

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
DECEMBER 1, 2023 to DECEMBER 31, 2023**

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. AUTOMOTIVE INSURANCE

A. ERIE INSURANCE EXCHANGE v. MEGAN JOHNSON, ET AL.

[2022-CA-1405-MR](#)

12/15/2023

2023 WL 8656205

Opinion by ECKERLE, AUDRA; CETRULO, J. (CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION) AND GOODWINE, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 03/06/2024

Upon remand from the Kentucky Supreme Court in a decision dismissing a prior appeal on the grounds of lack of finality as to the underlying challenged order, the Floyd Circuit Court ruled by summary judgment that the Motor Vehicle Reparations Act (MVRA) allowed a Personal Injury Protection (PIP) insured control over the manner in which medical benefits are paid. Appellees were previously involved in a motor vehicle collision and requested Appellant insurance company to disburse payment to a chiropractor. Appellant refused claiming medical bills had to be paid in the order received, and it had bills from other providers predating this treatment. The trial court reasoned Appellant was not entitled to unilaterally to determine the extent, timing, and payment of medical services the Appellees were entitled to receive. Additionally, because Appellant lacked a reasonable foundation to disregard Appellees' payment directions, the trial court ruled, pursuant to KRS 304.39-320, it must pay attorneys' fees at a rate of 18% per annum under KRS 304.39-210.

On appeal, Appellants argued the MVRA "merely allows an insured to direct payment among the types of losses, such as medical expenses or lost wages, but not within a particular element of loss" and cited the holdings in *Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mutual Insurance Company*, 250 S.W.3d 321 (Ky. 2008), and *Medlin v. Progressive Direct Insurance Company*, 419 S.W.3d 60 (Ky. App. 2013) for support. Appellants also contended that this issue "constituted a justiciable controversy" and "the proper interpretation of the statute [was] reasonably subject to debate" thereby affording it a reasonable basis to dispute the payment directive and avoid paying attorneys' fees and interest.

The Court of Appeals disagreed with both premises and affirmed the circuit court's ruling. The Court reasoned that *Neurodiagnostics* and *Medlin* were not on-point as to the specific issue in this matter, and rather, those opinions "emphasiz[ed] that the MVRA affords the insured control over how his or her benefits are paid." Per *Medlin*, the Court stated that the MVRA only requires two options—"an insurer either reimburse the insured for money spent out of pocket or pay the medical care providers directly"—but the insurer must abide by that choice. As to the award of attorneys' fees, it was held that Appellees presented proof of loss, and Appellant did not dispute the medical services provided or that claims would exceed the PIP limit. The trial court was held to have correctly ruled that nothing in

the plain language of the law supported Appellant’s position “that chiropractic medical expenses had not ‘accrued’ until [Appellant] paid the medical bills that had been previously submitted.” The Court declared that the MVRA’s purpose is “to ensure prompt payment of PIP claims with minimal need to resort to court proceedings. Absent assertion of a valid defense, such as lack of documentation, a bona fide dispute whether the expense was reasonable, or exceeding the PIP limit, [Appellant] has always been obligated to pay the chiropractic expenses.” A dispute regarding the timing or priority of payment did not excuse this. Additionally, it was held that a denial and bad faith was not necessary to trigger the award of fees and interest but “only a delay without reasonable foundation must occur.”

Judge Susanne M. Cetrulo authored a separate opinion concurring in part and dissenting in part. The opinion reasoned that, while the majority’s interpretation of the MVRA providing insureds ultimate control over payment of benefits was correct, there was a reasonable dispute over the interpretation of the law which was a matter of first impression. As a result, it was reasoned Appellant presented a “legitimate defense” because the case law did not clearly contradict its position, and the award of fees and interest should have been reversed.

II. CRIMINAL LAW

A. **JON BUECHELE v. COMMONWEALTH OF KENTUCKY**

[2023-CA-0113-MR](#)

12/01/2023

2023 WL 8286953

Opinion by EASTON, KELLY MARK; CETRULO, J. (CONCURS) AND COMBS, J. (CONCURS)

Appellant challenged the Nelson Circuit Court’s denial of his motion to suppress evidence of drugs seized by police during an investigative stop. Appellant was stopped after he was observed disregarding KRS 189.570(14), the law prohibiting pedestrians from walking down the middle of a street. When Appellant was initially told to come over to the observing police officer, he turned and walked away from the officer’s patrol car. After the officer exited his vehicle, Appellant was told to stop, and Appellant stuck his hands in his pockets and began to pick up the pace. The officer caught up to Appellant, grabbed both his arms, and led him back to the patrol car. After reaching the patrol car, Appellant removed his hands from his pockets, and the officer observed drugs scattered underneath his vehicle.

