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

I. ADMINISTRATIVE LAW - PLANNING AND ZONING

A. ***DONNA MOLYNEAUX v. CITY OF BARDSTOWN***

2021-CA-0045-MR 12/02/2022 2022 WL 17365877
Opinion by THOMPSON, KELLY; DIXON, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Donna Molyneaux appealed the Nelson Circuit Court's judgment upholding Appellee City of Bardstown's decision regarding approved alterations to non-historic townhouse properties constructed in 1988 which were located within the Bardstown Historic District and enjoining their unapproved alterations. Appellant's husband initially applied for a Certificate of Appropriateness (COA) on both their behalf with the Bardstown Historical Review Board seeking approval of proposed alterations to the exterior of the townhouses which included a request to replace wood siding, trim, and fencing with vinyl material. The Board recommended approval of the application with conditions which essentially required that materials had to be replaced with like materials (i.e., wood for wood, vinyl for vinyl), and the applicants "work with [the Board's] staff to find other alternative materials that are appropriate." The recommendation was approved by the city council. A notice of appeal and petition for declaration of rights were filed before the circuit court where the matter lingered for years. During this time Appellee filed a counterclaim, in which no answer was filed in response, seeking to enjoin unapproved alterations; Appellant and her husband divorced; and Appellant took quitclaim ownership of the townhouses. The circuit court upheld the decision to adopt the Board's recommendations and granted Appellee's request for an injunction.

The Court of Appeals reversed and remanded with instructions to vacate the approved recommendation and for the Board to conduct another review. Due to the failure to file a response to Appellee's counterclaim, Appellant's argument that Appellee could not file a counterclaim in an administrative appeal was deemed to have been waived. Citing the Bardstown Historic District's inclusion on the National Register of Historic Places pursuant to 54 U.S.C. § 300308, the Court was unpersuaded by Appellant's position that the townhouses, as non-historic properties, were exempt from local regulations governing historic properties. However, the Court ruled that the Board failed to make specific findings as it concerned the makeup of the townhouses' exterior, and resultingly, it was premature in issuing its decision without resolving questions over the pre-existing materials. The Court held that the Board failed to make necessary findings which rendered the circuit court's judgment clearly erroneous due to the inability to determine if the recommendation was supported by substantial evidence. It further held that the Board impermissibly delegated its factfinding authority to its staff in proscribing a condition requiring the applicants to work with the staff in finding "alternative materials." It was reasoned that Appellant's husband's silence in the face of this condition could not function as "consent" allowing the Board to delegate its factfinding authority. It was concluded that the Board's decision that materials had to be replaced with like materials was arbitrary and capricious and "at odds with" the local guidelines' more nuanced and detailed provisions.

II. CONSUMER PROTECTION LAW

A. ***COMMONWEALTH OF KENTUCKY, EX REL. ATTORNEY GENERAL DANIEL CAMERON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF KENTUCKY v. JONES & PANDA, LLC***

2022-CA-0028-MR 12/09/2022 2022 WL 17542961
Opinion by CETRULO, SUSANNE M.; CALDWELL, J. (CONCURS), AND JONES, J. (CONCURS)

This is an appeal by the Attorney General from a decision of the Fayette Circuit Court which had set aside a criminal investigative demand (CID) previously issued to Jones & Panda. The court below declined to conduct an *in camera* review of the documentation and facts upon which the Attorney General had based his decision to issue the demand. The demand had been issued in order to investigate possible price-gouging by Jones & Panda during the COVID-19 pandemic. The Attorney General argued that it was not required to detail the reasons or grounds for the CID and had asked for an evidentiary hearing and *in camera* review. The Court of Appeals simply held that in this instance it was not clear that the trial judge had conducted any review or evidentiary hearing to determine the sufficiency of the evidence in support of the demand. The matter was remanded for an evidentiary hearing to determine if the CID was properly supported and to conduct an *in camera* review, if necessary, to accomplish this task. This decision was initially ordered not to be published, but a motion to publish filed by the Attorney General was granted on January 13, 2023.

