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

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. ARBITRATION

A. ***AUTO VENTURE ACCEPTANCE, LLC v. JEROME C. BLAIR, JR. AND SERVICE FIN. CO.(Ky. App. 2024).***

2022-CA-1458-MR 8/30/2024 2024 WL 3996765

DISCRETIONARY REVIEW GRANTED 04/16/2025

Opinion Affirming by ACREE, JUDGE; KAREM, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Auto Smart II, LLC (Auto Smart) agreed to sell Jerome Blair a 2008 Land Rover. Auto Smart and Blair entered into an installment contract and an arbitration agreement. As part of the installment contract, Auto Smart instantly assigned its rights to Auto Venture Acceptance, LLC (AVA). Several months later, Blair defaulted on the installment contract. AVA repossessed and sold the vehicle, leaving a remaining balancing in excess of $9,000. AVA then assigned the installment contract to Service Financial Company (SFC). SFC filed this lawsuit to collect the remaining balance, and Blair filed a counterclaim, as well as a third-party complaint against AVA. After answering the third-party complaint, AVA filed a motion to compel arbitration pursuant to the arbitration agreement. The Jefferson Circuit Court denied the motion, concluding AVA had previously assigned the right to compel arbitration to SFC. At issue in this appeal was whether the installment contract incorporated the arbitration agreement. The Court looked to the undisputed language on the face of the arbitration agreement and concluded the arbitration agreement, including the attendant right to compel arbitration, was incorporated into the installment contract. Consequently, when AVA assigned the installment contract to SFC, it assigned the attendant right to compel arbitration. Although the arbitration agreement purported to "survive any termination, payoff, or transfer," the Court concluded this merely contemplated the agreement's continued viability, but did not alter that a right cannot be simultaneously assigned and retained, absent agreement to that effect. As AVA had divested itself of the right to compel arbitration in assigning its rights to SFC, the circuit court correctly denied AVA's motion to compel arbitration.

II. CRIMINAL LAW

A. AMBOREE v. COMMONWEALTH (Ky. App. 2024).

2023-CA-0769-MR 8/16/2024 2024 WL 387046

Opinion Vacating and Remanding by CETRULO, JUDGE; L. JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 03/12/2025

Amboree appealed the Henderson Circuit Court's judgment, which sentenced him to six years of imprisonment for two convictions of possession of a controlled substance under KRS 218A.1415. A jury found Amboree guilty of two felonies: possession of methamphetamine and possession of fentanyl. For those crimes, the circuit court imposed two, three-year sentences to run consecutively for six years. Amboree challenged that sentence, arguing that the circuit may only run his sentences consecutively for three years, not six. He argued that KRS 532.080 excludes convictions for possession from a sentence enhancement, and KRS 532.110(1)(c) therefore caps a consecutive sentence at three years.

The Court of Appeals held that Amboree's consecutive sentences exceeded the statutory cap provided by law. The Court noted the maximum term of incarceration for possession crimes under KRS 218A.1415(2)(a) is three years, unlike the five-year maximum for other Class D felonies. It then pointed to subsection (8) of the PFO statute, KRS 532.080(8), which bars convictions for possession of a controlled substance from a sentence enhancement. Thus, the Court reasoned that the PFO statute only authorizes Amboree's sentences for possession to run consecutively for up to three years.

So ruling, the Court discussed *Commonwealth v. Gamble* in which the Supreme Court held that sentences for second-degree trafficking qualify for a PFO enhancement and may run consecutively for up to 20 years, despite the three-year maximum provided by KRS 218A.1413. 453 S.W.3d 716 (Ky. 2015). In doing so, our Supreme Court compared the language of the trafficking statute with the possession statute, recognizing that "KRS 218A.1415 has much clearer language. The statute states that despite its classification as a Class D felony, first-degree possession of a controlled substance carries a 'maximum term of incarceration [ ] no greater than three (3) years, notwithstanding KRS Chapter 532.'" *Id.* at 720-21. Similarly, this Court in *Eldridge v. Commonwealth* had noted that the language of KRS 218A.1415 means that no section of KRS Chapter 532, including the PFO statute, may enhance sentences for possession beyond three years. *Id.* at 619 (quoting *Gamble*, 453 S.W.3d at 720-21). For these reasons, the Court of Appeals vacated Amboree's sentence and remanded for resentencing.

