PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2025 to FEBRUARY 28, 2025

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. CIVIL PROCEDURE

A. SAMMY ROSE v. LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, ET AL. (Ky. App. 2025).

2024-CA-0432-MR 2/28/2025 2025 WL 647890

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

In a direct appeal from the trial court's dismissal of Appellant's civil claims against the Appellees, the Court of Appeals reversed and remanded for further proceedings. Appellant's complaint was "signed" by the typewritten name of "Samuel G. Hayward." However, at the time the complaint was filed, attorney Samuel G. Hayward, Sr. was deceased. His son, Samuel G. Hayward, Jr., was also an attorney in the same law firm as his father. Appellees convinced the trial court that the typewritten signature of "Samuel G. Hayward" referred to the deceased father because it omitted "Jr." Appellees argued that Appellant's complaint violated Civil Rule 11 because, as it observed, "the signature of a deceased attorney who died well before the filing of the Complaint and who was never counsel of record in this action is invalid and wholly fails to meet basic Rule 11 requirements." At this point, the five-year statute of limitations had expired for the Appellant's claims, and the complaint could not be refiled. The trial court agreed with the Appellees' reasoning, and so it struck the complaint and dismissed the action.

The Court of Appeals reversed, holding that the trial court improperly struck the complaint based on the typewritten signature. The absence of "Jr.," standing alone, does not prove the typewritten signature was meant to be that of the deceased father instead of the son. Furthermore, the Appellees did not offer any testimony or assertions from Samuel G. Hayward, Jr. about the signature, only speculation. Speculation is not evidence. Finally, although it is true that the typewritten signature in this case violated Rule 11, the deficiency was not called to Appellant's attention. Rule 11 contemplates that an omission of a specific nature, e.g., "the omission," will be "called to the attention" of the pleader or movant, and that the pleader or movant will be given an opportunity to dispute the alleged omission and – if it is indeed an omission – an opportunity to promptly cure it. The Rule only authorizes the striking of a complaint for omissions "called to the attention of the pleader," which did not occur in this case.

II. CONSTITUTIONAL LAW

A. R.LP. v. COMMONWEALTH OF KENTUCKY (Ky. App. 2025).

2023-CA-1254-MR 2/7/2025 2025 WL 420930

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

DISCRETIONARY REVIEW GRANTED 08/06/2025

In a direct appeal from the trial court's order of involuntary and indefinite commitment, the Court of Appeals affirmed, upholding the constitutionality of KRS Chapter 202C. Appellant presented three arguments on appeal. First, Appellant argued the statute unconstitutionally deprives due process for the mentally ill. This argument contained two essential subparts: (1) the initial evidentiary hearing, in which the trial judge determined whether a respondent is "guilty" by a preponderance of the evidence and without a jury, violates due process; and (2) the statute violates due process because it creates a more restrictive commitment reserved only for those found incompetent. In his second main argument, Appellant argued the General Assembly violated Sections 46 and 51 while in the process of enacting HB 310, which created KRS Chapter 202C. Third, Appellant argued the trial court erroneously allowed hearsay testimony from the Commonwealth's medical experts during his commitment hearing.

The Court of Appeals rejected Appellant's arguments. First, we disagreed that KRS Chapter 202C violated due process, holding that the initial evidentiary hearing on "guilt" is a threshold or screening mechanism prior to the actual commitment hearing. While the evidentiary hearing is without a jury and uses a preponderance standard, the commitment hearing allows the respondent to opt for a jury, and commitment must be determined using the criminal standard of beyond a reasonable doubt. Furthermore, although this two-part process uses terms borrowed from criminal law, involuntary commitment under KRS Chapter 202C is a civil proceeding. Next, we declined to consider Appellant's argument that the statute is unconstitutional for creating a more restrictive commitment based on incompetence because this argument was not presented to the trial court.

For Appellant's second argument, we held that the passage of HB 310 did not violate Section 46 (the "three-reading" requirement) or Section 51 (the title requirement) of the Kentucky Constitution. Appellant relied heavily on *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74 (Ky. 2018), arguing that because HB 310 was amended to insert language creating KRS Chapter 202C, the General Assembly should have re-read the amended bill an additional number of times. We agreed with the trial court's analysis that this bill was factually distinct from the scenario in *Bevin*, and the process was sufficient in this case. Similarly, we held the General Assembly did not violate Section 51's requirement that the title of a bill relate to the subject. The amended title of

HB 310, “An Act relating to crimes and punishments and declaring an emergency” was enough to give “general notification of the general subject of the act,” which is all that is required. *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002).

