

**KENTUCKY SUPREME COURT
OCTOBER 2022**

CIVIL PROCEDURE:

John Bruner, et al. v. Don Cooper, et al.

[2020-SC-0426-DG](#)

October 20, 2022

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, Keller, and VanMeter, JJ., concur. Nickell, J., concurs by separate opinion in which Keller and VanMeter, JJ., join. In 2009, Don and Cathy Cooper sought to have a dead-end road that had been maintained by the Pulaski County Fiscal Court and used by the public and adjoining landowners John and Beth Bruner declared their private roadway. The Pulaski Circuit Court found, in part, that the Coopers were estopped from bringing their claim. The Court of Appeals, without addressing the estoppel issue, directed the Pulaski Circuit Court to enter an order finding that the road was not a county road because it had not been formally adopted by the fiscal court. During the second round of litigation, the Court of Appeals affirmed the circuit court's order finding that the road was neither a public road nor an easement.

After the second trip to the Court of Appeals, the Coopers closed the road with a gate which gave notice to the adjoining landowners of the Coopers claim of exclusive control of the road. The adjoining landowner intervened. The Bruners were later granted CR 60.02 relief from the circuit court's previous orders regarding the road's classification. The circuit court then granted summary judgment in favor of the Bruners based on its finding that the road was a public road by prescription. Thereafter, the Court of Appeals held that the circuit court erred by granting the Bruners CR 60.02 relief, and vacated its summary judgment order.

The Kentucky Supreme Court held that the circuit court did not abuse its discretion in granting the Bruners CR 60.02 relief. It further held that the Coopers should have been estopped from bringing their claim in the first instance based on their delay in bringing it. The Coopers bought their property encompassing the road in 1993, but waited sixteen years before filing to have it declared their private roadway. In the intervening years, the Pulaski County Fiscal Court maintained and improved the road, and it was used as a common roadway to all. The Court also held in the alternative that the circuit court was correct in finding that the road qualified as a public road by prescription.

CRIMINAL LAW:

Commonwealth of Kentucky v. James Neal Hensley

AND

James Neal Hensley v. Commonwealth of Kentucky

[2020-SC-0527-DG](#)

[2021-SC-0223-DG](#)

October 20, 2022

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the decision of the Court of Appeals affirming the Boone Circuit Court's dismissal with prejudice on speedy trial grounds, the Supreme Court reversed and remanded. Hensley was arrested for first-degree possession of a controlled substance and possession of drug paraphernalia on January 30, 2019. Between Hensley's

arraignment on April 17 and the pre-trial conference on May 6, the Commonwealth submitted the suspected controlled substance for lab testing, but the state lab's testing schedule was backlogged. On June 19, Hensley invoked his right to a speedy trial, and the trial court set a trial date for August 26. On August 21, five days before the scheduled trial, the Commonwealth had still not received the lab's test results and requested a continuance. The trial court denied the Commonwealth's motion and found the period of six months and twenty-three days between Hensley's arrest and the final pre-trial conference violated Hensley's right to a speedy trial, focusing on the Commonwealth's delay in submitting the suspected narcotic residue for testing. The Court of Appeals found no abuse of discretion and affirmed the trial court's decision. However, the Court found that the Court of Appeals, and by extension the Boone Circuit Court, did err. A possible speedy trial violation necessitates consideration of four factors: (1) the length of the delay, (2) the reason for the delay, (3) defendant's assertion of the right, and (4) prejudice to the defendant. The length of delay, if approaching a year or longer, creates a presumption of prejudice and a finding of presumptive prejudice acts as a triggering mechanism for the remainder of the analysis. However, in this case the length of delay only approached seven months. While Hensley's case was relatively simple, the delay was not long enough to trigger presumptive prejudice and as such the Court did not reach the other factors. The Boone Circuit Court therefore erred in finding Hensley's speedy-trial rights violated.

