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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0218-ME

J.P.T. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 22-J-00411-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; J.D.T., A MINOR CHILD; AND P.C.T. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

ACREE, JUDGE: Appellant, Father, appeals the Boone Family Court's February 9, 2023 dispositional order following the underlying dependency, neglect, and abuse (DNA) action. He challenges the family court's determination that his son, J.D.T. (Child) was abused or neglected after P.C.T. (Mother) discovered bruises on

both of Child's upper arms and that he was responsible for that abuse or neglect. For the following reasons, we affirm.

VIOLATIONS OF RAP[1] 32

Before proceeding, we note that Father's several briefing violations make this Court's review more challenging than necessary. His statement of the case does not comply with RAP 32(A)(3). It says little about the case, is barely more than one page, and does not include a single citation to the record. It cites only to the brief's own appendix which is not a substitute for the rule's requirement to cite only to the certified record on appeal. *Serv. Fin. Co. v. Ware*, 473 S.W.3d 98, 102 n.4 (Ky. App. 2015) ("It appears that appellant's counsel engaged in the not-uncommon practice of creating an appendix from counsel's file and citing that appendix in the body of the brief. Such practice does not satisfy the requirements of CR[2] 76.12(4)(c)(iv) and (v)." The same applies under the corresponding new rules, RAP 32(A)(3) and (4).).

The brief also violates RAP 32(A)(4) which requires the argument section to include "ample references to the specific location in the record . . . pertinent to each issue . . . ." Counsel's argument section contains no such references at all.

[1] Kentucky Rules of Appellate Procedure.

[2] Kentucky Rules of Civil Procedure.

Father's brief also violates RAP 32(E)(1)(a) which says "[t]he appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court." And it violates another subsection of the same rule, which says: "Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." RAP 32(E)(1)(c). The first and second item in Father's appendix are, respectively, a November 15, 2022 agreed order and an August 26, 2022 agreed order from Mother and Father's dissolution proceeding. These agreed orders do not appear in the certified record and, therefore, we strike them from the appendix to the appellant's brief pursuant to RAP 10(B)(3) by separate order entered herein.

Lawyers who engage in appellate advocacy in this Court hold themselves out as possessing "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." SCR[3] 3.130(1.1) (Competency). Competency is the very first rule of professional conduct. And there is no more basic element of competency in the practice of appellate advocacy than knowing and simply following the Court's rules of procedure and brief writing. Failure in that regard has only two explanations: (1) an ignorance of the rules, or (2) an impertinent refusal to follow them. Both provide reasons for

[3] Rules of the Kentucky Supreme Court.

sanctioning an attorney. *See McAdam v. Kentucky Bar Ass'n*, 262 S.W.3d 640, 642 (Ky. 2008) (attorney disciplined pursuant to SCR 3.130(1.1) and 3.130(3.4) for "disobeying an obligation under the rules" of appellate procedure). Such sanctions are fully justified, even necessary, if we are ever to reclaim public confidence in our justice system. The vice of attorneys violating the rules of appellate procedure and professional responsibility has had a broad and insidious effect.

Rule-offending appellate counsel necessarily weaken their clients' chances of victory on appeal. They do not intend to hide injustices, but their filing of a deficient brief increases the possibility of such an effect. Judges and their law clerks – public servants all – believe themselves duty-bound to triage deficient briefs to decide which might be accomplishing that unintended consequence. That places an unnecessary load on an already over-burdened system. *See Commonwealth v. Roth*, 567 S.W.3d 591, 594-95 (Ky. 2019) (internal quotation marks and citation omitted) ("Without pinpoint citations to the record, a court must sift through a record to [find] the basis for a claim for relief. Expeditious relief would cease to exist without this requirement."). When counsel fail to narrow focus to specific parts of a record, or when they point to little or no persuasive legal authority, they unnecessarily tax already limited judicial resources.

Furthermore, this Court's forgiveness of a counsel's incompetency, or our pretending their rule violations do not matter, is unfair to the clients of opposing counsel and counsel themselves who are competent and do abide by our rules. Some observing the incompetent appellate advocacy and this Court's tolerance, especially less-experienced lawyers, might lose respect for the rules or for the Court itself. Some will choose no longer to be a victim of our unfair non-application of the rules; they will be tempted to follow the bad example we allow and join that brazen cadre of unsanctioned rule-breakers.