On appeal, Appellant argued that based on *Commonwealth v. Wilson*, 625 S.W.3d 252 (Ky. App. 2021), he was improperly seized. In *Wilson*, a prior panel of the Court determined that the arrest of a subject based on fleeing or evading police under KRS 431.005(1)(d) was improper because the underlying offense for which the subject was told to stop was a local ordinance violation as opposed to a misdemeanor or a felony required under the statute. The Court of Appeals affirmed the denial and reasoned that Appellant was not placed under arrest when he was told to stop by the officer, but rather, was only being detained for purposes of issuing a citation for a pedestrian violation. The drugs were reasoned to have been observed by the officer in plain view while he was still effectuating the detention for purposes of the issuing the citation.

B. **MICHAEL MILLS v. COMMONWEALTH OF KENTUCKY**

2022-CA-1356-MR

12/08/2023

2023 WL 8488426

Michael Mills appealed following criminal convictions for second-degree burglary, criminal mischief, and a violation of a domestic violence order. At issue, primarily, was whether jointly owned property that one member of a married couple destroyed – mid-divorce – can serve as a basis for criminal mischief under KRS 512.020(1)(a). Because Mills and his spouse had been ordered by a family court not to destroy marital property, the Court of Appeals concluded that he had no “reasonable ground to believe he had the right to destroy” the marital property.

III. CONTRACTS

A. NEAL A. HANEY, ET AL. v. JEROME C. STYKES A/K/A JERRY STYKES

[2022-CA-1261-MR](#)

12/08/2023

2023 WL 8489659

[2022-CA-1335-MR](#)

Opinion by EASTON, KELLY MARK; CETRULO, J. (CONCURS) AND COMBS, J. (CONCURS)

Neal A. Haney filed a civil complaint in Pulaski Circuit Court seeking damages arising from a business relationship he had with Jerome Stykes for the purchase and resale of properties, and Stykes counterclaimed for unpaid tax preparation work. Haney’s claim was dismissed for lack of timeliness, but Stykes’ claim was submitted to a jury who awarded damages for a breach of contract although for lower than what Stykes requested. Stykes was additionally awarded attorneys’ fees but denied prejudgment interest. Stykes also sought to recover a 2% “service fee” along with punitive damages and to assert a claim of theft of services, all of which the trial court did not allow to be submitted to the jury. Haney appealed the award of attorneys’ fees while Stykes cross-appealed the denial of his additional claims and prejudgment interest.

The Court of Appeals reversed the award of attorneys’ fees and affirmed the denial of Stykes’ additional claims and prejudgment interest. The Court reasoned that the 2% service fee constituted an impermissible hidden interest fee. Theft of services was determined not to have been established because failure to immediately pay invoices for tax preparation was not the equivalent of failure to pay a restaurant or hotel bill, which KRS 514.060(2) deems to be “prima facie evidence that the services were obtained by deception as to intention to pay.” The denial of punitive damages was deemed to be correct because breach of contract does not provide recovery for such damages. Prejudgment interest was held to be unavailable for unliquidated claims, and Stykes’ contractual claims contained “no listing of any kind of what charges were to be incurred for any specific service provided. The invoices gave only a total amount without itemization. What services were provided and what a proper charge was for that service were debatable under the unspecific language of the contract.” Lastly, the Court concluded the contract did not clearly and expressly communicate recovery of attorneys’ fees was available. “[T]he contract use[d] the phrase ‘placed in the hands of an attorney’ or a collection agency but then mention[ed] only ‘all costs of collection.’ Fees, much less attorneys’ fees, are never mentioned.” The case was remanded for a determination if attorneys’ fees were available under a non-contractual basis.

B. RODGER SPARKS v. MICHAEL ROSE

[2023-CA-0062-MR](#)

12/15/2023

2023 WL 8656493

Opinion by THOMPSON, LARRY E; ECKERLE, J. (CONCURS) AND TAYLOR, J. (CONCURS AND FILES SEPARATE OPINION)

The Court of Appeals reversed and remanded a judgment by the circuit court which granted summary judgment in favor of Michael Rose. The trial court ruled that because the parties did not enter into a written contract, there was no valid contract. On appeal, the Court held that the parties' complaint and answer both state that a contract was entered into, that the terms were discussed over text message, that part of the payment was made, and that the contract was performed, although allegedly performed in a substandard manner. The Court held that the parties' words and conduct showed the existence of a valid contract. The Court then discussed the measure of damages for a construction contract and held that, on remand, the trial court should determine the cost of remedying the defect, so long as it is reasonable, in determining damages. The concurring opinion stated that on remand, the trial court should also consider Appellant's substantial performance of the contract, even if the work was not completed to Appellee's satisfaction.

