

**PUBLISHED OPINIONS  
KENTUCKY COURT OF APPEALS  
JULY 1, 2022 to JULY 31, 2022**

**I. ADMINISTRATIVE LAW**

**A. IOLA CAPITAL, ET AL. V. PUBLIC SERVICE COMMISSION OF KENTUCKY, ET AL.  
AND BERNHEIM ARBORETUM AND RESEARCH FOREST V. LOUISVILLE GAS AND  
ELECTRIC COMPANY, ET AL.**

[2020-CA-1394-MR](#)

07/15/2022

2022 WL 2760664

[2020-CA-1395-MR](#)

Opinion by THOMPSON, KELLY; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellants appealed the dismissal of their complaints against the Kentucky Public Service Commission (Commission) challenging the issuance of a certificate of public convenience and necessity (CPCN) to Louisville Gas and Electric (LG&E) allowing the construction of a natural gas pipeline on the Appellants' land and paving the way for LG&E to file a condemnation action. The Appellants argued on appeal that LG&E was required to file a separate stand-alone application for a CPCN, and the circuit court erroneously dismissed the case for lack of subject matter jurisdiction. They further argued they were denied statutory due process rights by the Commission's failure to provide them with notice, a hearing, and intervention before the issuance of the CPCN. The Court reversed the Franklin Circuit Court's finding that it lacked subject matter jurisdiction on the grounds that the Appellants met the definition of a "party" under 807 KAR 5:001 Section 1(10)(a). However, the Court affirmed the circuit court's other findings and reasoned that the issuance of the CPCN was permissible without a separate stand-alone filing due to LG&E's sufficient compliance via amended filing of its rate increase application. The Court further held that there was no statutory due process violation because the legislature did not intend to provide landowners with notice, hearing, and intervention rights prior to the filing of condemnation proceedings. The Court noted that, while this was problematic, it could not extend these rights to the Appellants through judicial remedy and would instead require legislative action. The Court further ruled that the Appellants could not seek a "work-around" remedy via an administrative complaint and determined that the Commission operated within its discretion by dismissing the complaint on its finding that the Appellants failed to sufficiently articulate specificity as to the cost and danger of the pipeline's construction. The Commission was further found to have not acted arbitrarily in violation Section 2 of the Kentucky Constitution. In conclusion, the Court noted that its opinion "should not disturb or be given precedential effect in the ongoing condemnation proceedings."

**II. CONTRACTS**

**A. D.W. WILBURN V. H&H PAINTING, LLC**

[2020-CA-0919-MR](#)

07/01/2022

2022 WL 2374995

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

In a direct appeal from an award of damages to the Appellee, the Court of Appeals affirmed the trial court. Appellee, a former subcontractor for the appellant, was awarded damages relating to the Appellant's breach of two contracts for professional painting services in 2009-2010. After a jury initially found the appellant had breached its contracts and the former trial judge granted a judgment notwithstanding the verdict, the case was appealed to this Court twice on issues regarding how much Appellee was owed in damages.

In the appeal, the Appellant presented five issues: (1) Appellee failed to present evidence upon which damages could be determined with reasonable certainty; (2) the trial court should not have awarded damages relating to payroll; (3) the trial court erred when it failed to deduct material costs, specifically paint, from the award of damages; (4) the trial court's award of damages exceeded the amounts claimed by the Appellee in interrogatories, violating CR 8.01(2) and *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999); and (5) the trial court abused its discretion in awarding prejudgment interest to the Appellee.

The Court considered the first and second issues to be similar attacks upon the sufficiency of the evidence before concluding that (1) mere uncertainty of the amounts will not operate to thwart an award of damages, and (2) the trial court properly considered payroll in determining the value of Appellee's labor in a *quantum meruit* analysis of the damages. Similarly, the Court concluded the trial court did not err when it determined the costs of paint under the contract were not applicable when damages were based on the value of unpaid labor, and in any event the issue was not properly preserved. Regarding the *Fratzke* issue, the Court held the trial court did not err when it determined the Appellant had waived *Fratzke* by failing to preserve the issue in previous proceedings. Furthermore, the Court determined the *Fratzke* issue was not properly preserved. Finally, the Court determined that the trial court did not abuse its discretion in awarding prejudgment interest as a matter of equity on unliquidated damages.

