

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JANUARY 01, 2022 to JANUARY 31, 2022

I. REVIVAL OF ACTIONS

A. **CATHY STONE, ET AL. V. DEAN DAIRY HOLDINGS, LLC D/B/A DEAN MILK COMPANY, LLC, ET AL.**

[2017-CA-1179-MR](#)

01/14/2022

2022 WL 128028

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

This appeal was on remand from the Supreme Court of Kentucky for further consideration in light of its recent decision in *Estate of Benton by Marcum v. Currin*, 615 S.W.3d 34 (Ky. 2021). While the case was pending in federal court, the plaintiff, Cathy Stone, passed away on September 5, 2015. On December 13, 2015, Ms. Stone's counsel filed a statement under FRCP 25(a) noting Ms. Stone's death. On December 21, 2015, Ms. Stone's counsel filed a motion to substitute her husband as the named plaintiff, and the federal court granted the motion on March 21, 2016. Ten days later, the federal court remanded the case back to the Jefferson Circuit Court. On September 14, 2016, Appellants filed a CR 12.02(f) motion to dismiss on the ground that Ms. Stone's husband failed to file an application for revival of the action within one year of her death under KRS 395.275. The trial court granted the motion. Upon further review, the Court of Appeals reversed the Jefferson Circuit Court's order granting Appellees' motion to dismiss for failure to revive the action under KRS 395.278 and remanded for further proceedings. The Court found that, based on *Currin*, a litigant need not make a separate motion for revival under KRS 395.278 when a decedent party's husband had taken the appropriate steps under federal law to substitute himself as a party in his representative capacity. Thus, because the husband's motion for substitution was ultimately granted by the federal court while the case was still pending there, and because no separate motion for revival was required, the Court of Appeals found that the husband had properly complied with all applicable substitution requirements.

II. TORTS

A. **MARVIN MORRIS, M.D., ET AL. V. DAVID BOERSTE, AS ADMINISTRATOR OF THE ESTATE OF CAROLYN BOERSTE, ET AL.**

[2020-CA-0646-MR](#), [2020-CA-0754-MR](#), [2020-CA-0755-MR](#)

01/07/2022

2022 WL 67406

Opinion by GOODWINE, PAMELA R.; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellants, Marvin Morris, M.D. ("Dr. Morris") and University Medical Center ("University Hospital"), appeal a judgment of the Jefferson Circuit Court. At the end of a surgery, Dr. Morris and a surgical team left a surgical sponge in Boerste's abdomen. Boerste filed a medical negligence action, and, ultimately, a jury awarded her \$9.5 million in damages and \$1.0 million in punitive damages. On appeal, Appellants alleged several errors occurred during trial. The Court of Appeals determined the circuit court correctly found Appellants were not entitled to

instructions on apportionment of fault or mitigation of damages against Boerste; Appellants failed to properly preserve their pain and suffering argument; and there was sufficient evidence to support the jury's finding of liability against Dr. Morris. The Court of Appeals also determined that although Boerste was entitled to an instruction on punitive damages, the circuit court failed to include required language from KRS 411.148(3) in the instruction. This Court affirmed the judgment in part, reversed the punitive damages award, and remanded with instructions to include the language from KRS 411.184(3) in its punitive damages instruction.

Boerste cross-appealed, arguing the circuit court should have permitted reference to "never events" and apportionment of liability amongst defendants during the trial. The Court of Appeals determined reference to "never events" was properly excluded under KRE 702 and KRE 403, and discussion of apportionment was not relevant on a retrial for punitive damages.

III. CRIMINAL LAW

A. **TIFFANY DURBIN V. COMMONWEALTH OF KENTUCKY**

[2020-CA-0750-MR](#)

01/28/2022

2022 WL 258951

Opinion by McNEILL, J. CHRISTOPHER; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Tiffany Durbin appeals an order of the Grayson Circuit Court amending its judgment to reflect that the victim suffered death in compliance with KRS 439.3401(1). Because the judgment omitted that the victim suffered death as required by KRS 439.3401(1), the Kentucky Department of Corrections assigned Durbin parole eligibility at 20% instead of the statutorily mandated 85% for violent offenders. The Commonwealth moved to amend the judgment. Durbin objected, arguing that the trial court lacked jurisdiction to amend the judgment. The trial court Granted the motion, finding the omission to be a clerical error subject to correction under RCr 10.10. On appeal, Durbin argued that the trial court erred in determining the error to be clerical rather than judicial and that the trial court denied her finality by amending the judgment more than 10 days after its entry. The Court of Appeals affirmed the trial court's order amending the judgment, finding that the error was clerical, rather than judicial, because it was not the deliberate result of judicial reasoning and determination and was inconsistent with the evidence in the record. The Court further concluded that RCr 10.10 permits the trial court to correct a clerical error at any time on its own initiative or on the motion of any party.

