

**KENTUCKY SUPREME COURT
AUGUST 2023**

CRIMINAL LAW:

MICHAEL ROBERTSON V. COMMONWEALTH OF KENTUCKY

2021-SC-0485-MR

August 24, 2023

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

Michael Robertson was convicted of two counts of rape for acts perpetrated upon his 9-year-old stepdaughter. On appeal to the Supreme Court, Robertson alleged that the trial court erred by allowing the victim’s father, as her representative under Marsy’s Law, to remain in the courtroom prior to his testimony. He asserted that this violated his right to the presumption of innocence, his right to confrontation, and his right to have witnesses separated under Kentucky Rule of Evidence (KRE) 615. The Court held that the trial court in this case did not err but set forth best practice for when the issue arises in the future. The Court explained that both the defense and the Commonwealth should consider in their trial preparations whether a conflict may arise between Marsy’s Law and KRE 615. If there is an anticipated conflict, the parties should bring it before the court pretrial. At that time, the trial court should conduct a hearing at which the parties can discuss the potential conflict, and the Commonwealth can put forth its proposed order of witnesses and the basic substance of the victim’s testimony. With that information, the trial court should, to the best of its ability, determine the impact of the conflict on the proposed testimony of the victim. Then the court should determine if, in the interest of maintaining the integrity of the trial, a different order of Commonwealth witness presentation is mandated. The Court emphasized that it trusts trial courts to use their discretion in making these determinations to help ensure as fair a trial process as possible, within the parameters of Marsy’s Law.

Robertson alleged several other errors by the trial court. The Supreme Court held that none of these alleged errors merited reversal of Robertson’s convictions.

COMMONWEALTH OF KENTUCKY V. WILLIAM BEMBURY

[2022-SC-0018-DG](#)

August 24, 2023

Opinion of the Court by Justice Lambert. Bisig, Conley, Keller, Lambert, Nickell, and Thompson, JJ., sitting. Bisig, Conley, and Nickell, JJ., concur. Nickell, J., concurs by separate opinion. Keller, J., dissents by separate opinion in which Thompson, J., joins. Thompson, J., dissents by separate opinion. VanMeter, C.J., not sitting.

Two bicycle officers patrolling the entertainment district in downtown Lexington observed an individual named Joseph Napier approach William Bembury. The officers knew Bembury to be a synthetic marijuana trafficker. The two men had a brief conversation and then walked away from the area together, prompting the officers to follow them. Napier and Bembury sat down at a picnic table in a public courtyard. One of the officers watched from the first level of a nearby parking garage as Bembury took money from Napier and placed it in his backpack, which was on the picnic table in front of him. Bembury then pulled a rolling paper out of his backpack, reached back into his backpack, and pulled out a substance. Bembury then sprinkled the substance into the rolling paper, rolled it, and gave it to Napier. Napier took the joint and walked away from the area. The officers followed Napier, stopped him, and confirmed that the substance in the joint was synthetic marijuana. One of the officers then went back to Bembury, who was still in the courtyard, and arrested and handcuffed him. One of the officers performed a cursory search of Bembury's backpack and then waited until the other officer came back to the courtyard. The other officer then performed a more thorough search of the backpack and found, inter alia, a golf ball sized baggie of synthetic marijuana. After Bembury's motion to suppress the evidence found in his backpack was denied, he entered a conditional guilty plea to one count of possession of synthetic drugs. The Court of Appeals reversed.

The Supreme Court reversed the Court of Appeals and held that the search of Bembury's backpack was permissible as a search incident to his lawful arrest. The Court noted that the U.S. Supreme Court has yet to address whether searches of portable containers found on an arrestee's person at the time of his or her arrest may be searched incident to a lawful arrest. It therefore adopted the "time of arrest" rule as adopted by several other state courts. Under the time of arrest rule, a portable container is considered part of an arrestee's "person" for the purposes of a search incident to a lawful arrest if the container was in the arrestee's actual and exclusive possession, as opposed to constructive possession, at or immediately preceding the time of arrest such that the item must necessarily accompany the arrestee into custody.

JASON BARRETT V. COMMONWEALTH OF KENTUCKY

2022-SC-0068-MR

August 24, 2023

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

The Court affirmed Jason Barrett’s conviction of nine counts of Sexual Abuse in the First Degree for acts perpetrated against his minor stepdaughter. On appeal to the Supreme Court, Barrett asserted that the Commonwealth engaged in flagrant prosecutorial misconduct when the prosecutor told the jury in closing argument, “[t]hat [Barrett’s] presumption of innocence, I would submit to you is gone because you’ve heard the proof beyond a reasonable doubt.” The Court held that the prosecutor’s closing argument remark was improper but not palpable error.

