

**PUBLISHED OPINIONS  
KENTUCKY SUPREME COURT  
MARCH 2019**

**I. CRIMINAL LAW:**

**A. Willie Ward v. Commonwealth of Kentucky  
[2017-SC-000343-MR](#) March 14, 2019**

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Willie Roger Ward was charged with holding a seventeen-year-old female at gunpoint and forcing her to perform oral sex. He appealed as a matter of right from a judgment convicting him of first-degree sodomy, possession of a handgun by a convicted felon, and being a persistent felony offender (PFO) in the first degree, and sentencing him to forty years in prison. Finding no reversible error, the Supreme Court affirmed.

The Court held that: (1) the trial court did not err in denying Ward's motion to suppress the handgun or victim's testimony, since both were discovered as a result of a valid stop and search; (2) the trial court did not err in precluding Ward from introducing the victim's statement to a detective that she had previously performed acts of prostitution in the past, because the Rape Shield Law specifically protects victims against the admission of such evidence, and the statement did not directly pertain to the charged offenses; (3) evidence of the victim's age was properly admitted because background information about victims is generally admissible; and (4) evidence of the victim's age did not open the door to the victim's statement about past prostitution because Ward was able to effectively assert his defense that the victim was a prostitute without admitting the statement, and in any event, the evidence of the victim's age was properly admitted, rendering the "opening the door" theory inapplicable. However, (5) the trial court erred by refusing to allow Ward to stipulate to his convicted felon status based on *Anderson v. Commonwealth*, 281 S.W.3d 761 (Ky. 2009), but given that very little evidence regarding the prior conviction was introduced, this error was harmless. Finally, (6) the trial court did not err by failing to sever the possession of a handgun charge for trial by a different jury. Ward's trial was trifurcated and proceeded in three parts - a guilt phase for sodomy, guilt phase for being a convicted felon in possession of a handgun, and a penalty phase. Allowing the same jury that heard the sodomy charge to hear the handgun charge was not error because the handgun was used in the commission of the sodomy. The sodomy evidence was inextricably intertwined with the handgun evidence, and thus there was no abuse of discretion in denying severance.



Metro Housing Authority (LMHA), the owner and property management company of Apartments, and Juanita Mitchell, the property manager, for their failure to evict Love, thereby negligently causing Davion's death. Both the circuit court and the Court of Appeals held that LMHA was cloaked in governmental immunity, and Mitchell was shielded by qualified official immunity; thus, Bryant's case was dismissed. The Kentucky Supreme Court granted discretionary review, affirmed the lower courts and held: LMHA and Mitchell are both protected by the immunity doctrine. In so holding, the Court noted that the General Assembly has conclusively established its motive and statement of policy as to public housing and that it created housing authorities to administer duties that it recognized as essential and integral to the policy of the Commonwealth. The Court further held that Mitchell was always empowered with authority to decide what action was appropriate, change that decision, change the course of action, stop the proceedings, etc. Her actions were discretionary in nature.

### **III. GRANDPARENT VISITATION:**

#### **A. David Morton, et al. v. Bruce Tipton**

[2018-SC-000390-DGE](#)

**March 14, 2019**

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Maternal grandfather and step-grandmother had sole custody of children, with whom paternal grandfather sought visitation. After several years of proceedings regarding visitation, the trial court eventually ordered that paternal grandfather receive visitation with the children three times per year with certain restrictions. On appeal, the Court of Appeals held that the trial court applied the best interest factors enumerated in *Walker v. Blair*, 382 S.W.3d 862, 871 (Ky. 2012) even if it did not cite the case, and properly applied the preponderance of the evidence standard in a custody dispute between grandparents. Affirming on discretionary review, the Supreme Court held that although the trial court did not cite *Walker*, its findings of fact reflect proper consideration and application of the best interest factors. As for the standard of proof, the trial court properly applied the preponderance of the evidence standard; the higher clear and convincing evidence standard adopted in *Walker* only applies in the event of a grandparent visitation dispute involving a custodial parent.