Finally, we disagreed with Appellant on the hearsay question and affirmed the trial court’s admission of the Commonwealth’s experts’ testimony. The issue surrounded whether the doctors could reference psychiatric risk assessment tools which were administered by other staff members at Kentucky Correctional Psychiatric Center. Kentucky Rule of Evidence 703 “embodies the well-established rule that experts are permitted to base their opinions on facts and data that are not otherwise admissible in evidence, if they are of a type reasonably relied upon by other experts in their field.” *Exantus v. Commonwealth*, 612 S.W.3d 871, 899 (Ky. 2020). Because the doctors testified that the risk assessments were tools typically relied upon by psychiatrists, as well as the fact that the doctors used their own individual conversations with Appellant to form their opinions, we discerned no error in the trial court’s admission of the testimony.

III. CRIMINAL LAW

A. GARETH HERALD v. COMMONWEALTH OF KENTUCKY (Ky. App. 2025).

2023-CA-1164-MR 2/7/2025 2025 WL 421917

Opinion and Order Dismissing by EASTON, JUDGE; ACREE, J. (CONCURS) AND MCNEILL, J. (CONCURS)

This case involves an Appellant who became a fugitive after his probation was revoked, and he appealed the revocation decision. The Commonwealth filed a motion to dismiss this appeal based on the Fugitive Disentitlement Doctrine (“FDD”), which “recognizes the principle that when a criminal defendant absconds and remains a fugitive during his or her appellate process, dismissal of the appeal is an appropriate sanction.” *Commonwealth v. Hess*, 628 S.W.3d 56, 57 (Ky. 2021). This Court granted the Commonwealth’s motion to dismiss.

In light of the Kentucky Supreme Court’s recent decision in *Anderson v. Commonwealth*, __ S.W.3d __, 2024 WL 5172358, No. 2023-SC-0447-DG (Ky. Dec. 19, 2024), this case presented an opportunity to address a proper procedure for such motions. Specifically, in its motion to dismiss, the Commonwealth should clearly indicate that judicial notice is sought and explain the documents or other information offered as proof of the fugitive status. The Appellant should be able to question the accuracy of the information offered in its response to the motion to dismiss. Here, the Commonwealth asked for this Court to take judicial notice of the official Notice of Discharge when Appellant was released from prison on parole and a copy of the

pending Parole Violation Warrant, and Appellant responded. This Court concluded this is a sufficient and proper process for these cases.

Continuing, this Court offered guidelines to improve the process for future cases. First, a better practice would be for the Commonwealth to offer an affidavit from an employee of the Department of Probation and Parole to authenticate and explain any documents offered and to provide any personal knowledge of an appellant's status. Likewise, an affidavit could be offered for an appellant if in fact there is some mistake about the identity of the fugitive or present fugitive status. Second, both the Commonwealth in its motion to dismiss and an appellant in its response to the motion would be well-served by offering relevant factual information. The Court in *Anderson* clarified that FDD does not involve individual case discretion but is rather an application of legal rule to facts subject to *de novo* review. Thus, it depends upon factual circumstances which either do or do not sustain the application of FDD. *Anderson*, 2024 WL 5172358, at *4.

In conclusion, this Court granted the Commonwealth's motion to dismiss, with the stipulation that such dismissal shall become final ninety days after entry of this Order to allow Appellant a final opportunity to voluntarily end his fugitive status and to formally request by motion to vacate this Order

B. ***JOHN EDWARD ANDERSON v. COMMONWEALTH OF KENTUCKY (Ky. App. 2025).***

2021-CA-0692-DG	2/14/2025	2025 WL 494244

Opinion Reversing by THOMPSON, CHIEF JUDGE; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

Anderson was found guilty of theft by failure to make required disposition of property (KRS 514.070), a Class A misdemeanor. Anderson failed to report to jail to begin service on his conviction, and a bench warrant was issued. Nevertheless, Anderson, through counsel, timely appealed his conviction, which the circuit court affirmed. Thereafter, Anderson sought discretionary review from this Court. The Commonwealth sought dismissal of this action under the Fugitive Disentitlement Doctrine based on Anderson's ongoing fugitive status. Anderson subsequently surrendered himself to the jail. After denying the Commonwealth's motion, and granting discretionary review, this Court dismissed the appeal based on Anderson's status as a fugitive. Anderson sought review by the Kentucky Supreme Court, which reversed and remanded the case back to this Court. The Kentucky Supreme Court held that because Anderson turned himself in, he was no longer a fugitive and the Appellate Court should review the case on the merits.

On appeal, Anderson argued that KRS 514.070 did not apply to his actions and that he was given an illegal sentence due to lack of proof regarding the value of the property he

allegedly failed to turn over. Anderson was charged with the Class A misdemeanor version of the statute which requires a showing that the property refused to be returned was valued at $500 or more, but less than $1,000. The Commonwealth failed to put on any evidence regarding the value of the property; therefore, there was insufficient evidence to convict Anderson of theft by failure to make required disposition of property under the statutory requirements. This Court concluded Anderson's conviction should be reversed due to the Commonwealth's failure to provide sufficient evidence. Additionally, this Court concluded double jeopardy is invoked and Anderson cannot be retried because his conviction is being reversed for insufficient evidence.

