

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2022 to SEPTEMBER 30, 2022**

I. ADMINISTRATIVE LAW

A. COMMONWEALTH OF KENTUCKY, ENERGY AND ENVIRONMENT CABINET v. ERIC SHRADER, ET AL.

[2022-CA-0002-MR](#)

09/30/2022

2022 WL 4587691

Opinion by DIXON, DONNA L. CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS).

The Energy and Environment Cabinet appealed an order reversing the final order of the Claims Commission dismissing Shrader's claim against Cabinet. The Court of Appeals reversed.

Shrader contracted timber harvest of his property. Pursuant to 402 KAR 3:030, loggers shall comply with Best Management Practices (BMPs). The Cabinet's Kentucky Division of Forestry (KDF) inspects timber harvests for BMP compliance. KDF's inspections indicated site complied with BMPs. Shrader disagreed and contacted Cabinet to complain BMP violations went uncited.

Shrader petitioned the Commission for monetary damages, alleging the Cabinet failed to enforce BMPs by not citing loggers, which required him to fix areas of his property that he believed did not comply with BMPs. At the hearing, Shrader offered exhibits but was the only witness to testify. The hearing officer recommended the Commission dismiss Shrader's claim because Cabinet did not breach its duty to investigate or fail to enforce regulations in a routine, ministerial manner. The Commission adopted hearing officer's proposed order; Shrader appealed. The circuit court reversed and remanded Commission's order; the Cabinet appealed.

The Court of Appeals reversed, holding the circuit court erred by impermissibly shifting burden of proof from Shrader to the Cabinet and improperly substituting its own judgment for Commission's when its findings were supported by the record and not clearly erroneous. The Cabinet did not bear burden of proof and was not required to produce *any* evidence in support of its position. The circuit court improperly concluded a decision in Shrader's favor was required by his evidence and substituted its judgment for Commission's.

II. CONSTITUTIONAL LAW

**A. RAZ, INC., ET AL. v. MERCER COUNTY FISCAL COURT, ET AL.
DISCRETIONARY REVIEW GRANTED 03/15/2023**

[2020-CA-0543-MR](#)

09/30/2022

2022 WL 4587473

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS AND FILES SEPARATE OPINION) AND DIXON, J. (CONCURS)

Appellants appealed the Mercer Circuit Court's order upholding the Mercer Fiscal Court's approval of a zoning map amendment and order holding that Appellants had waived the enforcement of a deed restriction. Ultimately, the circuit court dismissed the appeal based on Appellants' failure to file an appeal bond as required by its order and KRS 100.3471. On appeal, Appellants argued that the statute was an unconstitutional infringement on the separation of powers between the judicial and legislative branches, imposed an unconstitutional penalty on the right to appeal, and violated the equal protection clauses of the United States and Kentucky Constitutions. The Court of Appeals affirmed the circuit court's order and dismissed the appeal for lack of jurisdiction. The Court discussed that Section 111(2) of the Kentucky Constitution states that the Court "shall exercise appellate jurisdiction *as provided by law*." (Emphasis added). Thus, in enacting KRS 100.3471, the General Assembly utilized its authority to prescribe the Court's appellate jurisdiction when it enacted KRS 100.3471. By stating an "appeal *shall* be dismissed" for failure to timely post the necessary bond, KRS 100.3471 removes such an appeal from the Court's jurisdiction.

Additionally, the Court determined that the statute did not levy a penalty on prospective appellants in a manner that took away their right to appeal under Section 115 of the Kentucky Constitution. Appellants brought a facial challenge to the statute, requiring them to "establish that no set of circumstances exists under which the [statute] would be valid." *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011) (internal quotations and citation omitted). The Court found that Appellants could not make such a showing and had neither argued nor shown that they were incapable of satisfying the bond requirement.

Moreover, the Court determined that the statute did not violate the equal protection clauses of the United States or the Kentucky Constitution. The Court noted statutes that affect economic policy are subject to a "rational basis" test" whereby "[a] statute complies with Kentucky equal protection requirements if a 'rational basis' supports the classification it creates." *Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018) (citations omitted). Here, the General Assembly stated the statute's purpose in Section 2 of House Bill 72 as follows: "to curb unnecessary appeals of land use cases, which appeals burden the courts, cause loss of jobs and loss of tax revenue, and many times render time-sensitive projects such as multifamily affordable housing projects undevelopable ...[.]". The Court concluded that the foregoing provided a rational basis for KRS 100.3471.