All the victims – the represented clients, the rule-abiding opposing counsel, the judges and their staff, the bar at large, the justice system itself – have endured the consequences of rule-offending appellate counsel far too long.

The party most responsible for these ills is the counsel who claims competence as an appellate advocate but demonstrates the opposite. The Court's forgiveness of rule violations over these many years saved those persons time, money, and reputation. Looking back, then, we must acknowledge our share of the blame. But looking forward, we should atone. The time has come to utilize the tools given us by our Supreme Court.

The sanctions available to this Court in the new Kentucky Rules of Appellate Procedure are as follows:

> [F]ailure of a party to substantially comply with the rules is ground for such action as the appellate court deems appropriate, which may include:
>
> (1) A deficiency notice or order directing a party to take specific action,
>
> (2) A show cause order,
>
> (3) Striking of filings, briefs, record or portions thereof,
>
> (4) Imposition of fines on counsel for failing to comply with these rules of not more than $1,000,
>
> (5) A dismissal of the appeal or denial of the motion for discretionary review, and
>
> (6) Such further remedies as are specified in any applicable rule.

RAP 10(B).

This Court has not been reticent in pointing out violations but always reluctant to apply sanctions. Its jurists were ever hopeful for improvement, but that hope has been in vain.[4] The Supreme Court approved the Rules of Appellate

[4] Four years ago, we said:

> This Court is weary of the need to render opinions such as this one, necessitated as they are by the failure of appellate advocates to follow rules of appellate advocacy. In just the last two years, at least one hundred and one (101) Kentucky appellate opinions were rendered in which an attorney's carelessness made appellate rule violations an issue in his or her client's case. The prodigious number of attorneys appearing in Kentucky's appellate courts lacking the

Procedure with these enhanced sanctions, and it has rendered opinions indicating a willingness to compel compliance by imposing those sanctions. *See Roth*, 567 S.W.3d at 596 (striking brief for failure to comply with procedural rule requiring citations to record and dismissing appeal); *Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021) (argument failing to inform appellate court how issue was preserved and where to find it in record can be treated as unpreserved and argument stricken from brief unless party seeks palpable error review). We read these decisions as indicating our reluctance to sanction should come to an end, and the bar should be made aware. The brief filed by counsel for Father in this case presents the opportunity to do just that.

In at least five prior opinions of this Court, rendered in just the last six years, the briefing deficiencies of this appellant's counsel, Darrell A. Cox, were sufficiently troublesome that they were expressly addressed as hurdles this Court had to clear before attempting to reach the substance of the appeal.

In 2018, in *Kitts v. Kitts*, we took note that Mr. Cox's brief "contain[ed] almost no citations to the record on appeal or any statement as to how the issues raised on appeal were preserved for review," and further referenced this

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> skill, will, or interest in following procedural rules is growing. . . . If this is not a crisis yet, it soon will be if trends do not reverse.

Clark v. Workman, 604 S.W.3d 616, 616-18 (Ky. App. 2020) (footnotes omitted).

"appellate court's authority to strike a brief that does not comply with CR 76.12[,]" now, RAP 32. No. 2017-CA-001173-ME, 2018 WL 5881683, at *2 (Ky. App. Nov. 9, 2018). In that case, we exercised our discretion and did not strike the brief. *Id.* We provided a full-on review as if there was no deficiency. *Id.* at *2-5.

In early 2019, we rendered *Bell v. Commonwealth* and again noted Mr. Cox's "failure to comply with CR 76.12(4)(c)(v) [now RAP 32(A)(4)] which requires 'a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.'" No. 2017-CA-001966-DG, 2019 WL 258094, at *1 (Ky. App. Jan. 18, 2019). Again, too, we pointed out that Mr. Cox's brief for appellant "does not contain a single reference to the record supportive of his arguments." *Id.* We reminded him that "[f]ailing to comply with these rules is an unnecessary risk the appellate advocate should not chance." *Id.* (citing *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010)). Again, we noted these failures afforded the Court "discretion to strike the brief or dismiss the appeal for [his] failure to comply with the rules." *Id.* And again, we exercised grace and moved to the merits of the appeal anyway. But we said this: "While we have chosen not to impose such a harsh sanction, *we caution counsel* that such latitude may not be extended in the future." *Id.* (emphasis added).