IV. IMMUNITY

A. CORTEZZ DICKERSON, ET AL. v. WILLIAM BOWER, ET AL. (Ky. App. 2025).

2024-CA-0132-MR 2/21/2025 2025 WL 568557

Opinion Affirming by ACREE, JUDGE; L. JONES, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Cortezz Dickerson and Mackenzie Kraps asserted physical tort and malicious prosecution claims against various Louisville Metro Police Department officers in their individual capacities. Their claims stemmed from their actions during a "caravan protest" in downtown Louisville, which led to their arrests. The trial court concluded the officers were entitled to qualified official immunity on the physical tort claims and granted summary judgment to the officers on the malicious prosecution claims. The Court affirmed. Citing prior decisions of the Kentucky Supreme Court, the Court emphasized that trial courts must engage in fact finding in resolving an immunity claim, even if presented in a motion for summary judgment. The Court went on to conclude the trial court's findings with respect to the officers' immunity claims were supported by substantial evidence, and that the officers were entitled to qualified official immunity on the physical tort claims as Dickerson and Kraps failed to make a showing the officers' discretionary acts were conducted in bad faith. The Court concluded the trial court properly granted summary judgment on the malicious prosecution claims, as neither Dickerson nor Kraps could make a showing the officers lacked probable cause in arresting them.

V. LIABILITY

A. EAGLE FURNITURE MANUFACTURERS, LLC v. NAUTILUS INSURANCE COMPANY, ET AL. (Ky. App. 2025).

2023-CA-0501-MR 2/14/2025 2025 WL 494580

Opinion Affirming by A. JONES, JUDGE; CALDWELL, J. (CONCURS) AND CETRULO, J. (CONCURS)

In a direct appeal from the trial court's grant of summary judgment to Nautilus and IPFS, the Court of Appeals affirmed. At issue in this case was whether the general commercial liability policy Appellant purchased from Nautilus and financed through premium finance company IPFS was in effect at the time of Appellant's loss. An agreement between Appellant and IPFS granted IPFS power-of-attorney to cancel the insurance policy if the Appellant defaulted. However, Kentucky Revised Statute (KRS) 304.30-110 incorporates certain notice-before-cancellation requirements into premium finance agreements. One such requirement is that the premium finance company must mail to the defaulting insured a notice of intent to cancel that states a time by which default must be cured, and the stated time may not be earlier than the tenth day after the date the notice is mailed. KRS 304.30-110(2).

Appellant failed to make its payment on December 11, 2020, IPFS mailed its notification on December 14, and Appellant failed to make its past-due payment on December 29. IPFS responded by mailing notices of cancellation to both Nautilus and Appellant on December 31, indicating the policy would be cancelled on January 2, 2021. Two days later, Appellant suffered a loss which would be covered by the policy, and it attempted to make the past-due payment on the policy to IPFS. IPFS rejected the tender, and Nautilus, citing cancellation of the policy, refused coverage. Appellant sued both IPFS and Nautilus on grounds related to breach of the insurance contract, and the circuit court granted summary judgment to Nautilus and IPFS.

Appellant presented three overarching arguments on appeal, contending the circuit court: (1) erroneously granted summary judgment to IPFS, (2) erroneously granted summary judgment to Nautilus, and (3) granted summary judgment prematurely.

The Court of Appeals rejected Appellant's arguments. First, we held the circuit court correctly viewed the law surrounding KRS 304.30-110 when IPFS cancelled the insurance policy with Nautilus. Despite Appellant's argument that IPFS failed to show actual notice, *i.e.*, that Appellant had *received* the notices, the statute only requires the premium finance company to mail the notices. The stricter requirement of actual notice may not be read into the statute. Furthermore, the evidence of record showed IPFS had mailed those notices.

Second, we held that the record supported summary judgment against Nautilus. Appellant argued that Nautilus acted contrary to KRS 304.20-320(2) and/or KRS 304.30-110. However, KRS 304.30-110 applies only to premium finance companies, and Nautilus was merely the insurer. In addition, KRS 304.20-320(2) was inapplicable as well. That statute concerns cancellations by insurers, but it was not Nautilus that cancelled – it was IPFS acting as Appellant's attorney-in-fact. Moreover, Appellant failed to adduce any evidence that Nautilus breached any contractual obligations it owed to Appellant.

Third, and finally, Appellant failed to show summary judgment was premature. Appellant, arguing for more discovery, offered nothing more than a hope or belief that "something will 'turn up'" – which is wholly inadequate for summary judgment purposes. *See Benningfield v. Pettit Envtl., Inc.*, 183 S.W.3d 567, 573 (Ky. App. 2005) (quoting *Neal v. Welker*, 426 S.W.2d 476, 479-80 (Ky. 1968)).

