SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000456-DE
(2013-CA-001347)

JEFFREY PETTINGILL — APPELLANT

JEFFERSON CIRCUIT COURT
VS. 2013-D-501731

SARA YOUNT PETTINGILL — APPELLEE

BRIEF FOR APPELLANT

Respectfully submitted,

WILLIAM D. TINGLEY, PLLC

By: William D. Tingley
William d. Tingley, PLLC
First Trust Centre
200 South Fifth Street, Suite 601N
Louisville, Kentucky 40202
Telephone: 502.589.2455
Facsimile: 502.415.7352
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of November, 2014, the original and nine copies of the Brief For Appellant was sent via FEDEX to the Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601, by U.S. First Class Mail to Sam P. Givens, Jr., Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, and by Hand-Delivery to: Hon. Judge Jerry J. Bowles, Family Court Division Six, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky, 40202 and Brian D. Gatewood, Johnson and Gatewood, P.S.C., 231 South Fifth Street, Suite 200, Louisville, Kentucky 40202, Counsel for Appellee.

WILLIAM D. TINGLEY, PLLC

By: _____
William D. Tingley

INTRODUCTION

This is domestic violence case where the Kentucky Court of Appeals denied review on the merits after the Jefferson County Circuit Court Clerk's Office failed to certify the video trial record as required by CR 73.08 and CR 98(2). The result was an opinion affirming the trial court's entry of a domestic violence order based upon the trial judges personal knowledge of the so called "lethality factors in intimate partner violence" risk assessment test.

STATEMENTS CONCERNING ORAL ARGUMENT

Appellant believes oral arguments would benefit the Court. In 2013 alone six thousand four hundred and fifty-seven orders of domestic violence were entered in the Commonwealth of Kentucky.[1] This appeal not only raises the important issue of how courts of appeal should treat errors made by Circuit Court Clerks in the appellate process, it raises both the issue of the appropriate procedure for the introduction into evidence in domestic violence cases of the "lethality factors in intimate partner violence" risk assessment test(s), as well as the legal sufficiency of the orders of protection entered on AOC Form 275.3, (Rev. 6-11). All of these issues are of first impression in the Commonwealth and merit a thorough analysis and discussion.

[1] Administrative Offices of the Court @KyCourts.Net.

STATEMENT OF POINTS AND AUTHORITIES

I

THE CIRCUIT COURT CLERK'S FAILURE TO CERTIFY THE VIDEO TRIAL RECORD ON APPEAL AS REQUIRED BY CR 73.08 AND CR 98(2) WAS NOT SUFFICIENT REASON TO DENY APPELLANT HIS CONSTITUTIONAL RIGHT TO A FULL APPELLATE REVIEW OF HIS CASE ON THE MERITS WHEN THE LOSS OF THAT RIGHT IS WEIGHED AGANIST THE INCONVENIENCE THE COURT OF APPEALS AND PARTIES MAY HAVE EXPERIENED WHILE HAVING TO OBTAIN COMPLIANCE FROM THE CLERK.

II

IT WAS ERROR FOR THE TRIAL COURT TO USE JUDICIAL NOTICE AS THE MEANS TO PERMIT IT TO THEN APPLY THE SO CALLED "LETHALITY FACTORS IN INTIMATE PARTNER VIOLENCE" RISK ASSESSMENT TEST TO THE FACTS OF THE CASE AND ERROR FOR IT TO DO SO AFTER THE CLOSE OF THE EVIDENCE.

III

IT WAS ERROR FOR THE TRIAL COURT TO USE A DOMESTIC VIOLENCE LETHALITY FACTOR RISK ASSESSMENT TEST AS ITS EVIDENTIRARY STANDARD FOR DETERMINING WHETHER DOMESTIC VIOLENCE HAD OCCURRED AND MAY OCCUR AGAIN RATHER THAN THE EVIDENTIARY STANDARD REQUIRED BY KRS 403.750 AS FOUND IN KRS 403.720.

