KENTUCKY SUPREME COURT
SEPTEMBER 2022

ADMINISTRATIVE LAW:
River City Fraternal Order of Police Lodge No. 614, Inc. v. Louisville/Jefferson County Metro Government, et al.
2021-SC-0159-DG **September 22, 2022**

Opinion of the Court by Justice Keller. All sitting; all concur. The River City Fraternal Order of Police Lodge No. 614, Inc. (FOP) filed an unfair labor practice claim against the Louisville-Jefferson County Metro Government (Louisville Metro). The FOP alleged that the Louisville Metro Police Department (LMPD) engaged in an unfair labor practice by coercing Sergeant David Mutchler, the FOP President, to reveal communications he had with Sergeant Armin White that the FOP asserted were protected by a "union business privilege." The Kentucky Labor Cabinet found that because no union business privilege exists in the Commonwealth, LMPD did not engage in an unfair labor practice. Both the Jefferson Circuit Court and the Court of Appeals affirmed.

After granting discretionary review, the Supreme Court held that Kentucky Revised Statute (KRS) 67C.402 creates a confidentiality but not a privilege. This confidentiality is limited to communications between a union member and an officer of the union. It operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty. The confidentiality does not and cannot apply to legal proceedings.

The Court further held that because KRS 67C.402 creates a limited confidentiality for union representative communications with members, it cannot be unilaterally waived. Both the FOP's individual members and the FOP are entitled to confidentiality. Thus, the Court held that because Sgt. White could not have waived confidentiality for the FOP, and because the statute clearly requires a limited confidence to be effectual, Sgt. Mutchler should not have been compelled to disclose the substance of his communications with Sgt. White. In compelling him to do so, Louisville Metro unlawfully interfered with the right of the police officers to bargain collectively regarding conditions of employment under KRS 67C.402(1). Accordingly, Louisville Metro committed an unfair labor practice under KRS 67C.410. Thus, the Supreme Court reversed the decision below and remanded to the Labor Cabinet to enter a cease-and-desist order pursuant to KRS 67C.410(2).

CONTRACTS:
Curtis Green, at al. v. Phillip Frazier
2021-SC-0293-DG **September 22, 2022**

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Court of Appeals affirming the Powell Circuit Court's finding that the arbitration clause contained in a sales contract between the parties was unconscionable and unenforceable, the Supreme Court reversed and remanded. The matter arose from an agreement between Green's Toyota and Frazier for the purchase of a new pickup truck

from Green's. As part of the sale, Frazier signed or initialed several documents that respectively contained variations of an arbitration clause. Upon discovering that the vehicle had been previously repaired prior to purchase, Frazier brought a civil complaint against Green's. Green's moved to dismiss for lack of jurisdiction and improper venue or to compel arbitration pursuant to the contract. The trial court found the arbitration clause unconscionable because it precluded or limited consequential or punitive damages. A non-unanimous panel of the Court of Appeals affirmed finding both procedural and substantive unconscionability in the clause. The dissenting judge opined the challenge to the arbitration terms was within the purview of the arbitrator and would have ordered arbitration. The Supreme Court reversed and remanded the matter, directing the trial court to enter an order compelling arbitration. In so holding, the Court found the parties had clearly agreed to arbitrate and all other issues were properly to be left to an arbitrator's determination. Both parties signed a contract containing a conspicuous arbitration provision and the imbalance in remedial rights created by the clause did not render the provision unconscionable. Accordingly, the contract was neither procedurally nor substantively unconscionable. The Court further found Frazier's claims under KRS 190.071 and the Consumer Protection Act to fall under the terms of the arbitration agreement, as did the question of proper venue.

CRIMINAL LAW:
Teresa Haney v. Commonwealth of Kentucky
2020-SC-0534-MR **September 22, 2022**

Opinion of the Court by Justice Nickell. All sitting. Minton, C.J.; Hughes and Lambert, JJ., concur. Conley, J., concurs by separate opinion in which Keller and VanMeter, JJ., join. Haney was operating a vehicle in Morgan County which collided head-on with a motorcycle, killing its driver and passenger. Haney was transported to an out-of-state hospital for treatment of her injuries. A Kentucky State Police Trooper went to the hospital to interview Haney and obtain a blood sample. During the twenty-minute recorded interview, the Trooper believed Haney could have been intoxicated. He did not provide *Miranda* warnings but did read Kentucky's implied consent warning and told Haney she was not under arrest, nor did he intend to arrest her at that time. Haney declined the opportunity to contact an attorney and consented to a blood draw. Subsequent testing revealed the presence of oxycodone and hydrocodone in Haney's blood. More than two months later, Haney was indicted on two counts of wanton murder.