B. PAIGE WILLIAMS v. COMMONWEALTH OF KENTUCKY (Ky. App. 2024).

2023-CA-0988-MR 8/16/2024 2024 WL 3836783
2023-CA-0403-MR

Opinion Reversing by TAYLOR, JUDGE; COMBS, J. (CONCURS) AND L. JONES, J. (CONCURS)

In 2019, Williams was indicted by a Christian County Grand Jury on eight counts of first-degree criminal abuse, victim twelve years of age or less. KRS 508.100. Williams was a pastor at First Methodist Church (FUMC) when several daycare employees reported incidents of abuse of the children at FUMC's daycare to Williams. The alleged perpetrator was Simpson, an employee of the daycare. Williams did not initially act on the reports of abuse despite the evidence presented to him. Eventually, the abuse was reported to a parent, who reported the abuse to the police. After obtaining a search warrant, the hard drive of the daycare's video recording system was seized and revealed eight incidents of children being abused by Simpson. Williams was subsequently indicted upon eight counts of criminal abuse in the first degree, victim twelve years of age or less. Following a jury trial, Williams was found guilty of the lesser included offense of criminal abuse in the third degree, victim twelve years of age or less.

On appeal, Williams contended the trial court erred by denying her motion for a directed verdict of acquittal upon the offenses of criminal abuse, and that she did not have actual custody of the children. Because she never had custody of the children, Williams contends the Commonwealth failed to prove an essential element of criminal abuse. The Court agreed with Williams. The plain language of KRS 508.120 indicates the defendant must have actual custody of the abused child. "Actual custody" must necessarily include the direct care or the direct control of a child by a defendant, and the evidence in this case indicated that Williams never exercised direct care or control over the children. Thus, the trial court's order was reversed.

III. PROPERTY

A. ERIN HERNANDEZ AND JUAN MANUEL HERNANDEZ v. COUNTY INVESTMENTS, LLC; ALAN STEVEN RUBIN; MAC SAWYERS; AND ROSS LERNER (Ky. App. 2024).

2023-CA-0236-MR 8/09/2024 2024 WL 3731869
2023-CA-0255-MR

Opinion Affirming in part and Reversing in part by McNEILL, JUDGE; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The Hernandezes appealed from a Jefferson Circuit Court judgment awarding $7,760 in damages to County Investments for unpaid rent, property damage, and attorney fees. County Investments cross-appealed. In 2014, County Investments obtained a quitclaim deed for a property in foreclosure. In September 2016, the Hernandezes entered into a rental agreement with County Investments to rent the property for one year at $1,100

per month. In December 2016, after learning the property was in foreclosure and would be sold at a judicial sale, the Hernandezes stopped paying rent. After the sale, County Investments exercised its right of redemption under Kentucky Revised Statute ("KRS") 426.530 to purchase the property and obtained a Commissioner's Deed in July 2017. The Hernandezes vacated the property in May 2017. County Investments filed a complaint seeking unpaid rent, attorney fees and costs, and sums due for damages to the property. The trial court held that County Investments had the proper authority to enter into the lease agreement and entitled to collect rent. After a subsequent hearing on damages, the trial court entered a final judgment awarding County Investments $4,400 for unpaid rent, $1,000 for property damages, and $2,360 for attorney fees.

On appeal, the Hernandezes raised multiple arguments. First, they argued the trial court erred when it determined County Investments had the authority to lease the property and collect rent in 2016. However, County Investments obtained a quitclaim deed in 2014. County Investments took the property subject to the mortgage lien, but the property owner was still entitled to lease the property out despite the property's foreclosure status. The Hernandezes further argued that the trial court lacked subject matter jurisdiction because the amount in controversy was less than the $5,000 minimum required by statute. For jurisdictional purposes, the amount in controversy is determined based on the allegations in the complaint, not what the party is actually entitled to. Because County Investments sought $5,500 in unpaid rent and unspecified property damages, the trial court had subject matter jurisdiction over the claims. Finally, the Hernandezes alleged that the attorney fees award was precluded by KRS 383.570(1)(c). We reversed the award of attorney fees because County Investments failed to property plead its claim for attorney fees under KRS 383.660(3). The Hernandezes argued next that the trial court's award for property damages was erroneous because it failed to make findings of fact to support the damages award. Despite hearing testimony about specific damages to the property, it was still unclear what the damage the $1,000 was awarded for. It was testified that $3,500 in repair costs and other property damage was found, but the trial court's order was unspecific as to what repair cost the $1,000 award was going toward. Therefore, the award of $1,000 in damages was reversed and remanded for the trial court to make specific findings of fact, based on the evidence presented at the damages hearing, to support its damage award.