**B. PSC INDUSTRIES, INC. V. TOYOTA BOSHOKU AMERICA, INC.**

[2022-CA-0149-I](#)

07/22/2022

2022 WL 2898988

Opinion by CLAYTON, DENISE; DIXON, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

The Appellant sought interlocutory relief under CR 65.07 compelling the parties to submit to arbitration after the Kenton Circuit Court ruled that the "knockout rule" applied on the matter concerning the fulfillment of orders for automotive parts between the parties. On appeal, the central question before the Court was whether the parties had a binding arbitration agreement. The Court ruled there was such an agreement and reversed the lower court, reasoning that the "knock out" rule under KRS 355.2-207 was inapplicable to the underlying facts. The Court found that there was a written agreement between both parties based on the existence of signed framework letter agreements for each transaction which contained arbitration clause provisions and language negating any previous proposals or offers.

**III. CRIMINAL LAW**

**A. RONNIE MEADOWS V. COMMONWEALTH OF KENTUCKY**

[2021-CA-0457-MR](#)

07/15/2022

2022 WL 2760475

Ronnie Meadows was released on parole in 1975 before he committed murder, burglary, and theft. He was separately indicted and tried on these counts. In 1977, Meadows was tried and found guilty of murder and sentenced to death. However, the Kentucky Supreme court set aside the death sentence and directed the trial court to impose a sentence of life imprisonment. Meadows pleaded guilty to three counts of theft by unlawful taking, receiving a total sentence of 15 years imprisonment. He was separately convicted of burglary, for which he received a 10-year sentence. The trial court directed that the theft and burglary sentences run consecutively with each other, and consecutively with the life sentence imposed on the murder conviction.

Following a number of unsuccessful motions for post-conviction relief, Meadows moved for relief pursuant to CR 60.02. Based on the holding of *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1993), Meadows argued that the trial court was not authorized to run his term sentences consecutively to his life sentence. The circuit court denied the motion, concluding that Meadows' motion was not timely and that it could not apply the holding in *Bedell* retroactively.

The Court of Appeals affirmed, but on different grounds. First, the Court held that Meadows' motion was not untimely because he alleged that the sentence imposed was illegal. Second, the Court found that the holding in *Bedell* must be applied retroactively because it was based on a new interpretation of an existing sentencing statute, rather than a new rule of constitutional or procedural law. But the Court concluded that Meadows' sentences fell under an exception to the *Bedell* holding as enumerated in *Stewart v. Commonwealth*, 153 S.W.3d 789 (Ky. 2005) and several other unpublished opinions. *Stewart* and the other cases held that term sentences may be run consecutively to a life sentence when the sentences were imposed in separate cases and arose from separate and distinct crimes. Since Meadows' term sentences were imposed under separate indictments, the Court held that the trial court was authorized to run those sentences consecutively to his life sentence. Accordingly, the Court found that the circuit court did not abuse its discretion by denying Meadows' motion for relief under CR 60.02.

#### IV. FAMILY LAW

##### A. T.G.-F. V. J.Y., ET AL.

[2021-CA-1480-ME](#)

07/08/2022

2022 WL 2541916

Opinion by ACREE, GLENN E.; CETRULO, J. (CONCURS IN RESULT ONLY) AND L. THOMPSON, J. (CONCURS)

The Estill Circuit Court granted Aunt and Uncle's petition to adopt Child without Mother's consent, thereby terminating Mother's parental rights to Child. While nothing in the record demonstrates the Estill Circuit Clerk sent copies of the adoption petition to the Cabinet for Health and Family Services (Cabinet) as required by KRS 199.510(1), the fact remains the Cabinet did not participate in the adoption in any manner. Mother appealed, in part arguing the circuit court failed to strictly comply with the adoption statutes. The Court agreed with Mother, concluding the circuit court committed reversible error by proceeding with the adoption without the Cabinet's participation. The Court held Kentucky's adoption statutes require Cabinet participation in every adoption in one of two forms. KRS 199.510 requires the Cabinet or a designee either to perform an investigation and report "not

