

RENDERED: JUNE 3, 2016; 10:00 A.M.  
TO BE PUBLISHED

**MODIFIED: JUNE 17, 2016; 10:00 A.M.**

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000603-MR

VIRGINIA GAITHER, ADMINISTRATRIX  
AND PERSONAL REPRESENTATIVE OF  
THE ESTATE OF LEBRON GAITHER, DECEASED APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 10-CI-00023

COMMONWEALTH OF KENTUCKY,  
JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF KENTUCKY STATE POLICE,  
AND KENTUCKY BOARD OF CLAIMS APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Virginia Gaither, administratrix and personal representative of the estate of LeBron Gaither (the Estate), appeals from a Franklin Circuit Court

order denying her motion for post-judgment interest on a Board of Claims award. The dispute concerns the date on which the interest begins to accrue.

LeBron Gaither was killed while acting as an undercover informant for the appellee, Kentucky State Police (KSP). On December 9, 2009, the Board of Claims entered an award in the amount of \$168,729.90 in favor of his Estate after concluding that his death was caused by the negligent performance of ministerial acts by the police officers acting within the scope of their employment. The KSP filed a petition for judicial review in the Franklin Circuit Court pursuant to Kentucky Revised Statutes (KRS) 44.140(1). The Estate filed a cross-appeal seeking to affirm the order and for a determination of the entitlement of the Estate to costs, expenses and interest.

On January 5, 2011, the Franklin Circuit Court entered an opinion and order reversing the final order of the Board of Claims on the grounds that the KSP was entitled to immunity. The Court of Appeals affirmed this judgment. *Gaither v. Justice & Pub. Safety Cabinet*, 2012 WL 1556313 (Ky. App. May 4, 2012) (2011-CA-000185-MR). The Kentucky Supreme Court thereafter reversed the judgment of the Court of Appeals and directed the Board of Claims to re-enter the award to the Estate, although in the reduced amount of \$148,787.12 because it had been erroneously calculated. *Gaither v. Justice & Pub. Safety Cabinet*, 447 S.W.3d 628, 629-30 (Ky. 2014), as corrected (Sept. 15, 2014), reh'g denied (Dec. 18, 2014). The Board of Claims accordingly entered a final order awarding the Estate the sum of \$148,787.12, and paid the amount by check dated February 3, 2015.

On February 25, 2015, the Estate filed a motion in Franklin Circuit Court seeking post-judgment interest on the award in the amount of 12 percent per annum, pursuant to KRS 360.040, from January 5, 2011, the date on which the circuit court entered the opinion and order reversing the initial award of the Board of Claims. The Estate contended that the interest had been accruing since the date the Franklin Circuit Court should have entered judgment in favor of the Estate, instead of erroneously reversing the award. The Estate calculated the accrued interest to be \$85,332.25,

Following a hearing, the Franklin Circuit Court denied the Estate's motion. This appeal by the Estate followed.

KRS 44.130 provides that

Orders, awards, and judgments of the board [of Claims] may be enforced by filing in the office of the clerk of the Franklin Circuit Court an authenticated copy of the order, award, or judgment, which, when ordered entered by the judge of the court, shall be entered on the order book and become to all effects and purposes an order, award, or judgment of the court, and be enforceable in a like manner.

KRS 44.140(1) provides that state agencies may take appeals to the circuit court from all awards of the Board of Claims where the amount in controversy exceeds \$1,000. Following a hearing, the circuit court is directed to "enter its findings on the order book as a judgment of the court, and such judgment shall have the same effect and be enforceable as any other judgment of the court in civil causes." KRS 44.140(5).

KRS 360.040 states that “[a] judgment shall bear twelve percent (12%) interest compounded annually from its date.” This general interest statute applies to Board of Claims awards under *Commonwealth v. Young*, 380 S.W.2d 239 (Ky. 1964). The *Young* court reasoned that KRS 44.140(5) “provided for all of the attributes of any other judgment to follow the circuit court’s judgment on appeal.” See *Bradley v. Commonwealth*, 301 S.W.3d 27, 30-31 (Ky. 2009)

A judgment is defined by Kentucky Rules of Civil Procedure (CR) 54.01 as:

[A] written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order”.

In the case before us, the circuit court held that the Estate was not entitled to post-judgment interest because the initial award made by the Board of Claims in December 2009 was not a “judgment” as defined by CR 54.01, and the award was not presented to the circuit court for enforcement until January 15, 2015, after the remand from the Kentucky Supreme Court.

In arriving at its decision, the trial court relied on *Thurman v. Commonwealth*, 981 S.W.2d 140 (Ky. App. 1998), a case in which the Board of Claims awarded \$250,000 to the Thurman estate on April 30, 1992. The Commonwealth of Kentucky appealed the award to the Laurel Circuit Court which entered a judgment affirming the award on September 30, 1993. The estate thereafter argued that it was entitled to post-judgment interest dating from April

30, 1992, the date of the Board of Claims award. The Court of Appeals disagreed, on the grounds that the award did not automatically become a judgment when it was rendered by the Board, but only attained the force and effect of a judgment when the circuit court entered its judgment on September 30, 1993. The opinion holds that “[A] Board of Claims award is to be treated as a judgment, on which interest . . . [can] . . . be awarded, only after a judgment has been entered by a circuit court on appeal, KRS 44.140(5), or after the award becomes final through its entry as a judgment by the Franklin Circuit Court in accordance with KRS 44.130.” *Thurman*, 981 S.W.2d at 142.

