

**KENTUCKY SUPREME COURT
APRIL 2023**

ADMINISTRATIVE LAW:

**FRIENDS OF LOUISVILLE PUBLIC ART, LLC, ET AL., V.
LOUISVILLE/JEFFERSON COUNTY METRO HISTORIC LANDMARKS AND
PRESERVATION DISTRICTS COMMISSION, ET AL.**

2022-SC-0025-DG

April 27, 2023

Opinion of the Court by Chief Justice VanMeter. All sitting. Conley, Keller, Lambert, Nickell, and Thompson, JJ., concur. Bisig, J., dissents by separate opinion.

The issues involve due process concerns relating to consideration of a certificate of appropriateness seeking to remove the Castleman statue from a roundabout at a primary entrance to Cherokee Park in Louisville. Primarily, whether the Court of Appeals and Jefferson Circuit Court erred in affirming the Louisville/Jefferson County Metro Historic Landmarks and Preservation Districts Commission’s approval of the Louisville/Jefferson County Metro Government’s 2022 application to remove the statue when Louisville Metro employees participated as members of the Commission. The Supreme Court held that the decision-making participation in this matter by Louisville Metro employees serving on the Landmarks Commission’s review of their own employer’s application is an inherent and intolerable conflict of interest, within the holding of *Hilltop Basic Res., Inc. v. Cnty. of Boone*, 180 S.W.3d 464, 469 (Ky. 2005), and resulted in a denial of procedural due process. Accordingly, the Court found that the lower courts did err and reversed and remanded to the circuit court with directions to set aside the Commission’s decision as arbitrary.

CONSTITUTIONAL LAW:

**CITY OF PIKEVILLE, KENTUCKY, ET AL. V. KENTUCKY CONCEALED
CARRY COALITION, INC.**

2022-SC-0053-DG

April 27, 2023

Opinion of the Court by Justice Nickell. All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Lambert, JJ., concur. Thompson, J., dissents by separate opinion.

Kentucky Concealed Carry Coalition (KC3) filed suit against the City of Pikeville alleging that various administrative rules, policies, and contractual provisions violated KRS 65.870, which generally prohibits the regulation of firearms by local government. The Pike Circuit Court granted summary judgment in favor of Pikeville. The Court of Appeals reversed. On discretionary review, the Supreme Court held KC3 lacked constitutional standing because it failed to allege a sufficiently specific injury resulting from Pikeville’s prohibition on the possession and carrying of firearms. Likewise, KC3 failed to establish associational standing because it failed to identify any specific injury suffered by any of its members. Therefore, the Supreme Court reversed the decision of the Court of Appeals and remanded to the trial court with instructions to dismiss the action without prejudice.

CONTRACTS:

JOE WIELAND, ET AL. V. DANA FREEMAN, ET AL.

[2022-SC-0139-DG](#)

April 27, 2023

Opinion of the Court by Justice Keller. All sitting. All concur.

Joe Wieland and Hot Rods & BBQ, LLC (Hot Rods) signed a lease for a property owned by Dana Freeman, Ben Freeman, and their company, Kountry Korner Kafe (collectively, “the Kafe”). In the spring and summer of 2018, however, the relationship between the parties regarding the tenancy began to deteriorate. Wieland and Hot Rods filed suit against the Kafe, alleging wrongful eviction, breach of contract, and defamation. After a grant of partial summary judgment in the Kafe’s favor on the wrongful eviction claim and with a partial summary judgment motion pending on the defamation claim, the trial court ordered the parties to alert the trial court to any matters that were still outstanding. Wieland and Hot Rods filed a response expressing confusion as to whether their breach of contract claim had been ruled upon. Subsequently, the trial court issued an order dismissing the defamation claim and erroneously noting that Wieland and Hot Rods had not responded to the trial court’s previous order.

Wieland and Hot Rods then appealed to the Court of Appeals. The Court of Appeals held that Wieland and Hot Rods had waived their breach of contract claim because they did not ask the trial court to make any findings of fact on that claim pursuant to Kentucky Rule of Civil Procedure (CR) 52.04 nor did they deny that they had failed to respond to the trial court’s order.

