

**KENTUCKY SUPREME COURT
FEBRUARY 2023**

ABORTION:

DANIEL CAMERON V. EMW WOMEN’S SURGICAL CENTER, ET AL.

2022-SC-0329-TG

February 16, 2023

Opinion of the Court by Justice Lambert. VanMeter, C.J.; Bisig, Conley, Nickell, Thompson, and Keller, J.J.; sitting. Conley, J. concurs. VanMeter, C.J., concurs in result only without separate opinion. Bisig, J., concurs in part and dissents in part by separate opinion in which Keller, J., joins. Keller, J., concurs in part and dissents in part by separate opinion in which Bisig, J., joins. Nickell, J., concurs in part and dissents in part by separate opinion. Thompson, J., concurs in part and dissents in part by separate opinion. The statutes at issue, KRS 311.772 (“the trigger ban”) and KRS 311.7707-11 (“the heartbeat ban”) prohibit abortion in Kentucky except in certain limited circumstances. The heartbeat ban prohibits abortions after a fetal heartbeat has been detected, unless necessary to preserve the life and health of the mother, and the trigger ban completely prohibits abortion unless necessary to preserve the life and health of the mother. The trigger ban became effective when the United States Supreme Court issued *Dobbs v. Jackson Women’s Health Organization*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), which overruled *Roe v. Wade*, 410 U.S. 133 (1973). Any person who violates either ban by performing or inducing an abortion is subject to prosecution for a Class D felony. And, a woman upon whom an abortion is performed in violation of the heartbeat ban may sue the person that performs it for wrongful death.

Two abortion service providers operating in Kentucky, EMW Women’s Surgical Center and Planned Parenthood Louisville, filed for injunctive and declaratory relief against the trigger ban and the heartbeat ban, asserting the constitutional rights of both them and their patients. No individual patient, nor any other woman who had been denied abortion care by operation of the bans, was named as a plaintiff. The providers alleged that the bans violated their patients’ rights to privacy and safety guaranteed by Sections 1 and 2 of the Kentucky Constitution. On their own behalf, the providers alleged that the trigger ban: violated the providers’ right to due process by imposing serious criminal penalties without giving fair notice of when it took effect; was constitutionally unintelligible because it failed to define the point at which it would become effective; improperly delegated the power of the General Assembly to define the scope of Kentucky criminal law; and took effect upon the authority of an entity other than the General Assembly. The providers made no arguments against the heartbeat ban in relation to their own rights.

The circuit court found that the providers had both first-party, constitutional standing to challenge the bans on their own behalf, and third-party standing to challenge the bans by asserting the rights of their patients. The circuit court found that the requirements for injunctive relief were satisfied and enjoined both bans pending a trial on the merits. Thereafter, the Attorney General filed for emergency interlocutory relief with the Court of Appeals which was granted. The Court of Appeals then recommended transfer of the Attorney General's motion for interlocutory relief to the Supreme Court, which it accepted.

A majority of the Court agreed that the providers lacked third-party standing to challenge either ban by asserting their patients' rights. However, six justices agreed that the providers had first-party standing to challenge the trigger ban on the grounds that it was an unlawful delegation of legislative authority and that it became effective upon the authority of an entity other than the Kentucky General Assembly. The providers' other two first-party standing claims regarding the effective date of the trigger ban are now moot, and the providers did not have first-party standing to challenge the heartbeat ban as they offered no arguments against it in relation to their own rights. One justice contended that the providers had neither first nor third party standing to challenge either of the bans. A majority of the Court agreed that the circuit court erred by enjoining the bans pending a trial on the merits. Accordingly, the Court dissolved the circuit court's temporary injunction, and remanded for proceedings on the merits as to the first-party claims of the abortion service providers.

CRIMINAL LAW:

COMMONWEALTH OF KENTUCKY V. THOMAS MOORE

[2021-SC-0411-DG](#)

February 16, 2023

Opinion of the Court by Justice Lambert. All sitting. All concur. In accordance with his plea agreement, Thomas Moore was convicted of two class D felonies and of being a persistent felony offender in the second degree (PFO II) and sentenced to twenty years in prison, probated for five years. Moore's probation was revoked and according to the final judgment, he was sentenced to an enhanced ten years on each class D felony and to twenty years on the PFO II charge, the sentences running concurrently for a total of twenty years in prison. Moore moved the circuit court under RCr 10.26 to vacate his sentence based upon the illegal twenty-year sentence on the PFO II charge. The circuit court denied the motion. When Moore appealed to the Court of Appeals, the Commonwealth argued that Moore's RCr 10.26 motion was procedurally barred from consideration. The Court of Appeals, however, concluded that the circuit court committed palpable error and that Moore was entitled to relief from the illegal sentence on the PFO II charge. The Court of Appeals further concluded that Moore's appeal from the denial of his RCr 10.26 motion to vacate was a

direct appeal and that Moore was not precluded from appropriately seeking relief under RCr 11.42. The Supreme Court of Kentucky held Moore presented a sentencing issue which alters the procedural analysis. Because an illegal sentence may not stand uncorrected, relief may be sought by direct appeal, RCr 11.42, CR 60.02, or a writ of habeas corpus. Although the Court of Appeals may have erred by considering Moore’s appeal from the RCr 10.26 motion as a direct appeal, the Court of Appeals properly determined that Moore is entitled to relief from the illegal twenty-year sentence on the PFO II charge.

