**PUBLISHED OPINIONS**
**KENTUCKY COURT OF APPEALS**
**JULY 1, 2023 to JULY 31, 2023**

*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. ADMINISTRATIVE LAW

### A. ***DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY v. CARRIAGE FORD, INC.***

2022-CA-0231-MR 7/14/2023 2023 WL 4535218
Opinion by DIXON, DONNA L.; ACREE, J. (CONCURS) AND JONES, J. (CONCURS)

This involved an appeal of the Franklin Circuit Court's reversal of Kentucky Claims Commission's (KCC) final order affirming the Department of Revenue's (DOR) dismissal of Carriage Ford, Inc.'s refund request. The Court of Appeals affirmed.

From 2012-2014, Carriage Ford, an Indiana car dealership, collected and paid Kentucky's motor vehicle usage tax (MVUT) for its Kentucky customers. In 2015, Indiana Department of Revenue audited Carriage Ford and found it owed Indiana sales tax for transactions where Kentucky customers took possession of vehicles in Indiana. Carriage Ford satisfied its Indiana tax bill for $183,003 and requested a refund from DOR for that amount plus interest, submitting evidence that it paid $256,862.16 in MVUT. DOR denied Carriage Ford's refund, Carriage Ford appealed to the KCC, the KCC affirmed DOR's denial, Carriage Ford appealed to the Franklin Circuit Court, and the circuit court reversed.

The Court held Carriage Ford was eligible for refund under Kentucky Revised Statute (KRS) 134.580(2). ("When money has been paid into the State Treasury in payment of any state taxes . . . the appropriate agency shall authorize refunds to the person who paid the tax . . . of any overpayment of tax and any payment where no tax was due.") Kentucky courts have long denounced interpretations of the MVUT which require payment of two similar taxes on the same purchase. Unfortunately, there is a dearth of law on whether a person who pays the MVUT can receive credit ***after*** registering a motor vehicle in Kentucky. Kentucky's Office of the Attorney General (OAG) opined that those who pay the MVUT "should without exception be credited with the tax paid in the foreign state when registering [a] motor vehicle in Kentucky upon proof that the sales tax was in fact paid in the foreign state." OAG urged when "such a construction of the statute does violence to the legislative intent, [the court should] specifically decline to adopt such an interpretation[.]" Supreme Court of Kentucky also mandates that courts "should not . . . interpret [a] statute to provide an absurd result." *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004). Carriage Ford provided proof it paid Indiana sales tax; therefore, it "shall be entitled to receive a credit" under KRS 138.460(6)(a).

## II. ADULT GUARDIANSHIPS AND CONSERVATORSHIPS

### A. ***SUZANNA P. WEBB v. COMMONWEALTH OF KENTUCKY, ET AL.***

2022-CA-0444-DG 7/14/2023 2023 WL 4535578
Opinion by KAREM, ANNETTE; DIXON, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Suzanna Webb argued that the Meade District Court erred in determining her partially disabled after a jury trial and appointing her daughter-in-law, Amber Betner, as her limited guardian and conservator. Webb argued that the court erred in concluding that one member of the interdisciplinary team required under Kentucky Revised Statute (KRS) 387.540(1) was adequately qualified to: (1) evaluate Webb pursuant to KRS 335.080(1)(a), (b), and (c) or 335.090(1)(a), (b), and (c); (2) aid in compiling the mandatory reports under KRS 387.540(1) prior to trial; and (3) testify in person at trial under KRS 387.570(6). The Court of Appeals reversed with instructions to remand the case to the trial court for a new trial. The Court determined that the statutory requirements of KRS 387.540(1) were straightforward, and that the legislature unequivocally required an individual who was a licensed or certified social worker or who had a degree or educational background in social work as determined by the board to be part of the interdisciplinary team compiling the reports. In this case, the Court concluded that the team did not have "a person licensed or certified as a social worker" under KRS 387.540(1) or an employee of the Cabinet for Health and Family Services who met the qualifications of KRS 335.080(1)(a), (b), and (c) or 335.090(1)(a), (b), and (c). While the individual involved on Webb's team held a bachelor's degree in psychology, she had no degree in social work and produced no evidence that she had completed courses equivalent to a social work or social welfare program as determined by the Kentucky Board of Social Work under KRS 335.090(1)(c)(2). Further, the employee's employment experience did not equate to the completion of courses equivalent to those stated in KRS 335.090(1)(c)(2). The Commonwealth and Betner failed to reference the Court to any part of the record indicating the employee's completion of such coursework. Thus, because there was effectively no report from one of the three persons required under the provisions of KRS 387.540(1), the Court held that the district court should not have gone forward with the jury trial because it did not follow the instructions set out by the legislature. *See* KRS 387.540(7).

