PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 1, 2025 to OCTOBER 31, 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. CRIMINAL LAW

A. COMMONWEALTH OF KENTUCKY v. JECORY LAMONT FRAZIER (Ky. App. 2025).

2024-CA-0366-MR 10/03/2025 2025 WL 2809167

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

This appeal by the Commonwealth arose from the circuit court's dismissal of Frazier's felon-in-possession of a firearm charge. Upon Frazier's motion, the trial court found KRS 527.040 to be facially unconstitutional as violating the second amendment in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L. Ed. 2d 387 (2022).

The trial court rejected the Commonwealth's argument that KRS 527.040 remained presumptively constitutional in the wake of *Bruen* and that the Commonwealth failed to show any history or tradition of disarming felons at the time of the Founding, as required by *Bruen.*

The Court of Appeals reversed and remanded to the trial court for reinstatement of the charges. We held that controlling precedent from the Kentucky Supreme Court in the case of *Posey v. Com.*, 185 S.W.3d 170 (Ky. 2006), had affirmed the constitutionality of KRS 527.040 under the right to bear arms in the Kentucky Constitution and that opinion also contained the necessary historical analysis required under *Bruen.*

The case was analyzed only under a facial challenge as to constitutionality and not under an as-applied challenge. Even though Frazier disputed this, Frazier clearly presented only a facial challenge to the trial court and did not create and adequate record for the trial court to evaluate any as-applied constitutional challenges before submitting his motion.

B. KEMONE TRIBBLE v. COMMONWEALTH OF KENTUCKY (Ky. App. 2025).

2024-CA-0763-MR 10/03/2025 2025 WL 2809445

Opinion Affirming by CETRULO, JUDGE; KAREM, J. (CONCURS) AND MOYNAHAN, J. (CONCURS)

This appeal follows a conditional guilty plea that reserved the right to appeal the denial of Tribble's motion to suppress statements given by him in a custodial interrogation. Appellant argues that his statements were given after detectives employed deceptive tactics that vitiated the *Miranda* warnings, rendering his waiver involuntary.

Tribble argued that the police essentially acted under the guise of defense counsel by suggesting they would go to court "with him" if he cooperated. When he then asked, "are you going to be going against me or with me?" the detective responded, "hopefully with you but it depends on you."

Viewing the totality of circumstances, the circuit court concluded that the officers did not represent themselves as advocates and that Tribble was not confused about their role. We affirmed the circuit court, while also addressing the broader application of *Leger v. Commonwealth*, 400 S.W.3d 745 (Ky. 2013), to all rights protected by *Miranda*.

Tribble also argued that his alleged lower intelligence and untreated ADD made it more likely that the officers' "deception" coerced him to confess. Again, we affirmed the circuit court, finding no evidence of coercion and very little evidence that Tribble had a diminished capacity. Tribble's waiver was knowing and voluntary, and the judgment was affirmed.

II. CIVIL LAW

A. CHERNOR JELLOH ET. AL. v. NICOLE SPIVEY (Ky. App. 2025).

2025-CA-0022-MR 10/03/2025 2025 WL 2809267

Opinion Reversing and Remanding by COMBS, JUDGE; CALDWELL, J. (CONCURS) AND EASTON, J. (CONCURS)

A settlement was reached between the parties involved in a motor vehicle in which Jelloh, the appellant, agreed to accept the sum of $7500 in exchange for executing a release. However, before executing the agreement, Jelloh, a native of West Africa, disappeared--presumably having returned to Africa. The trial court ordered him to comply, but he never appeared-- nor was the settlement executed. Opposing counsel filed a motion for contempt and for an award of his attorney's fees. The trial court, *sua*

sponte, without a motion for involuntary dismissal before it, dismissed the case for failure to appear and to comply with its order.

Jelloh's counsel filed this appeal seeking enforcement of the settlement agreement (and thereby his attorney's fee), arguing that Jelloh's personal execution of the release of his claims was not necessary to implement the agreement.