Commonwealth of Kentucky v. Perry Bell
[2021-SC-0252-DG](#)

October 20, 2022

Opinion of the Court by Justice Conley. All sitting. Minton, C.J.; Hughes, Lambert, and Nickell, JJ., concur. Keller and VanMeter, JJ., dissent by separate opinions. In this case the Court of Appeals reversed the trial court's denial of a directed verdict motion on the tampering with physical evidence charge. At trial the defendant argued there was insufficient evidence for a jury to reasonably conclude that Perry had tampered with physical evidence when he, in the presence of police officers, dropped a bundle containing synthetic marijuana between the passenger seat and the vehicle door. The Court of Appeals reversed citing this Court's decision in *Commonwealth v. James*, 586 S.W.3d 717 (2019).

The Supreme Court affirmed the Court of Appeals, and overruled *Taylor v. Commonwealth*, 987 S.W.2d 302 (Ky. 1998). Reiterating and slightly broadening the holding in *James*, the Supreme Court held once more that when a defendant, in the presence of an officer, drops evidence and the evidence is easily retrievable, the defendant has only abandoned evidence and not tampered with physical evidence.

Mark E. Kelly v. Commonwealth of Kentucky
[2021-SC-0334-MR](#)

October 20, 2022

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Marion County Circuit Court, Kelly appeals as a matter of right his convictions for unlawful imprisonment, wanton endangerment, and criminal trespass. The Supreme Court affirmed in all respects. After an episode of mental instability, Kelly began to believe persons unknown were surveilling him through his and his fiancée's cell phones. Attempting to avoid this surveillance, Kelly, armed with a pistol, left his house to seek assistance. Kelly eventually arrived at the home of the victims and

encountered two of them on the front porch. While brandishing and waving his weapon, Kelly ordered the two members of the family into their home and conscripted them into helping him contact the FBI. When family members asked if they could leave, Kelly refused. Another member of the family arrived at the home and was similarly ordered inside and not allowed to leave. A fourth family member discovered the situation and informed law enforcement. After a brief standoff with police, Kelly surrendered. No one was harmed. Kelly was convicted of three counts of unlawful imprisonment, three counts of wanton endangerment, and one count of criminal trespass. On appeal, Kelly asserted the circuit court erred in four respects: (1) denial of his motion for directed verdict as to two of the victims; (2) a double jeopardy violation; (3) improper admission of prior bad acts evidence; and (4) prosecutorial misconduct. As to the directed verdict, the Court found there was sufficient evidence to place before the jury the question of Kelly's guilt as to respective counts of wanton endangerment and respective counts of unlawful imprisonment relating to two of the victims. The evidence adduced at trial showed that Kelly pointed the gun at two of the victims and waved the gun around the third. The danger presented by Kelly's waving of a firearm in the direction of that third victim satisfied the minimal evidence needed for the wanton endangerment charges to be submitted to the jury. Similarly, Kelly's actions were sufficient to submit the unlawful imprisonment charges to the jury. The Court found no double jeopardy violation for convictions of unlawful imprisonment and wanton endangerment where the elements of the two crimes differed and the proof underlying each conviction was sufficiently unique. Third, admission of a similar incident occurring two weeks prior was not error was not an abuse of discretion where the evidence showed intent and lack of mistake. Finally, prosecutor's penalty-phase statements expressing disappointment with the jury and inviting the jury to consider Kelly's parole eligibility date were not misconduct.

INSURANCE:

Ashland Hospital Corporation D/B/A King's Daughters Medical Center, et al. v. Darwin Select Insurance Co. N/K/A Allied World Surplus Lines Insurance Co., et al.

[2020-SC-0260-DG](#)

October 20, 2022

Opinion of the Court by Justice Conley. Minton, C.J.; Conley, Hughes, Keller, Nickell, and VanMeter, JJ., sitting. Hughes, Keller, Nickell, and VanMeter, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion. Lambert, J., not sitting. In May 2011, the DOJ began an investigation into KDMC for potential violations of federal health laws. KDMC notified and obtained coverage for the costs of complying with that investigation under a D&O policy. In September 2013, hundreds of plaintiffs filed suit against KDMC in Boyd Circuit Court, alleging tortious conduct related to the DOJ investigation (but this would not be an established fact until May 2014). KDMC notified and sought professional liability and excess coverage for those claims under its 2012-13 policies. Darwin and Homeland Insurance denied coverage based on Exclusion 15, the prior notice of events exclusion, arguing the coverage obtained under the D&O policy in 2011 was notice of facts, matters, and events giving rise to a claim to a prior insurer based on the subpoena issued by the DOJ in May 2011. KDMC filed a declaration of rights in 2015. The Circuit Court ruled in KDMC's favor. On appeal, the Court of Appeals reversed and found Exclusion 15 was applicable to bar coverage. The appellate court further ordered KDMC pay recoupment

costs to the insurers for the costs of litigation up to that point. KDMC sought discretionary review and the Supreme Court granted.