VI. NEGLIGENCE

A. MARY MULLINS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BILLY MULLINS v. APPALACHIAN REGIONAL HEALTHCARE, INC. D/B/A HAZARD ARH, ET AL. (Ky. App. 2024).

2023-CA-1490-MR 2/21/2025 2025 WL 568777

Opinion Affirming in Part, Reversing in Part, and Remanding by EASTON, JUDGE; COMBS, J. (CONCURS) AND CETRULO, J. (CONCURS)

Appellant brought suit individually and in capacity as administrator of the decedent's estate, alleging medical negligence resulting in death. The Circuit Court granted summary judgment to the Appellee medical providers after concluding the Appellant failed to produce adequate expert testimony demonstrating evidence of medical negligence. At the time of summary judgment, nine individual medical practitioners and one hospital were named as defendants. This Court affirmed summary judgment as to seven of the Appellees but reversed and remanded for further proceedings as to three Appellees.

At issue on appeal is the adequacy of the opinions produced by Appellant's experts. To prove liability, it must be shown that each defendant violated the standard of care, and such violation caused the injuries. However, general statements of a violation of standards of care without reference to any individual medical practitioner by name or by specialty are insufficient. Thus, to survive a summary judgment motion by each defendant, Appellant needed to disclose expert testimony specific to each defendant.

This Court affirmed summary judgment as to seven of the Appellees, explaining that without more particularized statements having been made, the seven Appellees were entitled to summary judgment because Appellant was unable to raise a genuine issue of material fact against them. However, this Court reversed summary judgment, and remanded for further proceedings, as to the remaining three Appellees after concluding one of the expert reports did provide and note particular actions sufficient to create a genuine issue of material fact believed to be violations of the applicable standard of care.

VII. PROPERTY

A. BOUG, LLC v. SHENANDOAH HOLDINGS, LLC, ET AL. (Ky. App. 2025).

2023-CA-1473-MR 2/28/2025 2025 WL 647032
2024-CA-0285-MR

Opinion Affirming by EASTON, JUDGE; ECKERLE, J. (CONCURS) AND KAREM, J. (CONCURS)

These two appeals stem from an action to sell jointly owned property by judicial sale. The first appeal challenges the circuit court's granting of summary judgment, and the second appeal pertains to the refusal of a supersedeas bond. This Court affirmed the circuit court's rulings.

Dr. James Crase purchased a commercial building (the "SMC Building") for his practice in such a way as to eventually have the title held jointly by a trust in which he and his wife had an interest and also in the name of his three children. Each child (Kit, Kim, and Karl) had a separate Limited Liability Company ("LLC") for this purpose. After Dr. Crase and his wife died, the three children's LLCs became tenants in common with three equal shares of the SMC Building. The children ultimately decided to sell the SMC Building, and as tenants in common, they would divide the proceeds for any private sale evenly. However, the children were not successful in reaching any final agreement to sell.

Kim (owner of Shenandoah Holdings, LLC) no longer wanted to be a part owner of the SMC Building, and filed the action for sale in circuit court naming her siblings' LLCs as necessary parties. Kit (owner of BOUG, LLC) filed a Counterclaim and Crossclaim, claiming breach of a fiduciary duty arising from the siblings' LLCs joint tenancy based on a refusal to proceed with a prior private offer to buy the SMC Building. Kim filed a motion for summary judgment on Kit's Counterclaim, which the circuit court granted and issued in May 2023 holding that Kit failed to identify evidence of a fiduciary relationship. In December 2023, the circuit court entered its summary judgment dismissing Kit's crossclaim against Karl for the same reasons. Kit appeals these summary judgment decisions.

Thereafter, the circuit court ordered the distribution of sale proceeds. (The SMC Building was sold by the Master Commissioner in February 2023 by an Order of Sale issued by the circuit court. The $700,000 sale proceeds were held in the Master Commissioner's escrow account.) Kit filed a motion to stay distribution, approval of bond, and exceptions to the circuit court's order requesting approval of her supersedeas bond and a stay of the distribution of funds under RAP 63. Kit wanted the proceeds belonging to her siblings held to make sure that funds would be available to pay damages if she were to be ultimately successful on her breach of fiduciary duty claims. After a hearing and some procedural filings, the circuit court ultimately denied Kit's motion to stay distribution and proposed supersedeas bond as insufficient under RAP

63(A)(1). The funds were disbursed. Kit appealed the circuit court's orders denying the supersedeas bond and order for immediate distribution of the proceeds.