On cross-appeal, County Investments argued the trial court erred when it denied its motion to amend its complaint after four years had passed. Because time alone is not a sufficient reason to deny a motion to amend a complaint, the trial court erred when it denied County Investments' motion to amend its complaint. County Investments wanted to amend its complaint to seek the full eight months of rent due under its rental agreement with the Hernandezes. There was no reason to think that the Hernandezes did not know they owed $8,800 under the lease agreement because the lease was for a full year and they only paid four-months' rent. County Investments argued that it was entitled to the full eight months of unpaid rent owed under the lease agreement. When

a party claims breach of contract, it must show it used reasonable efforts to mitigate its damages from the breach and the party committing the breach has the burden of proving the party failed to mitigate its damages. Here, not only did the trial court place the burden of proof on County Investments when it should have been on the Hernandezes, it also erred when it determined County Investments had not attempted to mitigate its damages.

B. ***HAMILTON v. P.B. STRATTON FAMILY PARTNERSHIP, LLC (Ky. App. 2024).***

2023-CA-0575-MR 2023-CA-0577-MR 2023-CA-0580-MR 2023-CA-0663-MR	8/30/2024	2024 WL 3997119

Order and Opinion Affirming by ECKERLE, JUDGE; CALDWELL, J. (CONCURS) AND CETRULO, J. (CONCURS)

This case involves complex issues dealing quiet-title actions and trespass theories on boundary-line disputes and claims for ownership of the mineral royalties retrieved from mines and wells that were operated on the two properties at issue. There are many parties to the case, however the main groups are the: Hamiltons, Colemans, Strattons, Comptons, Shelby Field, Cambrian Coal, EQT, and Dismissed Parties. Back in 1896, Nelson Hamilton conveyed a tract of land to his son, John Hamilton. There was no surveyed description of the property, just descriptions of natural monuments and surrounding boundaries. Surrounding tracts included the William Adkins patent, the John Dils tract, and the Peyton Justice patent. The deed included the Coleman tract. In 1898, Nelson Hamilton conveyed the adjoining track to James Hamilton, and based part of the description in the 1898 deed upon the 1896 deed. The 1898 deed includes the tract claimed by the Hamilton parties and is the main focus of the action. The Colemans and Hamiltons hold clear title to their land as described in the 1896 and 1898 deeds.

The dispute between the Hamiltons and Strattons stems from varying interpretations of the 1898 deed boundary. The dispute between the Hamiltons and Comptons is an offshoot of the Hamilton-Straton dispute. Karen Compton's predecessor, Slone, received a deed from the Stratton predecessor in 1963. Slone then passed the property on via two deeds in 2005 and 2006, as well as a residual section of his will. Karen Compton testified that her family used and controlled the entire tract in the 1963 deed since she could remember. She testified that Jimmy Hamilton told her he owned the property, which is the best proof of any party regarding adverse possession. Jimmy Hamilton acknowledged Mrs. Compton and her family met the requirements of open, continuous, exclusive, and notorious possession of the property.

The trial court concluded that the Colemans own the property in the 1896 deed from Nelson Hamilton to John Hamilton. The Hamiltons own the property in the 1898 deed to

James Hamilton. The Strattons own the property in the 1924 Commissioners deed, with two exceptions. The Comptons own the surface tract as described in the 1963 deed to Slone both by record title and possession, as acknowledged by Jimmy Hamilton. The three families (Hamilton, Stratton, Coleman) own property within the bounds of their source deeds; however, a jury must decide the boundaries of these properties and damages. The Comptons own the surface interest.

A total of five maps were submitted to the jury. The jury found that the map that depicted the Hamiltons' property with more land to be accurate, as compared to the map that gave the Colemans' more property. The Strattons claim property interests that are derived from a 1924 Court-ordered deed that was a result of a division of the Dils estate. Part of the Dils property borders part of the claimed land by the Hamiltons and Colemans. However, over years of conveyances of surface and mineral interests, the Strattons were left possessing only some of the gas, oil, and coal interests.

As it relates to the various trespass and disgorgement claims, the Strattons, Colemans, and Hamiltons had all entered into leases for the rights to mine coal from their various property interests. Strattons leased to Shelby Fuel, later subleased to Cambrian. Colemans and Hamiltons also leased to Cambrian.

The trial court directed a verdict in favor of the Strattons and Colemans on the trespass claims, as the Hamiltons had expressly consented to the mining activities. The trial court also directed a verdict in favor of the Colemans on a claim for disgorgement of royalties advanced to the Colemans. The jury determined the Hamiltons' boundary included the larger of the two properties at issue, but not the smaller one. They were also awarded royalties paid by Cambrian and the disgorgement of royalties received by the Strattons and Shelby Fuel.

