons on five separate occasions, and publicly reprimanding her. The Kentucky Supreme Court affirmed the Judicial Conduct Commission. The Court explained that pursuant to Ky. Const. § 121 and SCR 4.025, the Commission is empowered to adjudicate charges against judges, including those who retire or resign; including removing judges from office for cause, after they’ve formally resigned. The Court also held that SCR 4.190 and SCR 4.170(2), when read in tandem, allow a judge only one informal appearance before the Commission, to facilitate a resolution without the initiation of formal proceedings. However, once formal proceedings have been initiated, the Commission is not required to grant a judge another informal meeting. Additionally, the Court held that pursuant to KRS 34.330 and SCR 4.030, the Commission was entitled to subpoena grand jury testimony regarding Judge Maze’s criminal indictment; and that the Commission’s investigate powers took precedence over- concerns of grand jury secrecy.

Finally, the Court held that the Commission's use of outside evidence in its investigatory file did not violate Judge Maze's due process rights. Wright, J. wrote separately to express his opinion that the Commission's reasoning for Count IV was mistaken.

Dawn M. Gentry v. Judicial Conduct Commission
[2020-SC-0434-RR](#)

December 17, 2020

Opinion of the Court by Justice VanMeter. All sitting; all concur. Dawn M. Gentry appealed the Judicial Conduct Commission's finding that her conduct warranted her removal from office. The Kentucky Supreme Court affirmed the Judicial Conduct Commission. The Court explained that the absence of one lay member at her hearing did not violate Ky. Const. § 121 because, while that section created the Commission it also empowered the Court to establish rules of procedure for the Commission. Therefore, SCR 4.120, which requires a minimum of five members of the Commission be present for the presentation of evidence, did not violate the Kentucky Constitution and was satisfied in this case. The Court reaffirmed its holding in *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306 (Ky. 1978), which upheld the Commission's dual investigatory and adjudicatory functions, finding the combination did not violate the due process rights of the accused. Along these lines, the Court held that the Commission's refusal to recuse an alternate member of its panel was not error because, although the member was exposed to evidence that did not conform to the KRE, the information was transmitted and received while the Commission was fulfilling its investigatory function, and not during the hearing, where the Commission was limited to reviewing only evidence that conformed to the KRE. Additionally, the Court held that the Commission's decision to add additional counts against Judge Gentry did not amount to vindictive prosecution. Further, the Court held that SCR 4.160's incorporation of the civil rules, and the Commission's decision to deny discovery requests pursuant to CR 26, 30, 33, and 36 did not violate Judge Gentry's due process rights because SCR 4.210 governs judges' procedural rights. The Court also held that the Commission's decision to amend the charges against Judge Gentry did not violate SCR 4.190 or her due process rights. Finally, the Court emphasized the difficulty in comparing the misconduct of judges and held that Judge Gentry's behavior represented a pattern of misconduct which warranted removal from the bench.

KENTUCKY WHISTLEBLOWER ACT:

Northern Kentucky Area Development District v. Mary Wilson

[2018-SC-0665-DG](#)

December 17, 2020

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Hughes, Keller, Lambert, and VanMeter, JJ., concur. Wright, JJ., concurs in result only by separate opinion. Nickell, J., not sitting. Mary Wilson sued her former employer, Northern Kentucky Area Development District (NKADD), alleging they violated the Kentucky Whistleblower Act (KWA). Wilson worked as a case manager in the Meals-on-Wheels program that NKADD facilitated. She argued she was retaliated against after she reported a co-worker for alleged misconduct. NKADD claimed Wilson was barred from suit because they were not a political subdivision of the state and therefore not an employer for purposes of the KWA.

The trial court found that the interests that NKADD served were not functions “integral to state government” as required under the *Comair* test. Wilson appealed the granting of NKADD's motion for summary judgment. The Court of Appeals concluded that NKADD was a political subdivision by statute.

