**PUBLISHED OPINIONS**

**KENTUCKY COURT OF APPEALS**

**SEPTEMBER 01, 2020 to SEPTEMBER 30, 2020**

## I. COUNTIES

### A. ***CITY OF STANFORD, KENTUCKY ACTING THROUGH THE STANFORD WATER AND SEWER COMMISSION, ET AL VS LINCOLN COUNTY, KENTUCKY, ET AL***

2019-CA-1247 09/11/2020 2020 WL 5491862 Released for Publication

Opinion by THOMPSON, LARRY E; COMBS, J. (CONCURS) AND KRAMER, J. (CONCURS)

The Court of Appeals affirmed a judgment which concluded that an ordinance adopted by the Lincoln County Fiscal Court was lawful. The ordinance imposed a $4.00 fee on all active water service within the county in order to help fund emergency 911 services. The ordinance required any entity operating a water distribution system within Lincoln County to collect the fee from water customers and remit it to Lincoln County. The Court of Appeals held that KRS 96.170, which allows a legislative body of a city to offer water to its residents and fix the price of said water, is not an exclusive grant of authority over water prices. The Court held that it was a general grant of authority and that nothing in the statute prohibited another governmental entity from adding a tax or fee to water bills so long as the tax or fee was authorized by statute. The Court further held that KRS 65.760 and KRS 67.083 authorized the fiscal court to collect a fee from water customers. KRS 65.760 allows the county to establish and fund the 911 services, and KRS 67.083 grants a fiscal court authority to enact ordinances to provide and finance certain governmental services.

## II. CRIMINAL LAW

### A. ***ANTONIO GORDON VS COMMONWEALTH OF KENTUCKY***

2019-CA-1429 09/11/2020 2020 WL 5491890 Released for Publication

Opinion by GOODWINE, PAMELA R; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellant challenged an order denying his motion to amend his judgment and sentence following a guilty plea. No written motion was filed by either appellant or the Commonwealth. Rather, the Commonwealth sent an e-mail to the circuit court requesting the matter be placed on its docket after discovering both parties made a mistake regarding parole eligibility. Without the benefit of a written motion, the hearing was confusing and without particularity, providing no basis for appellate review. The circuit court denied appellant's request. Appellant appealed. The Court of Appeals dismissed the appeal, finding that appellant was not properly before the Court. No formal motion had been filed and the circuit court provided no basis for denying appellant's request. The Court noted that had the circuit court required the parties to file a formal motion rather than allowing a matter to be placed on its docket via e-mail, appellant likely would have received a just result. Instead, precious time and resources were wasted with a futile appeal. The Court remanded the matter back to the circuit court for the parties to file a CR 60.02 motion and for the circuit court to consider same.

## III. DISSOLUTION OF MARRIAGE

### A. ***VALARIE ANN NARAMORE VS DAVID DOWNEY NARAMORE***

2019-CA-0939 & 0992 09/11/2020 2020 WL 5491877

Opinion by JONES, ALLISON E.; COMBS, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Valarie Naramore filed for dissolution of her marriage to David Naramore. The only issues for the family court to decide were property division, spousal maintenance, and attorney's fees. The parties were referred to a Domestic Relations Commissioner, who conducted an evidentiary hearing. The DRC heard testimony relating to Valarie's physical and mental conditions, her anticipated expenses after she planned to move to Oklahoma City, David's 401(k)s and pensions, and the parties' real and personal property. Valarie requested an open-ended maintenance award of $3,550. The DRC concluded Valarie was unable to work and unable to meet her reasonable needs through her employment and did not believe it was appropriate to exhaust her portion of the 401(k)s and the pensions to meet her needs. The DRC recommended that David pay Valarie $1,500 per month until she remarries, cohabitates, or is of the age to receive Social Security disability, or until further orders of the court should Valarie qualify at an early age for Social Security disability. The family court accepted the DRCs recommendations and incorporated them into its final decree. David conceded that Valarie was entitled to maintenance. The Court of Appeals evaluated the maintenance award in light of the recommendation that Valarie's expenses were reasonable. The Court agreed with the DRC that retirement accounts should not be considered a readily available source of income to meet present day, preretirement-age needs. Should Valarie obtain Social Security disability, that would not require a reduction or elimination of maintenance. The Court noted that Valarie will likely be unable to find employment due to her mental and physical conditions and that Valarie and David lived a comfortable, middle-class lifestyle. However, the Court further noted that the maintenance award of $1,500 and Valarie's reasonable expenses of $3,550 left her with a $2,050 shortfall each month. The family court offered no explanation for the disparity, nor did it consider whether David could pay more maintenance to Valarie. The Court agreed that Valarie should have been awarded more maintenance and that the amount awarded was a clear abuse of discretion. Additionally, the family court's order that maintenance cease when Valarie is of the age to receive Social Security was arbitrary. Consequently, the Court of Appeals vacated and remanded.

