

**KENTUCKY SUPREME COURT
DECEMBER 2021**

ARBITRATION:

Legacy Consulting Group, LLC, et al. v. Brenda Gutzman, In Her Capacity as the Executrix of the Estate of Grace W. McGaughey, Deceased, et al.

[2020-SC-0288-DG](#)

Opinion of the Court by Justice VanMeter. All sitting; all concur. Presenting as an interlocutory appeal from the Fayette Circuit Court, which denied Money Concepts Capital Corporation and Legacy Consulting Group, LLC’s joint motion to enforce arbitration terms in their agreement with Grace McGaughey, the primary issue before the Supreme Court was whether Ms. McGaughey and, by extension, her estate were bound by the arbitration provisions contained within the agreement which she signed with Money Concepts and Legacy Consulting in December 2009 when she purchased a variable annuity with Jackson National Life Insurance Company. The Court held that while under federal and state law, arbitration agreements validly entered into are generally enforceable, arbitration agreements contained within insurance contracts are not enforceable. The Court agreed with the Court of Appeals’ finding that “the product at issue is for insurance based on the description of the portfolio as a fixed account and the regular payments of the same amount . . . consistent with an insurance product.” Because the investment product was insurance, the arbitration agreement was unenforceable, KRS 417.050(2), and neither Ms. McGaughey nor her estate were bound by its terms.

CRIMINAL LAW:

Frederick Jones v. Commonwealth of Kentucky

[2019-SC-0651-DG](#)

December 16, 2021

Opinion of the Court by Justice Keller. All sitting; all concur. Frederick Jones filed an application for expungement in Jefferson Circuit Court. As part of his application, he also filed a motion to proceed in forma pauperis (IFP), which would allow him to proceed without paying the required filing fee. The Jefferson Circuit Court denied his motion to proceed IFP, concluding that the legislature did not intend KRS 453.190, the IFP statute, to apply to applications for expungements. The Court of Appeals affirmed the Jefferson Circuit Court.

The Supreme Court determined that the IFP statute applies to “any action” and that “action,” as defined in KRS 446.010(1), includes “all proceedings.” The Court further concluded that an expungement is a separate proceeding from the underlying criminal case, and thus the IFP statute applies to an application for expungement. The Court further held that the IFP statute applies to both the filing fee and the expungement fee, as both fees are required to complete the expungement process and obtain all of its benefits.

Accordingly, the Supreme Court reversed the Court of Appeals and remanded to the Jefferson Circuit Court for proceedings consistent with its Opinion.

Commonwealth of Kentucky v. Steven D. Roark
2020-SC-0080-DG

December 16, 2021

Opinion of the Court by Justice Conley. All sitting; all concur. The Court of Appeals reversed the conviction of Steven Roark, holding the trial court erred when it excluded an exculpatory video recording of Alvin Couch during his guilty plea allocution, by ruling Couch was available for trial pursuant to KRE 804(a)(5). Roark's attorney had told the trial court he had a subpoena delivered to the Leslie County Detention Center where Couch was incarcerated, and the Court of Appeals concluded that was enough to demonstrate a good faith attempt had been made to secure Couch's presence at trial. The Supreme Court reversed and reinstated Roark's conviction.

The Supreme Court held KRE 804(a)(5) imposes an equal burden on any proponent of a witness to demonstrate a good faith attempt was made to secure their presence at trial, either by procedure or other reasonable means. The mere verbal representations of the proponent are insufficient for a trial court to predicate a finding of unavailability, since the rule is meant to preclude self-serving fabrications of unavailability. As such, the verbal representations of Roark's attorney that a subpoena had been delivered was insufficient to demonstrate a good faith attempt. Moreover, being in the custody of the Commonwealth, a subpoena would not have been enough to secure Couch's presence at trial; there needed to be a transport order as well. Thus, transport orders are within the "other reasonable means" contemplated by KRE 804(a)(5). Since there is no record of a returned subpoena or a signed transport order, it was not an abuse of discretion for the trial court to conclude Couch was available for trial. Finally, the Supreme Court rejected the Court of Appeals' conclusion that application of KRE 804(a)(5) had harmed Roark's due process rights to present a defense. The trial court's application of the rule was not mechanistic, nor did it place an impossible bar on Roark's presentation of a defense therefore, there was no due process violation in excluding video evidence from trial.