A few months later, we rendered *Williams v. Commonwealth* in which Mr. Cox represented a defendant tried by a jury and convicted of rape. He

appealed, arguing to this Court that the circuit court should have granted a mistrial, among other things. It was necessary to again quote to Mr. Cox the rule that "requires Appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner[,]" which rule allows us, if we chose, to "summarily affirm the trial court on the issues contained therein." No. 2018-CA-000218-MR, 2019 WL 1092660, at *2 (Ky. App. Mar. 8, 2019) (citing *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986)). We found that procedural route unnecessary because it was "uncontroverted that Appellant, through counsel, argued against a mistrial below and assented to a continuance. An appellant is estopped from asserting an invited error on appeal." *Id.* (citing *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011)).

In the same month, we rendered *Rafus v. Rafus*, No. 2018-CA-001514-ME, 2019 WL 1312839 (Ky. App. Mar. 22, 2019). The brief Mr. Cox filed for his client in that case also failed to comply with CR 76.12(4)(c)(iv) and (4)(c)(v) – now RAP 32(A)(3) and (A)(4) – requiring the appellant "to include 'ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, . . . supporting each of the statements narrated in the summary' . . . [as well as] in the 'Argument' section" of the appellant's brief." *Id.* at *3 (quoting CR 76.12(4)(c)(iv)). Again, we were reluctant to impose a sanction despite being

"permitted to do [so] by both CR 76.12(8)(a) [now RAP 10(B)] and *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010)." *Id.* We simply pointed out "that it is not an appellate court's duty to search the record for applicable evidence." *Id.* (citing *Baker v. Weinberg*, 266 S.W.3d 827, 834 (Ky. App. 2008)). Nevertheless, with no help from Mr. Cox in narrowing the search, this Court "examined the record in its entirety" – in vain – for any evidence to support his client's appeal. *Id.*

One year ago, this Court rendered *Willet v. Sanitation District No. 1*, No. 2022-CA-0073-MR, 2023 WL 2335907 (Ky. App. Mar. 3, 2023). We found the brief Mr. Cox filed to be "materially deficient" for the same reasons cited in our opinions in the four appeals described above – no citations to the record and no preservation statement – but also for failing to provide "***any*** citations to relevant authority." *Id.* at *1-2 (emphasis in original). We also quoted extensively from *Commonwealth v. Roth*, *supra*, emphasizing the importance of following these rules, stating it is an appellate advocate's "fundamental . . . duty and obligation" to follow these rules for briefing. *Willett*, 2023 WL 2335907, at *2. If an appellate advocate fails in that duty, particularly the duty "to provide citations to the record regarding the location of the evidence and testimony upon which he relies to support his position, . . . we will accordingly not address it on the merits. . . ." *Id.*

at *2 (internal quotation marks omitted) (quoting *Roth*, 567 S.W.3d at 594). We said what Mr. Cox filed was an

> irredeemably deficient brief. We "cannot tolerate" Appellants' "total disregard" for appellate briefing rules. *Koester*[*v. Koester*], 569 S.W.3d [412, 414 (Ky. App. 2019)]. The current and former briefing rules, as well as precedent, provide the clear answer as to the appropriate sanction: Appellants' brief should be stricken. . . . And when an appellant's brief is stricken, the appeal is dismissed.

Id. at *3.

We can only presume Mr. Cox read each of these five opinions but we know conclusively he chose not to heed their warnings. On June 19, 2023, three months after having one of his clients' appeals dismissed in *Willet* for failing to comply with the appellate rules, Mr. Cox filed another substantially noncompliant brief – the brief he filed for Father in this very case under review. His violations of the appellate rules in prior cases – surely, well-known to him by now – are repeated in this brief. The Court's patience is not interminable. Mr. Cox has been afforded more than sufficient grace and guidance from this Court.

By separate order rendered contemporaneously with this Opinion, the Court sanctions Mr. Cox pursuant to RAP 10(B)(4). Future violations of the Kentucky Rules of Appellate Procedure in this Court *shall* result in further sanctions.

Having imposed this sanction, the Court concludes this case involves the important constitutional right to parent and will do its best to glean from the record and the appellee's brief why Father believes the family court committed reversible error.

BACKGROUND

Mother and Father were going through a divorce when the underlying DNA petition was initiated. They shared custody of Child and their other minor children by an agreed order in their divorce action. The parties were prohibited from committing further acts of abuse, stalking, or sexual harassment. The order also restrained the parties from being within five hundred feet of one another and prohibited any unauthorized contact.