III. ELECTION LAW

A. ***BRIDGETTE EHLY v. COMMONWEALTH OF KENTUCKY, STATE BOARD OF ELECTIONS***

2022-CA-1316-EL 12/22/2022 2022 WL 17839317
Opinion by GOODWINE, PAMELA R.; CLAYTON, C.J. (CONCURS) AND McNEILL, J. (CONCURS)

Appellant sought to overturn the Oldham Circuit Court's orders directing sums to be dispensed to state agencies and recount personnel for costs incurred in the recount of the May 17, 2022, Republican primary election for the office of State Representative for the 59th District. Appellant filed a petition for recount naming the State Board of Elections (Board) as party-defendant and omitting her primary election opponent. The circuit court set a recount bond and ordered that Appellant would be responsible for paying the costs of the recount. The Board moved for a dismissal for failure to name all necessary parties. Dismissal was granted and all costs incurred in the transportation and security of ballots to the circuit court's custody during the pendency of the action was ordered to be paid from Appellant's recount bond. Appellant filed an appeal, and the Court of Appeals reversed the dismissal and remanded with instruction to perform a statutory recount. Upon return to the circuit court, it ordered another recount bond and required Appellant cover the costs of the recount. Upon completion of the recount, payment was ordered from Appellant's recount bond. After a denial of a

motion to alter, amend, or vacate pursuant to CR 59.05; Appellant appealed seeking to recover the amounts paid from the first recount bond and arguing she was wrongly charged for costs due to the first recount having been erroneously dismissed.

The Court noted there was "little to no case law" on the standard of review concerning a challenge of a recount bond, but it relied on case law concerning a challenge to a supersedeas bond for analogous support. The Court affirmed the circuit court and held that KRS 120.095 and *Hatcher v. Ardery*, 242 S.W.2d 105 (Ky. 1951) requires a petitioning party to bear all costs accrued because of a recount petition even for those not originally intended. It was determined that Appellant was afforded sufficient notice and every opportunity to be heard by the circuit court, and thus, her "misplaced belief" she would not have to pay all costs associated with the first recount petition did not violate her due process rights. No separation or powers issues were implicated because costs were incurred by the transportation of voting equipment and ballots to the circuit court's custody, and the circuit court was vested with authority under KRS 120.095(1) to determine costs and order payment. Lastly, the Court did not entertain Appellant's argument that the circuit court erroneously "limited the grounds for relief" concerning her CR 59.05 motion because there "is no appeal from the denial of a CR 59.05 motion," and substantive review was therefore "limited to the propriety of the orders distributing the costs of the recount."

IV. FAMILY LAW

A. ***H.H., ET AL. v. HONORABLE LORI GOODWIN, JUDGE, JEFFERSON FAMILY COURT, ET AL.***

2022-CA-1023-OA 12/02/2022 2022 WL 17365889
Opinion by MAZE, IRV; DIXON, J. (CONCURS IN RESULT AND FILES SEPARATE OPINION) AND LAMBERT, J. (CONCURS)

A writ of prohibition was sought from the Court of Appeals to compel the Jefferson Family Court to grant the petitioners temporary child custody and relinquish jurisdiction concerning custody and adoption to the Breckinridge Circuit Court, as well as estop the Cabinet for Health and Family Services from pursuing actions inconsistent with a goal of adoption. The Cabinet also filed a writ of prohibition related to the shared facts of this case which was addressed in a separate opinion by the Court in Case No. 2022-CA-1059-OA. The petitioners were the cousins and foster parents of a child in Cabinet's custody whom they wished to adopt. In a dependency, neglect, or abuse (DNA) action, the Jefferson Family Court originally ordered the child be placed in Cabinet's custody after being born with Hepatitis C and testing positive for opiates. The Cabinet's original goal was for reunification, but it changed the goal to adoption and ultimately filed a petition for termination of parental rights (TPR) after the mother failed to involve herself in the child's life. After little movement in the TPR action, the petitioners hired an attorney and filed a motion to intervene as parties in the TPR action. Upon the motion of the Cabinet, the TPR action was dismissed before the circuit court ruled on the motion to intervene. Based on their residency, the petitioners filed adoption and custody petitions in Breckinridge Circuit Court and later filed an *ex parte* motion for temporary custody which was granted. In response, the Cabinet filed an emergency *ex parte* petition in the Jefferson Family Court DNA action to have the child returned to its custody. The petition was granted, and the child was

placed in a new foster home before ultimately being placed with the biological mother. The petitioners filed a petition for a writ and requested intermediate relief with the Court. The Court granted intermediate relief returning the child back to petitioners as well as temporary custody while the petition for a writ was pending. Upon the biological mother's motion, the Jefferson Family Court returned custody back to her. The petitioners again filed another request for intermediate relief which was granted, and custody was returned to them.

