PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 1, 2022 to OCTOBER 31, 2022

I. CIVIL PROCEDURE – APPELLATE PRACTICE

A. ***ELMIS HAMBURGER v. MICHAEL S. PLEMMONS***

2021-CA-0337-MR 10/14/2022 2022 WL 7770308
Opinion by ACREE, GLENN E.; DIXON, J. (CONCURS) AND K. THOMPSON, J. (DISSENTS AND FILES SEPARATE OPINION)

Long after entry of a dissolution decree, finality, and the family court's loss of jurisdiction to amend the decree, the parties engaged in post-decree motion practice to resolve their differing interpretations of the final judgment. Without addressing its continuing jurisdiction, the family court entered an order stating nothing in the decree changes. Appellant appealed that order.

Because the briefs failed to substantially comply with CR 76.12 and failed to demonstrate a good faith effort to do so, the Court of Appeals struck the briefs and dismissed the appeal without reaching the merits. The majority held that "[s]ubstantial compliance is not a brief-writing standard; it is a judicial doctrine that allows a reviewing court to ignore its own rules when a party violates them, provided a good faith effort to comply can be shown." The opinion indicates that applying the doctrine of substantial compliance to excuse substantial noncompliance is no different, and no less unauthorized, than forgiving the filing of a notice of appeal out of time. "Courts do not possess the power of royal prerogative, a concept we reject because it is not 'in accord with the spirit of a republican form of government. There is no royal prerogative . . . .' *Cochran v. Beckham*, 89 S.W. 262, 263 (Ky. 1905). The people themselves and alone are our sovereign and they have not delegated to this or any branch of government such power that would authorize us to favor some by waiving compliance with rules our Supreme Court was empowered and obligated to make and enforce, while sanctioning the noncompliance of others."

The dissent agreed it is "fool-hardy for parties to attempt to file appellate briefs without reviewing the necessary requirements," but would "allow them the opportunity to submit conforming briefs" after reviewing "the resources we have on our Court of Appeals website which would aid them in complying with these requirements and hopefully improve their appellate practice both regarding this case and in their future practice." In sum, the dissent "believe[s] it would be better to rule based on the merits even if our ruling could not fully address the issues the parties had in mind (but failed to adequately communicate in their briefs) than to summarily dismiss the appeal. . . . The parties deserve that much."

II. CRIMINAL LAW

A. ***SA'MYRA N. GUERIN v. COMMONWEALTH OF KENTUCKY***

2021-CA-0952-MR 10/07/2022 2022 WL 5265083

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

Sa'Myra Guerin appealed the McCracken Circuit Court's judgment convicting her of second-degree assault and sentencing her to five (5) years' imprisonment. The Court of Appeals affirmed the circuit court. On appeal, Guerin argued that her trial counsel was unable to provide effective representation due to the size of his caseload, the Covid-19 mask mandates infringed upon her constitutional rights, the jury's racial makeup violated Guerin's right to a fair trial, and certain jurors were inattentive during her trial.

The Court first determined that a collateral proceeding in the circuit court was the appropriate course of action rather than a direct appeal. In such a proceeding, the circuit court and parties could create a proper record concerning whether counsel's performance was deficient and whether such performance was prejudicial to Guerin.

Additionally, Guerin argued that the mask mandate imposed by the Kentucky Supreme Court on all courtrooms during the Covid-19 pandemic unconstitutionally hindered jury selection, resulting in an unfair trial. The Court discussed that, while Kentucky courts have not opined regarding the specific issues Guerin discussed, other jurisdictions had done so. These courts had determined that "[b]eing able to see jurors' noses and mouths is not essential for assessing credibility[.]" *United States v. Tagliaferro*, 531 F.Supp.3d 844, 851 (S.D.N.Y. 2021). Moreover, Guerin was given an opportunity to submit proposed *voir dire* questions. Thus, the jury's requirement to wear masks during jury selection and Guerin's trial did not unconstitutionally infringe upon her constitutional rights.