IV. PLANNING AND ZONING

A. JOEL FREDERIC, ET AL. V. CITY OF PARK HILLS BOARD OF ADJUSTMENT, ET AL.

[2022-CA-0867-MR](#)

12/01/2023

2023 WL 8286391

Opinion by ACREE, GLENN E.; DIXON, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellee, Saint John the Baptist, Inc. (Saint John), owns and operates the Our Lady of Lourdes church in Park Hills, Kentucky. Appellees Sheila Burke and the Sheila Burke Trust owned land adjacent to the church. Saint John wanted to construct a grotto behind the church, a portion of which would sit on the Sheila Burke Trust land. The Sheila Burke Trust and Saint John applied for a conditional use permit to construct the grotto behind Our Lady of Lourdes. They also requested a variance for rear and side yard setbacks. The City of Park Hills Board of Adjustment (the Board) approved both the variance request and conditional use permit upon the condition the adjacent land would be deeded to Saint John. Appellants, nearby property owners, appealed the Board's decision to the circuit court. The circuit court affirmed the Board's decision, concluding Appellants had not met their burden of demonstrating the Board acted arbitrarily or outside its regulatory authority.

The Court of Appeals reversed the circuit court. First, it determined the Board acted in excess of its statutory authority by granting the conditional use and variances. While the church did not align with applicable provisions of Park Hills' Zoning Ordinance, it existed prior to its adoption and thus constituted a preexisting nonconforming use. The construction of the grotto would constitute an expansion of the church's nonconforming use. The Board is prohibited by both statute and Park Hills' Zoning Ordinance from enlarging or expanding a nonconforming use that would run afoul of applicable zoning regulations. While Appellees argued minor or modest expansions of preexisting nonconforming uses had been upheld by reviewing courts, Appellees' requested expansion is different in kind and larger in scale than those permissible modest expansions. Because the Court

determined the Board acted in excess of its statutory authority, the Court did not need to reach Appellants' argument that the Board's decision was arbitrary. However, the Court disagreed with Appellants that they were denied due process; Appellant Joel Frederic attended the hearing on the proposed conditional use and setback variance, and he did not demonstrate he was denied the opportunity for cross examination. Further, the Court disagreed with Appellees that preventing construction of the grotto would constitute a violation of the Religious Land Use and Institutionalized Persons Act because such prevention would not constitute a substantial burden upon the Appellees' free exercise of religion.

Judge Donna Dixon concurred in the Opinion prior to her retirement effective November 20, 2023. Release of this Opinion was delayed by administrative handling.

V. WORKERS COMPENSATION

A. GENERAL MOTORS V. THOMAS PAYNE, ET AL.

[2023-CA-0722-MR](#)

12/01/2023

2023 WL 8287133

Opinion by DIXON, DONNA L.; COMBS, J. (CONCURS) AND ECKERLE, J. (CONCURS)

Thomas Payne worked for General Motors (GM) when he fell and injured his legs and sought workers' compensation benefits. One doctor noted Payne walked with an antalgic gait, used an assistive device, and assigned a 20% whole person permanent partial impairment rating using the gait derangement table in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides). Payne walked in and out of the office of another doctor without using his assistive device, accidentally left it behind, and was called to retrieve it. That doctor found no deficits in Payne's range of motion and declined to use the gait derangement table in AMA Guides. That doctor filed two reports and assigned a 2% whole person impairment rating. The administrative law judge (ALJ) adopted findings and the impairment rating assigned to Payne by the first doctor and awarded 6% interest on past due benefits under KRS 342.040. GM's petition for reconsideration was denied and appealed to the Workers' Compensation Board (the Board), which affirmed the ALJ.

GM argued on appeal that the ALJ erred adopting the doctor's opinion that Payne qualified for a 20% impairment rating under the gait derangement table in the AMA Guides, claiming there was no substantial evidence Payne routinely used an assistive device. The Court of Appeals affirmed and held that the testimonies of Payne, the treating physician, and the doctor constituted substantial evidence. The fact that substantial evidence, such as testimony of another doctor, may also support contrary conclusion is immaterial. The Court further reinforced that it could not say the ALJ erred in choosing to rely on the first doctor's impairment rating, based on the AMA Guides, even if not followed to the letter. GM also argued imposing prejudgment interest on the past-due award under KRS 342.040 is an unconstitutionally vague civil penalty. KRS 418.075 requires notice to Kentucky's Attorney General in proceedings involving constitutionality of a statute. Because GM failed to comply with notice requirement, the Court declined to address issue.

Judge Donna Dixon authored the Opinion before her tenure with the Kentucky Court of Appeals expired on November 20, 2023. Release of this Opinion was delayed by administrative handling.