PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JUNE 01, 2022 to JUNE 30, 2022

I. ADMINISTRATIVE LAW

A. *J. M., BY AND THROUGH HIS PARENTS AND GUARDIANS PAULINA MINESINGER AND DANIEL MINESINGER V. OLDHAM COUNTY BOARD OF EDUCATION*

2021-CA-0080-MR 06/17/2022 2022 WL 2182731
Opinion by ACREE, GLENN E.; JONES, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

J.M., a student enrolled in the Oldham County School District appealed the Exceptional Children Appeals Board's (ECAB) final order denying him status as a student with a disability. Pursuant to Kentucky Revised Statute (KRS) 13B.140(1), J.M. appealed this decision to the Oldham County Circuit Court but did so thirty-one (31) days after ECAB rendered its final order. ECAB moved to dismiss the appeal as untimely as KRS 13B.140(1) requires administrative appeals to be filed within thirty (30) days of the administrative agency's final order. J.M. argued his appeal should be heard on the merits despite being filed a day late; however, the Oldham Circuit Court disagreed and dismissed the appeal. J.M. appealed this dismissal, and the Court found no fault in the circuit court's analysis, stating: "with some editing and elaboration, our decision closely parallels the circuit court's order." The Court began by noting "No judicial relief from an administrative agency's order generally exists as a matter of right." *Kentucky Unemp. Ins. Comm'n v. Norman Wilson & Universal, LLC*, 528 S.W.3d 336 (Ky. 2017). Consequently, the Court reasoned where a right to appeal is granted by statute, a party must strictly comply with the statutory scheme in order to exercise those statutory appellate rights. In relying on this rationale, the Court rejected J.M.'s argument that substantial compliance could cure his procedural defect where there existed no statutory authority to do so. The Court reached this conclusion because nothing in the statutory scheme permitted reading substantial compliance into the language of the statute and the Court is without power to rewrite statutes. Additionally, the Court was unpersuaded by J.M.'s argument that an expired Supreme Court order extending filing deadlines for the month of May 2020 should equally apply to J.M.'s appeal in August 2020.

II. CIVIL PROCEDURE

A. *DONNA POWERS V. KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY* **DISCRETIONARY REVIEW GRANTED 02/08/2023**

2020-CA-1011-MR 06/24/2022 2022 WL 2279868
Opinion by CALDWELL, JACQUELINE M.; GOODWINE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The Court of Appeals affirmed an order of the McCracken Circuit Court dismissing Appellant's claims against Fendol Carruthers, Jr. as nullities and denying Appellant's motion to revive said claims against Carruthers's estate. Appellant and Carruthers were involved in a two-vehicle accident. Because Appellant's claimed damages exceeded Carruthers's policy limit, Appellant sought

underinsured coverage from her policy in August 2016. Unbeknownst to Appellant, Carruthers passed away in March 2016. Appellant filed a complaint in April 2018, within the limitations period contained in the Motor Vehicle Reparations Act. However, Appellant did not seek to revive the action as to Carruthers's estate until September 2019. The circuit court ultimately dismissed the complaint and granted Appellee's request for summary judgement, this appeal followed. The Court of Appeals determined that Appellant's efforts to revive the claims as to the estate was outside the Motor Vehicle Reparations Act's two-year statute of limitations and the virtual representation doctrine was incapable of saving Appellant's claims because the doctrine was not intended to protect a party from its own failure to act with due diligence, as had occurred here. Further, the Court held that the underinsured motorist claim must also fail because the underlying claims were null considering Carruthers's death and Appellant's failure to properly revive the action.

III. CRIMINAL LAW

A. ***STEVEN D. ROARK V. COMMONWEALTH OF KENTUCKY***

DISCRETIONARY REVIEW GRANTED 03/15/2023

2017-CA-1665-MR 06/17/2022 2022 WL 2182631Opinion by THOMPSON, KELLY; CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS)

The jury instructions for manufacturing methamphetamine were defective where they allowed conviction for either completed manufacture or precursors/equipment with intent to manufacture, the evidence supported manufacture by either method, and the instructions did not require the jury to agree on one method. The duplicitous instruction allowed for conviction of either instance of the crime on one instruction and did not require unanimity. The jury instructions for possession of methamphetamine were palpably erroneous; they violated double jeopardy where Appellant could have been convicted of possessing the same quantity of methamphetamine he was convicted of manufacturing, and they lacked unanimity as to whether the jury convicted Appellant of possessing the liquid or powdered methamphetamine. Accordingly, Appellant was entitled to a new trial on these charges.

B. ***JOSEPH EBU V. COMMONWEALTH OF KENTUCKY***

2020-CA-0553-MR 06/24/2022 2022 WL 2279734
Opinion by THOMPSON, KELLY; ACREE, J. (CONCURS) AND CALDWELL, J. (CONCURS)

Permanent resident failed to establish ineffective assistance of counsel where counsel advised him if he pled guilty to misdemeanors involving fraud that he could be deported and advised him to consult with an immigration attorney. Under *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010), immigration consequences are not clear and straightforward if the consequences cannot be determined from simply consulting statutes. Therefore, while a federal statute explained that convictions for crimes involving moral turpitude (CIMT) will result in deportation, because counsel could not determine from reading the federal statutes which Kentucky crimes would be categorized as CIMT, counsel was not required to research whether the misdemeanors at issue qualified as CIMT. Counsel provided competent assistance to the permanent resident.