Finally, the Court discussed that even if Appellants had posted a bond with the circuit court under KRS 100.3471, the Court would still affirm the circuit court because the Fiscal Court made sufficient findings required to grant the zoning change.

B. BLUEGRASS TRUST FOR HISTORIC PRESERVATION v. LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT PLANNING COMMISSION, ET AL.

DISCRETIONARY REVIEW GRANTED 03/15/2023

[2020-CA-0726-MR](#)

09/30/2022

2022 WL 4587547

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Bluegrass Trust for Historic Preservation ("Bluegrass") appealed the Fayette Circuit Court's order finding that the Lexington-Fayette Urban County Government ("LFUCG") Planning Commission (the "Planning Commission") was not arbitrary or capricious in approving certificates of appropriateness

authorizing the demolition of the Commonwealth Building located in Lexington, Kentucky. The Court of Appeals dismissed the appeal based on its lack of jurisdiction over the matter under KRS 100.3471, which requires appellants to file an appeal bond. On appeal, Bluegrass argued that the statute was an unconstitutional infringement on the separation of powers between the judicial and legislative branches, imposed an unconstitutional penalty on the right to appeal, and violated the equal protection clauses of the United States and Kentucky Constitutions. The Court first discussed that Section 111(2) of the Kentucky Constitution states that the Court “shall exercise appellate jurisdiction *as provided by law*.” (Emphasis added). Thus, in enacting KRS 100.3471, the General Assembly utilized its authority to prescribe the Court’s appellate jurisdiction when it enacted KRS 100.3471. By stating an “appeal *shall* be dismissed” for failure to timely post the necessary bond, KRS 100.3471 removes such an appeal from the Court’s jurisdiction.

Additionally, the Court determined that the statute did not levy a penalty on prospective appellants in a manner that took away their right to appeal under Section 115 of the Kentucky Constitution. Bluegrass brought a facial challenge to the statute, requiring them to “establish that no set of circumstances exists under which the [statute] would be valid.” *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011) (internal quotations and citation omitted). The Court found that Bluegrass could not make such a showing and had neither argued nor shown that they were incapable of satisfying the bond requirement.

Moreover, the Court determined that the statute did not violate the equal protection clauses of the United States or the Kentucky Constitution. The Court noted statutes that affect economic policy are subject to a “rational basis” test” whereby “[a] statute complies with Kentucky equal protection requirements if a ‘rational basis’ supports the classification it creates.” *Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018) (citations omitted). Here, the General Assembly stated the statute’s purpose in Section 2 of House Bill 72 as follows: “to curb unnecessary appeals of land use cases, which appeals burden the courts, cause loss of jobs and loss of tax revenue, and many times render time-sensitive projects such as multifamily affordable housing projects undevelopable ...[.]”. The Court concluded that the foregoing provided a rational basis for KRS 100.3471.

Finally, the Court discussed that even if Bluegrass had posted a bond with the circuit court under KRS 100.3471, the Court would still affirm the circuit court because the Planning Commission’s actions were not arbitrary.

C. COMMONWEALTH OF KENTUCKY, EX REL. DANIEL CAMERON, ATTORNEY GENERAL v. BOONE DEVELOPMENT, LLC, ET AL.

DISCRETIONARY REVIEW GRANTED 03/15/2023

[2021-CA-0411-MR](#)