## III. CRIMINAL LAW

### A. ***TIMOTHY SHANE v. KENTUCKY PAROLE BOARD***

2022-CA-0135-MR 7/14/2023 2023 WL 4535569
Opinion by McNEILL, J. CHRISTOPHER; CETRULO, J. (CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION) AND JONES, J. (CONCURS)
***DISCRETIONARY REVIEW GRANTED 12/06/2023***

Appellant's parole was revoked for a violation of consuming alcohol. His final revocation hearing was conducted before an administrative law judge (ALJ) whose findings were adopted by the parole board. Appellant filed a declaratory judgment action in Franklin Circuit Court arguing the parole board improperly delegated the final revocation hearing to an ALJ, the orders were missing the requisite findings pursuant to Kentucky Revised Statute (KRS) 439.3106, and there was insufficient evidence

to support revocation. Appellant requested an injunction reinstating his parole and filed a motion for summary judgment which was denied.

The Court of Appeals reversed. The Court first considered whether the appeal was moot due to Appellants subsequent release on parole and determined "the public interest" exception applied. The Court then ultimately reasoned the parole board impermissibly delegated the final revocation hearing to an ALJ. The Court interpreted the holding in *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019), to require the parole board to conduct the final revocation hearing, and as a result, the Court determined that delegation to an ALJ amounted to a denial of due process. The Court cited language in KRS 439.440, KRS 439.330(1)(e), and KRS 439.320(4) which it interpreted to require the parole board to directly conduct final revocation hearings. The Court reasoned that, while the hearings may be conducted by less than a full panel of the parole board, at least two members must preside. The Court declined to answer the additional claims raised by Appellant due to the underlying mootness and having already reversed the lower court's order.

Judge Susanne M. Cetrulo filed a separate concurring opinion which stated that, while this decision departs from the Court's previous holdings in *Hodge v. Kentucky Parole Board*, No. 2021-CA-1512-MR, ___ S.W.3d ___, 2023 WL 453138 (Ky. App. Jan. 27, 2023), and *Ivy v. Kentucky Parole Board*, No. 2022-CA-0369-MR, 2023 WL 2439676 (Ky. App. Mar. 10, 2023), the legal analysis citing the language of KRS 439.440 was persuasive. Judge Cetrulo wrote that the panel in *Ivy* relied on language in KRS 439.341 to conclude that the authority to preside over final revocation hearings could be delegated to an ALJ, but Judge Cetrulo concluded the language of KRS 439.440 suggests this was not among the permissible allocations the parole board could impart. The concurring opinion's conclusion noted, "Since a motion for discretionary review is currently pending before our Supreme Court on *Hodge*, further clarity in this matter may thankfully be coming soon."

### B. ***LEE ALLEN CANAFAX v. COMMONWEALTH OF KENTUCKY***

2022-CA-1035-MR 7/28/2023 2023 WL 4830425

Opinion by EASTON, KELLY MARK; KAREM, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

In 2011, Appellant entered a guilty plea to an amended charge of first-degree sodomy, which disregarded the age of the victim thereby reducing the charge from a Class A felony to a Class B felony, and three counts of first-degree sexual abuse for a 27-year sentence. In 2014, Appellant filed a motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 asserting ineffective assistance of counsel. An agreed order was entered between Appellant and the Commonwealth removing one of the sexual abuse convictions after it was noticed that his indictment failed to list one of the counts he pled to thereby reducing his sentence down to 22 years. In 2019, Appellant filed a motion pursuant to Kentucky Rule of Civil Procedure 60.02 asserting that the incidents for which he was charged occurred prior to statutory changes that took effect in July 2006, and thus, his sentence and period of post-incarceration supervision should be governed under the lesser penalties of the previous version of the applicable statutes. The Scott Circuit Court denied the motion as untimely filed and reasoned the claim should have been raised in his prior RCr 11.42 motion.

The Court of Appeals affirmed and reasoned that, while the sentencing range changed for first-degree sexual abuse, Appellant "was sentenced to the one period (five years) within the law for his crimes both before 2006 and after." While Appellant was subject to two more years of post-

incarceration supervision, if he "complied with the terms of his incarceration and eventual release, he would serve no additional time." Otherwise, the changes to the statutes did not have any impact on Appellant's charges, and Appellant was facing a potential life sentence from a Class A felony sodomy charge. The Court additionally reasoned that waiting 8 years to bring this claim was unreasonable because Appellant should have been aware of the alleged date errors and could have corrected them earlier or raised them in his RCr 11.42 motion. Furthermore, the Court noted that Appellant's RCr 11.42 motion "affirmatively stated the crimes occurred on or about August 2006." Lastly, the Court held that Appellant failed to prove any fraud that the Commonwealth "purposefully chose the date in the Indictment, knowing it was not true."