Haney moved to suppress her statements as being obtained in violation of *Miranda*. She further moved to suppress the blood draw as the sample was obtained without a warrant. The trial court denied both motions in a detailed written order concluding Haney was not in custody, so no *Miranda* warning was required, and Haney's consent to the blood draw negated her assertion a warrant was necessary. The trial court further denied Haney's motion to dismiss based on her allegations of abuse of the grand jury process as being without merit. Haney entered a conditional guilty plea to amended charges and received a sentence of twenty-five years' imprisonment. She appealed as a matter of right, raising the same three allegations of misconduct complained of in the trial court.

The Supreme Court first analyzed the totality of the circumstances surrounding Haney giving a statement to the investigating officer. It concluded she was not in a coercive

custodial environment which would render any statements involuntary. Because a reasonable person would not have felt they were under arrest or deprived of their freedom, the officer's duty to administer *Miranda* warnings was not triggered. Thus, the trial court did not err in denying the suppression motion.

Next, the Supreme Court concluded the trial court erred in failing to determine whether Haney's consent was voluntary before refusing to suppress the blood draw. Acknowledging a warrant is generally required for a blood draw, after discussing the holdings in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), *Commonwealth v. Morriss*, 70 S.W.3d 419 (Ky. 2002), *Commonwealth v. Brown*, 560 S.W.3d 873 (Ky. App. 2018), *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), and the language of KRS 189A.105(2)(b), the Supreme Court held questions of fact existed as to whether Haney's consent was voluntary and therefore reversed and remanded for the trial court to consider the totality of the circumstances surrounding her consent.

Finally, the Supreme Court found no error in the trial court's denial of Haney's motion to dismiss the indictment. Noting the extreme reluctance courts have to scrutinize grand jury proceedings, any allegedly misleading statements made by the officer regarding road conditions were not sufficiently prejudicial nor did they constitute a flagrant abuse of the grand jury process warranting relief.

Commonwealth of Kentucky v. Chasity Shirley
2021-SC-0254-DG **September 22, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. Shopping at a Walmart in Pulaski County, Chasity Shirley switched bar codes on two items and used the self-scanner to check out, paying $80.80 less than she should have paid based on the prices at which the items were offered for sale. Rather than charging Shirley with a theft crime, the Commonwealth charged Shirley under KRS 434.845 with committing unlawful access to a computer in the first degree, a Class C felony. At trial, the circuit court denied Shirley's motion for a directed verdict on the charge, concluding that Shirley did not retain the effective consent of Walmart to use its self-checkout register. The jury found Shirley guilty of the crime. On Shirley's appeal, the Court of Appeals in a 2-1 decision reversed the circuit court's denial of the directed verdict. *Held*: The Court of Appeals did not err. In order to be found guilty of unlawful access to a computer in the first degree, the defendant must access or attempt to access a computer without the effective consent of the owner for a fraudulent purpose as prescribed in KRS 434.845(1)(a) and (b). At issue here is whether Shirley lost Walmart's effective consent to use the self-scanner; effective consent is lost if the consent is "[u]sed for a purpose other than that for which the consent is given." KRS 434.840(9)(d). In accordance with statutory interpretation principles, the focus of KRS 434.840(9)(d) is the purpose for which consent to use the computer was given, not the fraudulent purpose a bad actor desires to achieve. Because the Commonwealth did not present proof that Shirley accessed Walmart's self-checkout register beyond the consented-to barcode scanning for completion of a self-checkout sales transaction, it was clearly unreasonable for the jury to find Shirley guilty of unlawful access to a computer in the first degree. The circuit court erred by denying Shirley's motion for a directed verdict of acquittal on that charge. The Court noted other criminal statutes addressing theft likely were relevant to Shirley's conduct.

Thomas Simpson v. Commonwealth of Kentucky
2021-SC-0344-MR **September 22, 2022**

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the judgment of the Muhlenberg Circuit Court sentencing Simpson to twenty-years' imprisonment for two counts of manslaughter second degree, driving under the influence of controlled substances first offense, and persistent felony offender first-degree, the Supreme Court Affirmed. Simpson was charged with two counts of wanton murder and driving under the influence after his vehicle crossed the center line of U.S. Route 431 and struck another vehicle containing Karen Leach and Linda Embry, killing both. Simpson, unharmed, consented to a blood draw to determine the presence of alcohol or other drugs in his system. The blood draw indicated Simpson's blood contained methamphetamine. At trial, the jury found him guilty of two counts of a lesser charge, manslaughter second-degree. In this matter of right appeal, Simpson argued (1) failure to mirandize prior to interviewing him and a lack of probable cause to take the blood draw; (2) erroneous excusal of a prospective juror; and (3) improper testimony at trial.