Held: Exclusion 15 did not apply to bar coverage because the May 2011 subpoena was lacking in the requisite specificity required by the insurance policy to constitute notice of circumstances giving rise to a claim and because KDMC had given the insurers notice of the subpoena and investigation during the negotiation period for the 2012-13 policies. The Court noted that the insurers' understanding of the subpoena up until November 2013 had also been the subpoena was insufficient to constitute notice of circumstances giving rise to a claim—only when coverage was sought for the tort litigation in Boyd County did the insurers officially reverse their position. Nonetheless, the unambiguous language of the policy required the time, date and place of the incident giving rise to a claim; a description of it; a description of the injury or damage which has allegedly resulted or may result from it; how and when KDMC first became aware of the incident and the names, addresses and ages of the injured parties and any witnesses. The subpoena simply did not contain this information with the requisite specificity, and in several respects wholly omitted the required information altogether.

The Court also reversed the Court of Appeals in holding that notice could be obtained from multiple sources over a number of years. Instead, a reasonable interpretation of the policy as a lay reader would understand it would require notice of circumstances giving rise to a claim be contained in a single communication, with supplementation allowed for errors or inadvertent omissions within a reasonable time. The Court also held that despite KDMC obtaining insurance coverage for the investigation under the D&O policy in 2011-12, because the insurers were aware of that fact when negotiating the insurance policies for 2012-13, it was incumbent on the insurers to clearly state in the policy that they would not cover any potential claims which may have arisen from the same facts, matters, and events of the DOJ investigation. The failure of either party to clearly state its understanding of the effect notice of the DOJ investigation had on the policy coverage led to a latent ambiguity as to the effect of the notice on Exclusion 15's applicability. Under normal rules of insurance contract interpretation, an interpretation favoring coverage will be adopted so long as it is reasonable given a lay reader's understanding of the facts and language. According to this rule, the Court held the specific notice of the DOJ investigation to the insurers prior to the policies taking effect defeated the general provision of Exclusion 15. The insurers stimulated the expectation of risk protection by failing to inform KDMC of their belief Exclusion 15 would bar any coverage of potential claims related to the DOJ investigation.

Finally, the Court reversed the Court of Appeals ruling as to recoupment, holding the lack of a final order or judgment from the circuit court on that matter, as well as the fact the issue had not been identified on appeal by either party nor briefed before the appellate court, means the Court of Appeals lacked subject matter jurisdiction to make that ruling. The Supreme Court remanded back to the Court of Appeals to consider the applicability of two other exclusions invoked by the insurers but not considered by that court previously due its ruling on Exclusion 15.

JUDICIAL DISCIPLINE:

Julia H. Gordon v. Judicial Conduct Commission
2022-SC-0171-RR

October 20, 2022

Opinion of the Court by Justice Hughes. All sitting; all concur. The Judicial Conduct Commission determined that Julia Hawes Gordon, Family Court Judge for the 6th Judicial Circuit in Daviess County, Kentucky, committed judicial misconduct as charged in five of the six counts against her and ordered that she be removed from office. Judge Gordon appealed the Commission's Final Order, and the Supreme Court found no error warranting reversal. Between 2017 and 2021, Judge Gordon inappropriately inserted herself into at least three of her son's Daviess County criminal cases by acting as counsel, advisor, and advocate for her son, lobbying and pushing both the prosecutor and presiding judge over those cases to take actions as she directed, and acting well outside the constitutional role of judge.