Commonwealth of Kentucky v. Shuntrell D. Conner
2020-SC-0099-DG

December 16, 2021

Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Keller, and Nickell, JJ., concur. Conley, Lambert, and VanMeter, JJ., concur in result only. Criminal Appeal. Discretionary Review Granted. Shuntrell D. Conner was convicted of trafficking in marijuana, tampering with physical evidence, possession of drug paraphernalia, and being a first-degree persistent felony offender following an investigation at a traffic stop for erratic driving. After recognizing Conner as a passenger in the vehicle, the officer remembered a tip that Conner was dealing methamphetamine. Instead of investigating the driver's erratic driving, the officer questioned Conner about his potential drug dealing, threatened the use of a drug dog if Conner did not consent to a search of the vehicle, and made multiple calls to locate a canine investigation unit. The canine unit arrived, conducted a canine sniff search around the vehicle, and alerted to the presence of drugs. A search of the vehicle revealed 6.5 ounces of marijuana. Conner moved to suppress the evidence obtained as a result of the search, and the trial court denied the motion. Conner appealed the trial court's denial, and the Court of Appeals reversed.

The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals. Specifically, the Court held that the stop was extended because the officer abandoned the purpose of the stop (investigating the driver's erratic driving) to investigate Conner's potential drug trafficking, which included taking time to locate a canine investigation unit. The Court also held that the Commonwealth failed to meet its burden to establish that the extended duration was supported by reasonable, articulable suspicion.

Gregory Wahl v. Commonwealth of Kentucky
[2020-SC-0139-MR](#)

December 16, 2021

Opinion of the Court by Justice Lambert. All sitting; all concur. Gregory Wahl was convicted of one count of first-degree assault and one count of being a second-degree persistent felony offender. He was thereafter sentenced to forty-five years and appealed his convictions to the Kentucky Supreme Court as a matter of right. First, Wahl asserted that the trial court erred by denying his motion to dismiss the indictment on the basis of immunity. Second, Wahl argued that the trial court erred by allowing the Commonwealth to introduce the hearsay statement of his girlfriend through the testimony and written report of an EMS worker to whom the statements were made. Third, Wahl argued that the trial court erred by not granting his motion for a mistrial after the Commonwealth questioned a witness about whether Wahl had been violent toward her during cross examination. Fourth, and finally, Wahl contended that the trial court exceeded the scope of KRS 532.055 when copies of documents related to his prior convictions were introduced and sent into deliberations with the jury. After review, the Supreme Court held that the trial court had a substantial basis to conclude there was probable cause that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503. Second, the Court held that statements made for medical treatment or diagnosis to EMS workers and included in an EMS pre-hospital care report were admissible pursuant to KRE 803(4). Third, the Court held that the trial court did not err by denying Wahl's motion for a mistrial, because the Commonwealth was not permitted to ask about domestic violence, and, by extension, did not violate KRE 404. Lastly, the Court held that the trial court did not commit palpable error by admitting proof of Wahl's prior convictions that contained identifiers of past victims.

Brett A. Smith v. Commonwealth of Kentucky
[2020-SC-0370-MR](#)

December 16, 2021

Opinion of the Court by Justice Keller. All sitting; all concur. Brett A. Smith was convicted of one count of sodomy in the first degree, victim under 12 years old, and three counts of sexual abuse in the first degree, victim under 12 years old, by a Henry County jury. He alleged multiple errors, but the Supreme Court found none. First, the Court held that the trial court did not err in denying Smith's motion for a directed verdict where the evidence presented distinguished between counts of sexual abuse even though they were different than the counts described in the jury instructions. Second, the Court held that the trial court did not err in admitting testimony regarding actions and statements by Smith's co-defendant. Third, the Court held that the trial court did not err in concluding the victim's psychotherapy records did not contain exculpatory evidence. Fourth, the Court held that Smith's speedy trial right

was not violated by the Commonwealth's interlocutory appeal of the trial court's exclusion of KRE 404(b) evidence. Finally, the Court held that the trial court did not err in denying Smith's motion for a reduced sentence.