The Supreme Court reversed the Court of Appeals finding that NKADD was a political subdivision of the state for purposes of the KWA. The Court disagreed with the Court of Appeals conclusion that NKADD was a political subdivision by statute because of oversight in their statutory analysis. Applying *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 413 S.W.3d 90 (Ky. 2013), the Supreme Court, found that NKADD was created by an immune parent, since it was established directly pursuant to statute passed by the General Assembly, a governmental entity. Further, the Supreme Court held that NKADD did not provide an integral state function because its services, such as the Meals-on-Wheels program, were proprietary and not essential to providing care to the elderly. Further, the court found NKADD did not serve a state-wide function, but only served a local eight-county region. Therefore, the Supreme Court held NKADD was not a political subdivision of the state and as a result, not an employer for purposes of the KWA.

LOSS RECOVERY ACT:

Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary of the Governor’s Executive Cabinet v. Stars Interactive Holdings (IOM) Ltd., F/K/A Amaya Group Holdings (IOM) Ltd. et al.

AND

Stars Interactive Holdings (IOM) Ltd., F/K/A Amaya Group Holdings (IOM) Ltd., et al. v. Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary of the Governor’s Executive Cabinet

[2019-SC-0058-DG](#)

[2019-SC-0209-DG](#)

December 17, 2020

Opinion of the Court by Justice Wright. All sitting. Keller, Lambert, and Nickell, JJ., concur. VanMeter, J., dissents by separate opinion, in which Minton, C.J., and Hughes, J., join. . Appellees/Cross-Appellants (collectively, PokerStars), ran an international illegal internet poker website. The Commonwealth, Appellant/Cross-Appellee, filed an action in Franklin Circuit Court pursuant to Kentucky’s Loss Recovery Act, Kentucky Revised Statutes (KRS) Chapter 372, to recover treble damages for Kentuckian’s losses on the illegal gambling site. The trial court granted summary judgment in favor of the Commonwealth. Appellees/Cross-Appellants (PokerStars) appealed to the Court of Appeals. The Court of Appeals reversed, holding there was no standing under the Loss Recovery Act in the present case. The Commonwealth petitioned the Supreme Court of Kentucky for discretionary review, and the Court granted the motion. Thereafter, PokerStars filed a cross-motion for discretionary review, which the Court also granted. The Court held the Commonwealth qualified as a “person” under the Loss Recovery Act; PokerStars, because it took a “rake” from the winnings of the poker games” was a “winner” under the Act; the award amount was properly calculated and did not violate either the Due Process Clause or the Excessive Fines Clause; and the Commonwealth’s amended complaint met Kentucky’s notice-pleading standard.

MEDICAL MALPRACTICE REVIEW PANEL ACT:

Mark Smith and Chinena Smith v. Wynetta Fletcher, APRN, et al.

2019-SC-0503-TG

December 17, 2020

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller, Lambert, Nickell, and Wright, JJ., sitting. Minton, C.J.; Hughes, Lambert, Nickell, and Wright, JJ., concur. VanMeter, J., not sitting. Mark and Chinena Smith filed a complaint against Advanced Practice Registered Nurse Wynetta Fletcher, Dr. Amjad Bukhari, and Dr. James Detherage under the Kentucky Medical Review Panel Act (“MRPA”), Kentucky Revised Statutes (“KRS”) 216C.005, et seq., declared unconstitutional by *Commonwealth v. Claycomb*, 566 S.W.3d 202 (Ky. 2018). After the claims worked their way through the panel process, the Smiths filed a complaint in Fayette Circuit Court against Nurse Fletcher, Drs. Bukhari and Detherage, and the entities that allegedly employed them. Subsequent to the filing of the Smiths’ complaint in circuit court, the Supreme Court’s decision in *Claycomb*, wherein it declared the MRPA unconstitutional, was finalized. The defendants then moved the circuit court to dismiss the Smiths’ complaint as violative of the statute of limitations. The trial court found the complaint to be untimely and dismissed the case. The Smiths appealed, and the Supreme Court accepted transfer of the case from the Court of Appeals.