STATEMENT OF THE CASE

This case is before the Court on discretionary review of an opinion by the Kentucky Court of Appeals affirming the entry of a domestic violence order of protection against the Appellant and in favor of the Appellee. The opinion affirming was entered on May 23, 2014. See Appendix Exhibit 1, Opinion Affirming, Kentucky Court of Appeals No. 2013-CA-001347-ME, Jeffery L. Pettingill v. Sara Yount Pettingill. Appellant's petition for rehearing was denied on July 10, 2014. See Appendix Exhibit 2, Order Denying Petition For Rehearing, Kentucky Court of Appeals No. 2013-CA-001347-ME, Jeffery L. Pettingill v. Sara Yount Pettingill.

On July 2, 2013 Appellee took a petition against the Appellant alleging domestic violence. Appendix Exhibit 3, Domestic Violence Petition/Motion, Jefferson County Circuit Court, Family Court Division, Case number 13-D-601731-1. The petition does not allege Appellant ever physically abused or assaulted the Appellee but rather it alleges that for the reasons stated therein "I[Appellee] am scared for me and my daughter's safety especially now that I am going to be filing for divorce." During the KRS 403.750 hearing on her petition the Appellee affirmed on cross-examination that Appellant had never physically abused her. VR No. 1: 7/11/13; 12:12:55[2]. Nor did she testify during said hearing that the Appellant had ever threatened her with physical abuse. Despite these facts on July 11, 2013 the trial court entered a domestic violence order of protection in favor of the Appellee and against the Appellant for a period of three years. The trial court entered the order utilizing AOC Form 275.3 (Rev. 6-11). See Appendix Exhibit 5, Order

[2] See Appendix Exhibit 4, the video record of the July 11, 2013 KRS 403.750 hearing. The video record is attached as an exhibit as the Jefferson County Circuit Court Clerk failed to certify it to the Kentucky Court of Appeals as required by CR 73.08 and CR 98(2). How the Court of Appeals treated said clerk's oversight is the Appellant's first assignment of error.

of Protection, Jefferson County Circuit Court, Family Division, Case number 13-D-601731-1. In addition to the use of said form the trial court made separate findings of fact on its docket sheet. See Appendix Exhibit 6, July 11, 2013 Court Docket sheet for Jefferson County Circuit Court, Family Division, Case number 13-D-601731-1. On said docket sheet the trial court wrote in pertinent part: "The Court finds: 9 out of 12 for lethality factors in intimate partner violence". The trial court then listed the 9 behaviors of the Appellant it believed satisfied the lethality factors in intimate partner violence risk assessment test it had in mind. The "lethality factors in intimate partner violence" risk assessment test utilized by the trial court was not itself introduced into evidence. Nor did the trial court tell the parties at any time prior to or during the hearing that it would be utilizing said risk assessment test factors. Rather the use of the test factors was announced by the trial at the close of the proof when it stated that "9 out of the 12 lethality factors for intimate partner violence are present in this case". VR No. 1: 7/11/13; 12:46:16.

The trial courts judgment was duly appealed to the Kentucky Court of Appeals. The relevant assignments of error put forward by Appellant were that: 1) the trial court erred as a matter of law in utilizing the so called "lethality factors in intimate partner violence" risk assessment test absent said test being properly admitted as evidence in the case, i.e. through one of the parties or by Judicial Notice, and 2) the trial court erred as a matter of law in utilizing the so called "lethality factors in intimate partner violence" risk assessment test as the standard for determining whether an act of domestic violence may occur again. The Court of Appeals rejected each of Appellant's assignments of error and affirmed the decision of the trial court.

Also material to this appeal is its procedural history before the Court of Appeals. On August 8, 2013 the Court of Appeals entered a Notice of Expedited Appeal pursuant to CR 76.03(1), CR73.08, and CR 76.12(2)(a)(i). See Appendix Exhibit 7, Order Expediting Appeal, Kentucky Court of Appeals Case No. 213-CA-001347-ME. Consistent with said rule the court shortened the briefing schedule to thirty days and ordered the Jefferson County Circuit Court Clerk (hereinafter "Clerk") to comply with CR 73.08 regarding certification of the video trial record. Appendix Exhibit 7, page 2, Paragraph B. In compliance with said order both parties filed their briefs in the time allotted and both made multiple citations to the video trial record complete with reference to the digital counter numbers as required CR 98(4)(a). It was not until the Court of Appeals issued its opinion that the Appellant realized that the Clerk had failed to certify the video record. Because of said omission the Court of Appeals denied Appellant a review of his case on the merits. Specifically, that court held in pertinent part: "It is the duty of the appellant to ensure the record on appeal is 'sufficient to enable the court to pass on alleged errors.' Burberry v. Bridges, 427 S.W.2d 583, 585 (Ky.1968). Therefore, we cannot review the actual testimony, but rather, 'must assume that the omitted record supports the decision of the trial court.' [Citation omitted]". Appendix Exhibit 1, page 6. In his motion for a rehearing Appellant asserted that the court's reliance on Burberry was misplaced and that the effective dismissal of his appeal was disproportional to any inconvenience the Court of Appeals or the parties may have suffered while obtaining compliance with the civil rules from the Clerk. See Appendix Exhibit 8, Appellant's Petition For Rehearing. As stated previously, that petition was denied by the Court of Appeals without comment on July 14, 2014. Exhibit 3. This appeal followed. Thereafter,