We agreed and reversed the order of dismissal. We remanded with directions for the court to utilize the remedy available by virtue of CR 70, which gives it the power to appoint "some other person" to execute the release in lieu of resorting to the extreme remedy of involuntary dismissal.

B. ***KENNETH MINTON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PHYLLIS J. MINTON, DECEASED v. PADUCAH & LOUISVILLE RAILWAY, INC. (Ky. App. 2025).***

2023-CA-1146-MR 10/10/2025 2025 WL 2882039

2023-CA-1148-MR

Opinion Affirming by L. JONES, JUDGE; COMBS, J. (CONCURS) AND ECKERLE, J. (CONCURS)

The Court concluded it is generally improper for a trial court to take judicial notice of the absence of a Kentucky statute or regulation requiring a railroad to remove vegetation near a crossing, but the error was unpreserved because the objection to the taking of judicial notice was not made until the following day. The taking of judicial notice was not a palpable error because the notice was not mentioned again during the trial or contained in the jury instructions. The Court held that the prohibition on the giving of ultimate issue testimony by an expert set forth in *Kennedy v. Hageman*, 704 S.W.2d 656, 659 (Ky. App. 1985), was overruled by *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997). Finally, the Court held that only the physical characteristics of a railroad crossing - not the actions or inactions of a driver - may be considered to determine whether the crossing is extra-hazardous.

C. ***MIRANDA STOVALL ET. AL. v. KY 120 UNITED AFT ET. AL. (Ky. App. 2025).***

2024-CA-0627-MR 10/17/2025 2025 WL 2942203

2024-CA-0648-MR

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

These two appeals were from orders granting a motion to dismiss and denying attorney's fees. The complaint was filed by parents of children in the Jefferson County Schools. They sought damages from the Appellees for advocating a teacher "sickout" to protest proposed changes to the teachers' retirement system. The Court affirmed the granting of the Appellees' motion to dismiss and the denial of Appellees' motion for attorney's fees, although for reasons different than those relied upon by the circuit court.

First, a five-year limitation period applies under KRS 413.120(2). The circuit court had ruled that the claim for damages from the Appellees was time-barred under the one-year limitation period for personal injuries. But the one-year limitation period applies to physical harm, which was not the nature of the injury here. Thus, the claim was not time-barred.

Instead of a limitation issue, the Court found a lack of standing and causation. The statute relied upon regulated interaction between employers and employees and was not designed to create a cause of action for the parents of students. Further, the Appellants cannot establish that the two Appellees were the cause of the work stoppage such that the work stoppage is fairly traceable to them alone: the work stoppage was the result of hundreds of individual decisions. There is no practical way to redress the claim made by assessing responsibility among all those who participated, even if Appellants led the way. The Complaint was still properly dismissed.

In the context of awarding attorney's fees, the Court then addressed the circuit court's ruling that the social posts advocating the sickout were protected speech under the Uniform Public Expression Protection Act (UPEPA). KRS 454.462(1). UPEPA's purpose is to prevent SLAPP lawsuits that are aimed to harass, intimidate, or silence. While Brewer had a right to criticize the legislation, the posts called for an illegal public employee work stoppage. While, the Complaint was properly dismissed, Appellants were not proven wrong in their argument that the call for an illegal act which immediately followed was not protected by the First Amendment and could support a claim for damages in some circumstances. The circuit court did not abuse its discretion in not awarding attorney's fees.

D. ***JENA LHOTSKY AND JENA LHOTSKY, AS GUARDIAN, CONSERVATOR, AND NEXT FRIEND FOR ALEX LHOTSKY, A DISABLED ADULT v. GUY SUTCLIFFE. (Ky. App. 2025).***

2024-CA-1521-MR 10/17/2025 2025 WL 2942192

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

This is an appeal from a summary judgment in a car accident case where the court addressed principles of negligence *per se* and proximate cause. We affirmed the circuit court's judgment in favor of a homeowner whose brick/stone mailbox was struck by a driver resulting in the driver's death and serious injuries to the passenger.