**B. *MAUREEN O'MEARA HOLLAND VS JOHN ELKAN HERZFELD III***

2019-CA-1116 09/25/2020 2020 WL 5848888 Ordered Published 10/02/2020

Opinion by CLAYTON, DENISE G.; TAYLOR, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant challenged two orders denying her motion to modify or terminate her maintenance obligation to her former husband. The obligation was set forth in a property settlement agreement that had been incorporated into the final decree of dissolution of marriage. The Court of Appeals affirmed, first noting that the PSA set forth that any modification of the spousal maintenance award to appellee would be governed by the maintenance modification statute (KRS 403.250). Thus, the circuit court applied the correct legal standard of changed circumstances and unconscionability in assessing whether modification or termination of maintenance was warranted. The Court then held that substantial evidence supported the circuit court's finding that appellee's continued receipt of maintenance under the terms of the PSA had not become unconscionable.

## IV. OPEN RECORDS

### A. ***NATHANIEL PARISH VS KAITLYNN PATRICE PETTER, ET AL***

2019-CA-1615 09/04/2020 2020 WL 5266145 Released for Publication

Opinion by MAZE, IRV; ACREE (CONCURS) AND COMBS (CONCURS)

This case stems from an interpersonal protective order. Appellant sent a request under the Open Records Act (KRS 61.870, *et seq.*) to the Lexington-Fayette Urban County Government for body camera video of police investigating appellee's sexual assault allegations against appellant on the night of the subject incident. LFUCG denied the request for the video, citing the law enforcement exemption (KRS 61.878(1)(h)). Instead of challenging the denial, appellant sent a notice to take deposition and subpoena duces tecum to LFUCG in the IPO civil action to produce the video. LFUCG responded by treating the subpoena as a request under the ORA and stated, absent a court order, the video was exempt from disclosure pursuant to KRS 61.878(1)(h). Appellant then moved the circuit court to order LFUCG to produce the video. The circuit court denied appellant's motion, claiming he did not follow the statutory procedures to challenge an ORA denial by asking the Attorney General to review the matter (KRS 61.880) or by filing an original action in circuit court (KRS 61.882). The IPO hearing proceeded without the video being produced and the trial court granted appellee's petition. On appeal, the Court of Appeals disagreed with the circuit court's order denying appellant's motion to compel the video. The Court held that, as a party in a civil proceeding, appellant did not need to challenge the denial of his ORA request before seeking the video through discovery. A party to litigation may seek public records from a nonparty public agency through discovery requests, including a notice to take deposition and subpoena. If the nonparty public agency objects, then the trial court must determine whether the records are discoverable or not in that case. This evaluation is independent of whether the party seeking to compel discovery is also a requester of public records under the ORA. The Court also questioned LFUCG's decision to treat a subpoena as a request under the ORA, as LFUCG noted it had denied previous requests for body camera videos in a similar fashion. The Court held that a public agency's response to a subpoena should be independent and separate from its response to an ORA request. The reason for objecting to a subpoena should be based on the rules of discovery and not based on the ORA. However, although the circuit court erred in failing to evaluate appellant's motion pursuant to the Rules of Civil Procedure, the Court concluded that this was harmless error considering the evidence supporting entry of the IPO against appellant. Therefore, the Court affirmed.

## V. PROPERTY

### A. ***ORPHA BISHOP VS S.T. BROCK, ET AL***

2019-CA-0367 09/18/2020 2020 WL 5580518

Opinion by ACREE, GLENN E.; COMBS, J. (CONCURS) AND MAZE, J. (CONCURS)

This case arose from a property dispute. The circuit court found that appellees acquired appellant's gravel road by adverse possession. Appellant asked the Court of Appeals to review the ruling because appellees had a mistaken belief all along that the property belonged to them. The Court held that appellees could adversely possess land they mistakenly thought was theirs and affirmed the circuit court's ruling. Ultimately, the claimant's intention is the controlling factor and where he takes possession under the "mistaken" belief that the land is his, and he evinces no intention of surrendering the disputed portion, he is holding adversely.