Charles Justice v. Commonwealth of Kentucky
[2020-SC-0464-MR](#)

December 16, 2021

Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, Lambert, Nickell, and VanMeter, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion. This matter was before the Supreme Court as a matter of right appeal after a circuit court jury convicted Justice of four counts of first-degree sexual abuse, incest, attempted first-degree rape, attempted promotion of a sexual performance by a minor, distribution of matter portraying a sexual performance by a minor, promotion of a sexual performance by a minor, and being a first-degree persistent felony offender. The trial court imposed the 220 years' imprisonment sentence fixed by the jury. Justice appealed the resulting judgment arguing the trial court made several errors.

While the Court did not agree with all the errors raised, it found reversal was warranted for Justice's convictions for attempted rape and sexual abuse because the jury instructions were duplicitous. Further, the Court found Justice's 220-year sentence to be illegal under *Stambaugh v. Commonwealth*. Accordingly, the Court affirmed in part and reversed in part and remanded the case to the trial court.

EMINENT DOMAIN:

**Borders Self-Storage & Rentals, LLC v. Commonwealth of Kentucky,
Transportation Cabinet, Department of Highways**
[2020-SC-0339-DG](#)

December 16, 2021

Opinion of the Court by Justice Nickell. All sitting; all concur. The Transportation Cabinet instituted a condemnation action against Borders Self-Storage & Rentals, LLC, to obtain a right-of-way for highway construction. At a jury trial, Borders sought to introduce the assessed tax value of the real property as reflected in the records of the Property Valuation Administrator which was approximately \$62,500 more than the value established by the trial court's appointed commissioners. The circuit court ruled Borders was not entitled to introduce the PVA assessment. The jury's verdict was in line with the testimony provided by the commissioners' valuation.

On appeal, the Court of Appeals concluded existing precedent permitted admission of a PVA's tax assessed value only if the value was established by the landowner and the evidence was proffered by the *Commonwealth* as a statement against interest of the landowner. Although Borders had established the value, the Court of Appeals found the trial court correctly ruled *landowners* may not introduce PVA values. The Court of Appeals expressed disagreement with the rule and urged the Supreme Court to reconsider prior precedents.

On discretionary review, after acknowledging prior precedents applying the rule date back over sixty years, predating the Kentucky Rules of Evidence by nearly three decades, and no opportunity had arisen to examine the ancient rule following the adoption of these evidentiary rules, the Supreme Court reversed the Court of Appeals.

The Supreme Court examined the evidentiary rules and held PVA tax records constitute public records not excluded by the hearsay rule under KRE 803(8). It concluded PVA tax values are relevant to establishing the fair market value of property sought to be condemned and should not be excluded from admission regardless of which side seeks introduction, thereby overruling the ancient rule discussed in *Culver v. Commonwealth, Department of Highways*, 459 S.W.2d 595 (Ky. 1970), and *Commonwealth, Department of Highways v. Brooks*, 436 S.W.2d 499 (Ky. 1969).

SOVEREIGN IMMUNITY:

Independence Bank c/o Paul Bradford and Michael Burns, as the Limited Guardian and Limited Conservator of Anthony W. Noel v. Trevor Welch in his Official Capacity as an Employee, Servant, and/or Agent of Lexington-Fayette Urban County Government and/or Lexington-Fayette urban County Government Division of Police, et al.

[2019-SC-0192-DG](#)

December 16, 2021

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Anthony W. Noel was seriously injured in a collision between his bicycle and a police cruiser driven by Trevor Welch, a Lexington police officer and employee of the Lexington-Fayette Urban County Government (LFUCG). He filed suit against Welch in his individual and official capacities and against LFUCG and two of its divisions. The LFUCG defendants moved for dismissal, asserting, among other things, sovereign immunity as protection from civil judgments and the costs and burdens of defending such actions. Noel countered that LFUCG's purchase of a retained-limit insurance policy, purchased for coverage beyond the limits of its self-insurance policy, waived sovereign immunity up to policy limits. The trial court disagreed, concluding that the LFUCG defendants are entitled to sovereign immunity and dismissing all claims against them. The Court of Appeals affirmed.

