KENTUCKY SUPREME COURT
DECEMBER 2022

CONSTITUTIONAL LAW:

COMMONWEALTH OF KENTUCKY EX REL. ATTORNEY GENERAL DANIEL CAMERON V. HOLLY JOHNSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET, ET AL.

2021-SC-0518-TG, 2021-SC-0519-TG, 2021-SC-0520-TG, and 2021-SC-0522-TG **December 15, 2022**

Opinion of the Court by Justice Hughes. All sitting. All concur. The Kentucky General Assembly passed House Bill (HB) 563, the "Education Opportunity Account Act" or "EOA Act," creating a structure by which Kentucky taxpayers who donate to account-granting organizations (AGOs) receive a nearly dollar-for-dollar tax credit against their income taxes. These AGOs allocate taxpayer contributions to education opportunity accounts (EOAs) that are set up for eligible students. Funds in the EOAs can be used for various education-related expenses and for nonpublic school tuition for eligible students. The EOA Act was challenged as violative of the Kentucky Constitution in Franklin Circuit Court and that court found it unconstitutional under Section 59, the special legislation provision, and Section 184, an education provision prohibiting the raising or collecting of any sum for education "other than in common [public] schools" unless the taxation question is submitted to and approved by the voters.

On discretionary review, the Supreme Court concluded the EOA Act violates Section 184 and affirmed the circuit court's holding that the statute is unconstitutional. The near dollar-for-dollar tax credits offered by the EOA program allow any Kentucky taxpayer to send their money to an AGO for use at nonpublic schools instead of paying a comparable amount they owe in Kentucky income taxes. The Court must look through the form of a statute to the substance of what it does, regardless of how the funds at issue are characterized. The EOA Act tax credits are distinguishable from charitable donations, which have a relatively *de minimis* effect on state income tax collections. The EOA program is a state-created structure that raises sums "for education other than in common schools" in violation of Section 184 of the Kentucky Constitution. With this conclusion, the remaining constitutional challenges to the EOA Act were rendered moot.

ROBERT STIVERS, ET AL. V. ANDY BESHEAR, ET AL.

2021-SC-0139-TG **December 29, 2022**

Opinion of the Court by Chief Justice Minton. All sitting. All concur. In this case, the Governor sued several members of the legislature, petitioning the trial court to enjoin several statues he alleged the Legislative Defendants passed in violation of the separation of powers doctrine. The trial court denied the Legislative Defendants' motion to dismiss on the grounds of legislative immunity. The Legislative Defendants filed an interlocutory appeal regarding legislative immunity, and the Supreme Court granted transfer of the case.

The Supreme Court reversed the trial court's denial of the Legislative Defendants' motion to dismiss on the grounds of legislative immunity. After considering the history of legislative immunity, the Court concluded that this type of conflict between branches of government is the exact circumstance in which legislative immunity is intended to operate. Thus, the Court found the Legislative Defendants were immune from the Governor's suit and remanded the case for dismissal of all claims against the Legislative Defendants.

CRIMINAL LAW:

HASAN A. SAXTON V. COMMONWEATH OF KENTUCKY

2021-SC-0353-MR **December 15, 2022**

Opinion of the Court by Justice Conley. All sitting. Minton, C.J.; Hughes, Keller, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion joined by Nickell and Lambert, JJ. Saxton was convicted of first-degree strangulation, tampering with physical evidence, second-degree persistent felony offender, criminal mischief, possession of marijuana, and possession of drug paraphernalia. After review, the Court reversed all convictions apart from those for possession of marijuana and criminal mischief.

First, the Court held Saxton was not denied his constitutional right to cross-examine a witness. Saxton had sought to cross-examine the victim as to whether she had been apprised of her rights under Marsy's Law and whether those rights were being fulfilled by the Commonwealth. The Court declared the "plain, indubitable" meaning of Marsy's Law deprived Saxton of any standing to inquire of the victim whether she had been informed of her rights under Marsy's Law or if her rights were being fulfilled. Moreover, there was no relief available to Saxton even if the victim's rights were being violated and, for those reasons, his attempt to question the victim on that subject was constitutionally inappropriate. Reviewing the claimed error under traditional Sixth Amendment rules, however, the Court concluded there was no error as Saxton only alleged that the victim was compelled to testify against her will by subpoena. The

Court noted this is a standard practice throughout the Commonwealth and in fact is a guaranteed right under Ky. Const. § 11.