On appeal, Judge Gordon made numerous arguments including that her rights as a victim under Marsy's Law, Kentucky Constitution Section 26A, were infringed, that evidence produced against her was inadmissible and insufficient, and that her removal was unwarranted. The Court held that Marsy's Law does not create a different standard of conduct for a sitting judge. Additionally, the Commission's finding for all charges were supported by clear and convincing evidence and there were no errors in the admission of evidence. Based on Judge Gordon's numerous violations of the Code of Judicial Conduct, removal was warranted. The Court affirmed the Commission's Final Order.

TORTS:

The City of Barbourville, Kentucky, et al. v. Evelyn Hoskins, et al.

[2021-SC-0435-DG](#)

October 20, 2022

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. Discretionary review granted. In this premises liability case, the City of Barbourville appealed from a decision of the Court of Appeals reversing the trial court's grant of summary judgment to the City with regard to Hoskins's premises liability claim.

Evelyn Hoskins suffers from diabetic neuropathy, which causes a loss of protective sensation in her feet. She visited Barbourville Water Park and walked on the sun-heated concrete sidewalks for approximately ten minutes. After returning home, she discovered blisters on her feet. Her feet eventually became infected and required partial amputation. Hoskins brought suit against the City, claiming the City did not fulfill its duty of care to her as an invitee to the water park. The trial court granted summary judgment in favor of the City. The Court of Appeals reversed, concluding that Hoskins's claims included questions of fact that should have been submitted to a jury.

On discretionary review, the Supreme Court reversed the Court of Appeals' holding regarding Hoskins's premises liability claims, finding that Hoskins's case was a rare circumstance in which no reasonable jury could find an unreasonable risk to exist and no reasonable jury could deem Hoskins's injuries sufficiently foreseeable to impute liability to the City. Thus, the trial court did not err in granting summary judgment in the City's favor on Hoskins's premises liability claim.

WRITS:

G.P. v. Honorable Angela McCormick Bisig, et al.

AND

C.M. v. Honorable Annie O’Connell, et al.

[2022-SC-0011-MR](#)

[2022-SC-0125-MR](#)

October 20, 2022

Opinion of the Court by Justice Keller. All sitting; all concur. G.P. was indicted in 2018 for one count of murder. C.M. was indicted for one count of first-degree rape (victim under 12 years of age), one count of first-degree assault, and one count of first-degree robbery in 2019. Both were found incompetent to stand trial, and the Commonwealth filed a Petition for Commitment for C.M. and G.P. under Kentucky Revised Statutes (KRS) Chapter 202C. While their KRS 202C proceedings were still pending, C.M. and G.P. filed petitions for writs of prohibition at the Court of Appeals requesting relief from the alleged unconstitutional process set out in KRS 202C. The Court of Appeals denied their petitions. G.P. and C.M. appealed the denials to the Supreme Court.

In their appeal to the Supreme Court, G.P. and C.M. both argued the unconstitutionality of KRS 202C, which creates a procedure for indefinite involuntary commitment for incompetent criminal defendants, and therefore sought relief from that process. The Supreme Court held that G.P. and C.M. did not meet the writ standard because they each had an adequate remedy by appeal following the conclusion of the KRS 202C proceedings. Accordingly, the Supreme Court affirmed the denial of both petitions.

Ex Parte Leo G. Smith, Chief Public Defender, Louisville & Jefferson County Public Defender Corporation; and, Elizabeth B. McMahon, Deputy Chief Public Defender, Louisville & Jefferson County Public Defender Corporation

[2022-SC-0243-OA](#)

October 20, 2022

Opinion and Order of the Court. All sitting; all concur. In this original action, petitioners moved for a supervisory writ interpreting the Rules of the Supreme Court, including the Rules of Professional Conduct, to determine whether those Rules permit attorneys to be members of a collective bargaining unit. The Court denied the petition for a supervisory writ for two reasons.

First, the Court concluded that Petitioners’ request did not present well defined and compelling circumstances justifying issuance of an extraordinary writ. The petitioners raised broad, speculative ethical issues that attorney may face if they join a collective bargaining unit.

Second, the ethical issues raised in the petition only impacted a relatively small number of attorneys in Jefferson County. As such, the Court was hesitant to issue a supervisory writ of statewide impact when the underlying issues only involve a relatively small number of attorneys practicing in the Commonwealth.