Mother filed her DNA petition on November 29, 2022. In the accompanying emergency custody affidavit, Mother stated she noticed bruises on Child's upper arms after Child had returned from a visit with Father. Mother took photographs of the bruises and filed for emergency custody of Child. The family court held a temporary removal hearing on December 1, finding an emergency did exist and granted temporary custody of Child to Mother.

On January 26, 2023, the family court held an adjudication hearing and both Mother and Father testified. The court's findings in the adjudication order stated:

Finding of abuse by [Father] re: [Child]

1. The Child . . . is 3 years old and mostly non-verbal. . . . Parents are going through a divorce in 20-CI-0869. Prior to this case being filed, the parties shared parenting time by agreement in the CI case.

2. On Nov. 24, 2022 [Mother] called law enforcement after noticing bruises on the backside of the [Child's] upper arms that resembled finger marks. The bruises were on both arms and were on the same location on both arms; both resembled hand/fingerprints. The [Child] was with [Father] for the three days prior to Nov. 24. [Child] was returned to [Mother] around 7 p.m. Nov. 23 and the bruises were noticed by [Mother] when [Child] took off his shirt around 10 am on 11/24. Comm[onwealth's] exhs. 1-3 photos of bruises.

3. [Mother] testified that the next time [Child] saw [Father] he would not go to [Father] and turned around to go back inside, the opposite direction from [Father]. Child has since pulled away from [Father] on multiple occasions when [Father] has reached out to touch him.

4. There is a history of domestic violence in the home which [Father] denies. [Mother] has obtained protective orders on multiple occasions throughout their relationship. On July 24, 2020 [Mother] filed for an EPO after an incident in which he tackled her from behind and pushed her down while she was trying to leave an argument. [Mother] went to the hospital after that incident.

5. On April 14, 2021 [Father] was arrested for domestic violence after an incident in which he followed [Mother] through the house to the garage, knocked a can of pop from her hand and choked her by grabbing her by her throat, then threw her down and smashed her phone. [Mother] testified she started to black out while [Father] choked her. [Father] testified he did not grab

her throat but rather pushed her face away and said, "Get the fuck away from me." Video of body cam was played as Comm[onwealth's] exh. 10, showing [Father] tell the police, "I didn't choke her but I did push her by the throat." The children were present in the home during both incidents of domestic violence.

6. [Mother] testified that after the DV charges, [Father] threatened to burn the house down with her and the children inside if she went to court.

7. [Mother] testified she is afraid of him. She testified he has ripped her security cameras down on two occasions.

8. On Jan. 11, 2022, Child sustained significant injuries [while] in [Father's] care. Comm[onwealth's] exhs. 7, 8, 9. [Father] and [Father's girlfriend] were present in the home. [Father] testified the child fell down the stairs, causing the injuries. [Child] went to the hospital as a result of the injuries.

9. [Father] testified the bruises on child's arms from the Nov. 24 incident were likely caused by him from playfully throwing the child on a mattress repeatedly because the child liked it and they were playing.

   [The family court found] risk of harm to Child due to repeated Domestic Violence in the home which Child is present in the home; Infliction of physical injury to [Child] – bruising to [Child's] arms in the care of Father. . . .

   Neglect or abuse has been proved by a preponderance of the evidence.

   [C]hild is . . . Neglected or Abused as defined in KRS[5] 600.020(1)(a). [Father] . . . [i]nflicted or allowed to be

[5] Kentucky Revised Statutes.

> inflicted upon [Child] physical or emotional injury by other than accidental means; [and] [c]reated or allowed to be created a risk of physical or emotional injury by other than accidental means . . . .
>
> The facts do support removal or continued removal of [Child] . . . The specific findings are as follows:
>
> Recurring violence in the home causes risk of harm to [Child]; Father's hands caused injury/bruising to both of Child's upper arms. . . .
>
> [Child's] best interests require the Court to change custody of [Child] . . . .
>
> Continuation in the home of removal is contrary to the welfare of [Child]. . . .
>
> Reasonable efforts were made to prevent [Child's] removal from the home. . . .
>
> Pending disposition of this matter, [Child], having been found . . . neglected or abused, shall . . . [b]e placed, or continue to remain, out of home of removal with . . . Mother. . . .
>
> [The family court granted] supervised parenting time for Father. . . .
>
> Next hearing will be held Feb. 9, 2023 . . . [for] Disposition.