## VI. TRIALS

### A. ***JENNIFER FORD M.D. VS BAPTIST HEALTH MEDICAL GROUP, INC. D/B/A BAPTIST NEUROLOGICAL SURGERY, ET AL***

2017-CA-1656 09/11/2020 2020 WL 5491045

Opinion by LAMBERT, JAMES H.; MAZE, J. (CONCURS) AND TAYLOR, J. (CONCURS)

The appeal was taken from a medical negligence claim in which the jury returned a verdict in favor of the defense. The Court of Appeals affirmed, rejecting appellant's arguments that (1) the circuit court failed to strike three jurors for cause, forcing appellant to use peremptory strikes to eliminate them from the jury pool; (2) the circuit court erred in permitting appellee to present an implicit comparative negligence defense after granting summary judgment on the issue; and (3) the circuit court erred in permitting appellee to advise the jury panel during *voir dire* that appellant bore the burden of proof and to describe that burden. Regarding the first issue, the Court originally did not consider appellant's argument on the merits due to a lack of preservation because she did not identify the names of the jurors who should have been stricken for cause on the strike sheet pursuant to *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009). However, the Supreme Court of Kentucky granted discretionary review on this issue and remanded the case for further consideration in light of its recent decision in *Floyd v. Neal*, 590 S.W.3d 245 (Ky. 2019). The Court agreed with appellant that *Floyd* only prospectively overruled the Supreme Court's earlier opinion in *Sluss v. Commonwealth*, 450 S.W.3d 279 (Ky. 2014), which permitted substantial compliance with the preservation rule by orally stating on the record which jurors would have been stricken for cause. Because *Sluss* was still applicable when Ford orally identified the jurors on the record, the Court of Appeals held that the issue was preserved for review. On the merits, the Court held that appellant did not establish a close relationship between the jurors in question and appellees or any bias to justify reversal on this issue. Regarding the other two issues, the Court held that the second issue lacked merit because appellant's argument was conclusory and unsupported by legal authority, and it declined to address the third issue on the merits because appellant waived the issue for purposes of appellate review.

### B. ***JORDAN CURTIS VS PRICE HOLDINGS, INC. D/B/A FRANKLIN DRIVE-IN***

2018-CA-1777 09/04/2020 2020 WL 5264772

Opinion by ACREE, GLENN E.; COMBS (CONCURS) AND MAZE (CONCURS)

Appellant slipped and fell at a drive-in theater owned by appellee. As part of routine maintenance, appellee repaved the area where appellant fell. After a jury verdict in favor of the theater owner, appellant asked the Court of Appeals to review two of the circuit court's rulings: (1) excluding evidence of appellee's subsequent remedial measures as not fitting an exception to KRE 407, and (2) failing to give a missing evidence instruction. Appellant claimed appellee controverted the feasibility of the precautionary measures and that proof of subsequent remedial repairs should have been allowed to refute that testimony. Appellant also argued the evidence would impeach the credibility of appellee's owner's testimony that no one knew where appellant fell. The Court of Appeals affirmed the circuit court's ruling. Appellee's owner did not testify that additional precautionary measures were unfeasible and did not testify that the location of the fall could not be identified; the record showed the appellee's owner's testimony and his own photographs established the approximate area where appellant fell and that the ground may have been disturbed there before she fell. Although he believed he had done all he could to assure safety, he testified that it was not perfect. The Court also affirmed the circuit court's refusal to give a missing evidence jury instruction, holding: (1) appellant did not put appellee on notice to preserve the ground as it was on the night of her fall; (2) sufficient evidence was submitted (testimony and photographs) to establish the condition of the ground on the night of the fall; and (3) appellee's repairs were made in the normal course of maintenance procedures. Accordingly, there was no evidence of spoliation.

## VII. TRUSTS

### A. ***SUSAN BEWLEY INDIVIDUALLY, ET AL VS DEBORAH FAYE HEADY INDIVIDUALLY, ET AL***

2019-CA-1625 09/25/2020 2020 WL 5739752

Opinion by KRAMER, JOY A.; ACREE, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Gloria Frances Dorris and Larry Russell Dorris were married to one another, but later divorced. Evidence suggests that subsequently Larry murdered Gloria and then took his own life shortly thereafter. Gloria's estate later sued Larry's estate for wrongful death. Additionally, her estate sought to impose a "constructive trust" upon assets that had been available to Larry during his lifetime, but which had passed outside the probate process upon his death (the "non-probatable assets"). Thus, Gloria's estate joined the recipients of those assets as defendants in its suit. With respect to Gloria's estate's request for a "constructive trust," the recipients moved to dismiss for failure to state a claim upon which relief could be granted. The circuit court, agreeing, entered judgment in their favor. Affirming, the Court of Appeals explained that while constructive trusts may be imposed as a remedy associated with claims of fraud, breach of confidence, breach of fiduciary duty, or unjust enrichment, Gloria's estate had conceded in its pleadings that the recipients had not committed any wrong and had not acquired the non-probatable assets through any "unconscientious manner" involving fraud, breach of confidence, or breach of fiduciary duty. Moreover, while a slayer's acquisition, enlargement, or accelerated possession of an interest in property because of the victim's death constitutes unjust enrichment that the slayer will not be allowed to retain, the recipients here were not unjustly enriched at anyone's expense. Gloria never had any interest in the non-probatable assets, and those assets were not any form of profit from her death.