The Colemans argued on appeal that the trial court erred by instructing the jury in a manner that permitted a choice between various maps. They argued, along with the Strattons, that one call in the 1898 deed should be interpreted as a matter of law to be a straight line in accordance with *Carter v. Elk Coal Company*, 173 Ky. 378, 191 S.W. 294, 300 (1917), ending any factual dispute about whether the line should follow the meanders of the ridge found on the map. This Court held that *Carter* does not require that narrow of a result. The question here of where a line is located was one for the jury, as it was not as simple as the question presented in *Carter*. There was no error in this jury instruction.

The next issue the Court analyzed was the trial court's decision to hold a jury trial in a quiet title action to determine where the property boundaries lay. The trial court held a bench trial to determine that the parties had valid legal title to the real property, but the jury trial was held to determine the physical boundaries of the property lines as it constituted a factual dispute. Boundary disputes often involve legal and factual questions. Due to the many factual questions at issue in this case, the trial court

properly submitted the case to a jury to determine the physical locations of the property boundaries.

This Court further held that it was not error on part of the trial court to not permit an attorney for one of the parties to testify. It was also not an abuse of discretion when the trial court did not allow an attorney for one of the parties to be deposed. This Court found no errors in the judgments or the trial court's rulings on the motions for judgment and motions for directed verdict.

C. ***AMERICAN COAL TERMINAL, INC., ET AL. v. ETERA, LLC, ET AL. (Ky. App. 2024).***

2023-CA-0068-MR 2023-CA-0250-MR	8/30/2024	2024 WL 3995999

Opinion and Order Reversing and Remanding Appeal NO. 2023-CA0068-MR and Dismissing Appeal NO. 2023-CA-0250-MR by LAMBERT, JUDGE; McNEILL, J. (CONCURS) AND TAYLOR, J. (CONCURS)

These appeals involved two summary judgments relating to a breach of contract and foreclosure action filed against American Coal. The first appeal was of a monetary judgment and order of sale. The second appeal was from an *in rem* summary judgment relating to *ad valorem* tax liens. The Court reversed and remanded with respect to the first appeal and dismissed with respect to the second appeal.

The first appeal concerned two promissory notes secured by real and personal property. The holder of the notes conducted a nonjudicial sale of the personal property to satisfy the outstanding balance of the notes before securing a judicial order authorizing the sale of the real property. The trial court entered summary judgment in favor of the holder. It also awarded the holder a judgment of almost $12 million, the claimed balance still outstanding on the notes before it sold the debtors' personal property.

The appellant, SNR, defaulted on its loan obligations in 2021, and appellees, MidCap accelerated the amounts due and owing under the notes and demanded immediate repayment. SNR failed to make any substantial payments after its default. MidCap filed against SNR for breach of contract and sought summary judgment. However, MidCap altered the litigation by informing the involved parties of its intention to satisfy part of the outstanding balances of the notes by conducting a nonjudicial sale of SNR's personal property collateral. SNR filed a motion to enjoin MidCap from conducting the sale; however, the sale occurred before the trial court was able to hear SNR's motion. The motion was withdrawn and incorporated into SNR's response to MidCap's motion for summary judgment. Ultimately, the trial court entered summary judgment in favor of MidCap and awarded it almost $12 million, the amount MidCap claimed was the outstanding balance of the notes before it sold SNR's personal property and retained the proceeds. It also entered an order permitting MidCap to satisfy the entirety of that

amount by selling SNR's real property. However, the trial court's order does not explain how it reached that result; it does not mention MidCap's nonjudicial sale, its "commercial reasonableness," or MidCap's receipt of $1.6 million in proceeds from the sale.

MidCap's theory of recovery against SNR was breach of contract. Due to the circumstances of the case, MidCap should have been required to prove, among other elements, that it conducted its nonjudicial sale of SNR's personal property collateral in a commercially reasonable manner; and the trial court should have granted SNR an opportunity to conduct discovery in that regard. This Court determined that MidCap was required to credit its proceeds from the nonjudicial sale towards the almost $12 million it claims was outstanding on its promissory notes. There was also not enough time for SNR to conduct discovery between the sale and the trial court's order favoring MidCap. Further, the trial court should have allowed SNR to amend its answer to raise the issue of MidCap's alleged noncompliance with its obligation to dispose of the collateral in a commercially reasonable manner because the nonjudicial sale was governed by Article 9 of the UCC. The trial court abused its discretion when it denied SNR's motion to amend its answer. The Court reversed the trial court's order denying SNR's motion to amend its answer and reverses the trial court's summary judgment order.