Barrett argued several other grounds for relief: (1) the trial court erred in allowing Barrett’s stepdaughter to read printed screenshots of her diary entries; (2) the trial court erred in allowing the Commonwealth to question Barrett about his stepdaughter’s credibility; and (3) the jury instructions violated Barrett’s right to a unanimous verdict.

The Court held that the trial court did not err in allowing Barrett’s stepdaughter to read aloud her diary entries because under KRE 801A, the diary entries were Barrett’s stepdaughter’s prior consistent statements that rebutted the defense’s theory that she lied about the sexual abuse to the police. Further, the Court held that the trial court erred in allowing the Commonwealth to question Barrett about his stepdaughter’s credibility, but the prosecutor’s line of questioning did not rise to the standard of palpable error. Finally, the Court held that the jury instructions did not violate Barrett’s right to a unanimous verdict because each instruction described a specific instance of sexual abuse testified to by Barrett’s stepdaughter.

The prosecutor’s improper comment in closing argument and the trial court’s error in allowing the prosecutor to repeatedly question Barrett about his stepdaughter’s credibility did not merit reversal of Barrett’s convictions.

EMPLOYMENT RELATIONS/DISABILITY DISCRIMINATION:

JOYCE TURNER V. NORTON HEALTHCARE, INC.

2022-SC-0004-DG

August 24, 2023

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

Turner was diagnosed with breast cancer. Her employer, Norton, approximately eight months after her diagnosis, fired her alleging at least twenty-one

instances of missing narcotics. Turner filed suit pursuant to the Kentucky Civil Rights Act against Norton Healthcare, alleging discrimination based on disability or perceived disability. The jury found in favor of Turner. Norton filed a motion notwithstanding the verdict, arguing that Turner had failed to produce any evidence that she was substantially limited in the performance of a major life activity, thus demonstrating a qualifying disability pursuant to the KCRA. Turner argued the Americans with Disabilities Amendments Act of 2008 by Congress applied to the KCRA (originally passed in 1992). The trial court ruled in favor of Turner. The Court of Appeals reversed, holding the ADAAA did not apply to the KCRA; and, under the KCRA, Turner had failed to establish a qualifying disability. Turner sought discretionary review which the Supreme Court granted.

The Supreme Court, with Justice Conley writing, unanimously affirmed the Court of Appeals on different grounds. The Court found that because under either the KCRA or ADAAA Turner had failed to present sufficient evidence of a qualifying disability, the question of whether the ADAAA applied to the KCRA was a secondary issue unnecessary to answer to reach resolution in the case. Under the KCRA, Turner had to establish she was substantially limited in the performance of a major life activity. Turner unequivocally testified at trial that she was never substantially limited in the performance of a major life activity. Under the ADAAA, which acknowledges “normal cell growth” is a major life activity, Turner nonetheless failed to present any evidence regarding normal cell growth at trial. Federal courts applying the ADAAA have ruled that disabilities which require a medical explanation to understand, even those which are otherwise self-evident like cancer, must be supported by qualifying expert testimony. Turner did not have an expert testify about her breast cancer thus, she failed to present sufficient evidence regarding normal cell growth.

ARBITRATION:

NEW ALBANY MAIN STREET PROPERTIES, LLC D/B/A PORT OF LOUISVILLE, ET AL. V. R. WAYNE STRATTON, CPA, ET AL.

2022-SC-0254-DG

August 24, 2023

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

Opinion of the Court by Justice Thompson. All sitting. All concur. An accountant employed by an opposing party in a separate lawsuit offered expert testimony during a court-ordered arbitration hearing, opining that New Albany Main Street Properties, LLC (New Albany) was systematically under-reporting income on its tax returns and failing to make proper payments under the terms of a lease. New Albany was able to establish that the accountant was incorrectly counting outgoing checks as incoming income rather than expenses.

New Albany then filed suit against the accountant for defamation and professional malfeasance. A motion to dismiss was granted against New Albany on the basis that privilege, and a lack of duty, barred these claims. The Court of Appeals affirmed.

After granting discretionary review and hearing oral argument, the Court affirmed on the basis that: (1) further discovery was not required to determine whether the judicial statements privilege applied; (2) the judicial statements privilege applied to court-ordered arbitration; (3) the judicial statements privilege applied in the same manner to expert witnesses as it did to lay witnesses; and (4) a lack of duty owed bars a cause of action for professional malfeasance against an expert employed by the opposing party.