Guerin also claimed that the mask mandate infringed upon her right to a fair trial because her counsel's masking denied Guerin her constitutional right under the Confrontation Clause to confront witnesses face-to-face. The Court determined that, because each witness testified under oath, the witnesses were unmasked during their testimony at trial, and their statements were subject to Guerin's cross-examination, Guerin was afforded the full protection of the Confrontation Clause

Finally, Guerin argued that the jury panel did not reflect a fair cross-section of the community because of its lack of African American jurors, and that some of the jurors had fallen asleep during the trial. The Court noted that, in *Commonwealth v. Doss*, the Kentucky Supreme Court stated "[t]he right to an impartial jury … does not afford a litigant the right to a jury that includes one or more members of his or her ethnic or racial background, religious creed, gender, profession, or other personal characteristic by which one is identified." 510 S.W.3d 830, 835 (Ky. 2016). Further, because Guerin provided no evidence that any of the jurors were sleeping, her claim must fail.

III. FAMILY LAW

A. ***COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES v. H.O., ET AL.***

2021-CA-1333-ME 10/14/2022 2022 WL 7765002

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

Appellant Cabinet for Health and Family Services (CHFS) appealed the termination of parental rights ordered by the Boyd Circuit Court. A petition to terminate father's parental rights was filed by Appellee mother, and CHFS sought a dismissal before the trial court and argued on appeal that only it could file a petition to terminate under KRS 625.090. The Court of Appeals affirmed the order of termination. The Court cited the General Assembly's amendment of KRS 625.090 made in response to its prior decision in *L.G.A. v. W.R.O.*, 638 S.W.3d 472 (Ky. App. 2021) in which language in the concurring and dissenting opinions deemed a change in the statute's language necessary. The Court noted a statutory conflict between KRS 625.090 and KRS 625.050 was resolved by this change, and even though Appellee mother filed her petition before the amendment, the General Assembly took this action in response to the Court's opinion in *L.G.A. v. W.R.O.* thereby resolving the difficulty the Court previously had in discerning the statutory intent of the law.

B. *D.W. v. CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, ET AL.* **DISCRETIONARY REVIEW GRANTED 02/08/2023**

2021-CA-1011-ME 10/28/2022 2022 WL 15527880
Opinion by COMBS, SARA W.; GOODWINE, J. (DISSENTS AND FILES SEPARATE OPINION) AND MCNEILL, J. (CONCURS)

Appellant father appealed from the termination of parental rights (TPR) order entered by the Jefferson Circuit Court. Upon entry of the order to terminate, the case became sealed and was closed to further electronic filings (eFiling). As a result, Appellant was unable to file a notice of appeal in the TPR case, and to avoid a late filing, electronically filed the notice in a related dependency, neglect, or abuse (DNA) case. The Court of Appeals noted the issue posed by this as one of first impression and further noted that the eFiling rules were ambiguous as to whether actions eligible for eFiling could later become ineligible. The Court expressed concern that practitioners could be "lured into a false sense of security that they may eFile a notice of appeal in their TPR actions up until the clock strikes midnight -- when in reality they cannot." Citing the intent and purpose of eFiling to "allow greater and more convenient access" to the trial courts as well as the ambiguity of the eFiling rules, the Court ruled that sufficient cause was shown to allow the appeal to be deemed timely filed. Upon review of the merits, the lower court was reversed on the basis that there was insufficient evidence to show terminating Appellant's parental rights was in the best interest of the child. The Court reasoned that Appellant's incarceration could not alone be found to constitute abandonment, and his conviction was not directly related to the educational neglect finding at the DNA adjudication.