The Court granted in part and denied in part the petition for a writ under the special cases exception that the Jefferson Family Court was acting erroneously, and correction was necessary in the interest of the orderly administration of justice. The Court reasoned that a direct appeal was not available in the TPR action because it was dismissed before the petitioners were joined as parties. A return of custody to biological mother was deemed erroneous due an absence of findings and conclusions of law that to do so was in the child's best interest and due to the Cabinet's documented permanency goal of adoption. A dismissal of the TPR action was held to not have automatically reverted the goal back to reunification due to the requirement of federal law and the Cabinet's own administrative regulations that a change of permanency be documented in the absence of a TPR. The Jefferson Family Court's return of custody back to the Cabinet after the Breckinridge Circuit Court granted temporary custody was declared to be of further error as it was not predicated on any grounds provided under KRS 620.060. Lastly, the Court was not persuaded by arguments that the Jefferson Family Court enjoyed sole jurisdiction over the matter by virtue of custody being originally granted in the DNA action. The Court reasoned that KRS 403.824(1) did not bestow continued and exclusive particular case jurisdiction upon it because the statute did not apply to adoption proceedings which could not have been initiated in Jefferson Family Court by the petitioners due to their Breckinridge County residency. The Court granted the petition for a writ allowing the Breckinridge Circuit Court to continue the adoption proceedings, continuing the petitioner's temporary custody, and ordering a stay as to the proceedings in Jefferson Family Court. The petition for a writ was denied as moot pertaining to the Jefferson Family Court relinquishing jurisdiction over adoption as no action concerning such was pending before it. The petition for a writ to estop the Cabinet from activities inconsistent with the goal adoption was also denied. Judge Dixon filed a separate opinion in concurrence expressing "deep concern at the Cabinet's actions."

B. ***CABINET FOR HEALTH AND FAMILY SERVICES v. HONORABLE KENNETH HAROLD GOFF II, JUDGE, BRECKINRIDGE CIRCUIT COURT, ET AL.***

2022-CA-1059-OA 12/02/2022 2022 WL 17365817
Opinion by MAZE, IRV; DIXON, J. (CONCURS IN RESULT AND FILES SEPARATE OPINION) AND LAMBERT, J. (CONCURS)

The Cabinet for Health and Family Services filed for a petition for a writ of prohibition with the Court of Appeals seeking to set aside orders of the Breckinridge Circuit Court and dismiss pending adoption and child custody actions "for want of both standing and particular case jurisdiction." The adoption and child custody actions were filed with the circuit court by the cousins and foster parents of a child (child's relatives) the Cabinet was initially granted temporary custody over by the Jefferson Family Court via a dependency, neglect, or abuse action, which was still pending. The Cabinet filed a motion to dismiss with the circuit court, which was set for a hearing, but the petition for a writ was filed along

with a request for intermediate relief before the hearing was held. The Court denied the request for intermediate relief on the basis that the circuit court's conducting of a hearing "did not rise to the level of irreparable injury warranting extraordinary intermediate relief." The petition for a writ was denied because the Cabinet was held to have adequate remedies in the form of the hearing itself to argue "that the underlying actions should be dismissed," in the alternative, to file a direct appeal. Judge Dixon filed a separate opinion in concurrence addressing the Cabinet's underlying arguments regarding the asserted particular case jurisdiction of the Jefferson Family Court and the child's relatives' standing to file their adoption claim.

V. GAMING LAW

A. ***MATTHEW WORKMAN v. KENTUCKY DOWNS, LLC, ET AL.***

2022-CA-0003-MR 12/22/2022 2022 WL 17839582
Opinion by CLAYTON, DENISE G.; JONES, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Matthew Workman appealed the Simpson Circuit Court's order granting Appellees' motion to dismiss Workman's action under Kentucky's Loss Prevention Act, or KRS 372.040 (the "Act"). Workman sought to recover certain losses from wagers placed on historical horse racing under the Act. The Court of Appeals affirmed the circuit court.

On appeal, Workman argued that the safe-harbor provision contained in the Act under KRS 372.005 did not apply to this action and that he was entitled to maintain a third-party action for un-filed wager losses on historical horse racing at Kentucky Downs. Alternatively, Appellees argued that KRS 372.005's exception applies in this case, as all wagers were "authorized," or "permitted" by the Kentucky Horse Racing Commission and previous court rulings.