ROGER D. BURDETTE V. COMMONWEALTH

2022-SC-0015-MR

February 16, 2023

Opinion of the Court by Chief Justice VanMeter. All sitting. All concur. Roger Burdette appealed as a matter of right from the Jefferson Circuit Court judgment sentencing him to twenty-seven years’ imprisonment for his convictions of murder, four counts of wanton endangerment in the first degree, operating a motor vehicle while under the influence, and failure to give right-of-way to a stopped emergency vehicle. On appeal, Burdette argued the trial court made numerous erroneous rulings which he claims resulted in a fundamentally unfair trial. With respect to the three evidentiary rulings Burdette raised, the Supreme Court held: 1) the trial court did not abuse its discretion in admitting five autopsy photos; 2) admitting evidence of Burdette’s texts about purchasing pills illicitly was not an abuse of the trial court’s discretion; and 3) the trial court did not abuse its discretion in admitting evidence of the content of the video (pornography) that Burdette was watching at the time of the collision. The Supreme Court further held that the trial court did not err by allowing the jury to view the vehicles involved in the collision. Regarding the trial court’s denial of Burdette’s motions to suppress, the Supreme Court affirmed the lower court, holding that under the “booking exception” to *Miranda v. Arizona*, 384 U.S. 436 (1966), two witnesses were permitted to testify regarding statements Burdette made that were contained in his medical records from jail, obtained through a grand jury subpoena. Lastly, the Supreme Court held that while the trial court committed error in forbidding defense counsel from using proof of a statement of Burdette, already admitted into evidence, to argue during closing argument that his intent was at most reckless, not wanton, such error was harmless beyond a reasonable doubt, given the overwhelming evidence presented against Burdette.

TORTS:

WALMART, INC., ET AL. V. LEIGH ANN REEVES

2021-SC-0288-DG

February 16, 2023

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

suffered from assaultive criminal activity in the parking lot of the Walmart on Nicholasville Road in Lexington, Kentucky after midnight on March 22, 2017. Following the attack, Reeves brought suit against Walmart for negligence. The Fayette Circuit Court granted Walmart’s motion for summary judgment, stating that Walmart owed Reeves no duty as a matter of law since the event was not reasonably foreseeable. On appeal, the Court of Appeals reversed the decision.

The Supreme Court granted discretionary review and reversed the decision of the Court of Appeals. Specifically, the Court held that for third-party criminal acts, a landowner owes a duty to protect only from dangers that are reasonably foreseeable. Accordingly, the Court reinstated the trial court’s order.

JEFFERSON COUNTY PUBLIC SCHOOLS A/K/A JEFFERSON COUNTY BOARD OF EDUCATION, ET AL. V. SHONTAI TUDOR, MOTHER AND NEXT FRIEND OF J.T., A MINOR

[2022-SC-0024-DG](#)

February 16, 2023

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

Shontai Tudor is mother and next friend of J.T., a minor. J.T. was involved in a physical and verbal altercation at school when his assistant principal, Brian Raho, interceded. Because of Raho’s intervention, Tudor brought suit alleging assault and battery against the Jefferson County Board of Education and Raho. The Jefferson Circuit Court granted summary judgment to the school and to Raho on immunity grounds. The Court of Appeals reversed the judgment. The Jefferson County Board of Education sought discretionary review solely to address the issue of whether the Jefferson County Board of Education is entitled to summary judgment on its immunity claim.

The Supreme Court reversed the Court of Appeals’ opinion to the extent that it reversed the Jefferson Circuit Court’s grant of summary judgment in favor of the Jefferson County Board of Education. Specifically, the Court held that the Board of Education was not engaged in a proprietary function when Raho interceded into the fight in question, and therefore, the Jefferson County School Board was entitled to governmental immunity.

WORKERS’ COMPENSATION

DAOUD OUFABA V. TAXI, LLC D/B/A TAXI 7 (AKA TAXICAB), ET AL.

[2022-SC-0003-DG](#)

February 16, 2023

Opinion of the Court by Justice Keller. All sitting. All concur. Daoud Oufafa was working as a taxi driver for Taxi-7 when he was shot during a ride, severely injuring him. Oufafa sought workers’ compensation benefits. An

Administrative Law Judge (ALJ) determined that Oufafa was an independent contractor under the Supreme Court’s past precedent and therefore was not entitled to workers’ compensation benefits. The ALJ was reversed by the Workers’ Compensation Board, which was reversed by the Court of Appeals.