The passenger argued that the mailbox was an encroachment under KRS 177.106 and violated KRS 179.240 as it was located within the right-of-way. We analyzed precedent and found neither of these statutes applied to create a negligence *per se* claim for a jury. The mailbox was not an obstruction and not in the right-of-way; it was 11 feet off the roadway; it was not clear who placed it there; and there was no evidence of it being struck in the decades prior to this accident.

With regard to the common law negligence claims, we found the lack of foreseeability of a danger here was significant in determining whether the property owner had any duty to this vehicle passenger. Moreover, we agreed with the circuit court that there was no proximate cause established. The mailbox, like a tree, was harmless until acted upon by the conduct of the driver in his operation of the vehicle.

E. SUSAN CROWDER v. MARVIN YUSSMAN, M.D. (Ky. App. 2025).

2024-CA-0930-MR 10/24/2025 2025 WL 2989364

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

Appellant filed suit against her former fertility doctor, Appellee, alleging that he used his own sperm to inseminate her artificially, without consent, in 1975. Following Appellant's discovery that Appellee was the biological father of her child, she filed suit against him asserting both statutory and common-law causes of action. The Jefferson Circuit Court granted Appellee summary judgment on all claims. In affirming the Trial Court's judgment, the Court of Appeals found that Kentucky's Fertility Fraud Act, Kentucky Revised Statute § 311.373, did not apply retrospectively to Appellant's fertility fraud claim. The Court further held that Appellant's common-law causes of action were time-barred pursuant to the applicable statutes of limitation and statute of repose. The Court also sanctioned Appellant's counsel for submitting three citations to fictious authority and a false preservation statement in her appellate brief to the Court in violation of the Kentucky Rules of Appellate Procedure.

III. QUALIFIED OFFICIAL IMMUNITY

A. ESTATE OF JEREMIAH BLEVINS, BY AND THROUGH JENNIFER BLEVINS, AS ADMINISTRATRIX ET. AL. v. BRANDON HOWE ET. AL. (Ky. App. 2025).

2024-CA-1100-MR 10/03/2025 2025 WL 2809420

Opinion Affirming by EASTON, JUDGE; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

This is an appeal of an order granting summary judgment to the Appellees based on qualified official immunity. The underlying action stems from a collision of trucks on a two-lane roadway. Appellants argued that individual employees of the Transportation Cabinet, the Appellees, should have repaired the roadway before the collision. The question was whether the Appellees' duties involving the maintenance and repair of this roadway were discretionary or ministerial. The circuit court dismissed the claims against the Appellees ruling that qualified official immunity applied. The circuit court held the employees had to use their discretion in prioritizing the funds available for various repairs in roadways, thereby making their duties of repairing the road discretionary in nature.

The Court ruled that the employees were acting in a discretionary manner entitling them to qualified official immunity. It was undisputed that Appellees were acting within the scope of their professional authority, and there is no allegation or evidence they acted in bad faith. Discretion is involved when officials look at all the repairs necessary for the roadways in their district and must prioritize which projects need the most immediate attention, while keeping budgetary constraints in mind.

The Appellants had also brought a claim against the Transportation Cabinet. The agency itself has a ministerial duty to maintain the roadways for which it may be held liable through the Board of Claims process, but any failure of the agency to perform its ministerial duty does not necessarily support an action against individual employees who must exercise discretion when carrying out the agency's budgetary decisions. The Court affirmed the circuit court.