The Court first determined that KRS 372.005's safe-harbor provision not only protected betting, gaming, or wagering that was "lawful," but also protects betting, gaming, or wagering that is "authorized" or "permitted." Because the Commission had approved Kentucky Downs' request to offer historical horse racing using certain wagering systems, the Commission had formally approved or sanctioned Kentucky Downs' actions. Moreover, the Court found that multiple levels of Kentucky courts had authorized Kentucky Downs' operation.

Thus, because Appellees fell under the safe harbor provisions contained in the Act, the Court affirmed the circuit court's dismissal of Workman's action.

VI. PROPERTY LAW

A. ***NEWREZ LLC D/B/A SHELLPOINT MORTGAGE SERVICING v. MARY YVONNE EMERSON***

2022-CA-0051-MR 12/02/2022 2022 WL 17365884
Opinion by GOODWINE, PAMELA R.; CETRULO, J. (CONCURS) AND COMBS, J. (CONCURS)

NewRez appealed an order of the Russell Circuit Court dismissing its *in rem* foreclosure action against Mary Yvonne Emerson. Emerson defaulted on her unrecorded mortgage loan and then discharged her debts in Chapter 7 bankruptcy. The circuit court found NewRez was not entitled to foreclose on the property because Emerson's debt was discharged in bankruptcy, and the indebtedness was unsecured. On appeal, NewRez argued Emerson's discharge of her personal liability in bankruptcy did not affect its ability to obtain an *in rem* judgment and order of sale of the property in state court. The Court of Appeals determined, under United States Court of Appeals for the Sixth Circuit case law, state courts have subject matter over *in rem* foreclosure actions and the determination of the validity of a mortgage because a debtor's personal liability is not at stake. Stated differently, federal bankruptcy courts have jurisdiction over whether a creditor may collect debts *in personam*, and Kentucky circuit courts have jurisdiction over whether a creditor may collect debts *in rem* under a mortgage. Further, although the mortgage lien was unperfected, that only affects priority, not its validity. Thus, the Court reversed the circuit court's order and remanded with instructions to proceed with *in rem* foreclosure proceedings.

B. ***GARELL MARK BURGESS, ET AL. v. CARL R. AUSTIN, ET AL.***

2020-CA-1579-MR 12/16/2022 2022 WL 17724559

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

At issue was Appellants' right to possess parcel of real property. Appellants acquired interest by quitclaim deed executed while property was the subject of a then ongoing foreclosure action and for which lis pendens notice had previously been duly lodged and recorded pursuant to KRS 382.440. Appellants were not parties to the proceedings and did not receive notice thereof. Subsequently, pursuant to judgment and order of sale, property was sold via commissioner's sale, and purchaser sought writ of possession to evict Appellants. In response, Appellants filed motions seeking post-judgment intervention and to restrain Appellee Clay-Rho Enterprises, successor in interest to purchaser, from executing its writ of possession, which the Meade Circuit Court denied.

On appeal, Appellants argue the circuit court erred by (1) determining intervention was untimely, and (2) dispossessing them of the property. The Court affirmed and held the circuit court did not abuse its discretion in denying intervention when Appellants had constructive and actual notice of challenge to their claim of title and, yet, inexplicably failed to take prompt action. On issue of dispossession, the Court held *Cumberland Lumber Co. v. First and Farmers Bank of Somerset, Inc.*, 838 S.W.2d 403, 405 (Ky. App. 1992), was dispositive. Pursuant to *Cumberland*, because a lis pendens notice was duly lodged and recorded in real property's chain of title prior to Appellants acquiring interest, joinder of Appellants as parties to foreclosure action was not required but merely permissible upon Appellants' timely motion. *Id.* at 405-06. Further, Appellants' contention their non-party status precluded divestment of their interest, pursuant to KRS 426.574, was rejected as contrary to the long-acknowledged intent of lis pendens to prevent property from being placed beyond the reach of a final judgment.

VII. TORTS

A. ***SYLVIA RIEFF v. JESSE JAMES RIDING STABLES, INC.***

2022-CA-0161-MR 12/02/2022 2022 WL 17365814
Opinion by CETRULO, SUSANNE M.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellant Sylvia Rieff challenged the Barren Circuit Court's summary judgment precluding her recovery on negligence claims for injuries suffered in a horseback riding accident after she signed a waiver of liability, which included her minor children, with Appellee Jesse James Rising Stables, Inc. On appeal, she argued that summary judgment was erroneous because the waiver did not meet the test articulated in *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). More specifically, a clause in the waiver which disclaimed liability except in cases of "gross negligence" was argued to not meet the *Hargis* standard of "utmost clarity." She further maintained it was ambiguous if the waiver intended to cover her individually rather than just her children.