investigation into the matter revealed that when the Clerk transmitted the certified record to the Court of Appeals on or about November 25, 2013 he failed to include the video record of the trial. See Appendix Exhibit 9, Transmittal Memorandum from David L. Nicholson, Circuit Court Clerk to Sam Givens, Kentucky Court of Appeals[3]. The parties where not copied on the transmittal memorandum. Exhibit 9 at "cc".[4]

[3] This memorandum should be part of the record transferred from the Court of Appeal to the Supreme Court.

[4] Nor was the video tape listed on the Certification of Record on Appeal served on counsel on August 23, 2013.

ARGUMENT

I

THE CIRCUIT COURT CLERK'S FAILURE TO CERTIFY THE VIDEO TRIAL RECORD ON APPEAL AS REQUIRED BY CR 73.08 AND CR 98(2) WAS NOT SUFFICIENT REASON TO DENY APPELLANT HIS CONSTITUTIONAL RIGHT TO A FULL APPELLATE REVIEW OF HIS CASE ON THE MERITS WHEN THE LOSS OF THAT RIGHT IS WEIGHED AGANIST THE INCONVENIENCE THE COURT OF APPEALS AND PARTIES MAY HAVE EXPERIENED WHILE HAVING TO OBTAIN COMPLIANCE FROM THE CLERK.

There are no reported cases in Kentucky addressing the appropriate appellate response when a circuit court clerk fails to correctly certify the trial record to the Court of Appeals as required by CR 73.08 and CR 98(2). However, in Ready v. Jamison, 705 S.W.2d 479 (Ky.1986)[5] this Court did articulated the approach to be taken when parties fail to correctly follow the rules of appellate procedure. It is Appellant's position that when the error in appellate practice is procedural the Ready balancing test should be applied regardless of whether the oversight was that of a party or a circuit court clerk.

In Ready this Court held that there are "three significant objective of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional rights to appeal". Id., 482. This holding came in the context of the Court's discussion of the then newly amended CR 73.02 which shifted Kentucky away from strict compliance with the rules of appellate procedure to a more equitable approach to dealing with procedural versus jurisdictional errors that occur in this context. In the cases consolidated with Ready the attorneys incorrectly identified the judgments appealed from in their notices of appeal and the Court of Appeals dismissed their cases for that reason. In reversing and

[5] Copies of all Kentucky cases cited are in the appendix number in the order that they appear hrerein.

remanding each of those dismissals this Court held in pertinent part:

> While our court continues to have a compelling interest in maintaining an orderly appellate process, the penalty for breach of a rule should have a reasonable relationship to the harm caused. Likewise the sanction imposed should bear some reasonable relationship to the seriousness of the defect. While dismissal still may be appropriate where the breach of the rule and the harm to the opponent is sufficiently serious, under CR 73.02(2) the appellate court is charged with the burden of deciding the appropriate sanction on a case by case basis. Id., 482.