09/30/2022

2022 WL 4587719

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

The Commonwealth appeals from the Jessamine Circuit Court’s order declaring KRS 100.3471 unconstitutional. The Court of Appeals reversed and remanded with instructions to the circuit court to conduct a hearing as described in KRS 100.3471(3) to determine the amount of an appeal bond and issue findings of fact regarding the appeal bond. On appeal, Appellees argued that the statute was an unconstitutional infringement on the separation of powers between the judicial and legislative branches, imposed an unconstitutional penalty on the right to appeal, violated the equal protection

clauses of the United States and Kentucky Constitutions, and violated the *Noerr-Pennington* doctrine. The Court first discussed that Section 111(2) of the Kentucky Constitution states that the Court “shall exercise appellate jurisdiction *as provided by law*.” (Emphasis added). Thus, in enacting KRS 100.3471, the General Assembly utilized its authority to prescribe the Court’s appellate jurisdiction when it enacted KRS 100.3471. By stating an “appeal *shall* be dismissed” for failure to timely post the necessary bond, KRS 100.3471 removes such an appeal from the Court’s jurisdiction.

Additionally, the Court determined that the statute did not levy a penalty on prospective appellants in a manner that took away their right to appeal under Section 115 of the Kentucky Constitution. Appellees brought a facial challenge to the statute, requiring them to “establish that no set of circumstances exists under which the [statute] would be valid.” *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011) (internal quotations and citation omitted). The Court found that Appellees could not make such a showing and had neither argued nor shown that they were incapable of satisfying the bond requirement.

Moreover, the Court determined that the statute did not violate the equal protection clauses of the United States or the Kentucky Constitution. The Court noted statutes that affect economic policy are subject to a “rational basis” test” whereby “[a] statute complies with Kentucky equal protection requirements if a ‘rational basis’ supports the classification it creates.” *Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018) (citations omitted). Here, the General Assembly stated the statute’s purpose in Section 2 of House Bill 72 as follows: “to curb unnecessary appeals of land use cases, which appeals burden the courts, cause loss of jobs and loss of tax revenue, and many times render time-sensitive projects such as multifamily affordable housing projects undevelopable ...[.]”. The Court concluded that the foregoing provided a rational basis for KRS 100.3471.

Finally, the Court found KRS 100.3471 does not violate the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine stands for the proposition that “defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decision[-]making by the government.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556, 134 S.Ct. 1749, 1758, 188 L.Ed.2d 816 (2014) (citations omitted). However, the Court noted that antitrust liability was not at issue in this appeal. Nor was anyone asserting a cause of action against Appellees based on any conduct intended to influence government decision-making.

III. CRIMINAL LAW

A. COMMONWEALTH OF KENTUCKY v. WENDY FILLHARDT

[2020-CA-1563-DG](#)

09/02/2022

2022 WL 4003631

Opinion by ACREE, GLENN E.; DIXON, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

After receiving reports of a drunk driver, Cold Spring Police Officer Billy Linkugel (Officer Linkugel) initiated a traffic stop with the reported vehicle. The driver, Wendy Fillhardt (Fillhardt), admitted to drinking that night and displayed signs of intoxication. Looking to cut Fillhardt a break, Officer Linkugel arrested her for public intoxication. He did not charge her with Operating a Motion Vehicle Under the Influence pursuant to KRS 189A.010, and, consequently, he failed to conduct a field

sobriety test or to test for Fillhardt’s blood alcohol content. The Commonwealth amended the public intoxication charge, instead charging Fillhardt under Kentucky’s DUI statute. Fillhardt then moved to dismiss the DUI charge, arguing the Commonwealth’s evidence could not overcome a directed verdict at trial. The Campbell County District Court agreed and dismissed the DUI charge. The Campbell Circuit Court found jeopardy attached and declined to overturn the district court’s decision. The Commonwealth appealed, and the Court granted discretionary review. On appeal, the Court addressed whether the district court had the authority to dismiss the DUI charge against Fillhardt. The Court concluded the district court lacked authority to do so. Under Kentucky Rule of Criminal Procedure (RCr) 9.64, only the Commonwealth has the power to dismiss criminal charges prior to trial. The Court also noted that the Kentucky Supreme Court has made clear: “the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial.” *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003). Further, “[i]t is premature for the trial court to weigh the evidence prior to trial to determine if the Commonwealth can or will meet [its] burden.” *Isham*, 98 S.W.2d at 61. In this case, the Court determined the Commonwealth never consented to the dismissal of the DUI charge. Accordingly, the district court erred when it dismissed the charge against Fillhardt.