IV. GOVERNMENTAL IMMUNITY

A. UNIVERSITY OF LOUISVILLE v. KRZYSZTOF WOLEK (Ky. App. 2025).

2024-CA-1246-MR 10/24/2025 2025 WL 2989377

Discretionary Review Granted 9/16/2026

Opinion Affirming by ECKERLE, JUDGE; THOMPSON, C. J. (CONCURS) AND L. JONES, J. (CONCURS)

Appellee, a professor at the University of Louisville, filed suit against Appellant, the University, alleging a violation of the Kentucky Campus Free Speech Protection Act, Kentucky Revised Statute 164.348. The Kentucky Court of Appeals affirmed the Jefferson Circuit Court's denial of Appellant's motion for judgment on the pleadings. The Court held that Appellee alleged sufficient questions of fact precluding judgment. Specifically, the Court reasoned that immunity remained a triable defense considering the pleadings presented issues of fact regarding whether Appellee's claim accrued within the General Assembly's one-year prescribed waiver of governmental immunity.

V. CIVIL PROCEDURE

A. CPV STONECROP SOLAR, LLC v. HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION ET. AL. (Ky. App. 2025).

2024-CA-1393-MR 10/24/2025 2025 WL 2989424

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

This is an appeal from a circuit court's determination that it lacked subject matter jurisdiction to hear Appellant's Petition for Declaratory Judgment that the tracts of land leased were exempt from Commission's jurisdiction under the agricultural supremacy clause (KRS 100.111(22), KRS 100.111(2), and KRS 100.203(4)) and the Right to Farm Act (KRS 413.072). The Court of Appeals vacated and remanded the circuit court's ruling that it lacked subject matter jurisdiction.

Considering the dictates of *Nash v. Campbell County Fiscal Court,* 345 S.W.3d 811 (Ky. 2011), we conclude that the circuit court erred in determining that it lacked subject matter jurisdiction to adjudicate Stonecrop's petition for declaration of rights because there was no final order of the Commission. As set forth in *Nash*, agricultural supremacy clause and the Right to Farm Act exempt real property used for agricultural purposes from the authority or regulation of city or county zoning and planning, with few exceptions. *Id*. at 815. *Nash* particularly instructed that the appropriate avenue to determine if property is used for an agricultural purpose is to file an action in the circuit court. *Id*. at 815-16. Thus, Appellant had no obligation to obtain a final order from the Commission as to whether the solar farm operation constituted an agricultural use. The circuit court committed reversible error by concluding otherwise.

VI. FAMILY LAW

A. DAVID WHITE v. AIESHA WHITE (NOW COLE) (Ky. App. 2025).

2024-CA-0725-MR 08/29/2025 2025 WL 2485359

Opinion Affirming in part, and Reversing in part by ECKERLE, JUDGE; CALDWELL, J. (CONCURS) AND MCNEILL, J. (CONCURS)

This is an appeal that seeks relief from an order modifying a prior custody decree granting sole parental custody. The Family Court improvidently granted sole custody to Appellee, as she never requested that relief. Furthermore, the Family Court's findings did not directly address any of the statutory factors under KRS 403.340 or KRS 403.270, as required by KRS 403.340. It is not this Court's responsibility to search the record for evidence to support the statutory findings for modification of custody. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). The order awarding sole custody was reversed and remanded to restore joint custody.

This Court offered guidance on the issue of allowing the friend of the court (FOC) to testify. KRS 403.300(3) requires a FOC to provide a report, that includes the required information under KRS 403.300, to counsel and any unrepresented party at least ten days before the hearing. However, we concluded the statute does not specifically require inclusion of the investigator's interviews with the child. Allowing the FOC to remain in the courtroom during testimony of Child's therapist and thereafter offer opinions and recommendations based on that testimony violates the separation-of-witnesses rule, Kentucky Rule of Evidence ("KRE") 615. This practice raises significant due-process concerns, as it affects the ability of a party to cross-examine the FOC effectively.

Appellant also appealed the finding of him being in contempt for violation of the timesharing schedule for spring break 2023. The Family Court denied Appellant's motions to alter the schedule to allow the eight-hour late return of the child from a planned trip. Appellant took Child on a cruise regardless. The Court found that even if the additional delay was beyond Appellant's control, the Family Court was entitled to consider Appellant's prior conduct to determine that he willfully violated the timesharing schedule. The finding of contempt was affirmed.