On discretionary review, the Supreme Court determined that LFUCG did not waive its sovereign immunity from Noel's tort claims. Kentucky Revised Statute (KRS) 67.180 allows a county to purchase insurance policies and permits suits instituted on such policies against a county but explicitly states that it is only for the purpose of measuring the liability of the insurance carrier to the injured party, creating a limited waiver of sovereign immunity. It also states that such a judgment cannot be enforced or collected against the county. The Court distinguished self-insurance from insurance and explained that LFUCG's self-insurance policy does not constitute the purchase of insurance because there is no risk shifting – the risk always remains with LFUCG. The Court was not convinced by Noel's argument that LFUCG's excess retained-limit insurance policy, which is not triggered until the retained limit of \$2 million is satisfied, constituted a waiver of sovereign immunity for liability between \$2 million and \$5 million because that would result in an intermittency of exposure, is entirely unworkable and cannot be what the legislature intended. The Court presumes the legislature is aware of the Court's longstanding interpretation that KRS 67.180 provides only a very limited waiver of sovereign immunity and if it intended a broader waiver as advocated by Noel, it could have so stated. Finding the statute and legislative intent clear, the Court affirmed the Court of Appeals with a different legal analysis.

TORTS:

Lindsey Childers, as Administratrix of the Estate of Cameron Pearson, et al. v. William S. Albright, et al.

2019-SC-0226-DG

December 16, 2021

Opinion of the Court by Special Justice Tennyson. Minton, C.J.; Conley, Hughes, Keller, and VanMeter, JJ.; and Special Justice Cheryl U. Lewis and Special Justice Julie A. Tennyson sitting. All concur. Lambert and Nickell, JJ., not sitting. William Albright was indicted by a Jefferson County Grand Jury on charges of murder and first-degree assault following a dispute outside of the gun store where Albright worked. The incident resulted in Cameron Pearson being killed and others being injured. In his criminal case, the trial court found Albright was immune from criminal prosecution under KRS 503.085, Kentucky's "Stand Your Ground" law, and ordered that the indictments against him be dismissed with prejudice.

Various members of the Pearson Family, in their individual and representative capacities, filed a civil suit in Jefferson Circuit Court against Albright and Hardshell Tactical, LLC, the business at which Albright was working at the time of the shooting, alleging negligence and wrongful death claims. Albright and Hardshell sought dismissal of the civil action, arguing that collateral estoppel and Albright's grant of KRS 503.085(1) immunity in his criminal case required that they be immune from civil action. The trial court denied the motion, and Albright and Hardshell appealed the denial. The Court of Appeals reversed, finding that collateral estoppel applied and that the grant of self-defense immunity in Albright's criminal case barred continued litigation in the civil action.

Louisville SW Hotel, LLC, et al. v. Charlestine Lindsey, et al.

2019-SC-0539-DG

December 16, 2021

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, and VanMeter, JJ., concur. Keller, J., concurs in result only. Nickell, J., concurs in part and dissents in part, by separate opinion. A five-year-old child tragically drowned in the defendant hotel's pool while at a birthday party. The jury found that the child's mother was 65% responsible for the child's death, and that the hotel was 35% responsible. The jury awarded compensatory damages for medical and funeral expenses totaling \$211,770.25, or \$74,119.59 after apportionment. It awarded \$0 dollars for the compensatory damages of loss of future earning potential, pain and suffering, and loss of consortium. The jury also awarded \$3 million in punitive damages. Following the defendants' motion for judgment notwithstanding the verdict, the trial court ruled that remittitur as to the punitive damages was required. It determined that a 5-1 ratio between punitive and compensatory damages was appropriate. It applied that multiplier to the entire, pre-apportionment compensatory damages award, and reduced the punitive damage award to \$1,058,851.25.