later than ninety (90) days from the placement of the child or ninety (90) days after the filing date of the petition, whichever is longer,” or “within ten (10) days of receipt of the petition [to] notify the court of its inability to conduct the investigation.” KRS 199.510(1)–(2). The Court rejected Aunt and Uncle’s argument that KRS 199.470(4)(a), dealing with pre-petition Cabinet participation, authorizes the circuit court discretion to proceed with no Cabinet participation when adoption petitions are brought by certain members of a proposed adoptive child’s family, including aunts and uncles. Rather, the Court addressed the legislative history of KRS Chapter 199 and concluded that, when the Cabinet declines to investigate and report or fails to comply with KRS 199.510 in an adoption by persons identified in KRS 199.470(4)(a), that provision authorizes the circuit court to direct the Cabinet to investigate and report. Because the circuit court failed to strictly comply with the adoption laws, the Court of Appeals vacated the adoption and remanded for further proceedings; Mother’s other arguments were moot.

**B. T.C., ET AL. V. CABINET FOR HEALTH AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY, ET AL.**

[2021-CA-0441-ME](#)

07/22/2022

2022 WL 2898488

[2021-CA-0445-ME](#)

[2021-CA-0446-ME](#)

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

Appellants, T.C. and J.C. are the natural parents of three children. Based upon allegations of dependency/neglect or abuse, Appellee Cabinet, initiated petitions for the removal of the children. The children were removed and placed in the temporary custody of the Cabinet. The Cabinet then placed them in two separate foster homes. The Cabinet continued to work with the family, with reunification as the goal. Although the natural parents did not immediately complete their case plans, they consistently made progress. Each time their cases were reviewed, the Cabinet and the family court agreed that reunification remained the goal. However, the foster parents moved to intervene in the dependency actions, seeking custody. Leave to intervene was granted, and the family court awarded temporary custody to the foster parents who then filed separate custody actions. The family court ordered the dependency cases to be closed and directed that all future motions be filed in the custody actions.

The Court of Appeals found that the family court had abused its discretion by directing the Cabinet to close its files on the dependency cases, as such an order violated the separation of powers provided for in Kentucky Constitution §§ 27 and 28. The Court of Appeals further found that the foster parents lacked standing to seek custody as either *de facto* custodians as defined in KRS 403.270 or as “persons acting as parents” as described in KRS 403.800(13). The Court of Appeals reversed and remanded the cases to the family court on the grounds that the family court abused its discretion in awarding temporary custody to the foster parents as it lacked statutory authority to do so under the dispositional alternatives provided in KRS 620.140 and had failed to make the findings of fact that the factors set forth in both KRS 403.270 (2) (a) – (k) and KRS 620.023 (1) and (2) had been met.

## V. PROPERTY LAW

### A. **PENNYMAC LOAN SERVICES, LLC V. MARK LYLES, ET AL.**

[2021-CA-0988-MR](#)

07/15/2022

2022 WL 2760348

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

In 2014, Matthew Lyles executed a note and a mortgage on real property located in Bullitt County, Kentucky. The mortgage was subsequently assigned to PennyMac. On September 4, 2014, PennyMac filed a complaint alleging that Matthew had defaulted on the note and seeking to foreclose on the property. However, Matthew died prior to service of the summons and complaint. PennyMac filed an amended complaint naming Matthew's parents, (the Lyles), his heirs at law. But it did not name the Administrator of his estate. The Lyles moved for a dismissal under KRS 395.278, arguing that PennyMac failed to revive the action against Anna Lyles in her capacity as personal representative of Matthew's estate. The Lyles also asked the trial court to release the mortgage. The trial court granted all of these motions.

The Court of Appeals reversed, holding that KRS 395.278 did not require PennyMac to substitute the estate as a party. The Court first noted that the real property passed to the heirs at law without the need for probate. Consequently, the Lyles were the proper real parties in interest for the foreclosure claims. And second, the Court held that KRS 395.278 did not require revival of the action because Matthew was never served with process prior to his death. As a result, the trial court never obtained personal jurisdiction over him, and revival was not necessary. Finally, the Court noted that, even if revival had been necessary in this case, then there would have been no real party in interest to seek release of PennyMac's lien. But since PennyMac properly asserted the reformation and foreclosure claims against the Lyles, the Court held that the trial court had no basis to order PennyMac to release its lien against the subject property.

