

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
DECEMBER 01, 2020 to DECEMBER 31, 2020

I. ADOPTION

A. S. R. V. VS J. S. B.

[2020-CA-0549](#) 12/04/2020 2020 WL 7083301

Opinion by ACREE, GLENN E.; JONES, J. (CONCURS) AND K. THOMPSON, J. (CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION)

Appellant brought separate appeals from orders in three actions. The first two orders granted adoptions by appellee of appellant's minor children; the third order denied appellant's petition for sole custody of her biological children. The Court of Appeals reversed all three orders and remanded the case with instructions to award sole custody of both children to appellant. The Court reversed the adoption judgments as violative of KRS 199.520 because appellee failed to establish, and the circuit court failed to find, grounds for terminating appellant's parental rights, the prerequisite to granting appellee's adoption petitions. The Court further held that the order regarding custody had to be set aside because the custody action was litigated between a parent (appellant) and a non-parent (appellee), and appellant had not waived her superior right to custody.

II. ATTORNEY'S FEES

A. MID SOUTH CAPITAL PARTNERS, LP VS BRYAN ADKINS, ET AL

[2019-CA-1764](#) 12/18/2020 2020 WL 7409968 Rehearing Pending

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

Appellant argued that the circuit court abused its discretion by awarding reduced attorney's fees and costs contrary to the legislative intent and mandates of KRS 134.452. Appellant had purchased two certificates of delinquency (COD) encumbering the real property of appellee for unpaid ad valorem taxes for the 2011 and 2012 tax years. Its litigation efforts culminated in a final judgment and order of sale awarding it certain fees and costs. However, although the circuit court granted judgment for the full amounts of the CODs, it did not award all attorney's fees and costs presented. The Court of Appeals affirmed, holding that the proper method for determining actual and reasonable attorney's fees pursuant to KRS 134.452 is set forth in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). The Court noted that an attorney's fee awarded should consist of the product of counsel's reasonable hours, multiplied by a reasonable hourly rate, which provides a "lodestar" figure, which may then be adjusted to account for various special factors in the litigation. Using the lodestar method, a court may consider the complexity or simplicity of a proceeding to collect or protect the COD, the skill required, and the fee customarily charged in the locality for similar proceedings. Applying the lodestar method and a common-sense analysis to the case herein, the Court concluded that the circuit court did not abuse its discretion in awarding reduced attorney's fees and costs.

B. JENNIFER KEY, ET AL VS MARINER FINANCE, LLC

[2019-CA-1785](#) 12/04/2020 2020 WL 7083270

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

Appellants challenged an order denying their motion to vacate the default judgment entered against them in favor of appellee with respect to a note securing a personal loan. The note contained a clause requiring payment of “reasonable” attorney’s fees if appellants defaulted. Appellee filed a complaint claiming payment on the note was past due and was awarded a default judgment that included an attorney’s fee in the amount of \$2,229.85 pursuant to a 33.3% contingency fee agreement between appellee and its attorney. On appeal, appellants asked the Court of Appeals to vacate the attorney’s fee and remand the case for a hearing on that fee because the circuit court abused its discretion by awarding an unreasonable contingency fee. The Court concluded that the circuit court abused its discretion by refusing to vacate the attorney’s fee award because it made no determination that the fee was “reasonable” before signing and entering the tendered default judgment. The circuit court should have required appellee to demonstrate that the one-third contingency fee was not excessive and that it accurately reflected the reasonable value of the bona fide legal expenses incurred.