As to the summary judgment decisions, this Court concluded the circuit court correctly granted them, but erroneously concluded there was no fiduciary duty. Here, the siblings were determined to be joint tenants, however, Kit did not establish any actual breach of fiduciary duties. This Court rejected Kit's argument that the siblings were involved in a joint venture as it overlooked the informal element of joint venture, that which is distinguishable from joint ownership and tenancy in common. Additionally, Kit's argument for damages from the alleged breach of duty was based only on "ifs" and uncertainties. Ultimately, Kim exercised her right as a cotenant to demand a judicial sale of the property as the siblings could not reach an agreement themselves.

Second, this Court found the circuit court did not abuse its discretion in denying the supersedeas bond to stay disbursement of the proceeds from the judicial sale of the SMC Building. RAP 63 allows a litigant to proffer a supersedeas bond to stay the enforcement of a judgment while the matter is on appeal. This was a case of a sale of jointly held property, not a case in which a monetary judgment was entered in someone's favor. To illustrate how a supersedeas bond may be applicable in a sale of jointly held property, this Court referred to *Lowery v. Madden*, 214 S.W.2d 592 (Ky. 1948). Therein, a buyer of jointly held property at a judicial sale who objected to some of the sale process could have offered to post a supersedeas bond to prevent execution of the judgment requiring him to pay the bid price as he is the only one with a judgment against him requiring payment. By contrast, here, the joint owners simply receive a distribution of funds paid into court, not by execution of a judgment for or against them. The circuit court did not abuse its discretion in denying the supersedeas bond.

This Court affirmed the circuit court on both appeals.

VIII. TAXATION

A. DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY v. HALE, INC. D/B/A LOTSA PASTA (Ky. App. 2025).

2023-CA-1192-MR 2/28/2025 2025 WL 645234

Opinion Affirming by ACREE, JUDGE; EASTON, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Pursuant to an audit, the Department of Revenue (DOR) determined that certain salads and spreads made by Lotsa Pasta are subject to taxation and assessed additional sales tax of $58,898.50 for the period of 2014 to 2017. Lotsa Pasta appealed to the Kentucky Board of Tax Appeals, which affirmed the DOR's determination. Lotsa Pasta then appealed to the Jefferson Circuit Court, which reversed, concluding the salads and spreads at issue were not "prepared food" under the statutory definition, and

consequently the salads and spreads were not excepted from—but rather were subject to—the tax exemption for "food and food ingredients" reflected in KRS 139.485(2). The DOR appealed. At issue in this appeal was whether Lotsa Pasta's salads and spreads constituted "prepared food" under KRS 139.485(3)(g)(2), and if so, whether they were nonetheless subject to the food manufacturing exception under KRS 139.485(3)(h)(1). The Court examined the statutory definition of "prepared food" and ultimately rejected Lotsa Pasta's argument that because the salads and spreads at issue were prepared in bulk, they were not "prepared food," explaining the statutory definition merely required they be sold—not prepared—as a single item. Notwithstanding the Court's determination the salads and spreads constituted "prepared food" under the statute, the Court concluded the salads and spreads were still excepted—and thus exempt—pursuant to KRS 139.485(h)(1), because food manufacturing was Lotsa Pasta's primary activity. The Court affirmed the circuit court's reversal of the tax assessment.

IX. TORT

A. JOSEPH HOLLAND, INDIVIDUALLY AND AS NEXT FRIEND AND FATHER OF T.H., A MINOR CHILD AND NEXT FRIEND AND FATHER OF K.H., A MINOR CHILD, ET AL. v. UNITED STATES AUTOMOBILE ASSOCIATION (Ky. App. 2025).

2024-CA-0254-MR 2/28/2025 2025 WL 647478

Opinion Affirming by L. JONES, JUDGE; EASTON, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellants appeal the judgment entered following a jury trial of their Kentucky Unfair Claims Settlement Practices Act (KUCSPA) and Kentucky Consumer Protection Act (KCPA) against Appellee, as well as orders entered on their post-trial motions. Appellants claim the circuit court made three errors: (1) not granting their motion for a directed verdict on the issue of coverage, (2) instructing the jury that a 'substantial factor' causation test applies under the KCPA, and (3) finding Appellee to be the prevailing party for purposes of the KCPA. This Court affirmed the circuit court on all claims.

Appellants carried a homeowner's insurance policy with Appellee. The case centers around the Appellee's refusal to repair water damage to the Appellants' home following a period of heavy rains in June 2019. While some claims and damages were resolved and paid in mediation, the Appellee claimed that damage and repair of the deteriorated fiberboard layer was not covered by the insurance policy. During a six day trial, the parties disputed whether the fiberboard damage was covered under the policy, Appellee's conduct in investigating and handling the Appellants' claim, and how Appellee's conduct affected the Appellants.

