

**KENTUCKY SUPREME COURT
JUNE 2024**

INSURANCE LAW:

BILLY E. POWERS, AS ADMINISTRATOR OF THE ESTATE OF DONNA POWERS V. KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY, ET AL.

2022-SC-0309-DG

June 13, 2024

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

Donna Powers and Fendol Carruthers, Jr., were involved in an automobile accident. Powers filed a negligence action against Carruthers and an underinsured motorist claim against her own insurance carrier, Kentucky Farm Bureau. Unbeknownst to Powers, however, Carruthers had died two years before she filed her complaint in the circuit court. Powers later sought to amend her complaint to substitute Carruthers’s Estate as the proper defendant to her negligence action, but did so after the relevant two-year statute of limitations had expired. The circuit court dismissed Powers’s claim against the deceased Carruthers, denied her motion to substitute Carruthers’s Estate, and granted summary judgment in favor of Powers’s underinsured motorist insurance carrier Kentucky Farm Bureau. The Court of Appeals affirmed the circuit court.

The Supreme Court granted review to consider whether the circuit court correctly denied Powers’s motion to amend her complaint to name Carruthers’s Estate, and whether Powers’s inability to recover a judgment against Carruthers’s Estate precluded a recovery for underinsured motorist coverage under her insurance agreement with Kentucky Farm Bureau. The parties’ underinsurance agreement limited coverage only to those damages that Powers was “legally entitled to recover” from her tortfeasor. The Supreme Court held that Powers’s negligence claim was null and void because she filed it against a deceased person. The Supreme Court likewise held that Powers had belatedly sought to name Carruthers’s Estate as the proper defendant to her action. The Supreme Court also held that by failing to timely sue her tortfeasor’s estate, Powers was not “legally entitled to recover” any damages from the Carruthers Estate and, therefore, unable to succeed in her claim for underinsured motorist coverage with Kentucky Farm Bureau.

FARM ANIMALS ACTIVITY ACT:

BRADLEY RACING STABLES, LLC, ET AL. V. JOI DENISE ROBY, ET AL.

2022-SC-0508-DG

June 13, 2024

AND

CHURCHILL DOWNS, INC., ET AL. V. JOI DENISE ROBY, ET AL.

2022-SC-0516-DG

June 13, 2024

AND

JOI DENISE ROBY, ET AL. V. CHURCHILL DOWNS, INC., ET AL.

2022-SC-0523-DG

June 13, 2024

Opinion of the Court by Chief Justice VanMeter. All sitting. All concur.

On review from the Court of Appeals reversing the Jefferson Circuit Court’s summary judgment rulings for Bradley Racing Stables LLC (“Bradley”) and Churchill Downs. The Supreme Court reversed. The main issue of the case is whether the Farm Animals Activity Act (“FAAA”) horse racing exemption under KRS 247.4025(1) applied to the parties. Specifically, whether a horse stabled in the backside of Churchill Downs during the Kentucky Derby but was not actively engaged in any activities related to the races, was engaged in horse racing activities for the purposes of the FAAA exemption. Roby initially brought the claim against Bradley and Churchill Downs in Jefferson Circuit Court for breaching its duty to maintain and keep the premises safe for the use of its patrons, failing to exercise reasonable care for the safety of Roby, and failing to eliminate or warn of dangerous conditions on the premises. Roby also asserted the claim that Bradley and Churchill Downs were liable under Louisville Metro Code of Ordinances (“LMCO”) § 91.028(A). The Jefferson Circuit Court concluded as a matter of law that the FAAA horse racing exemption did not apply to Bradley and Churchill Downs because the stabling of a horse was a farm animal activity, not a horse racing activity. Further, the trial court ruled LMCO § 91.028(A) did not impose strict liability for injuries caused by horses. The Court of Appeals agreed with the trial court’s holding on LMCO § 91.028(A) but reversed the trial court orders granting summary judgment for Bradley and Churchill Downs. The Court of Appeals held the horse racing exemption applied because: 1) live racing was occurring; 2) Roby was injured after being bitten by a horse located on the premises; and 3) the horse was used to escort racehorses to and from the track. The Supreme Court holds that the horse racing exemption does not apply because the horse that bit Roby was in its stall and was not being used to escort racehorses to

and from the track. Likewise, in *Keeneland Ass'n Inc. v. Prather*, 627 S.W.3d 878 (Ky. 2021), the horse racing exemption does not apply here because Roby's injuries stemmed from an inherent risk of engaging in a farm animal activity. Roby, an experienced horse owner, voluntarily approached the horse stabled in a restricted access area. As to Roby's LMCO § 91.028(A) claim, the Supreme Court holds it inapplicable here because the FAAA prevails over the ordinance. Roby's argument as to the duty owed by Churchill Downs is moot because the FAAA precludes liability for Roby's injury. Accordingly, the Supreme Court affirms the Jefferson Circuit Court's summary judgment rulings for Bradley and Churchill Downs.