The Court also determined that SNR did not contractually waive its right to have its personal property collateral sold in a commercially reasonable manner, because parties cannot do so under KRS 355.9-602(7) and KRS 355.9-610(2). Remedies are provided under KRS 355.9-626 if commercial reasonableness was not used, and commercial reasonableness may not be waived pursuant to KRS 355.9-602(13).

The second appeal involves a second order of the trial court entered after it rendered its order for summary judgment, as discussed above. The second order adjudicated the validity and amount of tax liens held by appellees, Boyd County and the Kentucky Revenue Cabinet. SNR argued on appeal that the summary judgment from the first appeal divested the trial court of jurisdiction to enter its second order, rendering the second order void. The Court determined the order was not void because the trial court lacked jurisdiction but dismissed the appeal because that order was interlocutory.

IV. EMPLOYMENT LAW

A. MITCHEL WEAFER v. HERITAGE INSTALLATIONS I, LLC (Ky. App. 2024).

2023-CA-0665-MR 8/09/2024 2024 WL 3731874

Opinion Reversing and Remanding by McNEILL, JUDGE; CALDWELL, J. (CONCURS) AND ECKERLE, J. (CONCURS)

This appeal arose from a wrongful discharge claim filed in Fayette Circuit Court. Weafer worked for Heritage installing doors and windows. He reported to his supervisor that his work trailer had defective brakes and brake lights which required repair. When the repairs were not made, Weafer refused to drive the vehicle and Heritage terminated his employment. In the amended complaint, Weafer alleged he was fired after refusing to abide by Heritage's directive to violate the law during his employment. Heritage filed a motion to dismiss pursuant to Kentucky Rule of Civil Procedure ("CR") 12.02(f), which the trial court granted. This appeal followed.

Kentucky is an at-will employment and employers may discharge employees "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) (citations omitted). However, there is a public policy exception to the at-will doctrine. Two specific exceptions have been recognized under the exception: (1) where the reason for discharge is due to the employee refusing to violate the law in the course of his employment, and (2) when the reason for discharge was the employee's exercise of a legislatively enacted right. *Grzby v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985). This case concerns the first exception. The Kentucky legislature has made it clear that brakes and brake lights are required to operate a vehicle in Kentucky. Kentucky Revised Statute ("KRS") 189.090(1) and KRS 189.055. Safely operating a vehicle is clearly important public policy. An employment-related nexus is also evident here. Further, in granting the underlying motion to dismiss, the trial court relied in part on the Supremacy Clause, U.S. CONST. art. VI, cl. 2, holding that Weafer's claim was pre-empted by the Federal Aviation Administration Authorization Act. No Kentucky appellate court has addressed this issue, and there was no clear directive presented that stated federal law supersedes the relevant provisions of KRS Chapter 189 as it applies to this issue. Therefore, this Court reversed and remanded for further proceedings.

V. ESTATE LAW

A. ESTATE OF KATIE LYNN GRISEZ v. ERIE LIFE INSURANCE CO. (Ky. App. 2024).

2022-CA-0451-MR 8/16/2024 2024 WL 3836617

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

After Katie Grisez died in a utility terrain vehicle (UTV) accident, Appellee insurer obtained the damage UTV and eventually sold it. The Appellant Estate of Grisez, utilizing the private right of action statute, KRS 446.070, alleged Appellee's actions violated KRS 524.100 prohibiting tampering with evidence. The circuit court granted

Appellee's CR 12.02(f) motion to dismiss for failure to state a claim because, despite taking the complaint's allegations as true, *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997) required dismissal. On discretionary review, *Monsanto* reversed the Court of Appeals opinion holding "the tort of spoliation is consistent with the statutory and common law of this jurisdiction." *Reed v. Monsanto*, 93-CA-2125-MR, 1995 WL 96819 (Ky. App. Mar. 10, 1995). The Supreme Court in *Monsanto* reversed this Court's "creation of a new cause of action for 'spoliation of evidence' . . . [preferring] to remedy the matter through evidentiary rules and 'missing evidence' instructions." 950 S.W.2d at 815. However, Appellant argued, correctly, that *Monsanto* never mentions the private right of action statute and seems only to address the common law basis for recognizing the tort. The Court of Appeals in this case, *Estate of Grisez*, found *Monsanto* to have implicitly rejected the statutory basis for the tort and postulated a rationale, as follows. For a private right of action to present a viable claim, "the person damaged [must be] within the class of persons the statute intended to be protected." *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005). Citing *Swan v. Commonwealth*, 384 S.W.3d 77, 91 (Ky. 2012), the Court of Appeals in *Estate of Grisez* held that "sanctions and remedies for spoliation of evidence, whether statutory or procedural, do not serve to protect one party or another so much as to protect and serve 'the interests of justice.' " Consequently, the Court of Appeals affirmed the circuit court's interpretation of *Monsanto* and its dismissal of Appellant's spoliation of evidence claim as not recognized in Kentucky jurisprudence.

