

**KENTUCKY SUPREME COURT
OCTOBER 2021**

ADMINISTRATIVE LAW:

Kentucky Unemployment Insurance Commission v. Michael Nichols, et al.

[2019-SC-0477-DG](#)

October 28, 2021

Opinion of the Court by Chief Justice Minton. Conley, Hughes, Keller, VanMeter, JJ., and Special Justice Jeffrey Edwards, sitting. All concur. Lambert and Nickell, JJ., not sitting. The Supreme Court granted discretionary review to address whether a non-attorney employee appearing on behalf of a corporation at unemployment insurance (UI) referee hearings as authorized by KRS 341.470(3) was engaging impermissibly in the practice of law. Upon review, the Court found that Nichols lacked standing to contest the validity of KRS 341.470(3). Accordingly, the Court reversed the decision of the Court of Appeals that invalidated KRS 341.470(3) on constitutional grounds. Because Nichols lacked standing, the Court declined to address the merits but did find it useful to future courts to correct the Court of Appeals panel's interpretation of *Turner v. Kentucky Bar Ass'n*, 980 S.W.2d 560 (Ky. 1998).

APPELLATE PROCEDURE:

M.A.B. v. Commonwealth of Kentucky, Cabinet for Health and Family Services, et al.

[2020-SC-0572-DGE](#)

October 28, 2021

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, Keller, and VanMeter, JJ., concur. Nickell, J., dissents with separate opinion. M.A.B.'s parental rights were involuntarily terminated, and she appealed. Her notice of appeal failed to name her children in either the caption or the body. However, the children's guardian *ad litem* was served with the notice of appeal. The Court of Appeals dismissed M.A.B.'s appeal for failure to name the children, as they were necessary parties to the appeal. The Kentucky Supreme Court reversed and remanded. The Court held, based in part on *Cates v. Kroger*, 627 S.W.3d 864 (Ky. 2021), that serving the children's guardian *ad litem* was the functional equivalent of naming the children, thereby substantially complying with CR 73.03. In addition, the Court overruled *R.L.W. v. Cabinet for Human Resources*, 756 S.W.2d 148 (Ky. App. 1988), only insofar as it holds that failing to name a child in a termination of parental rights appeal is automatic grounds for dismissal of the appeal.

CONSTITUTIONAL LAW:

David Jones, Individually, and on Behalf of All Persons Similarly Situated v. Clark County, Kentucky, et al.

[2020-SC-0107-DG](#)

October 28, 2021

Opinion of the Court by Justice Conley. All sitting; all concur. The Clark County Detention Center, the Appellee, presented David Jones, the Appellant, with a bill for his incarceration fees after fourteen months in a county jail. Shortly after his release, Jones was cleared of all charges. The Kentucky Supreme Court granted discretionary review to determine whether KRS 441.265 permits a county jail to both retain the monies collected from a prisoner and further bill the same prisoner for the cost of his confinement after the charges against him were dropped. The trial court granted

summary judgment to the Clark County Detention Center, finding KRS 441.265 permitted the collection, assessment, and billing of incarceration fees by the county jail. The Court of Appeals affirmed. The Supreme Court reversed, holding the lower courts erred in their analysis of KRS 441.265 by ignoring the role a sentencing court plays in the statute. County jails do not have the statutory right to bill a former prisoner for the cost of their incarceration without an order from a sentencing court. While a county jail does have the right to automatically deduct fees from a prisoner's canteen account, a county jail must return the automatically deducted fees if no order from a sentencing court comes into existence. Accordingly, the Court remanded the case to the Clark County Circuit Court.

CRIMINAL LAW:

Michael Fields v. Commonwealth of Kentucky
[2019-SC-0663-DG](#)

October 28, 2021

Opinion of the Court by Justice Hughes. All sitting; all concur. An investigation by the Office of the Attorney General cybercrimes unit led investigators to discover child pornography files on Michael Fields's desktop computer and external hard drive. After a jury trial he was convicted of four counts of possession of matter portraying a sexual performance by a minor, Kentucky Revised Statute (KRS) 531.335, and sentenced to ten years in prison by the Scott Circuit Court. On appeal, Fields argued that the trial court (1) improperly denied a directed verdict; (2) erred in excluding Matthew Considine as an expert witness; (3) improperly admitted various exhibits, and (4) improperly admitted the ten images and videos that formed the basis of the ten-count indictment. The Court of Appeals found no error and affirmed.

On discretionary review, the Supreme Court determined that the trial court committed no reversible error and affirmed the Court of Appeals. The Commonwealth's computer forensics expert testified that Fields previewed the four pornographic images on which he was ultimately convicted, which satisfied the "knowing" possession requirement of KRS 531.335. Because there was direct evidence that the four files had been viewed, in addition to circumstantial evidence, the jury had sufficient evidence to infer that Fields knew the files were on his computer and knew what the files contained. Further, the trial court did not abuse its discretion in declining to qualify Fields's computer forensics expert because the expert lacked knowledge and experience. Even if the trial court's refusal to allow the expert to testify was error, it was harmless because the avowal testimony contained no information that would have successfully countered the Commonwealth's expert's testimony that Fields viewed the four files. Further, the trial court properly admitted various exhibits regarding Fields's computer activity, which demonstrated that other files with pornography-suggestive names were opened on Fields's computer. Finally, the trial court properly admitted the images and videos that formed the basis for the indictment because the images constitute physical evidence of the crime itself and while the photos were undoubtedly prejudicial, the prejudice did not outweigh their probative value.