On the fifth day of trial, just before the lunch break, Appellee made a motion for a directed verdict on all claims, stating that Appellants failed to satisfy the three-part bad faith test set forth in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). While arguing for directed verdict, Appellee largely conceded that there was a significant factual dispute as to whether or not damage was covered under the policy. After hearing argument from Appellants, the circuit court denied the Appellee's directed verdict motion. Immediately following the lunch break, and before Appellee presented its case-in-chief, Appellants made a motion for directed verdict "on the limited issue of coverage," arguing Appellee had conceded the issue of coverage as to the first element of *Wittmer* when arguing its directed verdict motion. After hearing arguments from Appellee, the circuit court denied Appellants' motion for a limited directed verdict. As to this challenge, we find the directed verdict motion was procedurally deficient and properly denied. Appellee had not yet formally rested its case on the record nor had Appellee formally waived any right to call any witnesses. Additionally, a directed verdict motion made by a plaintiff can never be granted unless all elements of a claim are established, and no disputed issues of fact exist upon which reasonable minds could differ. Here, however, Appellants only sought a directed verdict as to one element of *Wittmer.* Thus, another reason why the first directed verdict motion was procedurally deficient and properly denied.

Thereafter, the trial court brought the jury back to the courtroom and directed Appellee to present its case-in-chief. Appellee chose not to present any evidence, rested its case, and the jury was discharged for the day. Appellants made a second motion for directed verdict on both the KUCSPA and KCPA claims based upon what they alleged were admissions of Appellee regarding the "false conduct" of one of the engineers, "coverage payments," and unreasonably "withholding the payment of the coverage." The trial court denied the second motion for directed verdict, which we affirm. Although this second motion for directed credit was made after the close of Appellee's case, it lack specificity and violates CR 50.01 requirements. Appellants did not state with specificity how the proof at trial established the elements of any claim, and the trial court properly denied the second directed verdict motion.

Next, relevant to this appeal, Appellants claim the jury instructions were erroneous as to their KCPA claim, as those instructions required an additional finding of causation not required by statute. After determining the issue was properly preserved, this Court concluded the trial court did not err by including the substantial factor language, finding the test is appropriate to determine causal nexus. The KCPA requires a causal nexus to show a plaintiff's ascertainable loss was the result of the defendant's conduct. In other words, the plaintiff must show the wrongful conduct was the cause-in-fact of his ascertainable loss.

Finally, Appellants claim the trial court erred in finding Appellee the prevailing party under the KCPA because the jury found Appellee in acts proscribed by the KCPA and their breach of contract claim was settled through mediation for the amount they

demanded. We agree with the trial court that Appellee was the prevailing party. While a jury may find a defendant engaged in acts that violated KRS 367.170(1), that alone does not make a plaintiff the prevailing party in a KCPA claim. The plain language of KRS 367.220(3) requires the prevailing party be the successful litigant of a claim brought under that section. The KCPA claim is established by KRS 367.220(1), which requires not only proof that a defendant engaged in acts violating KRS 367.170(1), but also proof of a causal connection between those acts and an ascertainable loss suffered by the plaintiff. Here, Appellants cannot be the prevailing party on their KCPA claim because the jury found Appellants did not establish the required causal connection. Additionally, any relief obtained on the contract claim comes from a settlement agreement. The United States Supreme Court has described a "prevailing party" as "one who has been awarded some relief by the court." *Buckhannon Bd. and Care Home. Inc. v. West Virginia Dep't of Human and Health Resources*, 532 U.S. 598, 603, 121 S. Ct. 1835, 1840, 149 L. Ed. 2d 885 (2001). This claim was extinguished without any determination on the merits by the court.

X. WORKERS' COMPENSATION

A. FORD MOTOR COMPANY v. JOSEPH BADALL, ET AL. (Ky. App. 2025).

2024-CA-0796-WC 2/21/2025 2025 WL 569326
2024-CA-0932-WX

Opinion Affirming by CALDWELL, JUDGE; THOMPSON, C.J. (CONCURS) AND ACREE, J. (CONCURS)

Ford Motor Company (Ford) petitioned for review of an opinion of the Workers' Compensation Board (Board) affirming an Administrative Law Judge (ALJ) decision awarding Joseph Badall (Badall) enhanced permanent partial disability (PPD) benefits upon reopening. Badall cross-petitioned for review, challenging the ALJ's denial of temporary total disability (TTD) benefits for the nearly three-year period between the filing of Badall's motion to reopen and his undergoing a surgery, which was approved by an ALJ a few months after the filing of Badall's motion to reopen. We affirm.