WORKERS' COMPENSATION:

DANIEL FARLEY V. P&P CONSTRUCTION, INC., ET AL.

[2022-SC-0350-WC](#)

August 24, 2023

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

Opinion of the Court by Justice Thompson. All sitting. All concur. Certain medical providers of treatments to an injured worker did not submit their billings to either the worker's employer or its insurance carrier within 45-days of the services being provided and the employer rejected those billings. The Administrative Law Judge ruled that the 45-day billing requirement found KRS 342.020(4) had no effect until after a determination of liability had been made and ruled the employer liable. The Workers' Compensation Board affirmed.

However, the Court of Appeals reversed, and Farley appealed as a matter of right.

This Court affirmed the Court of Appeals decision on the basis that (1) KRS 342.020(4) is unambiguous; (2) the statute specifically requires medical providers to submit their billings within 45-days of service regardless of whether a determination of liability has been made; (3) employers and their insurance carriers are therefore not responsible for payment of billings submitted to them after the 45-day period; and (4) 803 KAR 25:096 § 10(3) prohibits medical providers from, in turn, billing patients for services which have been denied for failure to submit bills within 45 days as required by KRS 342.020(4).

SHAN WOLFE V. JOE KIMMEL, ET AL.

2022-SC-0070-DG

August 24, 2023

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

Shan Wolfe was the vice president of GenCare, Inc., an in-home healthcare company that she co-owned with her business partner Robin Lampley. Wolfe sought legal advice from Joe Kimmel regarding her desire to exit GenCare and start her own in-home healthcare company, Legacy In Home Care, Inc. Kimmel advised Wolfe that she could begin Legacy, solicit GenCare customers for their business, and ask GenCare employees to work for Legacy, all before she ever resigned from GenCare. Wolfe took each of these actions and was sued by Lampley and GenCare shortly after she resigned from GenCare. In August 2016, Wolfe met with another attorney, Todd Farmer, who immediately and repeatedly reprimanded her for following Kimmel's advice and advised her to settle the case with Lampley as soon as possible, as she would undoubtedly lose if the case went to trial and would owe a substantial amount of money. In July 2017, Wolfe settled the suit with Lampley. Wolfe then filed a professional malpractice claim against Kimmel in February 2018. The trial court dismissed Wolfe's claim, finding that it was time barred under KRS 413.245, the applicable one-year statute of limitations, and the Court of Appeals affirmed.

The Supreme Court granted discretionary review solely to determine on what date Wolfe's damages became irrevocable and non-speculative sufficient to trigger the statute of limitations. Previously, in *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994), the Court held that for a non-litigation legal malpractice claim, damages become irrevocable and non-speculative when a claimant can state with certainty the exact dollar amount in damages he or she incurred because of the defendant's negligence. The Court held that *Broadbent* was wrongly decided, as Kentucky law has never required sum certain damages to state a claim for negligence. Moreover, for non-legal malpractice claims, damages are considered irrevocable and non-speculative when a claimant is reasonably certain that damages will indeed flow from the negligent act. *Broadbent* accordingly also created a disparity between when the statute of limitations is triggered for non-litigation legal malpractice claims versus non-legal malpractice claims. The Court therefore overruled *Broadbent* and its progeny and held that for non-litigation legal malpractice claims damages are considered fixed and non-speculative when a claimant is reasonably certain that damages will indeed flow from a defendant's negligence. The Court further held that Wolfe's damages became fixed and non-speculative in August 2016, making her February 2018 claim time barred under KRS 413.245.

ATTORNEY DISCIPLINE:

D. STEVEN PARKS V. KENTUCKY BAR ASSOCIATION

2021-SC-0475-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

D. Steven Parks applied for reinstatement to the practice of law pursuant to SCR 3.502(2). The Character and Fitness Committee recommended the Board of Governors not reinstate Parks. The Board agreed with the Committee and recommended the Supreme Court deny Parks' application for reinstatement. Previously, Parks had applied for reinstatement and asserted he had not been adjudicated bankrupt, when, in fact, he had been. Parks also stated in the application he had never been a party to a civil or administrative proceeding other than a divorce action, when he applied for reinstatement. He also asserted he had never been charged with fraud in any legal proceeding when he was the subject of an adversarial proceeding in his bankruptcy case alleging he had engaged in fraud. Parks also represented in the application he had not been previously charged with unprofessional or unethical conduct or had disciplinary proceedings against him, when he had in fact received a private admonition in the past. The Court elected not to review the recommendation as allowed under SCR 3.370(9) and adopted the recommendation to deny reinstatement pursuant to SCR 3.370(10).