B. BRYAN N. MCCUE v. COMMONWEALTH OF KENTUCKY

[2021-CA-0948-MR](#)

09/02/2022

2022 WL 4003633

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

A grand jury indicted Appellant on several charges, including driving under the influence, resisting arrest, and third-degree assault. Prior to trial, Appellant filed a motion to dismiss for lack of probable cause pursuant to *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986); though the Commonwealth repeatedly asserted that a motion to dismiss was improper in a criminal case, the Hart Circuit Court held a “*Wells* hearing” on the motion. The Hart Circuit Court determined the Commonwealth presented sufficient evidence to establish probable cause but did not discuss whether Appellant’s motion or the hearing were proper. Appellant entered a conditional guilty plea, reserving his right to appeal the circuit court’s denial of his motion to dismiss. While the Court of Appeals agreed Appellant was not entitled to dismissal of his indictments, it concluded the circuit court should not have entertained the motion at all. Under the Kentucky Rules of Criminal Procedure (RCr), “[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness.” RCr 9.64. Kentucky jurisprudence interprets this rule to mean that only the Commonwealth has the authority to dismiss a criminal complaint prior to trial, and that a trial court is only able to dismiss upon a motion for directed verdict following trial. Accordingly, a trial court lacks the authority to summarily dismiss criminal indictments, as Appellant requested. While exceptions to this general prohibition exist—for example, where a trial court detects prosecutorial misconduct which prejudices the defendant—no exception permits a trial court to weigh evidence. The Court noted the Commonwealth’s authority to dismiss criminal indictments is rooted in the separation of powers principle: the judiciary is unable to encroach upon the Commonwealth’s executive function in prosecuting criminal cases by dismissing indictments prior to trial. The Court concluded that a “*Wells* hearing” does not exist. Though the Court noted the circuit court never had the option to dismiss prior to trial without the consent of the Commonwealth, it agreed that denial of

Appellant's motion was correct. Therefore, the Court affirmed the circuit court's denial of Appellant's motion.

IV. DEFAMATION; PERSONAL JURISDICTION

A. **JOHN DOE 1, ET AL. v. ANA VIOLETA NAVARRO FLORES, ET AL.**

[2021-CA-0314-MR](#)

09/23/2022

2022 WL 4390880

Opinion by DIXON, DONNA L.; CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS)

The Does were minor Covington Catholic High School students who attended a March for Life Washington, D.C., rally. At the Lincoln Memorial, the students interacted with Black Hebrew Israelites and Native American activists. Many people, offended by students' behavior, called for their punishment, shaming, and doxing. The Does sued alleging defamation, intrusion upon seclusion, negligent infliction of emotional distress, and harassment. Defendants moved to dismiss, and the motion was granted. Since all but one defendant was out-of-state and made allegedly defamatory statements outside the state, the trial court dismissed those claims for want of personal jurisdiction. The Court of Appeals held that since *Pierce v. Serafin*, 787 S.W.2d 705, 706 (Ky. App. 1990), Kentucky courts have dismissed the notion that out-of-state defendants commit an "act" in Kentucky by sending tortious communication into the state.

The Does further claimed the trial court improperly dismissed their defamation claim against the remaining in-state defendant. The Court first pointed out there is no case law allowing defamation claims to proceed anonymously. It simply defies logic that one could anonymously prove defamation. Even so, the Does' claim fails to meet first element necessary for defamation because statement must be "about" or "concerning" them, and false—neither of which applies here based on content of statement. The Court held the trial court correctly identified statement as nonactionable "pure opinion."