CRIMINAL LAW:

BILLY JO FAUGHN V. COMMONWEALTH OF KENTUCKY

2023-SC-0094-MR

June 13, 2024

Opinion of the Court by Chief Justice VanMeter. All sitting. All concur.

This matter of right appeal challenged the trial court's allowance of two of the Commonwealth's expert witnesses to testify via Zoom, among other issues. The Supreme Court affirmed. Faughn was visiting his family home in Hopkinsville following the death of his father. Overwhelmed by the upcoming funeral, Faughn acquired and used methamphetamine and proceeded to drive down a local highway. A driver traveling in the opposite direction saw Faughn slumped over the steering wheel as he drove. The victim, the owner of a home along the highway, was tending to her garden as Faughn drove in her direction. Faughn's vehicle exited the roadway and traveled a significant distance before striking the victim, carrying her through the sidewall of her garage, and bringing her to rest 39 feet from where she was struck. The victim died from her injuries. Officers responding to the scene believed Faughn to be under the influence and administered Standard Field Sobriety Tests to Faughn, who failed each one. Faughn consented to a blood test which showed the presence of Methamphetamine in his system. A jury found Faughn guilty of wanton murder and operating a motor vehicle under the influence of methamphetamine. At trial, the Commonwealth sought to allow two witnesses to testify remotely: a lab employee from Pennsylvania who quantified the amount of meth in Faughn's system and a toxicologist from the University of Kentucky. The Commonwealth provided as justification the financial savings to be derived from not needing to pay the travel expenses of the lab employee and a desire to not impede the toxicologist's teaching duties. The trial court acquiesced and the witnesses each testified remotely. The Supreme Court held that the trial court committed error by allowing the witnesses to testify remotely, reiterating the Court's holding in *Campbell v. Commonwealth*, 671 S.W.3d 153 (Ky. 2023), and *Spalding v. Commonwealth*, 671 S.W.3d 693 (Ky.

2023) and noting the reasons proffered by the Commonwealth fell well short of public policies that could outweigh Faughn's constitutional right to confront the witnesses. The Court further held that while allowing the remote testimony was error, the error was harmless beyond a reasonable doubt because there was no dispute that Faughn used methamphetamine and operated the vehicle, and Faughn acted wantonly in doing so. Faughn's other claims of prosecutorial misconduct and improper admission of a body-worn camera recording were similarly found to be insufficient to justify reversal.

JOHN D. ELLIS V. COMMONWEALTH OF KENTUCKY

2023-SC-0096-MR

June 13, 2024

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

John Ellis went missing while his girlfriend of forty years was out of town. During that time his girlfriend's sister was raped after an assailant broke into her house. After Ellis reappeared at a hospital, police asked him to come to the station for an interview ostensibly regarding his disappearance. Ellis agreed. After about an hour of interviewing, and after Ellis had voluntarily given a DNA sample, the police accused him of raping the victim. They told him rapid DNA had proven his semen was on the victim; that tire tracks from the home matched his vehicle; that photographic and video evidence placed him at the scene. None of this was true. Ellis eventually stated, "I think I need a lawyer[.]" at which point the police officers several times acknowledged to Ellis that they understood him to have invoked his right to counsel and the interview was over.

One of the officers, however, only five minutes later brought Ellis' girlfriend into the interview. He testified that he intended to use her to elicit statements from Ellis. For fifteen minutes the officer went over the false evidence to Ellis' girlfriend in front of Ellis. He not only repeatedly emphasized that DNA made the case all-but-certain but stated that Ellis was probably a serial rapist and had many other victims. The officer then left the room while a video camera recorded the interaction between Ellis and his girlfriend. She asked him several questions regarding whether he had raped her sister. Ellis made several admissions that effectively conceded guilt while also asserting that he could not remember what happened.

The trial court refused to suppress the statements made between Ellis and his girlfriend and Ellis was eventually convicted of rape. The Supreme Court reversed. The Court determined that once the trial court concluded Ellis had invoked his right to counsel, controlling precedent requires the interview cease

unless the accused reinitiates contact. The Supreme Court concluded the trial court erred in failing to apply the controlling precedent. The Supreme Court of the United States has concluded that an interrogation is any words or actions a police officer knows or reasonably should know is likely to lead to a statement, whether inculpatory or exculpatory. Here, the officer acknowledged to Ellis that he had invoked his right to counsel and the interview had to cease. Instead, he brought Ellis' girlfriend into the interview room and repeatedly told her a litany of false evidence meant to convince her that Ellis had raped her sister. The officer knew or should have known this procedure would likely elicit a statement from Ellis, therefore, it constitutes an improper interrogation after the right to counsel had been invoked.