RICHARD DAVIS NULL V. KENTUCKY BAR ASSOCIATION

2022-SC-0422-KB

August 24, 2023

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

In 2022, the Court resolved eight separate disciplinary actions taken against Richard David Null and imposed a one-year suspension from the practice of law with 180 days of such suspension to be served and the remainder probated for two years subject to certain conditions. The Court ordered Null to show cause why the remainder of his suspension should be imposed. Null failed to respond. Therefore, the Court imposed the remainder of his suspension, totaling one year.

SHAMEKA LYNN O’NEIL V. KENTUCKY BAR ASSOCIATION

2023-SC-0148-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

Shameka Lynn O’Neil and the Kentucky Bar Association reached a negotiated sanction for O’Neil’s admitted violations of SCR 3.130(3.4)(c) and 3.130(3.5)(d). Under the terms of the negotiated sanction, O’Neil would receive a public reprimand. When representing a client at a district court Zoom hearing, O’Neil spoke over the judge on multiple occasions, and told the court “I bet I don’t appear again. Goodbye.” before closing the Zoom meeting after the court had denied her motion to withdraw from the case. After the court told her to appear the following morning, she sent an email to the judge threatening to file a complaint against the judge. The judge entered an order finding her in direct criminal contempt because of her refusal to abide by the court order requiring her appearance. The Supreme Court agreed the negotiated sanction was appropriate and publicly reprimanded O’Neil.

KENTUCKY BAR ASSOCIATION V. DAVID LEE HARGROVE

2023-SC-0149-KB

August 24, 2023

Opinion and Order of the Court. All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Thompson, JJ., concur. Nickell, J., concurs in result only. Lambert, J., dissents without separate opinion.

David Lee Hargrove was the Graves County Commonwealth’s Attorney at the time he was accused of violating the Rules of Professional Conduct. A trial commissioner suspended Hargrove from the practice of law for 150 days, ordered he complete trust accounting training, and ordered he pay the costs associated with the disciplinary proceeding. While Commonwealth’s Attorney, he maintained a private law office. Hargrove opened an escrow account that was meant to process grant funding as well as receive forfeited monies for the Commonwealth’s Attorney. Hargrove did not like the process for submitting forfeited money and decided to just use the funds directly to pay expenses he deemed associated with his official duties. Hargrove maintains he never personally profited from the expenditures and claimed to be a “poor record keeper.” Hargrove was indicted for abuse of public trust, a class C felony, KRS 522.050(3)(b). Hargrove entered an *Alford* plea and paid almost \$30,000 reimbursement. Neither Hargrove nor the KBA filed an appeal from the trial commissioner’s report. The Court adopted the recommendation and suspended Hargrove from the practice of law for 150 days, complete trust account training, and pay the costs associated with the disciplinary proceedings.

KENTUCKY BAR ASSOCIATION V. LEILA LOUISE HALE

2023-SC-0165-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

Leila Louise Hale was publicly reprimanded by the Nevada Supreme Court for prematurely taking attorney fees from client funds being held in trust and failing to disburse the remaining funds held in trust after negotiating medical liens. Kentucky has comparable rules to the Nevada rules under which she was disciplined. The KBA filed a petition for reciprocal discipline pursuant to SCR 3.435. The Court imposed identical discipline as required by SCR 3.435(4).

BRADLEY STUART SOWELL V. KENTUCKY BAR ASSOCIATION

2023-SC-0179-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

Bradley Stuart Sowell was suspended from the practice of law in 2020 and sought reinstatement of his license pursuant to SCR 3.502. The Board of Governors recommended his license be reinstated, as does the Character and Fitness Committee. Sowell has been involved with KYLAP and made great strides in his recovery. Since failing a drug test in 2019, he has been continually compliant with KYLAP demands regarding sobriety. He fulfilled the two-year waiting period before reapplying to be admitted to the practice of law. The Court granted Sowell’s application for reinstatement to the practice of law.