V. FAMILY LAW

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

[2021-CA-1188-ME](#)

09/09/2022

2022 WL 4112402

[2021-CA-1192-ME](#)

[2021-CA-1194-ME](#)

[2021-CA-1197-ME](#)

Opinion by THOMPSON, KELLY; CLAYTON, C.J. (CONCURS) AND CALDWELL, J. (CONCURS)

The mother of three children appealed their ordered custodial removal and the findings entered against her in a dependency, neglect, and abuse (DNA) matter by the Lewis Family Court. The findings were based on allegations that she made false reports that one of her children was sexually abused, had mental health issues, abused alcohol, and failed to provide essential care for her children. During the adjudication, testimony was presented that there were concerns about the

mother's mental condition and suspicions of alcohol abuse. The mental health concerns were predicated on observed paranoid, "very erratic," and "very combative" behavior. The suspicions of alcohol abuse were based on a statement by one of her children that he was afraid when she drank with her boyfriend, along with her observed behavior during a home visit. The family court relied on the testimony in making its findings and took *sua sponte* judicial notice of a domestic violence case previously and separately argued before it. The family court further justified its findings by noting the mother made three unproven reports of sexual abuse within a fourteen-month period involving allegations the child initially denied and which lacked physical evidence.

The Court of Appeals reversed and remanded the lower court's orders based on a lack of substantial evidence. The Court ruled there was never an official finding any of the sexual abuse allegations were fabricated and noted there was still an ongoing investigation. Citing *M.A.B. v. Commonwealth Cabinet for Health and Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015), the Court deemed the lower court's judicial notice of the previous domestic violence case to be improper since there was a lack of any documentation or evidence of the matter within the appellate record, and there was insufficient notice regarding it provided to the parties before the ruling. The lack of physical evidence and initial denials of the alleged sexually abused child, in the opinion of the Court, were not conclusive the acts of abuse did not occur. The Court stated the evidence presented to establish the mother's alleged mental health issues was vague and insufficient to suggest it posed a risk to her children or motivated her to make the sexual abuse reports. On the issue of the mother's alcohol use, the Court declared that consumption alone particularly without any indications of underlying substance abuse was insufficient to justify the findings without clear evidence that it presented a danger to the children. Citing *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 923 (Ky. 2021), the Court reasoned that there was simply no evidence presented that the mother failed to provide essential care and the family court's finding was speculative at best. Lastly, the Court determined that the mother did not sufficiently preserve her argument that the family court erred by refusing to interview the children in chambers, but for purposes of future guidance, discussed the holding in *Addison v. Addison*, 463 S.W.3d 755 (Ky. 2015), and distinguished that its ruling concerned the discretion of family courts in limiting a child witness' testimony in custody and timesharing matters under KRS 403.290 as opposed to a DNA action under KRS Chapter 620.

B. ROBERT ANDREW SHARP v. ROBBIN NELSON, ET AL.

[2021-CA-1005-MR](#)

09/30/2022

2022 WL 4587434

Opinion by JONES, ALLISON; CALDWELL, J. (CONCURS) AND GOODWINE, J. (CONCURS)

In its review of the Warren Family Court's order clarifying language contained in a previous order, the Court of Appeals affirmed. Appellant argued the language in a prior order that stated Appellant is not to be involved in decision making regarding his children or to gather information concerning his children did not prohibit him from obtaining his children's educational records. He also argued the family court erred because it failed to conduct an evidentiary hearing on the matter.

In affirming, the Court of Appeals held KRS 403.330 does not prevent a non-custodial parent from accessing educational records in the absence of a court order stating otherwise, but the prior order of the family court, as interpreted by the family court in a subsequent order, prevented Appellant from

accessing his children’s educational records. The Court of Appeals also held the family court had previously conducted an evidentiary hearing and was not required to do so again to clarify its prior order.

VI. GOVERNMENT BIDDING AND CONTRACTS

A. MOLINA HEALTHCARE OF KENTUCKY, INC. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and HUMANA HEALTH PLAN, INC. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and UNITEDHEALTHCARE OF KENTUCKY, LTD. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and AETNA BETTER HEALTH OF KENTUCKY INSURANCE COMPANY D/B/A AETNA BETTER HEALTH OF KENTUCKY INC. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and ANTHEM KENTUCKY MANAGED CARE PLAN, INC. v. KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, ET AL. and FINANCE AND ADMINISTRATION CABINET v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL.