The Court held first that the trial court did not err by instructing the jury on punitive damages, as the plaintiffs presented sufficient evidence to show that the defendants acted with gross negligence as to the maintenance of the pool and failure to employ sufficient staff. The Court next held that a limited retrial on the compensatory damages of loss of future earning potential, pain and suffering, and loss of consortium were improper. First, regarding the child's loss of future earning potential, the Court

overruled *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667 (Ky. 1992), which held that a jury is not permitted to award zero dollars in damages in a case involving the wrongful death of a healthy and capable child. The Court reasoned that loss of future earning potential for a deceased child in a wrongful death case is the only category of compensatory damages for which the jury is not free, in its discretion, to award zero dollars in damages. Next, the Court upheld the jury's zero-dollar award for the child's pain and suffering because the jury was presented with sufficient evidence to award pain and suffering, but chose not to. Lastly, as a matter of first-impression, the Court declined to adopt a rule mandating that juries award some amount of damages for loss of consortium to the parent(s) in cases involving the wrongful death of a child. It therefore upheld the jury's zero-dollar award for loss of consortium. Next, the Court held that the 5-1 ratio utilized by the trial court to reduce the punitive damage award was not excessive under *BMW of North America v. Gore*, 517 U.S. 559 (1996). Finally, as a matter of first impression, the Court adopted the majority rule that a remittitur ratio must be applied to the pre-apportionment compensatory damage amount, rather than the post-apportionment amount.

City of Versailles, et al. v. Shirley Jane Johnson

[2020-SC-0431-DG](#)

December 16, 2021

Opinion of the Court by Justice VanMeter. All sitting; all concur. The City of Versailles petitioned for discretionary review of the Court of Appeals' decision reversing the trial court's grant of summary judgment in favor of all named defendants. The Court of Appeals determined that Shirley Johnson was an invitee when she was injured in 2013 while visiting the monument marking her son's grave at the Rose Crest Cemetery, which the City of Versailles maintains, and that the cemetery had an affirmative duty to inspect and repair the monument. The Supreme Court reversed, finding that Johnson, not the cemetery, owned the monument which injured her, and that the cemetery was not obligated to inspect and repair the monument, regardless of Johnson's status as either an invitee or licensee while on cemetery grounds. The Court observed that while status-based duties continue to serve Kentuckians well in general premises liability matters, cemeteries are uniquely situated among public spaces in the Commonwealth. The Court distinguished between the purchase of a grave plot and the resulting easement – a property right which, if unassigned, passes to the owner's descendants – and any monuments or grave stones placed upon the grave plot – which are the personal property of the purchaser. The Court held that unless specifically detailed in a perpetual care agreement, the cemetery where the monument is located has no property interest in the monument and consequently no duty towards its maintenance.

WRIT OF MANDAMUS:

John Goble v. Jeremy Michael Mattox, et al.

AND

Amos Burdette v. Jeremy Mattox et al.

[2021-SC-0151-MR](#)

[2021-SC-0162-MR](#)

December 16, 2021

Opinion of the Court by Justice Hughes. All sitting; all concur. John Goble and Amos Burdette filed petitions for writs of mandamus seeking dismissal of their respective

criminal indictments for various felony and misdemeanor offenses. The Attorney General appointed the Fayette County Attorney as special prosecutor in both cases. The basis for each writ petition was a challenge to the ability of the county attorney to perform prosecutorial duties outside of his or her judicial circuit, arguing that the appointments of the Fayette County Attorney as special prosecutor were invalid. The Court of Appeals denied both writ petitions, holding that no statute prohibits such an appointment.

The Kentucky Supreme Court held that Goble and Burdette are not entitled to first-class writs because they failed to show that the trial court proceeded outside of its jurisdiction. Goble and Burdette were both indicted for multiple felonies and misdemeanors occurring in Scott County, which properly placed their cases within the jurisdiction of the Scott Circuit Court. Additionally, Goble and Burdette are not entitled to second-class writs because the trial court did not act erroneously. Kentucky Revised Statute (KRS) 15.725(3) permits Commonwealth and county attorneys to share prosecutorial duties and KRS 15.730 permits Commonwealth and county attorneys to prosecute or participate in actions outside of their judicial circuit or judicial district. The Fayette County Attorney's Office and the Scott County Commonwealth's Attorney's office maintained a written agreement allowing the Fayette County Attorney to act as special prosecutor before the Scott Circuit Court. Further, the Attorney General acknowledged the arrangement and specifically appointed the Fayette County Attorney as special prosecutor. The statutes clearly allow a county attorney to perform prosecutorial duties outside his judicial district or circuit when directed by the Attorney General. The Court affirmed the denial of the petitions for writs of mandamus.