IV. FAMILY LAW

A. ***S. G. V. CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.***

2021-CA-0510-ME 06/03/2022 652 S.W.3d 655
Opinion by CALDWELL, JACQUELINE M.; MCNEILL, J. (CONCURS) AND TAYLOR, J. (CONCURS)

The Court of Appeals affirmed an order of the Warren Circuit Court finding Appellant's child had been neglected. Upon the birth of Appellant's child, Appellant executed a document titled "Power of Attorney for Temporary Delegation of Parental or Legal Custody and Care Pursuant to KRS 403.352 and KRS 403.353" (the POA) which purported to give temporary custody of the child to his maternal grandfather, Appellant's father. That same day, the Cabinet for Health and Family Services (CHFS) filed a Juvenile Dependency, Neglect or Abuse Petition with the circuit court due to Appellant having tested positive for drugs while pregnant and her, and her family's, significant history with CHFS. Appellant filed multiple motions to dismiss the petition arguing she did not have custody of the child at the time the petition was filed. The motion was denied because of the revokable nature of the POA, and the child was adjudged to have been neglected. Appellant then appealed, arguing she could not have been found to have neglected the child because she did not exercise custodial control or supervision of the child because of the POA. The Court rejected this argument holding that a lack of custodial control or supervision does not preclude a finding of neglect against a parent. *Cabinet for Health and Family Services on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 573 (Ky. 2018); *see also* KRS 403.352(8). Because the POA did not prevent a finding of neglect and the circuit court did not otherwise abuse its discretion in determining the child was neglected, the circuit court's order was affirmed.

B. ***LESLIE GERALDS V. JANICE GERALDS***

2021-CA-0667-MR 06/24/2022 2022 WL 2280174
Opinion by THOMPSON, LARRY E.; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)

The Court of Appeals affirmed in part, reversed in part, and remanded an order of the Jefferson Circuit Court which allowed Janice Geralds to reopen a divorce settlement agreement and awarded her additional funds. The trial court held that Leslie Geralds failed to disclose assets during divorce settlement negotiations and this allowed Ms. Geralds to reopen the case pursuant to CR 60.02. The trial court also held that the money Mr. Geralds received upon his retirement which was not disclosed during the divorce, was part of his retirement package and Ms. Geralds was entitled to a percentage. The Court of Appeals affirmed the trial court's judgment that the case could be reopened pursuant to CR 60.02, but reversed as to the award of additional funds. The Court of Appeals found that the additional funds Ms. Geralds was seeking came from compensation Mr. Geralds earned when he signed a noncompetition agreement when he retired from his employment. The Court held that the money Mr. Geralds received for signing the noncompetition agreement was income earned on the date he signed the agreement, which occurred many years after the divorce; therefore, it was not a

part of his regular deferred compensation retirement plan and the trial court erred in awarding her a percentage.

V. STATUTES OF LIMITATION

A. ***SAMANTHA KILLARY V. LINDA THOMPSON, ET AL***

DISCRETIONARY REVIEW GRANTED 12/07/2022

2020-CA-0194-MR 06/24/2022 2022 WL 2279865
Opinion by CALDWELL, JACQUELINE M.; MCNEILL, J. (CONCURS) AND MAZE, J. (DISSENTS AND FILES SEPARATE OPINION)

The Court of Appeals reversed and remanded an order of the Jefferson Circuit Court dismissing Appellant's claims on the basis that the applicable statute of limitations had run. Appellant filed a civil complaint in May 2018 seeking damages for sexual abuse by her adoptive father and, allegedly, her adoptive father's girlfriend and her adoptive grandfather. Appellant also named Louisville Metro Police Department (LMPD) as all the alleged abusers were police officers. LMPD claimed governmental immunity prevented Appellant's suit against it, while the remaining Appellees argued the statute of limitations had run. The circuit court dismissed the case and appeal followed. The Court held the trial court erred in not applying the 2017 version of KRS 413.249 to Appellant's claim against her adopted father, making that claim timely, and remanded the matter for consideration on the merits. The Court determined that the issue of retroactivity of the 2017 version of the statute was a red herring because at the time Appellant filed her action, the 2017 statute was in effect and provided a new triggering event to Appellant, with a statute of limitation of "ten (10) years from [the date of the stepfather's] conviction, which was finalized with his sentencing in 2018." The Court further remanded with instructions for the circuit court to consider whether the 2021 amended statute, which the Court held did apply retroactively, provides for suit against LMPD as an "entity," where governmental immunity has been waived, and for consideration of whether Appellant's adoptive grandfather or adoptive father's girlfriend "failed to act as a reasonable person . . . in complying with their duties to the victim."