(Record (R.) 28-35.)

Though not reflected in the family court's findings, a Cabinet social worker, Jessica Jones, also testified at the adjudication hearing. Jones said that, following a Cabinet investigation, the allegations against Father were found to be

unsubstantiated. However, she also testified that no evidence of Child's bruising, including the photographs Mother took, was provided to the Cabinet during its investigation.

Father filed his motion to reconsider the adjudication hearing's findings on February 2, 2022. He included his sworn affidavit in which he stated Child's bruises were a result of Father playing with Child by tossing him in the air and catching him. He also included a letter addressed to him from Child Protective Services (CPS) stating the allegations of abuse or neglect of Child were unsubstantiated.[6] The family court denied Father's motion.

Following a dispositional hearing on February 9, 2022, the family court entered its order, taking the form of handwritten directions on a docket sheet incorporated into the Form AOC-DNA-5 Disposition Hearing Order. (R. 44, 51-53.) The court ordered Father's parenting time to be supervised by a Cabinet approved supervisor, that he complete a domestic violence assessment, that he complete anger management, batterer's intervention, and parenting classes, and that he otherwise cooperate with the Cabinet. *Id.* Father now appeals.

[6] As the Cabinet notes in its brief, it is unclear why counsel for Father did not attempt to introduce this letter into evidence at the adjudication hearing.

STANDARD OF REVIEW

In DNA appeals, this Court reviews a family court's factual findings for clear error. CR 52.01. A finding of fact is clearly erroneous if it is not supported by substantial evidence. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). "Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person." *Id*. (citation omitted). This Court reviews questions of law *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). "If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion." *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). As fact finder, the family court is "in the best position to evaluate the testimony and to weigh the evidence," and, so, "an appellate court should not substitute its own opinion for that of the family court." *Id*.

ANALYSIS

Both of Father's arguments on appeal claim the family court's findings of fact are not supported by the evidence. (Appellant's brief, p. 2 ("factual findings in complete contradiction of the evidence"; *id.* at p. 4 ("findings of the trial court were not supported by substantial evidence"))). He claims there was "no evidence of abuse" as defined by the statute. *Id.* at p. 2.

A second argument, not made directly in Father's brief but readily inferred, is that because he did not intend to injure Child, Mother's proof does not support the legal conclusion that he abused Child.

Neither of these arguments is persuasive.

1. Substantial evidence supports the family court's finding of abuse

Presuming Father's evidence was itself enough to support a ruling in his favor, we cannot reverse the family court's decision if the same can be said of the proof Mother presented. "[W]hen there is substantial evidence on both sides of [a] controverted fact it would be invading the province" of the factfinder if the appellate court made that choice. *Sesmer v. Barton's Adm'x*, 57 S.W.2d 1020, 1022 (Ky. 1933). The factfinder "may believe the evidence of one witness as against the evidence of several others" because the factfinder "sees the witnesses and hears them testify, observes their demeanor on the witness stand and considers many things in the conduct of a witness which this [appellate] court has no opportunity to consider." *Id.* We find that Mother did present substantial evidence sufficient to support the family court's decision. That is what matters when an appellate court reviews the decision of a trial court acting also as factfinder.

As the family court recorded in its adjudication, quoted *supra*, Child's bruising was photographed immediately after a three-day visit with Father and the photographs were admitted into evidence along with Mother's testimony

establishing the timeline of that visit relative to the bruising. There was Mother's testimony that she observed Child withdrawing from Father after that visit, supporting the inference that, since that visit, Child feared being with Father. There was evidence of Father's periodic violent tendencies and of Child suffering injuries during a prior visit with Father and his girlfriend that required a hospital visit. This evidence satisfies the definition of "substantial evidence." *Hunter*, 127 S.W.3d at 659.

As for Father's evidence, he did not refute Mother's proof; he merely speculated that, in fact, he may have caused the bruising while playing with Child. Calling it a "child rearing preference[,]" Father claimed the right to "play with his child as he sees fit." (Appellant's brief, at p. 3.) But rather than exculpating him, this admission supports the finding that Child's bruising was caused by his Father's own hands.

That leads to Father's implied argument that, because he intended no injury to Child, he cannot be found to have abused him.