The Supreme Court held that KRS 413.270, Kentucky’s Savings Statute, applied to the Smiths’ claims. The court further held that the 90-day period permitted under KRS 413.270 did not begin to run until February 14, 2019, the day *Claycomb* became final. Because the Smiths filed their complaint in Fayette Circuit Court on January 18, 2019, their complaint was timely filed, and the circuit court erred in dismissing it as untimely. Because the Court held that the Smiths’ claims were filed timely under KRS 413.270, it declined to address whether any other statute or equitable principle saved their claims.

However, KRS 413.270 only saves those claims that were filed with the medical review panel. The Smiths only filed claims against Nurse Fletcher, Dr. Detherage, and Dr. Bukhari under the MRPA. They did not file claims against the entity defendants, namely Health Plus, PSC, King’s Daughters Health System, Inc., KentuckyOne Health Medical Group, Inc., and KentuckyOne Health, Inc., until they filed a complaint in circuit court. As such, the claims against those entity defendants were untimely filed, and because no other statute or principle tolls the limitations period as to these defendants, the Court affirmed their dismissal.

WRIT OF PROHIBITION:

Sandra Jones Beck, M.D., et al. v. Hon. Ernesto Scorsone, et al.

2019-SC-0726-MR

December 17, 2020

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Real Party in Interest, Andrea Brandenburg, filed suit for negligence against the University of Kentucky Medical Center, three named medical professional Appellants employed by the Medical Center, Sandra Jones Beck, Justin Peterson, and Jennifer Tavitian, and ten other medical professionals identified as unknown and yet unnamed defendants, also employed by the Medical Center.

Appellants appealed to the Supreme Court from the Court of Appeals’ denial of their application for a writ of prohibition, which sought to prevent the trial court from enforcing a protective order

that forbid them from ex parte communication with Brandenburg’s unnamed treating physicians and healthcare providers employed by the Medical Center. The Appellants asserted that the trial court’s order erroneously denied them the right to confer informally with coworkers inside their own practice group and to retain the same attorney for the common defense of all claims. The Appellants argued the trial court’s erroneous order resulted in an irreparable injury incapable of remedy by appeal or otherwise, requiring a writ.

The Court of Appeals denied the Appellants' writ petition, finding the injury to be insufficient to issue a writ and not irreparable as required by the writ standard. The Supreme Court reversed the Court of Appeals and remanded for a writ to be issued in the Appellants' favor. The case was found not to present the irreparable injury ordinarily required for a writ, but that the trial court’s order is exceptional in how it disturbs an otherwise orderly administration of justice. The trial court order was apparently issued arbitrarily, seemingly based on the trial judge's expressed policy preference, inconsistent with *Caldwell v. Chauvin*, 464 S.W.3d 139 (Ky. 2015). That case harbors no preference for or against ex parte communications with treating physicians, absent an articulable reason to bar the practice in a particular case. The Supreme Court clarified that there may be reasons to prohibit the practice on a case-by-case basis, but that the trial court must not deny that opportunity to civil litigants, even in the medical malpractice context, without some specific articulable reason as may be in the particular case before the court. The Supreme Court reversed the Court of Appeals and remanded with an order to issue the writ for Appellants consistent with its opinion.

Henderson County Healthcare Corporation d/b/a Redbanks Skilled Nursing Facility, et al. v. Honorable Karen Lynn Wilson, Judge, et al.

[2020-SC-0001-MR](#)

December 17, 2020

Opinion of the Court by Justice Keller. All sitting; all concur. Jacqueline E. McGuire (hereinafter “Ms. McGuire”) was a resident at Henderson County Health Care Corporation d/b/a Redbanks Skilled Nursing Facility (hereinafter “Redbanks”) from 2010 to 2016. According to the complaint filed by Roland McGuire (hereinafter “McGuire”), who is Ms. McGuire’s brother, Ms. McGuire suffered multiple injuries while at Redbanks, including serious bedsores. Ms. McGuire eventually died at another facility, and McGuire, as administrator of her estate, filed suit against Redbanks.