VI. FAMILY LAW

A. ASHLEY V. BARNETTE, INDIVIDUALLY AND IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF KAMDEN HUNTER WILLIAMS v. ANGEL EVANS (Ky. App. 2024).

2023-CA-1159-MR 8/16/2024 2024 WL 387075

Opinion Reversing and Remanding by KAREM, JUDGE; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Mother filed a negligence action against the Cabinet for Health and Family Services ("Cabinet"), the Department for Community Based Services ("DCBS"), and DCBS service workers for the death of her 3-year-old son. Mother and putative father were incarcerated for various drug offenses throughout most of the child's life and the court granted guardianship to Mother's sister. On the day of the child's death, the child's caretaker left him at home in the care of her eleven-year-old son when a fire broke out. Only the 11-year-old survived the fire. The trial court granted summary judgment to all defendants finding that they are shielded by qualified immunity.

On appeal, Mother argues that the court should have permitted additional discovery; made more factual findings; and, ruled on her motion to file a second amended

complaint. The Court held that the trial court gave the parties ample time for discovery; thus, the ruling on summary judgment was not premature. However, the Court remanded the case back to the trial court to issue a ruling in accordance with the standards described in *Meinhart v. Louisville Metro Government*, 627 S.W.3d 824, (Ky. 2021). Lastly, the Court found that Mother failed to exercise reasonable diligence to obtain a ruling on her motion to file a second amended complaint before it became a moot issue.

B. JOLLY v. JOLLY (Ky. App. 2024).

2023-CA-1189-MR	8/30/2024	2024 WL 3996114

Opinion Affirming by CETRULO, JUDGE; L. JONES, J. (CONCURS) AND McNEILL, J. (CONCURS)

This is an appeal from a denial of CR 60.02 relief by the Bourbon Family Court. The judgment appellant sought to set aside was a decree of dissolution and incorporated separation agreement in an uncontested divorce proceeding. The appellant argued that the agreement was unconscionable and that the family court's failure to appoint a Guardian *Ad Litem* to represent him when he was incarcerated required setting it aside. We noted that Civil Rule 17.04 does require appointment of a guardian when a prisoner fails or is unable to defend an action unless that right to legal representation is waived. Here, however, the appellant did waive his right to counsel, agreed to an uncontested dissolution process, and knowingly signed an agreement. He did not fail to defend, but waived his defenses. Further, the family court correctly considered the grounds asserted for CR 60.02 relief and did not abuse its discretion in refusing to set aside the parties' agreement. The family court did not find the agreement unconscionable as it mirrored the parties' prior agreement in the unrelated criminal action, where appellant did have counsel.

C. T.P. v. CABINET (Ky. App. 2024).

2024-CA-0402-MR	8/30/2024	2024 WL 3996119

Opinion Affirming by CETRULO, JUDGE; L. JONES, J. (CONCURS) AND McNEILL, J. (CONCURS)

This is an appeal from a judgment terminating the parental rights of a mother to her daughter. Upon evidence that the mother had created the appearance of health problems in her child that were non-existent, the Cabinet took custody of the child and removed her from the mother's care and control over medical decisions. The child's extensive laundry list of health problems then quickly and completely vanished. The Cabinet filed to terminate the mother's rights after child had been in foster care for more than two years. The mother continued to deny that this medical abuse had occurred,

but she did not testify. At trial, the family court considered medical records, testimony of experts, the social worker, and therapist for the child and noted the astonishing improvement in the child's health since being removed from the mother's custody. The family court addressed all statutory prerequisites in finding that termination of parental rights was in the best interest of the child. The mother argued that the Cabinet had failed to make reasonable efforts to provide services necessary for reunification. The testimony at trial was that there were very few practitioners in the Commonwealth qualified to treat Factitious Disorder by Proxy. However, the family court noted that with the mother's continued denial of responsibility for causing her child harm, it was unclear what other services the Cabinet could have offered while protecting the child. We affirmed the Scott Family Court.