## VI. TORTS

### A. **CHARLOTTE A. HOWARD, ET AL. v. THE CITY OF ELIZABETHTOWN KENTUCKY, ET AL. AND JEREMY STUBBS V. CHARLOTTE A. HOWARD, ET AL.**

[2020-CA-0124-MR](#)

07/01/2022

2022 WL 2376258

[2020-CA-0133-MR](#)

Opinion by MCNEILL, J. CHRISTOPHER.; CALDWELL, J. (CONCURS) AND MAZE, J. (CONCURS)

The Court of Appeals affirmed an order of the Hardin Circuit Court dismissing Appellants' claims on summary judgment. Appellants sought damages in relation to a personal injury action resulting from an errant softball that was hit during a tournament held at a public park which struck and shattered the passenger side window of a passing vehicle containing the Appellants. In the initial complaint filed on August 26, 2014, the Appellant named the City of Elizabethtown (city) and the softball team, Kentucky Kaos (the softball team), among the defendants alleged to be liable. The circuit court dismissed the claims filed against the city on the grounds that the Kentucky Recreational Use Statute,

KRS 411.190, barred the asserted claims against it. The claims against the softball team were also dismissed after it was argued that it was an unincorporated association incapable of being sued.

An amended complaint was ultimately filed on January 23, 2017 naming two individuals, Steven Widmer (Widmer), and Jeremy Stubbs (Stubbs), as liable parties. Widmer helped purchase liability insurance for the event and Stubbs was the softball team coach. Widmer was granted summary judgment on a finding the claims did not relate back to the original complaint and were thus barred by the statute of limitations. Stubbs was denied summary judgment on his asserted statute of limitations defense but ultimately granted summary judgment denying the Appellants' *res ipsa loquitur* claims. On appeal, the Appellants asserted that dismissal of the city and the softball team was erroneous due to the fact that the injuries were sustained outside the city-owned property from on-site recreational activities the Appellants were not engaged in and due to an asserted factual dispute over the unincorporated status of the softball team. The Appellants also sought to reverse the summary judgments made in favor of Widmer and Stubbs.

Stubbs initiated a cross-appeal seeking to challenge the denial of summary judgment on his statute of limitations claim. The Court held the trial court's rulings were proper because KRS 411.190 immunized the city from liability based on the statute's plain language which covered all injuries from recreational activities both occurring on the premises and caused by participants thereon. Both the complaint and the response specifically identified the softball team as an unincorporated entity, and the response further stated that it was "not a legal entity doing business" within the state thus further supporting the lower court's findings. The trial court's summary judgment order on the running of the statute of limitations was upheld on the basis that the Appellants failed to offer any substantive argument and instead only asserted an unsupported position that the trial court could not conduct an evidentiary hearing on a motion for summary judgment. The Court further affirmed the summary judgment denying the Appellants' *res ipsa loquitur* claims because no evidence supported the contention that Stubbs had control over the cause of the injury. The Court deemed Stubbs' cross-appeal to be moot based on his entitlement to summary judgment on the *res ipsa loquitur* issues.

**B. WILLIAM N. TIPTON, ET AL. V. ST. JOSEPH HEALTH SYSTEMS, INC., ET AL.**

[2021-CA-0985-MR](#)

07/08/2022

2022 WL 2541827

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

William N. Tipton and Joann K. Tipton appeal an order of the Fayette Circuit Court summarily dismissing various civil claims asserted against the above-referenced appellees. Each of the Tiptons' claims sought to hold Leslie Little directly liable for damages and St. Joseph Health Systems, Inc., and CHI National Home Care indirectly liable based on being exposed to and subsequently contracting COVID-19. What the Tiptons asserted against the appellees was an array of what KRS 39A.275 deems "COVID-19 claims." Additionally, the Tiptons argued that KRS 39A.275 is unconstitutional because it is "special legislation" and violates the jural rights doctrine. The Court of Appeals affirmed the trial court, holding that the appellees were entitled to qualified official immunity under KRS 39A.275; that the statute is not "special legislation" and does not violate the jural rights doctrine.