The Supreme Court held Simpson was not in custody when he was interviewed unrestrained in the passenger's seat of an unmarked police SUV with the door open and was informed that he was free to leave. Accordingly, officers were not required to read his Miranda rights prior to the interview. The blood draw was proper as KRS 189A.103(1) does not require the presence of probable cause prior to an officer asking for consent to obtain a blood draw. The trial court properly excused a juror whose grandfather was convicted of vehicular manslaughter and who indicated she would be inclined to find for a lesser charge from the outset. There was no error when the trial court declined to declare a mistrial after the prosecutor described Leach and Embry as "murdered" during his questioning. Though the phrasing was impermissible, the trial judge properly admonished the jury and the presumption that such admonition cured the defect was not overcome by Simpson.

The Court further found that testimony characterizing Simpson's behavior during the interview as flippant and erratic was properly within KRE 702 and opinion testimony regarding a person's apparent intoxication is permissible. Simpson's belief that the testimony was an improper mischaracterization was unfounded and did not constitute palpable error. Testimony from a trooper at the scene that Simpson did not act like a typical person involved in a fatal collision ran afoul of *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013). However, the impermissible statement did not constitute palpable error as the statement was only a minor detail of the case against Simpson, which included laboratory evidence of the presence of methamphetamine in his system.

Commonwealth of Kentucky v. Kenneth Lamont Boone, Jr.
2021-SC-0494-DG **September 22, 2022**

Opinion of the Court by Justice Nickell. All sitting; all concur. Following a traffic stop in February 2016, Boone was found to be in possession of narcotics. After informing the investigating officer his driver's license was suspended, Boone provided the officer with a false name and birthdate, even after being warned doing so was a crime. After severing the drug charge, Boone was convicted by a jury in Fayette Circuit Court of

theft of identity, operating on a suspended license, failure to illuminate rear license, and being a persistent felony offender in the first degree (PFO I). He was sentenced to ten years' incarceration.

Boone appealed to the Court of Appeals which reversed his conviction of theft of identity (and consequently his conviction for PFO I) but affirmed in all other respects. The Court of Appeals concluded the trial court erred in refusing to instruct the jury on the misdemeanor offense of giving a peace officer false identifying information as a lesser-included offense to theft of identity. It held the requirement that an officer warn a person providing false information constituted a crime was merely a prerequisite, rather than an element, of the misdemeanor crime. Because theft of identity and giving false identifying information to a peace officer are "remarkably similar" crimes, the panel found the proper course is for a trial court to always submit both charges to a jury.

On discretionary review, the Supreme Court reversed the Court of Appeals. The Supreme Court held the crime of giving false identifying information to a peace officer requires proof of an element which theft of identity does not. It rejected the notion the required warning contained in the statutory definition for the misdemeanor was merely a prerequisite rather than an element of the crime. To qualify as a lesser-included offense, the lower crime must include proof of the same or fewer facts than the primary offense. Because giving false identifying information to a peace officer requires proof of an additional fact—a warning by the investigating officer—it cannot qualify as a lesser-included offense of theft of identity. The Supreme Court thus concluded the trial court properly refused to grant Boone's requested instruction on the lower offense.

PROBATE:
June McGaha, et al. v. Suzanne McGaha, et al.
2021-SC-0351-DG **September 22, 2022**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. On discretionary review, the Supreme Court reversed the decision of the Court of Appeals and reinstated the judgment of the Russell Circuit Court in this probate action. The Supreme Court held that the Court of Appeals failed as a reviewing court to give proper deference to the trial court's decision whether to grant the motion for leave to amend a pleading. In so holding, the Court also held that the Court of Appeals erred when it found that the district court below lacked jurisdiction to probate the will at issue in this action.

The Supreme Court clarified that KRS 24A.120 statutorily empowers district courts with exclusive original jurisdiction in non-adversarial probate matters. The same statute requires that adversarial probate proceedings be filed in the circuit court. The Court of Appeals' reliance on *Kentucky Unemployment Insurance Commission v. Wilson*, 528 S.W.3d 336 (Ky. 2017), was an incongruous application of this Court's precedent regarding verification and its effect on jurisdiction. The Supreme Court explained that *Wilson* applies to review of administrative rulings in which there is no appeal in the courts as a matter of right. But *Wilson* provides no support for the Court of Appeals'

conclusion that the district court lacked jurisdiction in a probate proceeding, a matter unrelated to review of administrative appeals.