B. **LEONARD L. MARTIN V. COMMONWEALTH OF KENTUCKY**

[2020-CA-1254-MR](#)

01/14/2022

2022 WL 129377

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Leonard Martin filed a post-conviction motion under CR 60.02 and CR 60.03 asking to be released from incarceration due to his fear of contracting COVID-19. The Floyd Circuit Court denied the motion, and the Court of Appeals affirmed. The Court concluded that Martin was

not entitled to relief under CR 60.02 because he did not demonstrate that there were errors in the judgment at issue and because his subjective fears regarding COVID-19 are not a proper basis for CR 60.02 relief. The Court further concluded that Martin was not entitled to relief under CR 60.03 because the relief he sought under CR 60.03 had been denied under CR 60.02 and because he did not file a separate, independent action as contemplated by that rule. Martin also failed to show that he was entitled to relief under the Eighth or Fourteenth Amendments. Such claims involving the conditions of his confinement are civil claims that are not properly brought in the sentencing court. The Court further concluded that the federal compassionate relief program is not available to him as a state prisoner.

IV. EMPLOYMENT LAW

A. DEZMON MOORE V. LOUISVILLE/JEFFERSON COUNTY METROPOLITAN GOVERNMENT, ET AL. **DISCRETIONARY REVIEW GRANTED 8/16/2022**

[2020-CA-1296-MR](#)

01/07/2022

2022 WL 67441

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

Appellant Dezmon Moore, a former police officer with the Louisville Metro Police Department (“LMPD”), was dismissed by the Louisville/Jefferson County Metropolitan Government through the Louisville Metro Police Merit Board. The dismissal was based upon three incidents. One incident involved a domestic violence charge that was dismissed by agreed order and an assault IV – domestic violence charge that was ultimately dismissed with prejudice and expunged. The other two incidents involved violations of no-contact orders. Moore appealed his dismissal to Board and objected to the admission of records relating to the expunged charges. He also objected to the admission of statements collected as part of the criminal investigation as violating his right to confrontation and cross-examination. The Board concluded that the records and statements were admissible but, without more, they could not prove LMPD’s case. Following the hearing, the Board determined that the domestic violence and assault IV – domestic violence charge was not proven, but the two violations of the no-contact orders were proven and warranted dismissal. Moore then appealed to Jefferson Circuit Court, which affirmed the Board’s decision. Moore then appealed to the Court of Appeals, which affirmed. The Court concluded that KRS 431.076(6) precludes the admission of court or law enforcement records following entry of an expungement order, but it does not preclude admission of witness statements taken during the criminal investigation or testimony concerning the underlying events. The Court also found that an officer has a right under KRS 67C.325 and in the collective bargaining agreement between Metro and the police union to confront and cross-examine witnesses at the evidentiary hearing. The Court, however, found that the errors were harmless because there was substantial, competent evidence to support the Board’s findings, and the decision to terminate Moore’s employment was not arbitrary.

V. CONTRACTS

A. THE WELLS GROUP, LLC V. LONNA BISHOP

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

Appellant The Wells Group (“Wells”) appealed from the Fayette Circuit Court’s orders denying its motion for summary judgment and, after a bench trial, entering judgment in favor of Appellee Lonna Bishop (“Bishop”). Bishop was president of LMR Construction, LLC. She signed a credit application from Wells to provide LMR with credit to purchase construction materials. The one-page credit application contained an “Agreement” stating that the undersigned personally and individually guaranteed all indebtedness that may become due under the Agreement. LMR defaulted on the loan. Wells subsequently filed a lawsuit against Bishop for the amount due, claiming that she personally guaranteed payment on behalf of LMR. After denying Bishop’s motion for summary judgment, the trial court held a bench trial. It concluded that Bishop was not personally liable for amounts due under the Agreement and dismissed Wells’ complaint with prejudice. On appeal, Wells argued that it was entitled to summary judgment prior the commencement of the bench trial. The Court of Appeals agreed and reversed the trial court’s orders and remanded the case for entry of judgment in favor of Wells. The Court concluded that although the denial of a motion for summary judgment is usually not appealable because it is interlocutory, an exception to that rule applied here. The Court further concluded that the language in the Agreement stating that whoever signed it would be personally liable for the debt was not ambiguous, and Bishop agreed to be personally liable even though she signed in a representative capacity.