The Court then recognized *Taylor v. Commonwealth*, 987 S.W.2d 302 (Ky. 1998), had been overruled by its recent case of *Commonwealth v. Bell*, 2022 WL 12196438 (Ky. 2022). Therefore, the Court held there was insufficient evidence to sustain a tampering with evidence conviction because the marijuana abandoned by Saxton had been abandoned in the presence of a police officer while Saxton was detained in the back of the police cruiser, and the officer searched his vehicle for only 11 seconds before recovering the marijuana. Additionally, the cruiser contained blockers underneath the front seats to prevent any contraband from being concealed. Accordingly, the tampering with physical evidence and the concomitant persistent felony offender in the second-degree convictions were reversed. The Court did, however, sustain the possession of marijuana conviction upon the basis of the bag of marijuana that Saxton had abandoned.

Next, the Court agreed with Saxton that the Commonwealth had failed to establish a sufficient chain of custody regarding a plastic container containing a marijuana cigarette and the two DNA buccal swabs of Saxton and his victim. No police officer testified to recovering the plastic container and marijuana cigarette from Saxton's person thus the evidence was not linked to Saxton from the inception—neither did anyone testify to collecting the DNA buccal swabs from Saxton and his victim. Though the Court affirmed that a perfect chain of custody is not required, it held that rule inapplicable where the foundational link in the chain connecting the evidence to the person in question is not established. On that basis, the possession of drug paraphernalia conviction was reversed. Similarly, because the DNA evidence corroborated the victim's account of her strangulation, the Court reasoned the DNA evidence substantially influenced the jury and was not harmless error; therefore, the first-degree strangulation conviction and the concomitant second-degree persistent felony offender conviction were reversed.

Finally, the Court rejected Saxton's argument that a Commonwealth's Investigator attempting to stop him from walking in front of the jury to get to his table on the first morning of trial created an inherently prejudicial environment that tainted the subsequent trial. Holding that the situation was more analogous to an outburst, and should be analyzed under rules governing outbursts, the Court concluded Saxton had not shown the Commonwealth's Investigator intended to prejudice Saxton by his action, nor did he show that the jury had even noticed the incident despite having the opportunity to do so during voir dire. Accordingly, the Court affirmed the trial court's refusal to declare a mistrial.

RICO L. CAVANAUGH V. COMMONWEATH OF KENTUCKY

2021-SC-0441-DG **December 15, 2022**

Opinion of the Court by Justice Conley. All sitting; all concur. All sitting. All concur. In this case, Cavanaugh was convicted of first-degree assault and being a persistent felony offender in the first degree. He was sentenced to thirty-four years in prison. On appeal, Cavanaugh claimed the trial court erred in its application of Marsy's law by allowing the victim to be present during the entire trial after KRE 615 was invoked. Cavanaugh also contended the trial court erred by failing to instruct the jury on lesser-included offenses.

The Supreme Court affirmed the trial court. It held Marsy's law, as a provision of the Kentucky Constitution, prevails over KRE 615 should they conflict. The Supreme Court also held that the trial court did not abuse its discretion by declining to instruct the jury on lesser-included offenses.

COMMONWEALTH OF KENTUCKY V. ANTHONY WOODS

2021-SC-460-DG **December 15, 2022**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Hughes, Keller, and Nickell, JJ., concur. Conley, J., dissents by separate opinion in which Lambert, J., joins. On review from the Court of Appeals, the Commonwealth appealed the intermediate court's finding that the record was insufficient to support Woods' conviction for driving under the influence. The Supreme Court reversed and reinstated the conviction. Police officers found Woods sleeping in his truck in a Waffle House parking lot shortly after midnight. Based on Woods's actions, officers suspected he was under the influence of alcohol, although no alcohol containers were found in the truck. Woods admitted to consuming several alcoholic beverages earlier in the night at a nearby bar after which he traveled to Waffle House for a late meal, but he did not explicitly state he drove himself from the bar to Waffle House. After Woods failed a field sobriety test, officers placed him under arrest. After a bench trial, Woods was convicted of DUI. The Jessamine Circuit Court affirmed the conviction. Woods appealed to the Court of Appeals. That court found the record insufficient to show that Woods was in control of the vehicle, relying on *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986). Specifically, it held the evidence was insufficient to show that Woods intended to operate the vehicle when police found him. The Supreme Court found the Court of Appeals' application of the *Wells* factors erroneous. The Court clarified that the factors set forth in *Wells* are non-exhaustive and emphasized that the Commonwealth need not prove every factor to show operation or control of a vehicle. In this case, the Court of Appeals erred in weighing too heavily the "intent" factor when more focus should have been placed on assessing the circumstances bearing on Woods's arrival at the Waffle House parking lot. Officers found Woods intoxicated and alone in the parking lot of an

establishment that does not sell alcohol. Woods further admitted to consuming alcohol prior to traveling to Waffle House. The evidence against Woods, though circumstantial, supported the reasonable inference that he drove himself from the bar to Waffle House in an inebriated state. This evidence was sufficient to support the judgment of the District Court.