During the discovery process, McGuire served Redbanks with requests for production of documents. Redbanks refused to turn over certain documents arguably included within these requests, and McGuire filed a motion to compel. Specifically disputed were nurse consultant reports and whether the Federal Quality Assurance Privilege (FQAP), 42 U.S.C. § 1396r(b)(1)(B) and 42 U.S.C. § 1395i-3(b)(1)(B), protects these reports from disclosure. The trial court granted McGuire’s motion to compel, ordering Redbanks to turn over the reports. Redbanks filed a petition for a writ in the Court of Appeals to prohibit the trial court from enforcing its order. The Court of Appeals denied the writ petition, and Redbanks appealed to the Supreme Court.

As an issue of first impression in Kentucky, the Supreme Court adopted a case-by-case approach that allows a trial court to determine how a document was generated, why it was generated, and by whom it was generated before determining if the FQAP applies to the document. After setting

out guidelines for trial courts to follow, the Court held that the nurse consultant reports at issue in this case were protected by the FQAP. Accordingly, the Court reversed the Court of Appeals' denial of Redbanks' writ petition.

ATTORNEY DISCIPLINE:

Kentucky Bar Association v. Edmund Victor Smith

[2020-SC-0071-KB](#)

December 17, 2020

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission charged Smith with violating SCR 3.130(1.4)(a)(4); SCR 3.130(1.16)(d); and SCR 3.130(3.4)(c) for his failure to communicate with his client and failure to return the unearned portion of a fee.

Because the Board of Governors of the Kentucky Bar Association failed to satisfy SCR 3.3750(c) and did not recommend a sanction, the Supreme Court was compelled to review the record de novo. In doing so, the Court noted that this was not the first instance in which Smith had failed to adequately communicate with his clients, nor the first time that he had refused to return the unearned portions of his fee. In July 2015, Smith was privately admonished for similar conduct.

After reviewing the facts of the present case, the Court determined that Smith had violated the rules as charged. Given Smith's previous transgressions, and finding no mitigating factors in his favor, the Court ordered Smith suspended from the practice of law in the Commonwealth for a period of sixty-one days.

Kentucky Bar Association v. Michael C. Skouteris

[2020-SC-0230-KB](#)

December 17, 2020

Opinion and Order of the Court. All sitting; all concur. Skouteris had nineteen separate disciplinary complaints in Tennessee, which were all resolved when he submitted a conditional guilty plea admitting he knowingly and intentionally misappropriated client funds. In conjunction with that disciplinary action, the Supreme Court of Tennessee ordered Skouteris to pay restitution of more than \$1,000,000 for funds he wrongfully received and retained in settlement of personal injury cases. Skouteris also admitted he knowingly misled clients as to the status of their cases and the filing of pleadings and admitted he generally failed to adequately communicate with clients. Skouteris also admitted to forging client signatures on settlement paperwork and representing clients while suspended from the practice of law.

The Supreme Court of Tennessee accepted Skouteris's guilty plea wherein he admitted to violating numerous Tennessee Rules of Professional Conduct. As a result of those violations, the Supreme Court of Tennessee disbarred Skouteris. However, at the time, that court's rules did not provide for permanent disbarment; as a result, pursuant to Tennessee's Supreme Court Rule 9 §§ 28 and 30.4, Skouteris may apply for reinstatement in Tennessee after five years if he has made the required restitution at that time.

Thereafter, the KBA filed a petition with this Court asking that we impose reciprocal discipline pursuant to SCR 3.435(4). Skouteris filed no response to the Supreme Court's show cause motion, apart from filing a motion that this Court treated as a motion for enlargement of time and an accompanying affidavit from the director of the Christian recovery program Skouteris

completed and for which he now works. This response did not serve to prove by substantial evidence that Tennessee lacked jurisdiction, there was fraud in the underlying proceedings, or why the Commonwealth should impose substantially different discipline.