Due to his work as a forklift operator for Ford, an ALJ found Badall had suffered a cumulative trauma injury to his back which manifested on January 7, 2013. The ALJ found Badall was medically released to return to work with restrictions on or about March 28, 2013. Badall had returned to work full-time in other positions since April 2013, earning the same wages as before his injury. The ALJ noted Badall was not seeking application of the two- or three-multipliers in KRS 342.730 in his brief. The ALJ awarded Badall TTD benefits from January 7, 2013, through March 28, 2013. The ALJ also awarded Badall PPD benefits with no statutory multipliers for 425 weeks with these benefits suspended during periods of TTD and subject to the limitations set forth in KRS 342.730(4) as of January 7, 2013. Lastly, the ALJ ordered that Badall shall recover

from Ford benefits for medical care required for the cure and relief of his back injury. Neither party filed a petition for review. Badall retired from Ford as of May 1, 2016.

In March 2018, Ford filed a motion to reopen to assert a medical fee dispute, in which Ford challenged Badall's request for back surgery, alleging it was not medically necessary and/or not related to the work injury. However, in May 2018, the claim was returned to the Frankfort motion docket for consideration of a motion to reopen for worsening, as it was found to be beyond the scope of the ALJ's medical fee dispute docket.

In June 2018, Badall filed a motion to reopen, checking a box on a form indicating the basis was a change of disability, but requesting in his motion additional TTD and/or PPD. The chief ALJ entered an order passing Badall's motion to reopen for TTD, should he prevail on the request for surgery, pending a decision on the medical fee dispute. In November 2018, an ALJ entered an interlocutory opinion and order resolving the medical fee dispute in Badall's favor, and ordered that TTD shall be paid beginning the date of surgery and upon reaching maximum medical improvement, either party may motion to terminate TTD and place the claim on the active docket.

Badall underwent the requested back surgery on August 11, 2021, and Ford began paying TTD as of that date. Ford filed a motion to terminate TTD as of December 26, 2021, when Badall reached the age of 70. The ALJ granted this motion.

Thereafter, Ford asserted another medical fee dispute. After presenting proof, the ALJ issued an opinion, order, and award in December 2023 ("ALJ decision on reopening"). The ALJ awarded Badall enhanced PPD benefits (two-multiplier) for the period from Badall's May 2016 retirement until December 26, 2021, with interruptions for periods of TTD. The ALJ also awarded Badall TTD benefits from the August 2021 date of surgery until December 26, 2021. However, the ALJ denied Badall's request for TTD during the time frame between the date Badall's motion to reopen was filed (June 4, 2018) and the date surgery occurred (August 11, 2021).

The ALJ denied the parties' petition for reconsideration, and both parties appealed to the Board. The Board affirmed the ALJ decision on reopening in an opinion entered June 7, 2024 (Board Opinion). This appeal followed.

First, Ford contends the Board erred in affirming the ALJ's decision on reopening and the award of enhanced PPD applying the two-multiplier in KRS 342.730(1)(c)2., arguing its application was barred by *res judicata.* In the alternative, Ford argued the ALJ erred in retroactively ordering the enhancement prior to the date Badall filed his motion to reopen. The Board, agreeing with the ALJ, found that application of the two-multiplier vested automatically upon Badall's retirement, and by operation of law, "KRS 342.730(1)(c)2. clearly entitles an injured worker earning the same or greater wages to the enhanced PPD benefits during any cessation of work during the applicable period of benefits." Thus, based on the plain language of the statute, the Board concluded that since Badall never returned to work after his retirement and was not entitled to TTD

benefits prior to the surgery, he was entitled to enhanced PPD benefits by operation of law from May 2, 2016, until the date of surgery (August 11, 2021). This Court discerned no reversible error in the Board's rejection of Ford's *res judicata* argument.

Second, Ford contends that the Board erred in affirming the ALJ's determination that enhancement of PPD benefits commenced upon Badall's retirement in May 2016 despite Badall's not filing his motion to reopen until June 2018. Ford contends the ALJ, and Board, misconstrued the Kentucky Supreme Court's ruling in the unpublished opinion *Muthler v. Climate Control of Kentucky*, Nos. 2010-SC-000302-WC and 2010-SC-000334-WC, 2011 WL 1642447 (Ky. Apr. 21, 2011). Therein, our Supreme Court upheld the Board's conclusion that such enhanced benefits could commence prior to the filing of a motion to reopen pursuant to KRS 342.760(1)(c)2. Likewise, here, this Court found no error by the Board.

Next, this Court considered Badall's cross-petition for review of the denial of TTD benefits for the period between the June 2018 filing of his motion to reopen and his back surgery on August 11, 2021. Badall argued he was entitled to TTD based on his assertions that he was unable to return to the employment he had at the time of his injury and was not at maximum medical improvement (MMI) when he filed his motion. Examining the definition of TTD within the meaning of KRS 342.0011(11)(a) and MMI in the American Medical Association's "Guides to the Evaluation of Permanent Impairment," the ALJ found Badall was at MMI, and so was ineligible for TTP benefits during this contested period. Badall did not challenge in his cross-petition the ALJ's finding, affirmed by the Board, that he offered no evidence explaining the nearly three-year delay between the November 2018 interlocutory order approving the surgery and his undergoing surgery in August 2021. Nor did Badall cite to an evidence of record explaining the delay in his undergoing surgery or cite any authority to support his contention that such delay has no bearing on determining whether he was at MMI or entitled to TTD during the contested period. We discern no reversible error in the Board's affirming the ALJ on this issue.