VII. INSURANCE

A. DEADWYLER ET AL. v. THE GRANGE PROPERTY AND CASUALTY INS. CO. (Ky. App. 2024).

2023-CA-1011-MR 8/30/2024 2024 WL 3997273

Opinion Affirming by ACREE, JUDGE; THOMPSON, CHIEF JUDGE (CONCURS) AND GOODWINE, J. (CONCURS)

Appellants, Kesha Deadwyler and Ashley Anderson, received treatment from Total Health Chiropractic and Rehab (Total Health) following an auto accident and sought basic reparation benefits from appellee, the Grange Property and Casualty Insurance Company (Grange) under a policy held by Deadwyler. Appellants sought treatment from Total Health forty-six days after the accident and sought reimbursement from Grange thereafter. Deadwyler's policy with Grange obligated persons seeking coverage to undergo examinations under oath (EUOs) as frequently as Grange reasonably required. Grange petitioned the circuit court to conduct an EUO of both Appellants pursuant to Kentucky Revised Statute (KRS) 304.39-280(3), seeking to question them about the facts and circumstances surrounding the auto accident; Grange suspected Total Health engages in insurance fraud, including billing for services not rendered. Grange also suspected Total Health solicited Appellants within thirty days despite being prohibited by KRS 367.4082 from doing so. Grange listed seven topics of inquiry for its proposed EUO, including questions regarding solicitation and the circumstances of the accident. The circuit court granted Grange's petition but limited the scope of Grange's inquiry to exclude discussion of Appellants' medical treatment. Regarding Grange's proposed questioning about solicitation, the circuit court limited Grange's inquiry to whether Appellants were referred to Total Health within thirty days of the auto accident and, if so, the name of the person who referred them. Appellants appealed, arguing (1)

Grange did not demonstrate good cause for its EUO as KRS 304.39-280(3) requires, and (2) the information Grange seeks is beyond the scope of acceptable EUO topics that *State Farm Mutual Auto Insurance Company v. Adams*, 526 S.W.3d 63 (Ky. 2017) established. The Court of Appeals determined good cause existed for the proposed EUO because it could not be said that no relevant information could be gleaned from the proposed EUO; the proposed EUO would allow Grange to obtain information regarding suspected insurance fraud and solicitation. As for Appellants' second argument, the Court of Appeals determined the circuit court had properly restricted the scope of inquiry in compliance with *Adams*. Under *Adams*, only certain topics may be inquired into during EUOs. Accident-related questions are permissible, while medical-related questions are not. *Adams* noted that accident-related and medical-related questions may sometimes be inter-related, and placed faith in trial courts to make such distinctions absent statutory guidance. Applying these principles to the appeal before it, the Court of Appeals determined the circuit court's tailoring of EUO questioning complied with *Adams* by excluding medical-related inquiries and restricting the scope of the solicitation inquiry, which the circuit court had deemed both accident-related and medical-related.

B. ***KENNETH JARNIGAN v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY (Ky. App. 2024).***

2023-CA-0333-MR 8/16/2024 2024 WL 3836618

Opinion Reversing and Remanding by TAYLOR, JUDGE; COMBS, J. (CONCURS) AND L. JONES, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 03/12/2025

This appeal arose from a motor vehicle accident between Jarnigan and Middleton; Jarnigan was insured by Allstate and Middleton was insured by State Farm. Because Jarnigan suffered injuries, Allstate paid basic reparation benefits of $10,000 for Jarnigan's medical expenses. Jarnigan filed suit against Middleton in Ohio Circuit Court, but eventually offered to settle for $50,000, which was the policy limit for bodily injury coverage. Jarnigan was informed Allstate asserted its right to be subrogated for its reparation payment to him. State Farm reimbursed Allstate $9,000 from Middleton's bodily injury coverage in the amount of $50,000, but both companies failed to inform Jarnigan's counsel of the payment. Only $41,000 of the bodily injury benefits under Middleton's policy remained, and the parties reached a settlement where Jarnigan would receive the remaining $41,000 of benefits available under the State Farm policy. Jarnigan released Middleton and State Farm from additional liability but filed a motion to amend his complaint to add Allstate as a defendant. He asserted that Allstate could only seek to recoup paid basic reparation benefits through subrogation if its insured, Jarnigan, was fully compensated for his injuries. Jarnigan also alleged that Allstate violated the Motor Vehicle Reparations Act (MVRA) by wrongfully obtaining the $9,000 payment and had acted in bad faith and in violation of the Unfair Claims Settlement Practices Act (UCSPA) by obtaining the payment. The motion to amend the complaint