III. INSURANCE

A. **CAMERON R. STONE BY NEXT FRIEND AND CO-CONSERVATOR, REGINA RAMAGE, ET AL VS KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY**

[2019-CA-1739](#) 12/11/2020 2020 WL 7266229

Opinion by CLAYTON, DENISE G.; KRAMER, J. (CONCURS) AND MCNEILL, J. (CONCURS)

This appeal was brought from an order granting summary judgment to Kentucky Farm Bureau Mutual Insurance Company (KFB). Appellants were the mother and the minor son of a woman who was killed in a car accident. They sought to recover loss of consortium damages under the underinsured motorist (UIM) provisions of a KFB automobile insurance policy, although the decedent’s claims were expressly excluded under the terms of the policy. The circuit court dismissed the mother’s claim as a matter of law because Kentucky does not recognize a claim for loss of consortium for an adult child. It further held that the son’s loss of consortium claim was excluded from coverage because it was derivative of the excluded primary wrongful death claim. The Court of Appeals affirmed, first holding that it was bound by the clear refusal of the Kentucky Supreme Court to create a loss of consortium claim for adult children and the absence of a statutorily-created claim. The Court then held that the son would not have a loss of consortium claim but for his mother’s claim, which was expressly excluded by the policy. An interpretation of the policy which gives a reasonable meaning to all its provisions supported the circuit court’s determination that the son’s derivative claim was excluded from UIM coverage.

IV. NEGLIGENCE

A. **KARIN J. STIENS VS BAUSCH & LOMB INCORPORATED**

[2018-CA-1762](#) 12/11/2020 2020 WL 7266398

Opinion by JONES, ALLISON E.; DIXON, J. (CONCURS) AND MAZE, J. (CONCURS)

Appellee B & L marketed a topical antibiotic, Besivance, for ophthalmological use. It was prescribed in appellant's photorefractive keratectomy procedure (PRK). Following her surgery, she suffered irreparable damage to her left eye. Besivance has not been approved as a prophylactic by the Federal Food and Drug Act. However, doctors are permitted and encouraged to use medications off-label. B & L through its representative began discussing Besivance with appellant's eye doctor. At this time, it had been used against pink eye and MRSA, but there were no clinical trials or articles regarding its use in refractive surgeries. The B & L representative told the eye doctor that Besivance could be used in an equivalent fashion to other antibiotics in refractive surgeries. B & L representatives were only to promote Besivance for its on-label purpose. Appellant's eye doctor, relying on his own judgment, the B & L representative's assurances, and the available literature, switched to Besivance for refractive eye surgeries. Following appellant's eye surgery, she filed a complaint against B & L and her eye doctor. The circuit court dismissed appellant's claims of strict liability and breach of warranty and ultimately granted summary judgment on her negligence claim. At issue on appeal was whether the circuit court erred when it granted summary judgment on appellant's negligence claim. The Court of Appeals focused on foreseeability, and what the tortfeasor knew or should have known at the time of the accident, contrasted with the circuit court's emphasis on a specific identifiable injury that could be causally connected to B & L's breach. The Court held that without a strict liability claim, which is founded in the essential common law elements, appellant could not claim a presumption-of-knowledge standard unless the product was sold in a defective condition unreasonably dangerous to the user. The Kentucky Products Liability Act imposes upon manufacturers a duty to test their products for risks that the medical community had a reasonable basis to suspect exist. However, Kentucky courts do not require manufacturers to lead scientific research into medical advances. The Court further noted that a manufacturer may also be held liable under a failure-to-warn theory if their product was known or suspected to be dangerous. However, B & L did not have any knowledge of reported risks or dangers associated with the use of their product. Appellant's eye doctor was one of the first to use Besivance in PRK surgeries. The Court held that summary judgment was properly granted.

V. TERMINATION OF PARENTAL RIGHTS

A. COMMONWEALTH OF KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, VS J. M. A., ET AL

2019-CA-1896 12/04/2020 2020 WL 7083248

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

The Cabinet for Health and Family Services petitioned to involuntarily terminate Mother's parental rights to two of her children. The circuit court denied the petitions. The Court of Appeals affirmed, holding that substantial evidence supported the circuit court's finding that termination of Mother's parental rights was not warranted. The children had a relationship with Mother, the older child missed Mother and wanted to be with her, the older child talked positively about her visits with Mother, Mother had submitted to over one hundred random drug screens, Mother found and continued full-time employment, Mother established independent housing, Mother was actively participating in methadone treatment, Mother had engaged in supervised and unsupervised visitation with the children, and Mother would continue in her attempts to reunify with her children.