The Supreme Court reversed and remanded the ALJ. Specifically, the Court held that pursuant to its decision in *Mouanda v. Jani-King Int’l*, 653 S.W.3d 65 (Ky. 2022), the appropriate test to determine whether a worker is an employee or independent contractor is the economic realities test. Accordingly, the Court remanded to the ALJ to apply the economic realities test to Oufafa’s case.

ATTORNEY DISCIPLINE:

KENTUCKY BAR ASSOCIATION V. JEFFREY OWENS MOORE

[2016-SC-0082-KB](#)

February 16, 2023

Opinion and Order of the Court. All sitting. All concur. Jeffrey Owens Moore was indefinitely suspended from the practice of law on August 25, 2016, for failing to respond to a charge in an underlying disciplinary case. He failed to seek reinstatement within five years and the Kentucky Bar Association (KBA) moved for his permanent disbarment pursuant to Supreme Court Rule 3.167(5). The Court held Moore failed to show cause why he should not be permanently disbarred and granted the KBA’s motion for permanent disbarment.

While Moore filed a response entitled “show cause,” it was treated as a motion for enlargement of time. The document filed only made blanket statements about Moore’s medical procedures and his alleged resulting inability to participate in the KBA proceedings against him without providing any proof thereof. Moore requested an additional sixty days to respond, which the Court granted. Moore failed to file anything further in the case. Accordingly, the Court permanently disbarred Moore from the practice of law.

KENTUCKY BAR ASSOCIATION V. ARTHUR JOSEPH MORBURGER

[2022-SC-0430-KB](#)

February 16, 2023

Opinion and Order of the Court. All sitting. All concur. Arthur Joseph Morburger was permanently disbarred in Florida for failing to comply with rules regulating attorney trust accounts. The Kentucky Bar Association (KBA) filed a motion to the Court asking Morburger be ordered to show cause why he should not be subject to reciprocal discipline in Kentucky. Morburger failed to file a response. Pursuant to Supreme Court Rule 3.435(4), the Court imposed identical reciprocal discipline and permanently disbarred Morburger when he failed to prove either a lack of jurisdiction or fraud in the Florida proceedings

or that his misconduct warranted a substantially different discipline in Kentucky.

LISA M. WELLS V. KENTUCKY BAR ASSOCIATION

[2022-SC-0503-KB](#)

February 16, 2023

Opinion and Order of the Court. All sitting. All concur. Lisa M. Wells moved the Court to enter a negotiated sanction pursuant to Supreme Court Rule (SCR) 3.480(2). Wells asked the Court to impose a probated two-year suspension with conditions. The Kentucky Bar Association (KBA) has no objection to the proposed discipline. The Court agreed with the parties that the probated suspension and conditions were appropriate.

Wells acknowledged violating numerous rules related to her conduct in three separate KBA files. Wells pleaded guilty to both misdemeanor and felony drug charges in Ohio in 2017 and was temporarily suspended from the practice of law in Kentucky. While Wells was initially noncompliant with the Ohio Lawyer Assistance Program (OLAP), she began complying after completing treatment. Her current contract with OLAP requires Wells to call a drug screening line daily and report for urine screens upon request. The Ohio Supreme Court suspended Wells from the practice of law for two years with credit for time served under a previous interim felony suspension. Wells admits she violated SCR 3.130(8.1)(b) by failing to initially respond to the Kentucky Office of Bar Counsel. However, since completing her substance use treatment, she has participated in the disciplinary process. The other two KBA files this negotiated sanction concerns involve trust account violations pursuant to SCR 3.130(1.15)(a) and disputed fees paid by clients. Wells asked the Court to order binding legal fee arbitration pursuant to SCR 3.810 for the fee disputes.

The Court agreed that the negotiated sanction was appropriate and ordered: fee arbitration; that Wells complete the next scheduled KBA Ethics and Professionalism Enhancement Program; that Wells complete the next scheduled KBA Trust Account Management Program; Wells' continued participation in the OLAP program and compliance with her OLAP agreement, and that Wells submit quarterly reports to the Kentucky Office of Bar Counsel demonstrating her ongoing compliance; and that Wells not receive any additional criminal or disciplinary charges.

KENTUCKY BAR ASSOCIATION V. STEVEN O. THORNTON

[2022-SC-0557-KB](#)

February 16, 2023

Opinion and Order of the Court. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting. Supreme Court Rule (SCR) 3.164 requires lawyers to answer charges from the Kentucky Bar Association (KBA). Steven O. Thornton failed to answer a charge

and the KBA filed a motion pursuant to SCR 3.167(1) asking the Court indefinitely suspend Thornton. One of Thornton's clients had filed a bar complaint against him alleging Thornton had failed to answer any responsive pleadings in the client's case, failed to respond to repeated client communications, and failed to communicate with the client about the case. Thornton failed to participate during both the complaint stage and the formal charge stage and the Court indefinitely suspended him.