The Court reversed the trial court, holding the statements should have been suppressed. It remanded for further proceedings consistent with the opinion.

DAQUAN N. LAMPKINS V. COMMONWEALTH OF KENTUCKY

2023-SC-0305-MR

June 13, 2024

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

Lampkins was convicted of two counts of murder, possession of a handgun by a convicted felon, and violation of protective order. He received a sentence of life imprisonment without the possibility of parole. The convictions stemmed from the killing of Lampkins's ex-girlfriend and another man. On direct appeal, Lampkins argued the trial court erred by: (1) excluding the victims' toxicology reports; (2) failing to instruct the jury to accept a judicially noticed fact; (3) failing to strike two jurors for cause; (4) improperly admitting evidence of prior bad acts; and (5) permitting the Commonwealth to dramatize one of the murders.

The Supreme Court affirmed Lampkins's convictions. First, the Court held the victims' toxicology reports were properly excluded because evidence of the victims' illegal drug use is irrelevant without proof of some specific connection to the charged crime. Second, the Supreme Court determined the trial court properly declined Lampkins's request to instruct the jury on the date of discovery because the timing of a litigation event is not an "adjudicative fact" for the jury to decide in criminal trial, and therefore, does not constitute a proper subject for judicial notice under KRE 201. Third, comments elicited in response to general questions regarding the jurors' perceptions of law enforcement and the fairness of the legal system did not provide an adequate basis for disqualification. Fourth, the Court held evidence of Lampkins's prior abuse of the victim was relevant and admissible for the purpose of showing motive, intent, and identity. Finally, the Supreme Court explained the Commonwealth failed to lay a proper foundation for the reenactment of one of

the murders because there was an insufficient showing of a fair similarity, but further concluded such error was harmless.

STATUTORY INTERPRETATION:

ANNETTE WILEY, INDIVIDUALLY AND AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE BLAIR, ET AL. V. MASONIC HOMES OF KENTUCKY, INC. D/B/A MASONIC HOME OF LOUISVILLE

2023-SC-0249-DG

June 13, 2024

Opinion of the Court by Chief Justice VanMeter. All sitting. All concur.

On review from the Court of Appeals reversing the Jefferson Circuit Court’s order denying Masonic’s motion to compel arbitration. The Supreme Court reverses the Court of Appeals and remands to the Jefferson Circuit Court for further proceedings. The central issue in this case is whether the legislature’s 2020 amendment to KRS 457.050 may be construed as retroactive to validate Blair’s 2019 power of attorney (“POA”) and, thereby, the contracts executed by Wiley pursuant to that POA. The Jefferson Circuit Court held the POA Wiley used to sign the admission documents and the alternative dispute resolution (“ADR”) agreement with Masonic was invalid because it failed to meet the requirements of KRS 457.050 and the 2020 amendment to the statute was not retroactive. Before KRS 457.050 was amended in 2020, the statute required the presence of two disinterested witnesses for a POA to be valid and the POA at issue was not signed by two witnesses. The Court of Appeals reversed the trial court’s order ruling the POA was valid because another statute, KRS 457.060, provided clear legislative intent of retroactive application for the 2020 amendments to KRS 457.050. Finding that the POA was valid, the Court of Appeals ruled that Wiley acted within her authority under the POA and arbitration is compelled by Masonic’s ADR agreement. The Supreme Court holds the POA was invalid at execution because it lacked the presence of two disinterested witnesses and none of the 2020 amendments to Chapter 457 retroactively make the POA valid. Not enough evidence is present to support the legislature was absolutely certain it intended KRS 457.060(1) to have retroactive application to make the alleged POA valid. KRS 457.460 cannot retroactively save the POA either because it terminated upon Blair’s death and before the passage of the 2020 version of the statute. Further, Wiley was not estopped from arguing the validity of the POA because Masonic cannot prove a material misrepresentation by Wiley or Blair in signing the optional ADR agreement. As a result of the Supreme Court’s holding that the POA is invalid, we do not need to consider the parties’ agreements about unconscionability of the ADR agreement or whether the wrongful death claim should be stayed pending arbitration of the other claims. Accordingly, the Supreme Court

reverses the Court of Appeals and remands to the Jefferson Circuit Court for further proceedings.

BAR EXAMINATION:

TIMOTHY POOLE V. VALETTA BROWNE, ET AL.