FAMILY LAW:

LISA THIELMEIER V. KENNETH THIELMEIER

2021-SC-0532-DG **December 15, 2022**

Opinion of the Court by Justice Lambert. All sitting. All concur. In this dissolution of marriage case, the husband and wife were married for three decades and had six children. Throughout the marriage, the husband was the primary breadwinner, and the wife was a full-time stay-at-home mom. The husband was a physician-owner of a successful anesthesiology practice, Anesthesiology Consultants Enterprises, Inc. (ACE). The relevant issues to be decided by the circuit court were the division of the husband's ACE 401(k); the valuation and division of the husband's ownership interest in ACE, which increased during the parties' separation; the award of spousal maintenance; and the award of attorney's fees.

The Supreme Court held that the circuit court erred by dividing the ACE 401(k), which was undisputedly martial property, as of a date shortly after the husband vacated the marital residence instead of the date of the divorce decree. The circuit court further erred by failing to explain why such a division was just under the factors in KRS 403.190. The Court further held that, while the circuit court did not err in its valuation of Ken's ownership interest in ACE, it did err in its division of that interest. The circuit court awarded 100% of the post-separation increase in the interest in ACE, which was undisputedly marital property, to the husband. The circuit court further failed to explain why its division was just under KRS 403.190. Finally, the circuit court erred by permitting the husband to pay 100% of his attorney's fees with marital funds but denying the wife the ability to do the same. Based on the Court's other holdings, it further held that spousal maintenance would have to be reevaluated on remand.

LAWRENCE MILLER, JR. V. BRITTANY BUNCH, ADMINISTRATRIX OF THE ESTATE OF AUTUMN RAINE BUNCH, ET AL.

2021-SC-0071-DG **December 15, 2022**

Opinion of the Court by Justice Lambert. All sitting. Conley, Hughes, and VanMeter, JJ., concur. Nickell, J., dissents by separate opinion in which Minton, C.J., and Keller, J. join. Miller and Bunch dated for a brief time. Soon after they separated, Bunch discovered she was pregnant. During Bunch's pregnancy, it was unknown whether Miller or Bunch's new boyfriend, Walker, was the child's father. Tragically, the child was stillborn. Bunch thereafter filed a wrongful death suit against the delivering hospital, naming Walker as the child's father. Miller filed a motion to intervene and to compel a paternity test, which ultimately proved Miller's paternity. Bunch and Miller later settled the claim with the hospital, but Bunch thereafter alleged that Miller was entitled to none of the settlement proceeds by virtue of Mandy Jo's Law, KRS 411.137 and KRS 391.033. The circuit court agreed, citing Miller's lack of financial and emotional support for Bunch during her pregnancy.

The sole issue addressed by the Court was whether Mandy Jo's Law was applicable to cases involving a stillborn child. The Supreme Court held that Mandy Jo's Law, as it is currently written, does not evince a legislative intent for its application to cases involving a stillborn child. The Court reasoned that neither the statutory exceptions to Mandy Jo's Law nor our judicially crafted definitions of "willful abandonment" and "care and maintenance" could be applied to a stillborn child. Further, the fundamental purpose of Mandy Jo's Law is to prevent a parent from financially benefiting from his or her child's death if the parent has abandoned the *child*, not the child's other parent.

INSURANCE:

HALEY BELT V. CINCINNATI INSURANCE COMPANY
2019-SC-0426-DG

AND

CINCINNATI INSURANCE COMPANY V. HALEY BELT

2020-SC-0310-DG **December 15, 2022**

Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Lambert, and VanMeter, JJ., concur. Keller, J., dissents by separate opinion in which Conley and Nickell, JJ., join. In this case, the Court of Appeals reversed the jury verdict granted against Cincinnati Insurance Company, finding that the trial court erred in failing to grant a directed verdict in favor of CIC on Belt's bad-faith claims.