Unlike Ready which involved a procedural mistake made by attorneys this case involves a procedural mistake made by a circuit court clerk. Specifically, the Clerk failed to certify to the Court of Appeals the video trial record as required by CR 73.08 and CR 98(2)[6]. As a result the Court of Appeals declined to fully review Appellants case on the merits. Specifically citing the lack of a video record and relying on Commonwealth v. Thompson, 697 S.W.2d 143 (Ky.1985), that court held: "[t]herefore we cannot review the actual testimony, but rather, 'must assume that the omitted record supports the decision of the trial court...therefore, we have no basis on which to reverse". Appendix Exhibit 1, page 6, line 5. In light of Ready, what the Court of Appeals should have done was recognize that a procedural error in the appellate process made by a circuit court clerk is no different than one made by a party, applied the Ready balancing test, and concluded that the delay in the appellate process caused by having to obtain the Clerk's compliance with the civil rules did not justify depriving the Appellant of his right to a review of his case on the merits. Ky.Const. Sec. 115.

Also, there is no question but that the Court of Appeals assessed the penalty for the absence of a video record wholly on the Appellant. Citing Burberry v. Bridges, 427 S.W.2d 253 (Ky.1968) the court held that: "[i]t is the duty of the appellant to ensure the record on appeal is 'sufficient to enable the court to pass on alleged errors.'". Appendix

[6] The Jefferson County Circuit Court correctly certified the remainder of the trial record.

Exhibit 1, page 6. Burberry was decided all most 20 years before this Court's decision in Ready and during a period of time when Kentucky was applying the rule of "strict compliance" the rules of appellate procedure. Moreover, in that case the allegation was that the *Appellant* had not designated a sufficient portion of the record for adequate appellate review not that the circuit court clerk had made a mistake in correctly transmitting the record. In addition, Burberry arose under former CR 75.01 which put the duty to designate the appellate record completely on counsel for the Appellant. See Appendix Exhibit 10, 1968 version of CR 75.01. The present version of CR 75.01, and the version in effect at all times relevant hereto, specifically excepts from the duty to designate proceedings taken exclusively by video recording as was the case herein. CR 75.01(1). Under the present rules transmission of the video record of the trial happens automatically once a notice of appeal has been filed, except in limited situations not applicable to the case at bar, with no duty on an Appellant to take any action whatsoever. CR 98(2). Burberry therefore has no applicability to this case.

When a circuit court clerk fails to certify and transmit to the Court of Appeals the video record of the trial the remedy is for the Court of Appeals to require compliance of the clerk by appropriate order. The last sentence of the CR 73.08 states "[t]he appellate court, in its discretion, may extend the time for certification of the record upon motion and a showing of good cause." If a party may move to extend the time for certification then implicitly the Court of Appeals, on its own motion, may do so as well.

In this case the Clerk failed to certify the video trial record on appeal as required by CR 73.08 and CR 98(2). As a direct result of said failure the Court of Appeals declined to decide Appellants case on the merits thus denying him his constitutionally

protected right to such a review. This was error. What the Court of Appeals should have done is apply the Ready balancing test and concluded that the circuit court clerk's failure to certify the video trial record was not a sufficient reason to deny Appellant his constitutional right to a full appellate review of his case on the merits. Having discovered the absence of the video record the court should have issued an order to the Clerk requiring him to come into compliance with the civil rules in a time certain. CR 73.08. Therefore, the opinion affirming issued by the Court of Appeals in this case on May 23, 2014 opinion must be reversed. Ready, CR 73.08.

II

IT WAS ERROR FOR THE TRIAL COURT TO USE JUDICIAL NOTICE AS THE MEANS TO PERMIT IT TO THEN APPLY THE SO CALLED "LETHALITY FACTORS IN INTIMATE PARTNER VIOLENCE" RISK ASSESSMENT TEST TO THE FACTS OF THE CASE AND ERROR FOR IT TO DO SO AFTER THE CLOSE OF THE EVIDENCE.

On appeal the Appellant asserted that the trial court impermissibly took judicial notice of the lethality factors for intimate partner violence. The thrust of this argument was that the lethality factors in intimate partner are not the kind of facts that are the proper subject of judicial notice. They are neither generally known within the county in which the venue of the action is fixed and they are not capable of accurate and ready determination from sources whose accuracy cannot be reasonably questioned. KRE 201. In rejecting Appellant's Judicial Notice assignment of error the Court of Appeals held that it "found no inference by the trial court that it was taking judicial notice of any facts", that "the trial court identified its factual findings on the docket sheet as being in conformity with the lethality factors" and, held that the trial court was merely "comparing its findings to the lethality factors". Exhibit 1, page 8.