XI. WRONGFUL DEATH

A. BLC LEXINGTON SNF, LLC D/B/A BROOKDALE RICHMOND PLACE SNF D/B/A RICHMOND PLACE REHABILITATION AND HEALTH CENTER, ET AL. v. BONNIE TOWNSEND, EXECUTRIX OF THE ESTATE OF LINDA ELAM AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF LINDA ELAM (Ky. App. 2025).

2023-CA-0960-MR 2/21/2025 2025 WL 568786

Opinion Affirming by MCNEILL, JUDGE; ACREE, J. AND L. JONES, J. (CONCURS)

The key matter on appeal regards statutory interpretation of Kentucky's wrongful death statute, and whether the wrongful death claims at issue are subjected to arbitration. Affirming the trial court, this Court concluded the wrongful death claims in the present case are not subject to arbitration as the claimants were not signatories to the arbitration agreement at issue.

Appellee is Bonnie Townsend, executrix of the estate of Linda Elam and on behalf of the wrongful death beneficiaries (Estate). The wrongful death beneficiaries are Ms. Elam's grandchildren (Grandchildren). Appellants are BLC Lexington SNF, LLC d/b/a Brookdale Richmond Place SNF d/b/a Richmond Place Rehabilitation and Health Center (BLC), *et. al.* Elam was a resident at BLC's nursing home facility, admitted on June 15, 2020. Townsend, Elam's sister, signed an arbitration agreement in her capacity as Elam's representative on that same day. On July 8, 2020, Elam was discharged from BLC and admitted to hospice care, where she passed away on July 13, 2020.

Appellee, in her capacity as executrix of Elam's estate, filed a tort action against Appellants in Fayette Circuit Court (State Action). An Amended Complaint was filed nine months later asserting a wrongful death claim on behalf of Grandchildren. After the initial Complaint was filed, however, BLC filed a petition with the United States District Court for the Eastern District of Kentucky against Townsend to compel arbitration. The two cases proceeded simultaneously until the BLC's motion to compel was granted by the United States District Court. As a result, Townsend was enjoined from litigating the State Action further. Grandchildren's wrongful death claims were permitted to proceed. A stay order was issued, and then lifted, in the State Action. BLC filed two separate motions to dismiss based on the federal order compelling arbitration. The Fayette Circuit Court denied the second motion to dismiss. BLC appeals from that order to the Court as a matter of right. It raises multiple issues, including whether the wrongful claims Townsend is asserting on behalf of Grandchildren belong to the Estate pursuant to Kentucky's wrongful death statute, thus subjecting those claims to arbitration. This Court concluded that it does not.

This Court's analysis hinged on interpretation and application of KRS 411.130. Appellants argue that because Elam has no surviving parents, spouse, or children, who have raised claims in this case, the Grandchildren's claim (or any claim of any "kindred more remote than those above named [in sections (a)-(d)]" of KRS 411.130(2)(e)) belongs to Elam's estate. However, this Court disagreed, stating that KRS 411.130 is a distributive provision, not a restraint on potential claimants. "[K]indred more remote than those above named," denotes a category of persons whose consanguinity is more remote than those relative expressly enumerated within KRS 411.130(2)(e).

Continuing, the Kentucky Supreme Court stated that under Kentucky law, a decedent or representative of a decedent cannot bind a wrongful death beneficiary to an arbitration agreement. *Ping v. Beverly Enters., Inc*., 376 S.W.3d 581, 597-99 (Ky. 2012). In 2015, in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), the Supreme

Court confirmed its holding in *Ping*, 376 S.W.3d 581, setting forth that "a wrongful death claim is a distinct interest in a property right that belongs only to the statutorily-designated beneficiaries. Decedents, having no cognizable legal rights in the wrongful death claims arising upon their demise, have no authority to make contracts disposing of, encumbering, settling, or otherwise affecting claims that belong to others. The rightful owners of a wrongful death claim, the beneficiaries identified in KRS 411.130(2), cannot be bound to the contractual arrangements purportedly made by the decedent with respect to those claims." *Id.* at 314.

In applying KRS 411.130 and the relevant case law, the wrongful death claims belong to the Grandchildren, who were not signatories to the arbitration at issue. Thus, wrongful death litigation may proceed on behalf of claimants unencumbered by alternative dispute resolution agreements. The trial court's order is affirmed.