## IV. DOMESTIC VIOLENCE

### A. ***BRIAN STRONG v. KRYSTALANNE N. GARY***

2023-CA-0219-ME 7/28/2023 2023 WL 4831206
Opinion by KAREM, ANNETTE; EASTON, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

Brian Strong appealed from the Kenton Circuit Court's order denying his petition for an Interpersonal Protection Order (IPO) against Krystalanne Gary under Kentucky Revised Statute (KRS) Chapter 456. Specifically, Strong argued that Gary's actions met the statutory definition of "stalking." The Court of Appeals affirmed, determining that the circuit court's finding that Gary's conduct did not meet the stalking definition was not clearly erroneous or an abuse of its discretion. The Court noted that Strong was required to prove two separate instances of stalking by a preponderance of the evidence. *See* KRS 508.130(2). However, Strong offered no proof that Gary's second instance of alleged stalking was done with the intent to threaten Strong or that such action would cause a reasonable person to suffer substantial emotional distress. Additionally, Strong failed to provide evidence that Strong subjectively suffered emotional distress. Thus, the statutory elements of "stalking" under Kentucky law were not satisfied.

## V. FAMILY LAW

### A. ***W.R.G. v. K.C***

2022-CA-1319-ME 7/28/2023 2023 WL 4831370
Opinion by GOODWINE, PAMELA R.; DIXON, J. (CONCURS) AND KAREM, J. (CONCURS)

Father challenged the circuit court's judgment granting Stepmother's petition to adopt his biological minor child. Although Father filed a *pro se* answer to the petition, he did not otherwise participate in the proceedings below. The Court of Appeals reviewed for palpable error and vacated the judgment, remanding the matter for a new hearing because Father was not served with any document requiring service including the trial order. Kentucky Rule of Civil Procedure (CR) 5.02(1) defines service as complete upon mailing "unless the serving party learns or has reason to know that it did not reach the person to be served." Stepmother's counsel admitted all documents he mailed to Father had been returned as undeliverable. The trial order was also returned to the circuit clerk marked as undeliverable. Despite Father's obvious lack of notice, the circuit court proceeded with the hearing

because the order was mailed to his last known address. The Court of Appeals held, at the point mail intended for Father was returned, counsel and the circuit court knew it did not reach him under CR 5.02(1). Without service of the trial order, Father did not have notice of the final hearing which amounted to a violation of his due process rights requiring a new hearing on the petition.

## VI. TORTS

### A. ***PAUL WILLIAMS, INDIVIDUALLY, ET AL. v. SCHNEIDER ELECTRIC USA, INC., F/K/A SQUARE D, ET AL.***

2022-CA-0184-MR 7/07/2023 2023 WL 4374514
2022-CA-0190-MR

Opinion by JONES, ALLISON; COMBS, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

***DISCRETIONARY REVIEW GRANTED 04/12/2024***

Vickie Williams contracted mesothelioma, which she alleged was the result of her childhood exposure to her father's dusty work clothing. Williams's father worked at Schneider Electric (f/k/a Square D) beginning in the late 1960s and continuing until approximately 2003. While at Square D, Williams's father was allegedly exposed to molding compounds manufactured by Union Carbide which contained asbestos fibers. Roughly one year after filing her complaint, Williams died from the disease, and her personal representative / executor was substituted. After a period of discovery, as well as a prior appeal to the Court of Appeals by Square D which the Supreme Court of Kentucky ruled was improperly interlocutory, the trial court granted summary judgment to the Appellees, ruling that the Appellees owed no duty to Williams as she was a "bystander of a bystander," and there was no foreseeable risk of harm to her through household exposure to her father's clothing.

In a direct appeal from the trial court's denial of the Appellees' motion, the Court of Appeals reversed in part, vacated in part, affirmed in part, and remanded. The Court held that the trial court erred when it granted summary judgment to the Appellees, ruling that the Appellees owed a duty to Williams because the risk of household exposure was foreseeable. Next, the Court considered a ruling of the trial court which excluded certain opinions proffered by one of Williams's experts, based on a purported late disclosure under Kentucky Rule of Civil Procedure 26.02. The Court reversed this order, as the trial court had not found that the late disclosure prejudiced the Appellees. Without a showing of prejudice, "there is no valid basis to exclude or limit testimony." *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006). Finally, the Court considered Square D's cross-appeal in 2022-CA-0190-MR. Square D asserted that the trial court had incorrectly determined that worker's compensation exclusivity did not apply. Williams's original complaint asserted she was also exposed to asbestos when she worked at Square D herself one summer as a teenager. Nonetheless, the trial court's order determined that there was no reason to grant summary judgment on the basis of workers' compensation exclusivity because there was no proof that Williams was exposed to asbestos during her brief employment. The Court affirmed the trial court on this point, noting that the medical and expert proof obtained during discovery attributed her asbestos exposure to her household exposure to her father's clothing and not to her employment at Square D. The Court then remanded this case to the trial court for further proceedings.