The record reflects that after the proof was closed in the parties KRS 403.750 hearing the trial court announced that it was granting the petition based upon the presence of "9 out of 12 of the lethality factors for intimate partner violence." VR No. 1: 7/11/13; 12:46:16. Said factors however were not introduced into evidence by either of the parties. The close of proof was the court's first mention of the factors and its intention to use them in the proceeding. Consistent with its pronouncement the court made the following written findings: "The Court Finds: 9 out of 12 for lethality factors in intimate partner violence:" (Emphasis added to the colon after the word "violence"). After that phrase,

which was punctuated with a semicolon, the court, in "checklist" fashion, listed the nine behaviors of the Appellant it believed meet the criteria for lethality in intimate partner violence. Appendix Exhibit 4.

Shakespeare wrote that "a rose by any other name would smell as sweet"[7] and this Court has held as much on numerous occasions. In Samples v. Commonwealth, 983 S.W.2d 151 (Ky.1998) this Court recognized that a trial court took judicial notice of a document though it never used the words "judicial notice". In that case the trial court overruled a pretrial motion of the defendant which sought an order that he be provided the addresses of all potential jurors in his case. In ruling on the motion the trial judge referred to the decision of the Jefferson Circuit Court chief judge to have the addresses of jurors removed from the juror qualification forms. This Court noted that this decision was documented but was not made a part of the local rules. In its discussion this Court held in pertinent part:

> However, the trial judge, who purported to be personally aware of the existence, authenticity and content of the document in question, clearly did take judicial notice thereof during his explanation in open court of his reasons for overruling appellant's pre-trial motion. Id., 153.

Similarly, in Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky.1992) this Court held that avoiding the use of a term of art did not make admissible that which otherwise would not be. In that case a social worker testified about a child's behavior using all of the elements of the Child Sexual Abuse Syndrome but not actually calling it that by name. This Court held that "[a]voiding the term 'syndrome' does not transform inadmissible hearsay into reliable scientific evidence". Id., 614.

In this case the trial court clearly took judicial notice of something called the

[7] *Romeo and Juliet*, William Shakespeare.

"lethality factors in intimate partner violence". Its failure to use the words "Judicial Notice" was not fatal to a finding that it did so. Samples, Hellstrom. As will be demonstrated, the words "lethality factors in intimate partner violence" are words of art in the domestic violence field, and are a shorthand way to refer to intimate partner violence risk assessment tests.

The United States Supreme Court has recognized that the term "Domestic Violence" is a term of art. U.S. v. Castleman, 134 S.Ct. 1405 (2014). Within this field the phrase "lethality factors in intimate partner violence" is also a term of art. It is a domestic violence shorthand reference to the questions found in test instruments that have been designed to predict recidivism in domestic violence offenders. See Appendix Exhibit 11, U.S. Department of Justice authorized study on Intimate Partner Violence Risk Assessment Validation Study, Final Report[8], pages 1 and 2 of 92 (Overview of study) attached for demonstrative purposes and not as additional evidence in this case. Had the trial court given adequate notice of its intention to use judicial notice, as it will be demonstrated it was required to do, this study done for the Department of Justice would have been the kind of information introduced in the required Daubert hearing. Indeed, the existence of such tests have at least been collaterally recognized in Kentucky. KRS 30A.015 provides that under the direction of the Supreme Court the circuit clerks and their deputies are required to receive training in various aspects of domestic violence including training about "lethality and risk issues". The Appellant does not expect the Appellee to disagree with this characterization of the phrase "lethality factors in intimate partner violence".

[8] The entire study can be found at www.ncjrs.gov/pdffiles1/nji/grants/209731.pdf.

Having established that the trial court improperly took judicial notice of a domestic violence lethality assessment test the question becomes what should it have done. In Commonwealth v. Howlett, 328 S.W.3d 191 (Ky.2009) this Court addressed the proper use of judicial notice, including the procedure required when it is utilized. In that case during a bench trial the judge, sua sponte, ruled as follows:

> I take judicial notice of the fact that a burp during the operation or observation time needs to start the observation time all over...by the manufacture of the machine[breathalyzer], Smith and Wesson. Therefore, I'm going to find him not guilty of that.

Of Judge Armstrong's actions this Court noted:

> Judge Armstrong's concerns over Howlett's burping during the observation period were seemingly based on his prior experience as a DUI persecutor and his knowledge of operating instructions for the breathalyzer machine.