B. <u>BRENDA MASSACCI-MILLER v. DAVID MILLER (Ky. App. 2025).</u>

2024-CA-0960-MR 10/24/2025 2025 WL 2989501

Opinion Vacating and Remanding by MCNEILL, JUDGE; CALDWELL, J. (CONCURS) AND ECKERLE, J. (CONCURS)

Appellant ("Mother") and Appellee ("Stepfather") were married in Ohio in 2006 and had two children. The parties divorced in 2011, and Mother gave birth to another child ("Child") who was not Stepfather's biological child. The parties remarried in 2015, and Stepfather began raising Child alongside Mother. Child's biological father ("Father") was never actively involved in Child's life. In early 2016, Mother commenced a paternity

case in Ohio against Child's Father. The Ohio court entered an order establishing paternity and child support and noted that Mother would remain legal custodian of Child pursuant to Ohio Revised Code ("R.C.") 3109.042. The parties moved to Kentucky with all three children in 2016, but shortly thereafter commenced divorce proceedings. Pursuant to a Marital Settlement Agreement, which was incorporated into the parties' 2017 Decree of Dissolution of Marriage, Mother and Stepfather were to share joint custody of both of their children and Child. Pertinent to the appeal, Father was not notified or served with anything from the parties' dissolution proceedings. The parties amicably raised their children and Child pursuant to the terms of the Marital Settlement Agreement for the following six years. After some parenting issues arose in 2023, Mother ceased allowing Stepfather to exercise visitation with Child and commenced a separate civil custody matter against Father. Father was served via warning order attorney and Stepfather was not notified or served with anything from those proceedings. After the circuit court entered a decree of sole custody in that matter, Mother moved to set aside the parties' Marital Settlement Agreement in the underlying matter. The circuit court denied Mother's motion and maintained that Mother and Stepfather would continue to share joint custody. Mother appealed.

The Court of Appeals vacated and remanded. Specifically, the Court held that the circuit court inappropriately awarded joint custody to Mother and Stepfather in 2017 without first conducting a hearing and failed to adequately consider Child's best interests or Father's parental rights when Father was not served or notified of the proceedings. The Court further determined that the Ohio order stating that Mother was to remain legal custodian of Child was not an initial custody determination under Kentucky Revised Statutes ("KRS") 403.822 because the order simply noted a default custody status afforded by statute. Finally, the Court noted that, while it did not condone Mother's litigation tactics, the circuit court's actions led to two conflicting custody orders, both of which could not be contemporaneously supported by the law.

VII. APPELLATE PROCEDURE

A. W. I. S. v. K. M. B. ET. AL. (Ky. App. 2025).

2024-CA-1125-MR 10/03/2025 2025 WL 2809242

2024-CA-1126-MR

Opinion and Order Dismissing by ECKERLE, JUDGE; A. JONES, J. (CONCURS) AND TAYLOR, J. (CONCURS)

These are appeals of a granted stepparent adoption brought by the natural father. The natural father filed his brief, and this Court found the brief to be severally deficient. Instead of dismissing the appeals, the Court struck the brief and allowed for an opportunity to file a compliant brief. Natural father again filed a deficient brief with little changes as to the recommendations of the Court. The Court then permitted the

opportunity to file a corrective reply, which the natural father failed to do. After repeated failures to file a compliant brief, this Court ruled that the appeals are to be dismissed.

The briefs submitted failed to cite to the written record at all, as required by RAP 32(A)(3) and (4). There was no preservation statement, this section of the brief was used to discuss issues not listed in his issues section. Third, the appendix did not contain citations to where the items listed would be found in the record. In short, despite this Court's leniency, natural father demonstrated he was unable, or unwilling, to abide by the mandatory briefing rules. The Court's patience is not boundless.