The Supreme Court affirmed the Court of Appeals, clarifying that the test set out in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), is a prerequisite for submission of a common law or statutory bad faith claim to the jury. Finding that Belt failed to show that CIC lacked a reasonable basis in law or fact for challenging coverage—element two of the *Wittmer* test—the Court concluded that Belt did not meet the standard set out in *Wittmer*, and thus the trial court erred when it denied CIC's motion for a directed verdict.

TAXATION:

CENTURY ALUMINUM OF KENTUCKY, GP V. DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY

2021-SC-0300-DG **December 15, 2022**

Opinion of the Court by Justice Hughes. All sitting. All concur. Keller, J., also concurs by separate opinion. Kentucky Revised Statutes (KRS) Chapter 139 provides for the collection of state sales and use taxes, although some sales transactions are tax exempt. In particular, "supplies" purchased by a manufacturer are tax exempt, but "repair, replacement, or spare parts" are not. Century Aluminum of Kentucky, GP (Century) and the Department of Revenue disagreed as to the interpretation of the statutes which categorize tangible personal property as either tax-exempt supplies or taxable repair, replacement, or spare parts. The Kentucky Claims Commission agreed with Century's interpretation, but the Franklin Circuit Court and the Court of Appeals did not. Upon review of KRS 139.470(10) and KRS 139.010(26), in effect the during the relevant time period (2010-2015), consistent with the statute, a tax-exempt supply is consumed within the manufacturing process and has a useful life less than one year, making it an item which the manufacturer inevitably, regularly, and/or frequently buys to maintain the manufacturing process. This regularly consumed supply is distinguishable from a taxable repair, replacement, or spare part, which maintains, restores, mends or repairs solid machinery or equipment of a long-term or permanent nature and which does not necessarily have a known, limited useful life.

WORKERS' COMPENSATION:

COMMONWEALTH OF KENTUCKY, PERSONNEL CABINET V. AIMEE TIMMONS, ET AL.

2021-SC-0271-WC **December 15, 2022***

**Opinion modified on March 16, 2023 to be designated as not to be published.*

Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, and Van Meter, JJ., concur. Nickel, J., dissents by separate opinion in which Keller and Lambert, JJ., join. In this case, the Court of Appeals affirmed a decision of the Workers' Compensation Board to overturn an Administrative Law Judge's ruling that Timmons's injury was not work-related for the purposes of workers' compensation.

The Supreme Court reversed the Court of Appeals and affirmed the ALJ, albeit on different grounds. The Court held that, for the purposes of applying the "traveling-employee" exception to the coming-and-going doctrine, an employee's work-related travel does not begin until that employee avails himself of the common risks of the public road. Because Timmons's injury occurred while she was still on her property, her work-related travel had not begun and the injury she sustained was not work-related for the purposes of workers' compensation.

ATTORNEY DISCIPLINE:

RICHARD DAVIS NULL V. KENTUCKY BAR ASSOCIATION

2022-SC-0422-KB **December 15, 2022**

Opinion and Order of the Court. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, sitting. All concur. Nickell, J., not sitting. Richard Davis Null filed a motion with the Supreme Court of Kentucky pursuant to Supreme Court Rule (SCR) 3.480(2). Null asked the Court to suspend him from the practice of law for one year, with 180 days to serve and the remainder probated for two years subject to conditions. The Kentucky Bar Association expressed no objection to the negotiated sanction subject to certain conditions. The Court agreed with the parties and imposed the suspension.

Null's case concerned eight separate disciplinary files in which the Court found he violated several Supreme Court Rules, including: seven counts of SCR 3.130(1.3), two counts of SCR 3.130(1.4)(a)(3), four counts of SCR 3.130(1.4)(a)(4), one count of SCR 3.130(1.6)(a), two counts of SCR 3.130 (1.15)(a), seven counts of SCR 3.130(1.16)(d), two counts of SCR 3.130(8.1)(a), one count of SCR 3.130(8.1)(b), and four counts of SCR 3.130(8.4)(c). In each of the several KBA files, Null had accepted money from clients and then failed to perform the requisite legal work for which he was paid. Since Null had no

previous disciplinary history, the Court agreed with the sanctions as negotiated by the parties. The Court also ordered Null to repay a number of unearned fees to his former clients and attend the next Ethics and Professionalism Enhancement and Trust Account Management programs held by the KBA. The Court ordered Null pay his KBA membership dues, satisfy all continuing legal education requirements, and pay the costs associated with the proceeding.