The dissenting opinion disagreed on the matter of the timeliness of the appeal and stated it should have been dismissed. The opinion stated section 15(4) of the eFiling rules along with KRS 625.108(2) demonstrated that eFiling was not available in TPR actions upon entry of final judgment, and thus, there was no ambiguity in the rules. The dissent also disagreed with the holding on the merits, citing Appellant's admission he was out of custody for nearly a year, his non-compliance with the lower court's remedial orders and his case treatment plan, and the possibility his child could reach the age of majority before his release from incarceration.

IV. TORTS

A. ***CARROL CHEATWOOD v. KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY***

2021-CA-0699-MR 10/21/2022 2022 WL 12121442
Opinion by ACREE, GLENN E.; CLAYTON, C.J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellant challenged the circuit court's denial of her loss of consortium claim against Appellee after ruling the claim was excluded by provisions of the policy of insurance. The Court of Appeals affirmed. The opinion resolves the Court of Appeals' previous conflicting unpublished opinions and the unpublished Supreme Court order indicating similarly conflicting views, all of which turned on interpretation of the same insurance policy exclusion. The Court of Appeals, relying on other published Kentucky Supreme Court precedent, held that a loss of consortium claim is a consequence of the underlying bodily injury claim (*i.e.*, is a derivative claim) and that, in the context of this insurance contract, coverage for a loss of consortium claim is implied only if the associated bodily injury claim is covered and impliedly excluded if the bodily injury claim is excluded.

V. SOVEREIGN IMMUNITY

A. ***COMMONWEALTH OF KENTUCKY v. WAYNE RILEY, ADMINISTRATOR FOR THE ESTATE OF ARCHIMEDIA DELEARA RILEY, ET AL.***

DISCRETIONARY REVIEW GRANTED 03/15/2023

2021-CA-1115-MR 10/21/2022 2022 WL 12129821
Opinion by CALDWELL, JACQUELINE M.; CLAYTON, C.J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Appellant Commonwealth of Kentucky challenged the circuit court's order directing it to turn over discovery. A December 2017 apartment fire in south Louisville, which resulted in several deaths and an injury, was at the center of a civil suit filed in Jefferson Circuit Court Division 1 and a capital criminal prosecution pending in Jefferson Circuit Court Division 6. One of the civil defendants appearing before Division 6 filed a motion for discovery against the criminal defendant before Division 1. Criminal defense counsel requested a stay of discovery on the basis that irreparable injury could result from the disclosure due to the ongoing criminal matter. Instead of ruling on the request to stay, Division 6 ordered the Jefferson Commonwealth's Attorney's Office, a non-party in the civil case, to turn over materials it possessed. The Commonwealth Attorney objected citing a forthcoming decision from the Kentucky Court of Appeals in a previously pending appeal which involved a similar discovery issue. When the appeal was decided on procedural grounds and did not address the merits of the discovery issue, another motion for discovery was filed against the Commonwealth Attorney. Division 1 granted the motion and ordered the materials be produced for *in camera* inspection for disclosure of any relevant materials.

The Commonwealth argued on appeal that sovereign immunity precluded it from being compelled to provide discovery, and in the alternative, Division 1 abused its discretion by potentially compromising

the prosecution and the criminal defendant's rights in the pending criminal action. While the Court of Appeals disagreed with the Commonwealth's sovereign immunity rationale, it vacated and remanded the lower court's order on the basis that it was an abuse of discretion. The Court reasoned that the Commonwealth's sovereign immunity is "limited to instances where the Commonwealth or a division thereof is being named in an action" and "does not protect [it] from being ordered to produce discovery as a matter of course." Citing *O'Connell v. Cowan*, 332 S.W.3d 34 (Ky. 2010), the Court further reasoned that the disclosure did not implicate the Commonwealth's work product privilege because the materials sought only consisted of preliminary materials turned over in accordance with RCr 7.24. However, ultimately the Court concluded that the lower court abused its discretion by not rendering a decision on the disclosure's possible effect on the criminal defendant's rights and remanded with instructions for a determination to be made on that issue.