WORKERS' COMPENSATION:

Michael O'Bryan v. Zip Express (Correctly Identified as Ramp Logistics, LLC), et al.

[2020-SC-0262-WC](#)

December 16, 2021

Opinion of the Court. All sitting; all concur. Appellant, Michael O'Bryan was injured in a work-related automobile accident during the course of his employment for Appellee, Zip Express. O'Bryan filed a workers' compensation claim. The administrative law judge found he was permanently totally disabled and should receive benefits as long as he remained disabled. Zip Express appealed to the Workers' Compensation Board, arguing O'Bryan's benefits should terminate at age 70 under a newly-amended version of KRS 342.730(4). O'Bryan countered, arguing the amendment is unconstitutional on several grounds. The Board could not determine the constitutionality of the statute, but held that it applied to O'Bryan's case. O'Bryan appealed to the Court of Appeals, which affirmed and held the statute is constitutional. O'Bryan appealed to the Supreme Court of Kentucky, which affirmed the Court of Appeals. The Supreme Court held the statute did not violate O'Bryan's right to equal protection under the law, his due process rights, that it does not amount to the exercise of an absolute and arbitrary power, that it is not special legislation, and that it did not violate the requirement that all bills be read three times before each house of the legislature.

ATTORNEY DISCIPLINE:

William David Rye v. Kentucky Bar Association

[2021-SC-0419-KB](#)

December 16, 2021

Opinion and Order of the Court. All sitting; all concur. Under SCR 3.480(2), Rye moved the Supreme Court to enter an Order resolving the pending disciplinary proceeding against him by imposing a 181-day suspension from the practice of law, probated for three years, subject to conditions. Rye's motion was the result of an agreement negotiated between Rye and the Kentucky Bar Association based on his admitted violation of SCR 3.130(1.1); SCR 3.130(1.3); and SCR 3.130(1.4)(a)(2). In negotiating this sanction, the KBA took into account Rye's mitigation efforts, including his acknowledgement of his misconduct and his cooperation during the disciplinary process. The KBA also considered Rye's disciplinary history, which included a number of private admonitions and reprimands and a probated 30-day suspension.

Upon considering the facts of the current disciplinary action, the relevant case law, Rye's disciplinary history and his mitigating behavior, the Court concluded that the proposed discipline was adequate. Accordingly, the Court suspended Rye from the practice of law for 181 days, probated for three years, with conditions.

Myra Deshawn Chenault v. Kentucky Bar Association

[2021-SC-0331-KB](#)

December 16, 2021

Opinion and Order of the Court. All sitting; all concur. Chenault applied for reinstatement to the practice of law under SCR 3.510(3), following the termination of her four-year suspension. She was suspended for four years for violating SCR 3.130(8.4)(b) and 3.310(8.4)(c) after pleading guilty to one count of violation of public trust stemming from improper payments she made to herself while she was Master Commissioner.

The Character and Fitness Committee reviewed Chenault's application and determined she had complied with all conditions of her suspension. The Committee further found that Chenault had successfully completed her pretrial diversion, her felony conviction had been expunged, and her sentence had been served in the form of diversion with full payment of restitution. Based on these findings, the Committee unanimously recommended that Chenault be reinstated to the practice of law.

Despite an objection from Bar Counsel over the Committee's lack of a formal hearing, the Board of Governors unanimously voted to accept the recommendation of the Committee and approve Chenault's application to practice law. The Court agreed with and accepted the Board's recommendation, ordering Chenault's application for reinstatement to be approved, subject to payment of costs related to the disciplinary proceedings.