The Court of Appeals affirmed and ruled that the waiver's language was sufficient to communicate to ordinary persons that it covered all conduct short of gross negligence. Citing *CLK Multifamily Mgmt., LLC v. Greenscapes Lawn & Landscaping, Inc.*, 563 S.W.3d 706 (Ky. App. 2018) for analogous support, the Court determined that the waiver satisfied three out of four factors under *Hargis*: (1) an express exoneration of Appellee from liability; (2) a virtual impossibility to construe the clause as intending to do anything other than provide protection against suits for bodily injuries and damages; and (3) the nature of the hazard at issue in the underlying case was specifically mentioned under the waiver's coverage. The Court noted that only one of the *Hargis* factors need be satisfied. The Court concluded the waiver was specifically enforceable against Appellant because her argument was based on a select portion of the agreement which, when read as a whole, contained indemnifying language that specifically identified her within its coverage. The Court reasoned, this coupled with a lack of or contradictory evidence in the record, such as assertions by Appellant during her deposition she only intended to sign on behalf of her children, did not support her position.

B. ***KATE CARUCCI v. NORTHERN KENTUCKY WATER DISTRICT***

2021-CA-0524-MR 12/16/2022 2022 WL 17724565
Opinion by CALDWELL, JACQUELINE M.; CLAYTON, C.J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Appellant Kate Carucci sought to reverse the Campbell Circuit Court's summary judgment in favor of Appellee Northern Kentucky Water District on her negligence claim related to injuries sustained from a fall after stepping on an unsecured water meter cover on a public sidewalk. The case was remanded back to the circuit court after the decision rendered in *Northern Kentucky Water District v. Carucci*, 600 S.W.3d 240 (Ky. 2019) reversed an original summary judgment precluding suit based on governmental immunity. The new summary judgment was rendered based on the reasoning that there was no affirmative evidence Appellee had actual or constructive notice of the unsecured water meter cover.

On appeal, Appellant argued that Appellee had knowledge of a report of unauthorized water use, and weeks before her accident, dispatched an employee in response who failed to assert during a deposition if he secured the meter cover before completing the assignment. The Court of Appeals affirmed the summary judgment and agreed there was a lack of evidence of actual or constructive notice of Appellee regarding the unsecured water meter cover. It was reasoned Appellant could cite no evidence of actual notice, and the evidence in the record did not establish the water meter was uncovered for a period long enough to give Appellee constructive notice before the accident. The Court stated that the report of unauthorized water use alone did not represent a dangerous condition to a passer-by, and there was a lack of affirmative evidence to suggest the meter cover was not secured after the inspection was completed. Furthermore, the Court's opinion held that an inference that Appellee's employee failed to secure the meter cover was impermissibly speculative particularly since it was in an area where others could have tampered with it between the service call and the accident. Thus, summary judgment was proper since Appellant only offered speculation and argument in the place of affirmative evidence to support her claims that the employee who inspected the meter failed to secure the cover.

C. ***HEATHER JONES, AS SISTER OF NICOLE WAGNER AND AS ADMINISTRATRIX AND ON BEHALF OF THE ESTATE OF NICOLE WAGNER, ET AL. v. ACUITY, A MUTUAL INSURANCE COMPANY***

2021-CA-0834-MR 12/22/2022 2022 WL 17838393

Opinion by CETRULO, SUSANNE M.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

This is an appeal from a summary judgment in favor of an insurer by the Harrison Circuit Court. The trial court found that no coverage existed under the commercial general liability policy issued to a plumbing business whose employee, Donald Bottoms, had pled guilty to the fatal shooting of Nicole Wagner. Mr. Bottoms and Ms. Wagner spent time together on the night of April 18, 2020, at Bottoms' apartment located within his plumbing company's place of business. When he drove her home in the early morning hours, a struggle ensued in his vehicle, and she was shot and killed. Her estate filed a claim for wrongful death, and Acuity, the insurer of the business moved for summary judgment, asserting that the policy only covered the business and Mr. Bottoms for events that fell within the conduct of the business. The trial court's summary judgment was affirmed by the Court on the basis that coverage was intended to cover business purposes and not personal and recreational activities. The Court further found that the criminal plea could be used for purposes of collateral estoppel in this civil action.