The Supreme Court granted discretionary review to determine if Wieland and Hot Rods had waived their contract claim. The Supreme Court affirmed the Court of Appeals, holding that CR 52.04 was dispositive. Under that rule, Wieland and Hot Rods were required to move the trial court for additional

findings regarding their contract claim. Because they did not do so and failed to alert the trial court in any other way of its error, they waived their breach of contract claim.

CRIMINAL LAW:

DONNIE CAMPBELL V. COMMONWEALTH OF KENTUCKY

2021-SC-0479-MR

April 27, 2023

Opinion of the Court by Justice Conley. All sitting. VanMeter, C.J.; Bisig, Keller, and Nickell, JJ., concur. Thompson, J., concurs by separate opinion. Lambert, J., concurs in result only by separate opinion.

The trial court allowed a medical doctor to testify via zoom over the objections of defense counsel who argued it was a violation of defendant's 6th Amendment right to confront witnesses. The jury convicted on assault in the first-degree, robbery in the first-degree, violation of a domestic violence order, and being a persistent felony offender in the first-degree. The trial court accepted the recommendation of the jury and thereby sentenced Campbell to life in prison.

The Supreme Court reversed Campbell's conviction for assault in the first-degree by holding that Campbell's Sixth Amendment rights were violated by allowing a doctor to testify via zoom as to serious physical injury, as alleged by the Commonwealth. Analyzing the issue under *Maryland v. Craig*, the Supreme Court found the trial court erred and held there was not a sufficient finding of necessity to allow the doctor to testify remotely. 497 U.S. 836, 853 (1990).

ANSHANIQUE M. LEAVELL V. COMMONWEALTH OF KENTUCKY

2021-SC-0379-MR

April 27, 2023

Opinion of the Court by Justice Keller. All sitting. All concur.

Anshanique M. Leavell appealed from her convictions for murder, receiving stolen property—firearm, and tampering with physical evidence. These convictions arose after she shot Amareya Freeman one time in the chest. At trial, she asserted that she acted in self-defense. On appeal, Leavell asserted several issues, including that the trial court erred in denying her motions for directed verdict, that the trial court erred in admitting evidence that she was potentially affiliated with a gang, and that the Commonwealth's Attorney engaged in prosecutorial misconduct. The Kentucky Supreme Court held that the trial court did not err on any of these issues.

Finally, Leavell asserted that the trial court erred in admitting testimony that Leavell did not act consistently with someone who truly acted in self-defense in violation of *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013). On this issue, the Supreme Court held that the trial court did not err in admitting testimony that would have otherwise violated *Ordway* because Leavell first elicited testimony about the way a typical suspect behaves. After she did so, the Commonwealth was permitted to elicit similar testimony to rebut the evidence Leavell elicited.

DAVID A. KIMMEL V. COMMONWEALTH OF KENTUCKY

[2022-SC-0038-MR](#)

AND

DAVID A. KIMMEL V. COMMONWEALTH OF KENTUCKY

[2022-SC-0061-MR](#)

April 27, 2023

Opinion of the Court by Justice Bisig. All sitting. Lambert and Nickell, JJ., concur. Thompson, J., concurs by separate opinion. Conley, J., concurs in part and dissents in part by separate opinion in which VanMeter, C.J., and Keller, J., join.

David A. Kimmel was charged separately with burglary, theft, and being a first-degree persistent felony offender after shoplifting from Walmart. While released on bond for that offense, he shoplifted from Rural King and was charged with the same offenses. Kimmel agreed to have all charges tried together and was sentenced to forty years in prison pursuant to KRS 533.060(3), which requires that the sentence imposed for the offense committed while awaiting trial must run consecutively to the confinement for the offense for which the person is awaiting trial. Kimmel argued that the forty-year sentence violated KRS 532.110(1)(c), which requires that the maximum aggregate sentence of consecutive sentences cannot exceed the longest term authorized for the highest class of crime committed – here, twenty years.