Next, the Supreme Court reaffirmed that, while leave to amend a pleading shall be freely given when justice so requires, the decision on whether to allow an amendment is within the trial court's discretion. Here, the Court of Appeals "presumed" to know—without actually knowing—why the trial court denied the motion for leave to amend and then proceeded to engage in its own de novo review concerning denial of the motion for leave to amend. The Court concluded that the circuit court did not abuse its discretion by denying the motion for leave to amend on these facts.

Finally, the Supreme Court held that dismissal of the action was appropriate. After the sole plaintiff reached extrajudicial settlement of his claims there were no remaining claims for the circuit court to resolve. As a result, the Supreme Court reinstated the circuit court's dismissal.

STANDING:
Brandis Bradley, Individually, et al. v. Commonwealth of Kentucky, ex rel, Daniel Cameron, Attorney General, et al.
2022-SC-0076-TG **September 22, 2022**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. On transfer from the Court of Appeals, the Supreme Court vacated the judgment of the Franklin Circuit Court and remanded the case with instruction that the action be dismissed without prejudice for lack of standing.

The Supreme Court held that Bradley had not demonstrated constitutional standing in her individual capacity. The Court concluded that Bradley had failed to demonstrate that the removal of Floyd Circuit Court, Division II, harmed her in a concrete and particularized way, especially where the Court of Appeals took judicial notice of the fact that Bradley had filed to run for a position on the Floyd District Court.

Finally, the Court held that Bradley had failed to demonstrate associational standing. The Floyd County Bar Association was not properly named as a party in the action. And the Court concluded that the Floyd County Bar Association had not demonstrated associational standing because it had not established that its attorney members would have standing to sue in their own right to remedy alleged injuries to their unnamed clients. As a result, the Court vacated the judgment of the Franklin Circuit Court and remanded the action with instruction that the case be dismissed without prejudice.

WORKERS COMPENSATION:
Lakshmi Narayan Hospitality Group Louisville v. Maria Jimenez, et al.
2021-SC-0449-WC **September 22, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Maria Jimenez was employed as a housekeeper by Lakshmi Narayan Hospitality Group (Holiday Inn) when she slipped and sustained injuries to her neck, head, left shoulder, and back in 2014. The Chief Administrative Law Judge (CALJ) awarded temporary total disability benefits and in 2019, Jimenez's claim was reopened pursuant to Kentucky Revised Statute (KRS) 342.125(1)(d) after she alleged a worsening of her condition. Holiday Inn

objected and asserted that *res judicata* barred reopening. Relying on Jimenez's deposition testimony and medical evidence, a different Administrative Law Judge (ALJ) awarded Jimenez permanent partial disability benefits and future medical benefits for treatment of her cervical spine. The Workers' Compensation Board (Board) disagreed and determined that Jimenez's claim was barred by *res judicata*. The Court of Appeals concluded that Jimenez's claim was not barred and that the Board misconstrued the reopening statute because nothing in the statute precludes the reopening of an award of temporary disability benefits.

The Supreme Court affirmed the Court of Appeals, holding that the Board misconstrued the reopening statute. The statute does not restrict or limit reopening to particular types of claims or awards. Further, *res judicata* does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times. The observable symptoms necessary to support a permanent disability award can become more manifest over a period of time extending beyond the original proceedings and applying *res judicata* in this instance would undermine the purpose of the workers' compensation system.

WRITS:
Latrice Marie Leslie-Johnson, Individually, et al. v. Honorable Audra Jean Eckerle, et al.
2021-SC-0450-MR **September 22, 2022**

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Court of Appeals' denial of petitioners' writs of prohibition and mandamus, the Supreme Court affirmed, finding petitioners failed to make the necessary showing of irreparable harm or to demonstrate an error to justify invocation of the "special circumstances" exception. The matter arose from civil litigation between Johnson and Norton Hospitals. Johnson gave birth at a Norton facility by way of a c-section, but the child died of complications shortly after birth. Johnson and her husband, as administrators of the child's estate, filed a medical negligence action against the hospital. As part of that litigation, Norton sought in discovery extensive social media records for both parents. The Johnsons objected and Norton moved to compel production. The circuit court granted the motion and denied a subsequent motion to reconsider. The Johnsons then filed an original action in the Court of Appeals seeking writs of prohibition and mandamus. The Court of Appeals denied the petition and the Johnsons appealed. The Supreme Court affirmed, noting that writs are extraordinary remedies which may only be granted in two circumstances. Only the second circumstance was at issue, where the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The Court reasoned the production of social media information did not fall into the second circumstance. CR 26.02(1), read liberally, tilts in favor of production and the Johnsons could point to no specific privilege that production of the records would violate. The discovery request was relevant, the period for which discovery was sought was made broad partially by the actions of the Johnsons, and the trial court ordered all social media data to be treated as "strictly confidential." Accordingly, the Court found the Johnsons failed to show the irreparable harm required to justify the grant of the writs.