Rejecting both the trial judge's use of judicial notice in this situation and the procedure he employed to use it this Court held:

> Although KRE 201(a) specifically empowers courts to take judicial notice of 'adjudicative facts,' we must conclude that the taking of judicial notice which is derived from the court's personal knowledge of a fact peculiarly known to the judge is a fact neither "[g]enerally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; [nor] [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE 201(b)(1)(2). Thus, we reaffirm our longstanding position that, under KRE 201, a trial judge is prohibited from relying on his personal experience to support the taking of judicial notice.
>
> Procedurally, we cannot address Section 2 of KRE 201(b). That section allows judicial notice of a proposed fact if it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." However, KRE 201(e) states: "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." But procedurally, the taking of judicial notice on that ground was flawed.
> The trial judge, in this case, proclaimed judicial notice without request of either lawyer, and then proceeded to dismiss the case in the same motion. There was no opportunity to make a "timely request" for "an opportunity to be heard." The

> judge did refer to "Smith and Wesson" as an apparent attempt to cite a source "whose accuracy cannot reasonably be questioned."[1] This was not sufficient.
>
> In a jury trial, when it is requested that judicial notice be taken of a fact, the other party is afforded the opportunity to respond. No less right is afforded parties in a bench trial. Here, there was no opportunity to "reasonably" question the source. "The drafters of KRE 201, following the lead of most commentators, encouraged courts to give advance notification when feasible: 'If a court acts on its own initiative, the parties should be informed of the facts noticed and given an opportunity to respond.' " Lawson, *supra,* § 1.00 [5][e], at 20 (quoting *Evidence Rules Study Committee, Kentucky Rules of Evidence—Final Draft,* p. 16 (Nov.1989)).
>
> Therefore, it was improper for the court to find judicial notice *sua sponte* and dismiss the case, all in one fell swoop. Judicial notice, as utilized in this case, was inappropriate.

This Court's decision in Howlett is "on all fours" with the facts of the instant case. As in Howlett the trial court in the instant case took judicial notice of an adjudicative fact *sua sponte*. In Howlett it was of the correct operating procedure for the Smith and Wesson breathalyzer machine. In this case if was of one of the tests for determining lethality in intimate partner violence. In Howlett neither party was given advanced notice of the courts intention to take judicial notice. Nor where the parties in the instant case. In Howlett the trial courts taking of judicial notice lead to the entry of a judgment dismissing the defendants DUI charge. In the instant case the taking of judicial notice lead to the entry of a domestic violence order against the Appellant. The law is clear, when judicial notice of an adjudicative fact is improperly taken the judgment based thereon must be reversed. Howlett. Therefore, the judgment of the trial court in this case must be reversed and as well as the opinion of the Court of Appeals affirming that judgment. Howlett.

III

IT WAS ERROR FOR THE TRIAL COURT TO USE A DOMESTIC VIOLENCE LETHALITY FACTOR RISK ASSESSMENT TEST AS ITS EVIDENTIRARY STANDARD FOR DETERMINING WHETHER DOMESTIC VIOLENCE HAD OCCURRED AND MAY OCCUR AGAIN RATHER THAN THE EVIDENTIARY STANDARD REQUIRED BY KRS 403.750 AS FOUND IN KRS 403.720.

In addressing this assignment of error the Court of Appeals determined that the Appellant had made a typographical error and meant to argue the point under KRS 403.750. Appendix Exhibit 1, page 4. The Appellant did not make a typographical error. However, the Appellant has attempted to make the argument more succinctly herein.

Before a trial court can enter a domestic violence order of protection it must find that an act of domestic violence and abuse has occurred and that an act of domestic violence and abuse may occur again. KRS 403.750(1)(a). However, the necessary evidentiary findings for the legal conclusions set out in KRS 403.750(1)(a), i.e. the legally required evidentiary standards, are found in KRS 403.720, the definitional section of KRS 403.700 et seq. Therein domestic violence is defined as "...physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, assault". In other words, to reach the legal conclusion that domestic violence has occurred and may occur again, KRS 403.750, a trial court must find that there is evidence that petitioner suffered physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, assault and it must find that there is evidence that it may occur again, KRS 403.720. This is the "standard" to which the Appellant was referring in the Court of Appeals.