2023-SC-0567-OA

June 13, 2024

Opinion and Order. All sitting. All concur.

After Poole had unsuccessfully attempted to pass the Kentucky Bar Examination on five separate occasions, he was notified by the Kentucky Office of Bar Admissions that he could not take the exam again pursuant to Kentucky Rules of the Supreme Court (SCR) 2.080(4). Poole then filed an original action alleging the respondents had failed to afford him proper accommodations during his prior exam attempts.

This Court affirmed the decision by the Kentucky Office of Bar Admissions and determined that Poole had been afforded proper testing accommodations when he had requested them, had not objected to the accommodations afforded him during prior testing, and would not be allowed to sit for the exam a sixth time or be granted admission to the Bar by this Court.

ATTORNEY DISCIPLINE:

IN RE: LEILA LOUISE HALE

2024-SC-0034-KB

June 13, 2024

Opinion and Order. All sitting. All concur.

Leila Louise Hale was publicly reprimanded by the State Bar of Nevada for violating its rules regarding conflicts of interest and the safekeeping of property. If an attorney licensed to practice law in the Commonwealth of Kentucky receives discipline in another jurisdiction, SCR 3.435(4) requires this Court to impose the identical discipline unless there is a lack of jurisdiction or fraud in the out-of-state proceeding or the misconduct warrants substantially different discipline in Kentucky. The Supreme Court of Kentucky entered an order directing Hale to show cause why she should not be subject to reciprocal discipline. Hale failed to provide a reason why reciprocal discipline should not be imposed and the Supreme Court publicly reprimanded her for violating the Nevada and Kentucky Rules of Professional Conduct

IN RE: COLIN DOAN EDMUNDSON

2024-SC-0082-KB

June 13, 2024

Opinion and Order. All sitting. VanMeter, C.J.; Bisig, Conley, Nickell, and Thompson, JJ., concur. Keller and Lambert, JJ., would issue a show cause order directing Edmundson to state why he should not be indefinitely suspended pursuant to SCR 3.167.

The Kentucky Bar Association petitioned the Supreme Court to indefinitely suspend Colin Doan Edmundson from the practice of law in the Commonwealth of Kentucky for failing to file an answer to a charge as required by SCR 3.164. As Edmundson had failed to file an answer to a charge, the Court indefinitely suspended him from the practice of law in the Commonwealth of Kentucky.

IN RE: JOSEPH RILEY SCHWAMB

2024-SC-0089-KB

June 13, 2024

Opinion and Order. All sitting. All concur.

The Kentucky Bar Association's Board of Governors considered eighteen charges against Joseph Riley Schwamb, all of which reached the Board as default cases pursuant to SCR 3.210. The Board found Schwamb guilty of all charges and recommended he be suspended from the practice of law for 181 days, reimburse all funds owed to his clients, and pay the certified costs of the proceedings. The Court adopted the recommendation of the Board. Schwamb had been suspended from the practice of law for non-payment of KBA dues and non-compliance with the minimum CLE requirements. Included in his eighteen charged violations of the Rules of Professional Conduct were counts for Schwamb continuing to practice law during the period of his suspension, failing to perform work for which he accepted fees, failing to keep numerous clients informed regarding their cases, and failing to inform his clients of his suspension. The Court found Schwamb guilty of the eighteen counts and suspended him from the practice of law in the Commonwealth of Kentucky for 181 days. The Court also ordered Schwamb to refund unearned fees to two clients and pay the costs associated with these proceedings.

IN RE: MARCUS DANIEL GALE

2024-SC-0117-KB

June 13, 2024

Opinion and Order. All sitting. All concur.

Marcus Daniel Gale failed to answer charges filed in three separate cases by the Kentucky Bar Association's Office of Bar Counsel. Due to his failure to respond to the charges, the Supreme Court indefinitely suspended Gale from the practice of law pursuant to SCR 3.167.

IN RE: MICHAEL GARY BYERS

2024-SC-0179-KB

June 13, 2024

Opinion and Order. All sitting. All concur.

Byers moved the Supreme Court to impose a negotiated sanction of a public reprimand with conditions pursuant to SCR 3.480(2). The Court granted Byers's motion. The Kentucky Bar Association Inquiry Commission charged Byers with failing to communicate the scope of his representation and basis for his fee, failing to execute a written advance fee agreement, failing to advise his client to consult independent counsel before entering into a business relationship, failing to deposit unearned fees into an escrow account, and failing to refund unearned fees. Byers admitted to all charges against him except the first regarding an alleged failure to communicate the scope of his representation and basis for his fee. Byers agreed to pay restitution to his client and agreed to attend the Ethics and Professional Enhancement Program and Trust Account Management Program offered by the KBA.