ROBERT BRIAN OUSLEY V. KENTUCKY BAR ASSOCIATION

2023-SC-0186-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

Robert Brian Ousley and the Kentucky Bar Association negotiated a sanction of a five-year suspension from the practice of law. The Court agreed the sanction was appropriate and granted Ousley’s motion. Ousley was charged with first-degree burglary in 2019 and entered an *Alford* plea to an amended charge of second-degree burglary. He was automatically suspended from the practice of law pursuant to SCR 3.166 following his felony conviction. The Court found Ousley had violated SCR 3.130(8.4)(b) and granted his motion for a negotiated sanction, suspending him from the practice of law for five years.

KENTUCKY BAR ASSOCIATION V. DAVID ALAN COHEN

2023-SC-0203-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

The Court adopted the Board of Governors' recommendation that David Alan Cohen be suspended from the practice of law for three years followed by two years' probation. Cohen was employed by a law firm as a contract senior associate. He accepted a client without disclosing the client or the fee to the firm. It was later discovered he had been providing "off the books" legal services for years. Cohen had also submitted fraudulent expense forms to the firm and taken blank checks from the firm's operating account and written the checks to himself. The Court found Cohen had violated one count of SCR 3.130(1.15)(a) and one count of SCR 3.130(8.4)(c).

JOE STEWART WHEELER V. KENTUCKY BAR ASSOCIATION

2023-SC-0214-KB

August 24, 2023

Opinion and Order of the Court. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. VanMeter, C.J., concurs by separate opinion in which Bisig and Conley, JJ., join. Thompson, J., not sitting.

Joe Stewart Wheeler filed a motion to resign under terms of permanent disbarment. The KBA did not object and the Court granted the motion. Wheeler was indicted on one count of theft by unlawful taking or disposition (\$10,000 or more) and one count of theft by unlawful taking (\$1,000 or more). Wheeler entered an *Alford* plea to the charges. In his plea agreement, Wheeler admitted to taking funds from one of his clients and depositing them into his own account.

TONY BRANDON MILLER V. KENTUCKY BAR ASSOCIATION

2023-SC-0219-KB

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

Tony Brandon Miller and the KBA negotiated a sanction of a 181-day suspension from the practice of law. The Court agreed this was an appropriate sanction for violating SCR 3.130(1.3), SCR 3.130(1.4)(a), SCR 3.130(1.16)(d), SCR 3.130(1.7)(a)(2), SCR 3.130(3.3)(a)(1), SCR 3.130(4.2), and two counts of SCR 3.130(8.1)(b). Miller had been communicating with a client via the adult-content website "Only Fans." He appeared for this client in another matter on which she was being represented by another attorney and lied to the court

about the reason for the client’s absence from court. In another case, Miller was paid a retainer and service fees by a client. After paying Miller, the client was unable to get in contact with him.

RICHARD BOLING V. KENTUCKY BAR ASSOCIATION

[2023-SC-0279-KB](#)

August 24, 2023

Opinion and Order of the Court. All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Lambert, JJ., concur. Nickell and Thompson, JJ., dissent without separate opinion.

Richard Boling and the KBA entered a negotiated sanction pursuant to SCR 3.480(2). The Court concluded the proposed sanction was inadequate and denied the motion. Boling was prosecuting a drug-overdose, second-degree manslaughter case when he knowingly misrepresented evidence to the grand jury. The circuit court concluded Boling “intentionally elicited and presented false testimony in order to elevate the degree of the offense with which [the defendant] was charged.” The proposed negotiated sanction calls for a one-year suspension from the practice of law to run concurrently with the five-year sanction already imposed in another KBA matter against Boling. The Court considered the aggravating factors of prior disciplinary offenses and a pattern of misconduct. The Court pointed out that if Boling’s sanction in this case were to run concurrently with his prior suspension, it would result in no separate sanction for his misconduct in this case. The Court noted a one-year sanction is likely appropriate in this instance, but that this instance of serious misconduct deserves separate discipline. The matter was remanded to the KBA for further proceedings.

MEREDITH LYNN LAWRENCE V. KENTUCKY BAR ASSOCIATION

[2023-SC-0291-KB](#)

August 24, 2023

Opinion and Order of the Court. All sitting. All concur.

Meredith Lynn Lawrence was suspended from the practice of law for five years following his conviction for tax fraud. He now seeks reinstatement to the practice of law. He paid full restitution in that matter and has been compliant with the terms of his suspension. The Character and Fitness Committee noted he has demonstrated worthiness of trust and confidence of the public, possessed sufficient professional capabilities to serve as a lawyer, and acknowledged his wrongdoing. The KBA did not oppose Lawrence’s motion for reinstatement and the Board of Governors recommended the motion be granted. The Court approved Lawrence’s reinstatement subject to certain conditions.