

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MARCH 01, 2021 to MARCH 31, 2021

I. ADOPTION

A. T.R.F. v. D.A.H, ET AL.

[2020-CA-0225, 2020-CA-0226](#) 03/19/2021 2021 WL 1045720

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

D.A.H (Stepfather) petitioned to adopt his two stepdaughters, against the consent of T.R.F. (Biological Father). Biological Father was abusive towards Mother in front of the children. Mother filed for and was granted sole custody in Clark County, Indiana, and Biological Father was given supervised visitation. His supervised visitation was suspended when he failed to comply with the Indiana court's directives. In 2018, Stepfather petitioned for adoption without consent of the biological father. Biological Father moved to dismiss based on lack of subject matter jurisdiction. The family court denied this motion and ultimately granted Stepfather's petitions for adoption, applying the termination of parental rights statute. Biological Father argued the family court lacked subject matter jurisdiction because this was in essence a termination of parental rights, which is still governed by the Uniform Child Custody Jurisdiction and Enforcement Act. Adoptions are explicitly excluded from the UCCJEA under KRS 403.802. The Court of Appeals held that the fact the adoption would terminate Biological Father's parental rights would not convert the adoption into a parental termination proceeding. Therefore, the family court had jurisdiction over the proceeding. Additionally, even though the family court mischaracterized this as a termination of parental rights proceeding, and not an adoption without consent, the Court reviewed the family court's findings and conclusions for strict compliance with the adoption statutes. Stepfather complied with all requirements, to wit: (1) jurisdictional requirements; (2) conditions outlined in 199.502; (3) that he is of good moral character, of reputable standing in the community, and of ability to properly maintain and educate the children; and (4) the best interest of the children will be promoted by the adoption and the children are suitable for adoption. Biological Father had abandoned the children, had not provided the children with food, shelter, medical care, or educational necessities, and had continuously or repeatedly inflicted or allowed to be inflicted emotional harm upon the children by other than accidental means. Biological Father argued there was no proof that he actually abused the children. The Court reiterated adoption without consent does not require all the elements of the termination of parental rights statute be satisfied, specifically that the children had been abused or neglected. The Court of Appeals affirmed the judgments of adoption entered by the family court.

II. INSURANCE

A. DARWIN NATIONAL ASSURANCE COMPANY (NOW KNOWN AS ALLIED WORLD SPECIALTY INSURANCE COMPANY) v. KENTUCKY STATE UNIVERSITY

[2019-CA-1811](#) 03/19/2021 2021 WL 1045716

Opinion by MAZE, IRV; LAMBERT, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant, Allied World, issued a claims-made-and-reported policy to Kentucky State University (KSU), which required that a claim occurring during the coverage period be reported no later than ninety days after coverage ended. KSU reported a claim to Allied World ninety-three days after coverage ended. Allied World denied coverage. KSU brought a third-party complaint against Allied World for coverage, among other claims. KSU argued it substantially complied with the policy requirements, while Allied World argued KSU failed to meet the policy requirements. The circuit court granted summary judgment to KSU, holding the notice-prejudice rule applied. Because Allied World was not prejudiced by receiving notice of a claim three-days late, the court held KSU was entitled to coverage. Allied World appealed. The Court of Appeals reversed the circuit court. Following *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798 (Ky. 1991) and public policy considerations, the Court held that, because the policy was unambiguous, the notice-prejudice rule did not apply to this claims-made-and-reported policy.

III. RESTITUTION

A. ANDREW MCMICHAEL v. COMMONWEALTH OF KENTUCKY

[2020-CA-0515](#) 03/19/2021 2021 WL 1045482

Opinion by DIXON, DONNA L.; ACREE, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Andrew McMichael pled guilty to theft by unlawful taking, over \$500 but less than \$10,000, for removing stainless steel siding from a dilapidated modular diner. The siding was scrapped for \$150. At the restitution hearing, the owner testified he bought the diner in 1991 for \$25,000, and it was subsequently moved and stored outside. The trial court ordered McMichael to pay the Commonwealth's estimate to replace the stainless steel in the amount of \$62,493. The Court of Appeals noted that Kentucky's restitution statutes give little guidance on how restitution is to be determined. The Commonwealth bears the burden of establishing the validity of the restitution claim and amount of restitution by a preponderance of evidence. Here, the owner offered no testimony to verify his estimate of the value of the diner or its siding. The only shred of evidence presented by Commonwealth as to the value of the metal came through an estimate to replace sheet metal on the unusable diner for over \$62,000—more than

double what the owner paid in 1991 for the entire diner. The Court noted there was no evidence of the current value of the diner or of the stainless steel at the time it was taken. The Court determined due process requires evidence sufficiently detailed and reliable to establish a fair restitution computation. The Court further held the trial court's measure of damages offended general principles of damages law because an award of \$62,493 to the owner in restitution created an impermissible windfall, going far beyond compensating for that which the victim was wrongfully deprived. It was clear error for trial court to award such amount of restitution. Reversing and remanding, the Court held the difference in value of the diner immediately preceding and following removal of the siding should be determined and serve as cap on amount of restitution, and the trial court must consider the value of the recovered siding in determining a restitution award. Additionally, the trial court failed to comply with KRS 532.033, which requires restitution orders provide to whom restitution payments should be made, how much payments should be, and when they should be made.

IX. SEARCH AND SEIZURE

A. MICHAEL LEE GILES v. COMMONWEALTH OF KENTUCKY

[2020-CA-0131](#) 03/26/2021 2021 WL 1169176

Opinion by TAYLOR, JEFF S.; CALDWELL, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Michael Lee Giles appealed the denial of a motion to suppress evidence seized from an automobile. Operating on a tip from a narcotics detective, an officer initiated a valid traffic stop based upon the vehicle's expired license plate tag. Although the narcotics detective indicated a similar car had left a known drug house, there were no signs of contraband in plain view, and there was no plain smell. Even so, a canine unit was dispatched, and the traffic stop was prolonged. The canine unit arrived, and the subsequent search revealed cocaine, a baggie with residue, and scales. The circuit court denied Appellant's motion to suppress evidence. The Court of Appeals reversed and remanded, holding that a valid traffic stop may become unlawful if it is unreasonably prolonged beyond the reasonable time required to issue a traffic citation. The main question was whether there was reasonable and articulable suspicion of criminal activity so to justify prolonging the traffic stop. The Court noted that there was no contraband in plain view, no plain smell, and the stop, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), was predicated upon a tip from a narcotics detective. The Commonwealth neither presented evidence nor made an indication at the suppression hearing that the narcotics detective's tip provided a reasonable basis for the search. In the absence thereof, the Court held that the officer's actions in prolonging the stop for an expired license plate tag to wait for a canine unit were unreasonable and were in violation of Giles' Fourth Amendment right to be free from an unreasonable search and seizure.