*Thurman* is of limited utility in resolving the present case, however, because the Estate is not claiming that it is entitled to post-judgment interest dating from the original award by the Board of Claims in December 2009, but from January 5, 2011, the date of entry of the opinion and order erroneously reversing that award. The Estate concedes that it did not present the original award to the circuit court for enforcement, but argues that it is entitled to interest from the date when it should have been converted into a judgment.

In *Elpers v. Johnson*, 386 S.W.2d 267 (Ky. 1965), a case relied upon by the Estate, a jury returned verdicts favorable to the plaintiffs and the circuit court accordingly entered a judgment in their favor on March 22, 1960. It also, however, entered judgment notwithstanding the verdict for the defendant. The Court of Appeals held that the trial court erred in granting judgment notwithstanding the verdict, and directed the trial court to enter a judgment in accordance with the jury

verdicts. On remand, on May 22, 1963, the trial court entered judgment in favor of the plaintiffs and allowed them to recover interest from March 22, 1960. The defendant appealed, arguing that the plaintiffs were entitled to interest only from May 22, 1963, the date of the judgment entered upon remand. The Court of Appeals held that the plaintiffs were entitled to interest from the date of entry of the original judgment, March 22, 1960.

There was some dispute in the case about the date when the judgments were entered. One of the defendant's arguments was that the judgment notwithstanding the verdict was entered eight days before the original judgment for the plaintiffs and should therefore take priority. The appellate court disagreed, stating, "[s]hould this be true, we are of the opinion that plaintiffs were entitled to interest from the date the judgment should have been entered . . . which would be March 22, 1960, the uncontradicted date of the judgment n.o.v." *Id.* at 287.

The other pertinent case is *Commonwealth v. Esenbock*, 200 S.W.3d 489 (Ky. App. 2006). In that case, the plaintiffs brought an action against the Transportation Cabinet following a fatal traffic accident. The Board of Claims apportioned fault amongst the Cabinet, the driver, and the estate of the passenger who died, with the result that the driver received a net award of \$8,984.25 and the estate received nothing. The plaintiffs brought an appeal to the circuit court, which affirmed the Board's decision in an opinion and order entered on February 10, 1999. The plaintiffs appealed.

The Court of Appeals held that the Board had improperly calculated the award, and remanded the matter to the Board of Claims. The Board entered an award on October 18, 2001, in conformity with the appellate directive, awarding the driver \$69,297.15, an increase of \$60,312.90 over the original award, and the estate, which had received nothing under the original award, \$6,385. The plaintiffs then sought post-judgment interest calculated from February 10, 1999. The Cabinet argued that the post-judgment interest should only accrue from that date on the original, lower amount of \$8,984.25, and that the interest on the amount of the increase in the awards should begin to accrue from October 10, 2001, the day the amended awards were entered by the Board.

The appeals court held, in reliance on *Elpers*, that once a judgment is entered, and the amount of the judgment is subsequently increased pursuant to the mandate of an appellate court, the increased judgment bears interest from the date of the original judgment. *Esenbock*, 200 S.W.3d at 494. The *Esenbock* court cited with approval an older case in which the original judgment failed to provide any alimony in a divorce case. *Id.* The wife appealed, and the judgment was reversed, but the lower court refused to award alimony from the date of the original erroneous order. The appellate court reversed, stating that “a full correction of that error requires that she be allowed alimony from the date when the erroneous judgment was entered and not simply from the date when the mandate of this court was filed.” *Helton v. Hoskins*, 128 S.W.2d 732, 733 (Ky. 1939), referencing *Baker v. Ward*, 120 S.W.2d 666 (Ky. 1938).

The appellees point out that there had been no determination of the amount that was owed to the Estate until the final decision of the Kentucky Supreme Court, and argue that it would be inequitable to require the Commonwealth to pay interest on a judgment that had never been entered. But the judgment of January 5, 2011, met the definition of a judgment under CR 54.01, as it was “a written order of a court adjudicating a claim or claims in an action or proceeding.” Admittedly, it awarded no funds whatsoever to the Gaither Estate. But, under *Esenbock*, even if the award is nonexistent, as in the case of the estate of the deceased passenger which the trial court held was not entitled to any recovery whatsoever, post-judgment interest will be awarded from the date of the original, erroneous judgment, not the judgment entered upon remand. Under our case law, the Gaither Estate is entitled to post-judgment interest on the amount of \$148,787.12, accruing from January 5, 2011.

The order denying the Estate’s motion for post-judgment interest is reversed, and the matter is remanded to the Franklin Circuit Court for entry of an order in accordance with this opinion.

ALL CONCUR.



BRIEFS FOR APPELLANT:

Daniel T. Taylor, III  
Prospect, Kentucky

Philip C. Kimball  
Louisville, Kentucky

BRIEFS FOR APPELLEE:

Scott Miller  
Frankfort, Kentucky