The Supreme Court relied on *Blackburn v. Commonwealth*, 394 S.W.3d 395 (Ky. 2011), in which the Court analyzed KRS 533.060(2) and held that the subsection does not modify the aggregate maximum sentence authorized by KRS 532.110(1). The Supreme Court held that the reasoning in *Blackburn* is equally applicable to KRS 533.060(3). As such, the Court concluded that KRS 533.060(3) and KRS 532.110(1)(c) can both be applied to Kimmel’s sentence because treating KRS 533.060(2) and (3) differently would lead to illogical and inconsistent results. The Court employed its obligation to harmonize apparently conflicting statutes when possible and held that while sentences under KRS 533.060(3) must be consecutive, the resulting total term of years

cannot violate the maximum aggregate sentence cap set forth in KRS 532.110(1)(c). The Court also found no error in the admission of KRS 404(b) evidence, nor in permitting witness narration while surveillance videos of the incident were played for the jury. The Court affirmed Kimmel's convictions but vacated his forty-year sentence and remanded the case to the trial court to sentence Kimmel to twenty years in prison.

RUVIEL HERNANDEZ V. COMMONWEALTH OF KENTUCKY

2022-SC-0138-MR

April 27, 2023

Opinion of the Court by Justice Bisig. VanMeter, C.J.; Bisig, Keller, Lambert, Nickell, and Thompson, JJ., sitting. All concur. Conley, J., not sitting.

Ruviel Hernandez appealed as a matter of right from the Greenup Circuit Court judgment sentencing him to a sentence of life plus twenty years for his convictions of rape and four counts of sexual abuse. On appeal, Hernandez argued the trial court erred 1) in refusing to suppress his interview with law enforcement because he was not provided *Miranda* warnings or an interpreter, 2) in admitting other bad acts evidence regarding another victim's allegations against him pursuant to KRE 404(b), and 3) in running his life sentence consecutive to his sentence of twenty years. The Supreme Court held that *Miranda* warnings were not required because Hernandez was not in custody at the time of the interview, nor was an interpreter required given Hernandez's proficiency with the English language and the American legal system. The Supreme Court further held evidence of another victim's allegations against Hernandez were similar to the allegations at issue at trial and admissible under KRE 404(b) for the issues of mistake, motive, intent, opportunity, preparation, and plan. The Supreme Court also held that Hernandez's pre-trial motion in limine to exclude the KRE 404(b) evidence was not a "motion to suppress" for purposes of RCr 8.27, and thus the lack of a hearing on that motion was not error. Finally, the Supreme Court held pursuant to *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1993), that the trial court erred in running Hernandez's sentences for life and twenty years consecutively and therefore remanded for entry of a new judgment running the life and twenty-year sentences concurrently.

FAMILY LAW:

CHARLES F. MAHL V. LOUANNE MAHL

[2021-SC-0481-DG](#)

AND

LOUANNE MAHL V. CHARLES F. MAHL

[2021-SC-0487-DG](#)

April 27, 2023

Opinion of the Court by Justice Bisig. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting.

Dr. Charles and Louanne Mahl were married for twenty-eight years and had two children before they were eventually divorced in 2007. The circuit court ordered Charles to pay Louanne spousal maintenance for ten years and once that expired, Louanne successfully petitioned the court for modification, proving a substantial and continuing change in circumstances that rendered the original maintenance award unconscionable. KRS 403.250. Charles appealed to challenge maintenance modification and attorney's fees awarded pursuant to KRS 403.220 but failed to name Louanne's attorney as a party to the appeal. The Court of Appeals declined to address the attorney's fee issue but reversed the circuit court's modification of maintenance, concluding that the circuit court abused its discretion.