Debra Goff, Individually and as Executrix of Estate of Elbert Goff, Sr. v. Honorable Brian C. Edwards, et al.
2021-SC-0452-MR **September 22, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Civil Appeal. After Debra Goff was appointed as the Executrix of her father Elbert Goff, Sr.'s Estate, Goff's sisters, beneficiaries, filed an action in circuit court against Goff. The sisters alleged that Goff breached her fiduciary duties to Elbert before he died by self-dealing through the misuse of the Power of Attorney and after he died by self-dealing through the misuse of her authority as Executrix of Elbert's Estate. The sisters also claimed Goff failed to pursue debts owed to Elbert by other family members and that Goff herself did not report to the probate court the $400,000 she owed to Elbert. The sisters subsequently amended the complaint to include claims against other family members alleged to owe money to the Estate. Goff moved to dismiss the original complaint against her and objected to the filing of the amended complaint on the basis that the circuit court did not have jurisdiction of the district court probate claims. The circuit court concluded it has subject-matter jurisdiction, and Goff petitioned the Court of Appeals for a writ mandating the Jefferson Circuit Court dismiss the sisters' complaint. The Court of Appeals denied the request. *Held*: The Court of Appeals did not err. In accordance with KRS 24A.120(2) and (3), the circuit court's jurisdiction provided within KRS 395.510 and KRS 395.515 allows it, as stated in KRS 395.515, to resolve settlement and distribution claims "if it appears that there is a genuine issue as to what constitutes a correct and lawful settlement of the estate, or a correct and lawful distribution of the assets." The claims alleging that Goff and other family members owe money to the Estate satisfy the statute's requirement as there appears to be a genuine issue as to what constitutes a correct and lawful settlement of the Estate and/or a correct and lawful distribution of the assets.

ATTORNEY LICENSING:
Christopher D. Jefferson v. Kentucky Office of Bar Admissions
2022-SC-0298-KB **September 22, 2022**

Opinion and Order of the Court. All sitting; all concur. Jefferson, a graduate of The Birmingham School of Law, applied to the Office of Bar Admissions (OBA) for admission to the Kentucky bar by reciprocity under SCR 2.110. He was notified by the OBA that the Character and Fitness Committee had determined he was not eligible for admission without examination because he did not earn a J.D. degree from a law school accredited by the American Bar Association. Jefferson was further notified that, under the Supreme Court Rules, there was a path for graduates of non-accredited law schools to seek admission to the bar by examination under SCR 2.014(3)(a). He appealed the decision to the Supreme Court under SCR 2.060.

In reviewing Jefferson's appeal, the Court noted that SCR 2.014(1) clearly and unambiguously states that "[e]very applicant for admission to the Kentucky Bar must have completed degree requirements for a J.D. or equivalent professional degree from a law school approved by the American Bar Association or by the Association of American Law Schools." The fact that The Birmingham School of Law may be regulated and "accredited" by the Alabama legislature or the Alabama Supreme Court, as argued by Jefferson, did not satisfy the requirements of Kentucky's rules. Accordingly, the Court concluded that the Character and Fitness Committee had

appropriately evaluated Jefferson's application and correctly determined he is not eligible for admission without examination.

ATTORNEY DISCIPLINE:
Inquiry Commission v. Bethany L. Stanziano-Sparks
2022-SC-0105-KB **September 22, 2022**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a Petition for Temporary Suspension of Stanziano-Sparks under SCR 3.165 alleging probable cause existed that her conduct posed a substantial risk of harm to her clients or the public, and/or that she was addicted to intoxicants or drugs and did not have the physical or mental fitness to continue to practice law. The Petition was based, in large part, on the affidavit of a judge stating that Stanziano-Sparks appeared in court for a scheduled jury trial while under the influence of illegal substances or drugs and that she refused multiple requests to submit to a drug screen.

Following the filing of the Petition, the Supreme Court entered an Order to Show Cause as to why Stanziano-Sparks should not be suspended from the practice of law. Stanziano-Sparks did not file a response. Thereafter, the Commonwealth's Attorney for the 29th Judicial Circuit filed notice that Stanziano-Sparks had entered a guilty plea to three drug-related criminal offenses, including one Class D felony. Accordingly, under SCR 3.166(1), the Court ordered that Stanziano-Sparks's suspension remain in effect until dissolved or suspended by order of the Court.