Because Skouteris failed to show cause as to why the Court should not impose reciprocal discipline, the Court suspended him from the practice of law in the Commonwealth of Kentucky for a minimum of five years, until such time as he is reinstated to the practice of law in Tennessee and until he is reinstated to the practice of law by Order of this Court pursuant to SCR 3.510.

Kentucky Bar Association v. Jason Nicholas Martin

[2020-SC-0292-KB](#)

December 17, 2020

Opinion and Order of the Court. All sitting; all concur. Martin was retained to represent a client in connection to the probate of an estate. During the representation, Martin failed to ensure the estate was timely settled, did not file appropriate tax returns, and did not keep Thompson fully and accurately informed of the progress of the matter. Martin was able to negotiate with the Kentucky Department of Revenue to obtain a waiver of penalties and fees resulting from his failure to file the tax returns. After nearly four years, a final settlement was approved and the estate was closed.

Thereafter, a three-count charge was issued by the Inquiry Commission alleging Martin violated SCR 3.130(1.1) for failure to provide competent representation, SCR 3.130(1.3) for lack of diligence and SCR 3.130(8.1)(b) for failure to respond to a lawful demand for information from a disciplinary authority. Martin did not respond. That failure ultimately resulted in a March 2020 Order of the Supreme Court suspending him indefinitely.

Upon consideration, the Board of Governors unanimously agreed Martin was guilty of the alleged violations and recommended he receive a public reprimand, attend and successfully complete the next scheduled EPEP and pay the costs of the disciplinary proceedings. Martin made no request under SCR 3.370(7) that the Court review the Board's recommendation, and the Court declined to undertake such review.

Consequently, under SCR 3.370(9), the Court adopted the recommendation of the Board of Governors. In so doing, the Court noted that Martin's failure to respond to the disciplinary proceedings was obviously concerning. However, his unethical actions did not result in harm or prejudice to the estate or client; although untimely, he completed the matters for which he was hired; and Martin had no prior discipline since his admission to practice law in 2001.

William Lawrence Summers v. Kentucky Bar Association

[2020-SC-0451-KB](#)

December 17, 2020

Opinion and Order of the Court. All sitting; all concur. On March 22, 2012, Summers was suspended from the practice of law in Ohio for six months. A reciprocal order was entered on October 25, 2012, in Kentucky for a period of 180 days. However, in July 2012, prior to the reciprocal order being entered in Kentucky, Summers was retained by his client to appear in U.S. District Court in New Hampshire in a criminal matter. He received a retainer, which included

travel expenses. Another Ohio attorney and a local attorney appeared in court with the client. Summers did not provide representation at the court appearance. At his sentencing, the client discovered that Summers was suspended in Ohio.

On August 1, 2018, Summers entered a plea of guilty to criminal contempt in violation of 18 U.S.C. § 401(1) and stipulated that in July 2012, while he was suspended in Ohio, he engaged in the practice of law for his client. Summers was sentenced to six months in federal prison and ordered to pay restitution in the amount of \$26,000.00. On December 19, 2019, Summers completed his incarceration.

Summers admits that he violated SCR 3.310(5.5)(a) and SCR 3.310(8.4)(c). Pursuant to SCR 3.480(2), Summers and the KBA agreed to a negotiated sanction of 180-day suspension. Upon review of the record and similar case law, the Court agreed the negotiation sanction was appropriate and suspended Summers from the practice of law in the Commonwealth of Kentucky for a period of 180 days.

Kentucky Bar Association v. Charles Edwin Johnson
[2020-SC-0503-KB](#)

December 17, 2020

Opinion and Order of the Court. All sitting; all concur. Johnson was personally served with bar complaints related to charges arising from three separate disciplinary files. He failed to respond in any of the three cases, warranting indefinite suspension under SCR 3.380(2). Accordingly, the Supreme Court ordered Johnson suspended indefinitely.