was granted by the trial court, and Allstate filed a motion to dismiss. The motion to dismiss was granted by the trial court, because Jarnigan's claims based upon bad faith and violation of the UCSPA could not succeed and Jarnigan failed to state a claim upon which relief could be granted. However, Jarnigan filed a motion to vacate the trial court's order, arguing the trial court failed to address all the claims raised in his amended complaint against Allstate. The motion was granted, and the trial court acknowledged that Allstate improperly obtained reimbursement of $9,000 for basic reparation benefits paid to Jarnigan. Nonetheless, the trial court determined Jarnigan's only remedy was to seek recoupment of the $9,000 from State Farm since it wrongfully reimbursed Allstate. Jarnigan's amended complaint was dismissed pursuant to CR 12.02.

This case hinged on whether Allstate improperly obtained reimbursement of $9,000 from State Farm by allegedly misusing its statutory subrogation right found in the MVRA and the proper remedy, if any, for such misuse. Under KRS 304.039-070, a reparation obligor (such as Allstate) does not have an all encompassing right to subrogation for paid basic reparation benefits. Those subrogation rights are limited by KRS 304.39-140(3); the reparation obligor may only obtain reimbursement for paid basic reparation benefits from the tortfeasor's liability insurance if its insured is fully compensated for his damages. Thus, there exists a legal remedy against Allstate for its misconduct. The insured party, Jarnigan, may recover directly from its insurer, Allstate, such amount of the improperly received basic reparation benefits reimbursement that would have been available from a tortfeasor's liability carrier to compensate the insured for his damages. The trial court thus erred by rendering summary judgment dismissing Jarnigan's amended complaint. This Court reversed and remanded.

VIII. LEGISLATIVE/OFFICE OF ATTORNEY GENERAL AUTHORITY

A. COMMONWEALTH OF KENTUCKY, EX REL. ATTORNEY GENERAL RUSSELL COLEMAN v. JANE DOE 1; JANE DOE 2; AND JOHN ROE (Ky. App. 2024).

2023-CA-1103-MR 2023-CA-1140-MR	8/12/2024	2024 WL 3732274

Opinion Affirming 2023-CA-1103-MR and Vacating and Remanding 2023-CA-1140-MR by Easton, JUDGE; ACREE, J. (CONCURS) AND GOODWINE, J. (CONCURS)

The Office of the Attorney General (OAG) issued a grand jury subpoena with the support of the Franklin County Grand Jury. OAG was investigating the employment of Jane Doe 1 and Jane Doe 2 ("the Does"), both employed by Roe LLC. The Does had a second employer in the same county who receives some of its general funding from the

Commonwealth. The focus of the investigation was potential violations of criminal laws involving state funds. The June 2023 subpoena issued by OAG was directed to Roe, a member of Roe LLC, and sought essentially all employment records regarding the Does. OAG wanted to compare the records for evidence that certain state funds were related to some kind of deceit connected with their work. Roe and the Does moved to quash the subpoena and seal the record. OAG agreed the record should be sealed. The trial court granted the motion to quash the subpoena. After the first notice of appeal was filed, the trial court entered an order which unsealed a portion of the record. OAG filed an emergency motion to this Court, asking for an order that the case remain sealed pending an opinion on the merits of the appeals, which was granted.

As to the sealing of the record, we concluded that our Court's keeping the identities of the participants anonymous and the trial court's reassessing whether any or all parts of the record should be sealed will balance the necessary secrecy surrounding grand jury proceedings and the public's right to know what its government does.

As to the merits of the appeal, the OAG asked this Court to reverse the trial court's determination that the Does have standing to challenge the subpoena. This Court held the Does, along with Roe, did have standing to bring the action because OAG sought personal and financial information not generally available to the public. The action was the only way for the Does to address the potential invasion of privacy.

OAG argued it had the authority under KRS 15.715(6) in Franklin County to investigate the potential crimes at issue here (unauthorized payments being made from the state treasury to the Does). However, the alleged payments were being paid indirectly to the Does and occurred outside of Franklin County. Kentucky has adopted a cooperative prosecutorial system, and no one in the county where the Does work asked the OAG to assist in investigating crimes in that particular county. KRS 15.715(6) cannot apply just because there is possibly an indirect connection to state funds.

Further, the trial court found the subpoena issued to be unreasonable because there was no allegation that state funds were being used directly to violate the law and there was no precedent provided to support the theory that any crime was committed relating to the personal and tax information sought. Thus, the trial court's order quashing the subpoena in question was affirmed.