### **IV. WORKERS COMPENSATION:**

#### **A. Doug Trevino v. Transit Authority of River City, et al.**

[2018-SC-000364-MR](#)

**March 14, 2019**

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. While operating a TARC bus in Jefferson County, Kentucky, Douglas Trevino was assaulted by a passenger resulting in injuries to his face, teeth, as well as causing post-traumatic stress

disorder. TARC responded by denying the claim pursuant to the special defense provided in KRS 342.610(3). Having reviewed the on-board bus surveillance video, the ALJ concluded that Trevino's intentional action, leading up to the assault which injured him, was the proximate cause of the assault. The Board and the Court of Appeals affirmed. The Kentucky Supreme Court affirmed and held: if a claimant's aggressive or inflammatory behavior proximately causes violence, thus resulting in injury to the claimant, the claimant is not entitled to compensation under Kentucky's Workers' Compensation laws. In so holding, the Court noted that the ALJ's conclusion was based on her review of the bus surveillance video as well as Trevino's testimony. She clearly did not find Trevino's version of the events credible. Therefore, the ALJ's decision denying Trevino benefits pursuant to KRS 342.610(3) was supported by substantial evidence.

**V. ATTORNEY DISCIPLINE:**

**A. Kentucky Bar Association v. Rachelle Nicholle Howell  
2018-SC-000438-KB March 14, 2019**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Board of Governors recommended the Supreme Court find Howell guilty of violating SCR 3.130-1.3 (nine counts); 3.130-1.4(a)(3); 3.130-1.4(a)(4) (nine counts); 3.130-1.15(e); 3.130-1.16(d) (ten counts); and 3.130-8.1(b) based on ten consolidated disciplinary files. The Board also recommended that the Court suspend Howell for ninety days, with an additional ninety-one days to be probated for a period of two years with conditions.

Bar Counsel argued before the Court that the Board erred in its disciplinary recommendation because it was not supported by substantial evidence and was clearly erroneous as a matter of law under SCR 3.370(5)(a)(1). Bar Counsel further argued that Howell's suspension, which permits automatic reinstatement, unduly depreciated the seriousness of Howell's misconduct.

Noting that the recommendation of the Board is merely advisory under SCR 3.360, the Court agreed with Bar Counsel. The Court discounted the mitigating factors offered by Howell and determined, based on precedent, that Howell's reinstatement to practice law in the Commonwealth must be contingent upon the approval of the Character and Fitness Committee. Accordingly, the Court ordered that Howell be suspended for a period of one hundred and eighty-one days, with the suspension continuing until she is reinstated to the practice of law by order of the Court under SCR 3.510.

**B. Kentucky Bar Association v. Justin Neal O'Malley**

**2018-SC-000664-KB**

**March 14, 2019**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. In October 2018, the United States Bankruptcy Court for the Eastern District of Kentucky permanently disbarred O'Malley from the practice of law in that court. The KBA filed a petition for reciprocal discipline under SCR 3.435.

O'Malley was previously suspended for 181 days by the Supreme Court for his actions in another bankruptcy case concluding in violations of SCR 3.130(1.1) (competency); 3.130(1.16)(d) (duties upon termination of representation); 3.130(3.3)(a)(1) (making a false statement of fact to a tribunal); 3.130(3.4)(c).

In the present case, O'Malley's clients contacted a Chapter 13 Bankruptcy Trustee to resolve their issues after their case was closed without discharge in late 2017. The Trustee discovered that O'Malley had forged another attorney's name on legal documents and had failed to return his clients' money, using it instead for personal expenses. The Trustee moved to disbar O'Malley, and the parties eventually signed an Agreed Order wherein O'Malley agreed to be permanently prohibited from practice in the United States Bankruptcy Court for the Eastern District of Kentucky and to pay his clients \$10,500 within 30 days.

The KBA filed a reciprocal discipline petition with the Supreme Court in December 2018. O'Malley failed to respond to the petition as directed under SCR 3.435. Accordingly, the Court ordered O'Malley permanently disbarred from the practice of law in the Commonwealth.

**C. Bryan Edward Bennett v. Kentucky Bar Association**

**2019-SC-000069-KB**

**March 14, 2019**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Attorney Bryan Edward Bennett and the Kentucky Bar Association agreed to a negotiated sanction under SCR 3.480(2) to impose a public reprimand of Bennett for violations of Supreme Court Rules 3.130(1.3) (lawyer shall act with reasonable diligence and promptness in representing a client), 3.130(1.4)(b) (lawyer shall explain a matter to a client to permit that client to make informed decisions regarding representation), and 3.130(1.16)(d) (lawyer shall protect client's interests upon termination of representation). Bennett failed to adequately represent his client in his client's immigration proceedings, putting his client at risk for deportation. The Court approved the negotiated sanction, to which the KBA did not object, in light of *Teater v. Kentucky Bar Ass'n*, 243 S.W.3d 349 (Ky. 2008), after Bennett admitted his guilt, promised to take Continuing Legal Education classes in the field of immigration law, and took steps to rectify his actions.