VI. FAMILY LAW

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

[2021-CA-0807-ME](#), [2021-CA-0809-ME](#), [2021-CA-0810-ME](#)

01/21/2022 2022 WL 188148

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

Appellant D.H., who is the father of the children at issue, appealed from judgments of the Kenton Family Court that terminated his parental rights to his three children. On appeal, Appellant argued that the trial court’s conclusions of law merely repeated the language of KRS 625.090, which sets out the findings necessary to support an involuntary termination of parental rights, and did not identify any particular evidence supporting its conclusions. He also argued that the family court erred in finding that there was no reasonable expectation of improvement, that he was not given the opportunity to care and provide for the children, and that the pandemic restrictions imposed after March 2020 limited the availability of reunification services. Appellant also argued that the family court should have dismissed the petitions because it failed to enter its decision within 30 days after the conclusion of proof and argument, as required by KRS 625.090(6). The Court of Appeals affirmed. In doing so, the Court determined that while it is better practice for the family court to state the factual bases for each conclusion, the family court’s extensive factual findings in this case were sufficient. It determined that there was substantial evidence to support the family court’s conclusions. The

Court also held that the 30-day requirement in KRS 625.090(6) does not impose a jurisdictional barrier to granting termination beyond the time limit and, at most, implicates the family court's particular case jurisdiction.

VII. WORKERS' COMPENSATION

A. QUAD/GRAPHICS, INC. V. ROBERT BARTOLOMEO, ET AL.

[2021-CA-1033-WC](#)

01/21/2022

2022 WL 188054

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

Appellant Quad/Graphics, Inc. petitioned for review of an opinion by the Workers' Compensation Board affirming an opinion and award by the Administrative Law Judge to Appellee Robert Bartolomeo. Prior to his employment with Quad, Bartolomeo worked as an electronics technician and mechanic for more than 18 years. He underwent low back surgeries in 1998, 2001, and 2003. He testified that he improved after each surgery and was able to return to work without restrictions. Bartolomeo began working for Quad in 2013 as an electronic control specialist and then as a master electrician. He testified that he began experiencing pain in his low back, shoulder, and thumbs in 2016. Bartolomeo had an additional surgery to his low back in 2017. He testified that some of his pain improved after the surgery, but he then developed additional symptoms and pain. Bartolomeo filed his claim for Permanent Partial Disability (PPD) benefits after leaving work in March 2020. His physician concluded that Bartolomeo's conditions were caused by cumulative trauma, which manifested into disabling reality as a result of his work activities with Quad. Quad's physician found no evidence of cumulative trauma and would not have imposed any restrictions on his capacity to work. The ALJ found Bartolomeo's physician's conclusions to be more persuasive and awarded PPD benefits based on a 31% impairment rating for the low back and thumb injuries and medical benefits for the low back and thumb conditions. On reconsideration in light of *ViWin Tech Windows & Doors, Inc. v. Ivey*, 621 S.W.3d 153 (Ky. 2021), the ALJ carved out an additional 13% for the impairment related to the prior low back surgeries and awarded PPD benefits based on a combined 18% rating. The Board affirmed. On appeal to the Court of Appeals, Appellant argued that the Board denied it a meaningful review by failing to address the substantive issues of law it raised and that such failure constituted a denial of due process and the arbitrary exercise of power in violation of the Kentucky Constitution and KRS 342.285(2). He also argued that the ALJ's award was not supported by substantial evidence. The Court concluded that the Board accurately summarized all of the ALJ's findings and addressed all issues that Appellant raised. It further concluded that the ALJ's award was supported by substantial evidence. The Court also addressed the sufficiency of the ALJ's carve out pursuant to *Ivey* and concluded that the ALJ properly applied the holding of *Ivey* in determining the carve out in Bartolomeo's case.