ATTORNEY DISCIPLINE:

Kentucky Bar Association v. Charles Edwin Johnson

[2022-SC-0269-KB](#)

October 20, 2022

Opinion and Order of the Court. All sitting; all concur. The Supreme Court indefinitely suspended Johnson from the practice of law by order on December 17, 2020. On June 17, 2021, the Court issued another suspension against Johnson for a period of 61 days, with an additional 119 days probated for a period of two years. Although neither suspension has been lifted, Johnson continued to engage in the practice of law, filing documents and appearing in court in a number of probate, criminal and family matters.

As a result of these events and after the KBA was notified, the Inquiry Commission filed a complaint against Johnson for violating SCR 3.130(3.4) and SCR 3.130(5.5)(a). Johnson failed to respond to this complaint. Consequently, on January 26, 2022, the Commission filed a Charge against Johnson. That Charge alleged that Johnson violated SCR 3.130(3.4) by knowingly disobeying an obligation under the rules of a tribunal, SCR 3.130(5.5)(a) by practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, and SCR 3.130(8.1)(b) by knowingly failing to respond to a lawful demand for information from the Inquiry Commission in its initial complaint. Johnson received the Charge by sheriff service.

Johnson did not respond to the Charge, and, accordingly, an Order of Submission was filed to the Board of Governors. The Board considered the Charge on default pursuant to SCR 3.210. After considering the current Charges against Johnson, his prior discipline, and his pattern of misconduct, the Board recommended that Johnson be suspended for one year, consecutive with his other discipline. Johnson did not file a notice to the Court to review the Board's decision and the Court did not elect to review the decision under SCR 3.370(8). Accordingly, the decision of the Board was adopted under SCR 3.370(9) and Johnson was suspended for one year, consecutive with his other discipline.

Kentucky Bar Association v. Brian J. Klopfenstein
[2022-SC-0335-KB](#)

October 20, 2022

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association moved the Supreme Court to order Klopfenstein to show cause why he should not be subject to reciprocal discipline after being publicly reprimanded by the Supreme Court of Missouri. The public reprimand in Missouri resulted from Klopfenstein's deficient representation of two clients. Klopfenstein filed a response admitting no good cause existed. Accordingly, under SCR 3.435(4), the Court granted the KBA's motion and ordered that Klopfenstein be publicly reprimanded in Kentucky consistent with the order of the Supreme Court of Missouri.

William C. Adams, III v. Kentucky Bar Association
[2022-SC-0392-KB](#)

October 20, 2022

Opinion and Order of the Court. All sitting; all concur. On motion by Adams for approval of a negotiated sanction, the Supreme Court approved the sanction. Adams represented Client for many years. In late 2018 and early 2019, and again in May 2020, Adams had an intermittent sexual relationship with Client's wife. In May 2020, Client developed a medical issue which required hospitalization, and during this time Client's wife sought Adams' legal services to draft a Power of Attorney. The Power of Attorney's purported goal was to permit Client's wife to assist and oversee Client's

business if Client remained unresponsive. Adams drafted a broader document granting Client's wife financial authority as well as the power to make health care decisions on behalf of Client. While the document was dated May 1, 2020, the document was actually drafted on May 4, 2020, on or after the date of Client's hospitalization. Though Adams did not forge the document himself, Adams admitted knowledge of the forgery. The Inquiry Commission filed a two-count Charge against Adams, the first under SCR 3.130(1.7)(a) for conflicts of interest, and the second under SCR 3.130(8.4)(c), which prohibits a lawyer from engaging in dishonest, fraudulent, or deceitful conduct. After negotiations and approval by the Inquiry Commission Chair and the Kentucky Bar Association Immediate Past President, the parties reached an agreement wherein Adams admitted to both counts of the Charge. The negotiated sanction for these violations was a one-year suspension, with one hundred days to serve and the remaining two hundred sixty-five days probated for two years with conditions. Adams has occasioned no prior discipline in his twenty-five years practicing law in the Commonwealth and has cooperated fully with the disciplinary authorities during this action. The Court further found the sanction to be in line with punishments given under similar circumstances. For these reasons, the Supreme Court found the negotiated sanction appropriate.