[2021-CA-0806-MR](#)

09/09/2022

2022 WL 4112393

[2021-CA-0819-MR](#)

[2021-CA-0822-MR](#)

[2021-CA-0824-MR](#)

[2021-CA-0847-MR](#)

[2021-CA-0849-MR](#)

[2021-CA-0855-MR](#)

Opinion by GOODWINE, PAMELA R.; JONES, J. (CONCURS) AND MAZE, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 04/19/2023

In 2020, the Commonwealth issued a request for proposals (“RFP”) for managed care organizations (“MCOs”) to run the Medicaid program. The Commonwealth awarded Molina, United, Humana, Aetna, and WellCare contracts. Molina then acquired Passport’s managed care assets. After the Finance and Administration Cabinet (“FAC”) denied Anthem’s protest, Anthem filed suit in Franklin Circuit Court. Ultimately, the circuit court granted summary judgment and invalidated the 2020 RFP based on scoring irregularities and Molina’s retention of a former member of Governor Beshear’s transition team, Emily Parento, which gave rise to an “appearance of impropriety.” Molina appealed. Humana also appealed the circuit court’s interpretation of the managed care contract to allow Molina to retain Passport’s Medicaid membership, and United appealed the circuit court’s order for the Cabinet for Health and Family Services (“CHFS”) to award Anthem a sixth MCO contract. Aetna also appealed and CHFS, the FAC, and Anthem cross appealed.

The Court of Appeals reversed the order of the circuit court invalidating the 2020 RFP because neither the alleged scoring deficiencies nor Molina’s retention of Parento rebutted the presumption of correctness afforded agency decisions under the Kentucky Model Procurement Code (“KMPC”). The Court also held that, although Parento bound herself by the Executive Branch Code of Ethics (“EBCE”) by signing a confidentiality agreement, the circuit court was without jurisdiction to determine whether she violated a complaint with the Executive Branch Ethics Commission. The Court affirmed

the circuit court's interpretation of the MCO contract to allow Molina to retain Passport's Medicaid membership. Finally, the Court vacated the order awarding Anthem a sixth MCO contract because the circuit court was without authority to compel CHFS to award a contract.

VII. STATUTE OF LIMITATIONS

A. ESTATE OF KENDRICK BELL, JR. BY AND THROUGH LENISE BELL AS ADMINISTRATRIX v. LAURIE CRAYCROFT, M.D., ET AL.

[2020-CA-0360-MR](#)

09/30/2022

2022 WL 4587673

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

On July 28, 2017, Kendrick Bell, Jr was admitted to Sts. Mary & Elizabeth Hospital ER for a drug overdose. After treatment, he was discharged but returned to the ER later that day. After several days in a coma, Bell died from an anoxic brain injury. His Estate prepared a medical negligence claim against the Hospital, physicians, and nurses which was submitted to a Medical Review Panel. While the complaint was pending, the Kentucky Supreme Court found the Medical Review Panel Act (MRPA) to be unconstitutional. *Commonwealth v Claycomb*, 566 SW 3d 202 (Ky 2018). After *Claycomb* became final, the Estate filed the complaint in circuit court. The Hospital moved to dismiss, arguing that the complaint was not filed within one year. The trial court granted the motion to dismiss, finding that, since the MRPA was found to be unconstitutional in its entirety, the statute could not operate to toll the limitation period. The trial court further found that KRS 413.270 was not applicable because the Medical Review Panel was not a "court" within the meaning of the statute.

While the matter was pending on appeal, the Kentucky Supreme Court issued its decision in *Smith v. Fletcher*, 613 S.W.3d 18 (Ky 2020), holding that KRS 413.270 operated to toll the one-year statute of limitations. In that case, the Court concluded that Medical Review Panels were a "court" as defined by the statute because they performed a quasi-judicial role in that it was the agency "required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for [its] official action." The Court concluded that public policy favored the application of KRS 413.270 because plaintiffs reasonably relied upon the MRPA's requirements.

The Court of Appeals noted that all parties agreed that the holding of *Smith* was applicable. The Court also noted that the Estate properly filed its claims against all defendants with the Medical Review Panel and immediately filed its complaint in circuit court once *Claycomb* became final. Consequently, the Court of Appeals concluded that KRS 413.270 operated to toll the statute of limitations, and the Estate's complaint remained timely. Therefore, the Court vacated the summary judgment and remanded the matter to the circuit court for further proceedings on the merits of the Estate's complaint.