2. *Infliction of physical injury under KRS 600.020(1)(a)1.-2. does not require intent to injure, only that injury occurred "by other than accidental means"*

For purposes of KRS 600.020(1)(a)1.-2., Father's intention never plays a role in determining whether, by his act or omission, Child was injured. The analysis begins with Child's injury. There is no real dispute Child was injured. So, we move on to whether Father, the "person exercising custodial control or

supervision of the child[,]" had a hand in bringing about that injury. KRS 600.020(1)(a).

Taking Father's explanation as fact, he would claim the injury was accidental and, therefore, excluded from the statutory definition of "Abused or neglected child[.]" KRS 600.020(1)(a)1.-2. That statute, excerpted for application to these facts, says: "'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when . . . [h]is . . . parent . . . [i]nflicts or allows to be inflicted upon the child physical or emotional injury . . . [or c]reates or allows to be created a risk of physical or emotional injury as defined in this section to the child *by other than accidental means* . . . ."

Father would argue Child's injury was accidental because his *purpose* was simply to play with Child, and it was not his *intent* to harm him. We emphasize these words – purpose and intent – because the distinction between them is critical in determining whether Child's injury was "by other than accidental means" for purposes of KRS 600.020(1)(a)1.-2.

Intent is not a concept underpinning what is or is not "accidental" under the statute; however, *purpose* is. As the word "accidental" is defined in the preeminent legal dictionary, something is accidental only when "[n]ot having occurred as a result of anyone's *purposeful* act; esp[ecially] resulting from an event that could not have been prevented by human skill or reasonable foresight."

Accidental, BLACK'S LAW DICTIONARY 18 (11th ed. 2019) (hereinafter "Black's") (emphasis added).

Note that Black's definition of "accidental" does not use the word "intentional"; instead, the author[7] uses the word "purposeful" in the definition to say what it is not – *i.e.*, it is not the result of someone's purposeful act regardless of what the person intended. A *purposeful* act and an *intentional* act are not the same thing. Black's defines both terms and they are not synonymous.

"Intention" is "[t]he willingness to bring about something planned or foreseen . . . ." *Intention*, BLACK'S 965. When a person acts with intention, what he desires to happen and what does happen are the same. *Id.* ("'*Intention.* – This signifies *full advertence in the mind* of the defendant to his conduct, which is in question, and to its consequences, *together with a desire for those consequences*.' P.H. Winfield, *A Textbook of the Law of Tort* § 10, at 19 (5th ed. 1950).."). The fact that a person's desire for a particular outcome coincides with that same particular outcome happening is the syllogistic concurrency a prosecutor must prove – intent – to secure a criminal conviction. But intent need not be proved to establish something happened *by other than accidental means*.

For the purposes of this statute, we do not define the adjective "accidental" by the absence of *intent*; we define it by the absence of human agency

[7] Since 1995, Bryan A. Garner has been editor-in-chief of Black's Law Dictionary.

– *i.e.*, a person's engaging in a *purposeful* act even if the outcome was unintended. BLACK'S, 18. Black's defines "purposeful" as something "[d]one with a specific aim in mind; deliberate." *Purposeful*, BLACK'S 1483. Deliberate action is still purposeful, even if the intended outcome does not come to fruition and, instead, some other consequence results from that deliberate action. Here is an example.

Archimedes filled a tub with water and got in. His *purpose* was to bathe. He did not *intend* to overflow the tub. That purposeful act led directly to his invention of Archimedes' principle – "Eureka!" Because his act was purposeful, the small flood (and his resulting invention) was not accidental.

The Supreme Court alluded to this distinction between intentional and purposeful in *Cabinet for Health and Family Services v. P.W.*, 582 S.W.3d 887 (Ky. 2019). "While in some cases an intentional act leads to a finding of abuse or neglect," said the Court, "there is no requirement that the parent actually intend to abuse or neglect the child." *Id*. at 895. Stated differently, "a parent need not intend to abuse or neglect a child in order for that child to be adjudged an abused or neglected child." *Id*. There simply is "nothing in the plain language of the statute or in our precedent requiring a trial court to find that a parent intentionally abused or neglected her child." *Id.* at 894.

Child's injury was not sustained by other than accidental means and there is substantial evidence it was the result of Father's purposeful act, including

his admission. In other words, it was an injury Father could have "prevented by human skill or reasonable foresight." *Accidental*, BLACK'S 18.

CONCLUSION

For the foregoing reasons, we affirm the Boone Family Court's February 9, 2023 dispositional order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell Cox
Covington, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

Nathaniel Young
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