In the instant case, rather than look to KRS 403.720 to determine if Appellant's

conduct put Appellee in reasonable fear of imminent physical injury and reasonable fear that imminent physical injury may occur again, the trial court employed a domestic violence risk assessment test that purports to predict the likelihood of domestic violence recidivism in an intimate partner relationships. Its findings therefore were findings that the Appellant meet the criteria or "factors" for the risk assessment test it applied and not findings that Appellant's conduct met the statutory definition of domestic violence as found in KRS 403.720. In doing so the trial court applied the wrong legal standard to the evidence.

In its opinion affirming on this issue the Court of Appeals also held in pertinent part:

> The trial court utilized an AOC-275.3 standard form Order of Protection in addition to notations of additional factual findings made on the official docket sheet from the day of the hearing. On the AOC-275.3 form, the trial court checked the appropriate box indicating it was finding for Sara against Jeffrey "in that it was established by a preponderance of the evidence, that an act(s) of domestic violence or abuse has occurred and may again occur…" [Top of page two under the heading "Additional Findings"]

The statement the Court of Appeals quoted from AOC Form 275.3 (Rev.6-11) is found under the heading on that form titled "ADDITIONAL FINDINGS"[9]. Appendix Exhibit 2, page 2. Under that heading the trial court had the option to check three main boxes:

> _____For the Petitioner against the above-named Respondent in that it was established, by a preponderance of the evidence, than an act(s) of domestic violence or abuse has occurred and may occur again; or
>
> ____For the Respondent in that it was not established, by a preponderance of the evidence, than an act(s) of domestic violence or abuse has occurred and may occur again; or
>
> ___The ___ Petitioner ___Respondent has filed a motion to amend the Domestic Violence Order dated _____.

[9] The initial finding appears to be jurisdictional and is on page one of the form, under the heading "THE COURT HEREBY FINDS".

Clearly none of the statements next to any of the boxes are findings of fact. To be a finding of fact the statement must explain "why" the trial court reached the legal conclusion(s) it reached, i.e. the case specific facts it believed supports its legal conclusion(s). Anderson v. Johnson, 350 S.W.3d 453, 459 (Ky.2011). Therefore the Court of Appeals reliance on this section of the form to support its opinion that the trial court made findings of fact sufficient to satisfy the definition of domestic violence as found in KRS 403.720 was error. In fact AOC Form 275.3 (Rev.6-11) contains no findings of fact regarding whether the Appellant's conduct meets the definition of domestic violence as set-out in KRS 403.720.

CONCLUSION

The opinion affirming issued by the Court of Appeals in this case must be reversed as must the judgment entered by the trial court. The failure of the Court of Appeals to apply the principals of appellate practice as set out in Ready was error. The Court of Appeals should have weighed the Clerk's failure to transmit the video record on appeal and the harm to the appellate process occasioned thereby against the Appellants constitutional right to a review of his case on the merits and concluded that denying him a full appellate review was not proportional to the inconvenience the court and parties may have suffered while the court obtained compliance with CR 73.08 and CR 98(2) by the Clerk. Further, it was error for the trial court to take judicial notice of the lethality factors in intimate partner violence risk assessment test and error for it to use that test as the evidentiary standard for determining if the Appellant had committed an act of domestic violence rather than using the statutory definition of domestic violence as found in KRS 403.720. To the extent the Court of Appeals affirmed the trial courts use of the lethality factors in intimate partner violence risk assessment test its opinion that opinion must be reversed for those reasons as well.

Finally, though there are multiple errors in the trial court's judgment that requires it to be reversed the Appellant would respectfully urge this Court to specifically address in its opinion the finding of fact defect on page two of AOC Form 275.3 (Rev. 6-11). Clearly the form, standing alone, does not provide the capacity for trial courts to satisfy their duty under CR 52.01 to make finding of fact regarding the behavior of a Respondent that does or does not satisfy the statutory definition of domestic violence. Neither the victims of domestic violence nor the courts in Kentucky who are attempting to protect

them are served by a form that does not satisfy the minimum requirements of the law.

Respectfully,

WILLIAM D. TINGLEY, PLLC

By: _____
William D. Tingley
Counsel for Appellant