On appeal, the Supreme Court held that Charles's failure to name Louanne's attorney in the notice of appeal was not fatal, particularly in light of this Court's recent opinion in *M.A.B. v. Cabinet for Health and Family Services*, 635 S.W.3d 90 (Ky. 2021), and its adoption of the new Rules of Appellate Procedure. The Supreme Court upheld the attorney's fee award because the circuit court properly considered the financial position of the parties and recognized the difficulties created by Charles's noncompliance with discovery orders. Finally, the Supreme Court concluded that the Court of Appeals erred in reversing the circuit court's modification of maintenance. The circuit court conducted numerous hearings and considered copious information presented by the parties regarding their financial circumstances. As such, the circuit court did not abuse its discretion in modifying maintenance and was undoubtedly best positioned to make that determination. The Court of Appeals opinion is reversed, and the circuit court order is reinstated.

WORKERS' COMPENSATION:

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT V. MICHAEL GOSPER, ET AL.

2021-SC-0386-WC

April 27, 2023

Opinion of the Court by Justice Nickell. All sitting. All concur.

The Administrative Law Judge (ALJ) determined that a worker's bilateral knee condition was caused by work-related cumulative trauma. The Workers' Compensation Board and the Court of Appeals affirmed. On direct appeal, the Supreme Court held there was sufficient evidence to support the finding of work-related injury and causation. The ALJ's findings were also held to be sufficiently specific. The Supreme Court further reaffirmed the standard for cumulative trauma injuries as stated in *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976). Therefore, the Supreme Court affirmed the decision of the Court of Appeals.

WRITS:

STEVEN RUSH ROMINES V. HONORABLE TIMOTHY R. COLEMAN, ET AL.

2022-SC-0424-MR

April 27, 2023

Opinion of the Court by Justice Thompson. All sitting. All concur.

Attorney made statements to news media regarding the ethics and conduct of a police officer. The officer filed a defamation suit against both the attorney and his law firm. Defendants filed a motion to dismiss in the Circuit Court asserting improper venue and failure to state a claim. After the Circuit Court's denied the motion to dismiss, defendants filed a petition for a writ of prohibition, which sought dismissal of the suit, which was denied by the Court of Appeals.

Attorney appealed and the Kentucky Supreme Court determined that the attorney could show neither a lack of adequate remedy by appeal nor a great and irreparable injury based on his claim of improper venue. Further, the attorney was not entitled to writ of prohibition based on his alleged defenses of First Amendment protection, the "judicial statements privilege," or the "libel-proof plaintiff doctrine."

ATTORNEY DISCIPLINE:

KENTUCKY BAR ASSOCIATION V. ASHLEE DEHNAE SMITH

2023-SC-0019-KB

April 27, 2023

Opinion and Order of the Court. All sitting. All concur. Ashlee Dehnae Smith failed to update her bar roster address and failed to complete her Continuing Legal Education (CLE) requirements for the 2017-18 educational year. The Board mailed a show-cause notice to Smith regarding her failure to comply with CLE requirements. Smith had not kept her bar roster address up to date, but finally received the notice when it was sent to her service address. The CLE department told Smith how to cure the CLE deficiency, but she failed to do so. Smith filed a motion with the Supreme Court and an affidavit testifying she had completed 6.5 additional hours of CLE for the relevant year but had forgotten to submit her form for the hours. She attached a certificate of attendance. The KBA Inquiry Commission investigated Smith's claims and subpoenaed her bank records for the relevant time of the CLE she had allegedly attended—which showed her bank card was used in another city during the time she asserted she was in the CLE program. The inquiry commission issued charges against Smith for violating Supreme Court Rule (SCR) 3.130(3.3)(a)(1) by falsely testifying in an affidavit; SCR 3.130(3.3)(a)(3) by knowingly filing a false affidavit and false certificate of attendance; SCR 3.130(8.4)(c) by fraudulently certifying she earned CLE credits she had not, in fact, earned; and SCR 3.130(3.4)(c) for failing to maintain a current KBA roster address.

The Court accepted the recommendation of the Board of Governors and found Smith guilty of all the counts of ethical misconduct. It suspended her retroactively for a period of three years, beginning in 2017. She must comply with the relevant requirements of SCR 3.502 for reinstatement.