Martice N. McRae v. Commonwealth of Kentucky
[2020-SC-0114-MR](#)

October 28, 2021

Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal. Martice McRae was tried and convicted by a Jefferson County jury for the murder of

Justin Hague. McRae was arrested after investigators received a lead from Deonta Thorn. Thorn, arrested in an unrelated case, provided information in a police interview about a murder McRae committed in the summer of 2017. Thorn also made statements during the interview about possessing a gun that he transferred to McRae, statements that incriminated Thorn since he was a convicted felon. Thorn told police he provided a .40 caliber Smith and Wesson to McRae, the same gun McRae used to shoot the victim. Before Thorn was called as a witness at trial and after a “dry run” hearing of the Commonwealth’s and McRae’s questions and Thorn’s answers, the trial court determined that Thorn could not be asked questions related to his personal possession of firearms, granting Thorn a partial Fifth Amendment privilege. Held: The trial court did not abuse its discretion by compelling Thorn to testify to his knowledge of the crime, while prohibiting potentially incriminating questions about his gun possession. Further, the trial court did not abuse its discretion in denying McRae’s request for recross-examination of a detective when the redirect testimony did not involve new matter and was only an amplification of previous testimony elicited during cross-examination; did not commit palpable error by allowing the detective to answer the Commonwealth’s questions about surveillance videos; and committed only harmless error, if any, by overruling McRae’s objection to the Commonwealth’s closing argument.

MEDICAL MALPRACTICE:

Kentucky Guardianship Administrators, LLC, as Conservator for Kali Crusenberry, et al. v. Baptist Health System, Inc. d/b/a Baptist Health Corbin, et al.

[2019-SC-0295-DG](#)

October 28, 2021

Opinion of the Court by Justice Keller. Minton, C.J.; Conley, Hughes, and VanMeter, JJ., concur. Lambert, J., concurs in part and dissents in part without opinion. Nickell, J., not sitting. Kali Crusenberry was admitted to Baptist Health in Corbin on August 1, 2013, for symptoms including fever, vomiting, and extreme nausea. Upon arrival, Crusenberry was diagnosed with several infections and hypokalemia (low potassium). After being treated at the hospital and sent home, Crusenberry suffered a cardiac arrest that left her permanently injured. Crusenberry sued the hospital and one of her physicians, Dr. Bathina, for her injuries. After eleven days of trial, the jury found that neither party had breached their standard of care.

On appeal to the Supreme Court, Crusenberry raised eight alleged errors. Those errors included whether the trial court improperly admitted certain evidence (such as undisclosed expert testimony), improperly excluded certain evidence (such as an incident report, certain expert testimony, and restrictions on cross-examination of witnesses), and improperly limited the hospital’s legal duty in a jury instruction. The Supreme Court affirmed the Whitley Circuit Court on all issues.

PUBLIC PENSIONS:

City of Forth Wright, Kentucky, et al. v. Board of Trustees of the Kentucky Retirement Systems

[2020-SC-0053-DG](#)

October 28, 2021

Opinion of the Court by Justice VanMeter. Minton, C.J.; Conley, Hughes, Lambert, and Keller, JJ., sitting. Minton, C.J.; Hughes and Lambert, JJ., concur. Keller, J.,

concur by separate in which Conley, J., joins. Nickell, J., not sitting. The cities of Fort Wright, Covington, Taylor Mill, and Independence appeal the decision of the Franklin Circuit Court finding that the Board of Trustees for the County Employees Retirement System (CERS) are governed by KRS 61.650 and KRS 61.545(21), which contains a “prudent investor” standard and afforded them the discretion to invest in certain unregulated hedge funds and private equity funds. The cities argued that the Board’s investment conduct is governed by KRS 78.790, which requires the Board to invest within an enumerated list of financial products. The Supreme Court held that the coextensive legislative history of both KERS and CERS is clear evidence of the Board’s broad, and exclusive control over investments. Specifically, the Court noted that the 2002 amendments to KRS 61.650(1) which deleted the reference to “securities which, at the time of making the investment, are, by law, permitted for the investment of funds by fiduciaries in this state” means that the Board was “no longer limited by the KRS 386.020 list” and reaffirmed the Board’s “exclusive control of all investments.” Justice Keller, concurring by separate opinion, noted that, although, the Board enjoyed a general grant of authority to invest in hedge funds, it was still constrained by the prudent investor standard and that “[i]f the Board is to adequately reflect [beneficiaries’] investment interests with caution. . . it may look to this case, and no further, in which some beneficiaries have stated clearly their displeasure with hedge fund investment.”

STATUTE OF FRAUDS:

Charles Adamson v. Jonathan Adamson, et al.

[2020-SC-0175-DG](#)

October 28, 2021

Opinion of the Court by Justice Conley. All sitting; all concur. In this case, the Court of Appeals affirmed the circuit court’s enforcement of a mediation agreement that included a contract to sell a piece of land and transfer title. The Court of Appeals held the agreement was not a contract of sale therefore the Statute of Frauds was inoperable. Moreover, it held Charles Adamson was his wife’s agent at the mediation when the contract was entered into based upon apparent authority, and equitably estopped him from arguing he was not.

The Supreme Court reversed. It held the Statute of Frauds was applicable as the contract was one for the sale of land on its own terms; additionally, the Statute of Frauds was applicable in any contract whose purpose is to transfer title to land. The Court ruled that neither Charles Adamson nor his wife nor an authorized agent of either signed the mediation agreement insofar as it applied to the contract for the sale of land, therefore the Statute of Frauds barred enforcement. Finally, the Court overruled the grant of equitable estoppel, holding a husband’s representation that he would make his wife go along with any agreement is an erroneous basis upon which to find he had apparent authority to act for his wife.

WORKERS COMPENSATION:

Time Warner Cable, Inc. v. Ricky Smith, et al.

[2020-SC-0580-WC](#)

October 28, 2021

Opinion of the Court by Justice Conley. All sitting; all concur. In this case, the ALJ concluded Ricky Smith was totally, permanently disabled. Time Warner appealed arguing the ALJ improperly concluded total disability based solely upon evidence of

Smith's psychological conditions, and that no substantial evidence supported the judgment as Smith did not have any psychological restrictions placed upon him by a doctor. The Court of Appeals affirmed the ALJ.

The Supreme Court affirmed the Court of Appeals. It held as a matter of first impression that a claimant can testify to the extent and duration of his psychological injuries, but cannot make a diagnosis, and an ALJ may rely upon such testimony in making an award of total disability so long as evidence supports the psychological condition is a direct result of a physical work injury. In this case, medical evidence did support the ALJ's conclusion. Finally, the Supreme Court reiterated the holding and import of *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), that a finding of disability is a holistic analysis of several factors, some of which are not named in the statutory scheme but nonetheless remain viable.

ATTORNEY DISCIPLINE:

Jonathan Richard McCarrick v. Kentucky Bar Association
2021-SC-0330-KB

October 28, 2021

Opinion and Order of the Court. All sitting; all concur. McCarrick ceased performing legal work around 2005 when he began working for a software company in a non-attorney role. In 2008, McCarrick was suspended from practicing law in Kentucky for failing to complete his continuing legal education requirements. He did not seek to be restored to practice. Instead, he continued his work in the software industry outside of Kentucky, living in various states and moving frequently.

McCarrick's daughter was charged with a misdemeanor in Jefferson District Court and, despite being suspended from the practice of law, McCarrick knowingly entered an appearance and appeared in court at his daughter's arraignment and during her pretrial conference, holding himself out to the court as the attorney of record.

After a disciplinary complaint was filed, McCarrick admitted to violating four Rules of Professional Conduct: SCR 3.130(5.5)(a) (practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; SCR 3.130(5.5)(b)(2) (holding out to the public or otherwise represent that the lawyer in admitted to practice law in this jurisdiction); SCR 3.130(3.4)(c) (knowingly disobeying an obligation under the rules of a tribunal); and SCR 3.130(8.1)(b) (knowingly failing to respond to a lawful demand for information). He requested a public reprimand as the appropriate sanction and the KBA did not object. After reviewing the facts and relevant case law, the Court agreed that a public reprimand was warranted and sanctioned McCarrick accordingly.

Maureen Ann Sullivan v. Kentucky Bar Association
2021-SC-0388-KB

October 28, 2021

Opinion and Order of the Court. All sitting; all concur. Sullivan moved the Supreme Court under Supreme Court Rule (SCR) 3.480(2) to impose a sanction of a 181-day suspension, with 90 days to serve and 91 days probated for two years with conditions. The Kentucky Bar Association did not object to Sullivan's request.

The case against Sullivan arose from three consolidated disciplinary files. Sullivan admitted that she violated three counts of SCR 3.130(1.3), three counts of SCR 3.130(1.4)(a)(3), one count of SCR 3.130(3.3)(a)(1), one count of SCR 3.130(1.6)(d), and

one count of SCR 3.130(3.4)(c). The KBA agreed to dismiss one count of SCR 3.130(1.5)(a), which was disputed by Sullivan.

In reviewing the proposed negotiated sanction, the Court noted that Sullivan previously had received four private admonitions, two disciplinary suspensions, and one administrative suspension. The Court further reviewed the disciplinary allegations against Sullivan and relevant case law before ultimately concluding that the negotiated sanction was appropriate. Accordingly, the Court suspended Sullivan for 181 days, with 90 days to serve and 91 days probated with conditions.