

RENDERED: OCTOBER 20, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002709-MR

WILLIAM MAYNARD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-01164

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: William Maynard has appealed from the October 21, 2003, opinion and order of the Franklin Circuit Court which granted summary judgment in favor of the Natural Resources and Environmental Protection Cabinet, now known as the Environmental and Public Protection Cabinet, (the Cabinet) and ordered Maynard to comply with the Cabinet Secretary's order previously entered on June 24, 2002. Having concluded that it was proper for the circuit court to grant the Cabinet's summary judgment motion, as

there was no genuine issue as to any material fact, and that the civil penalties against Maynard survived his death, we affirm.

On February 5, 1999, Maynard was notified by the Cabinet's Division of Waste Management (DWM)¹ of his violations of Kentucky law for disposal, without a permit, of human waste, restaurant grease waste, and other hazardous waste in three unlined pits, each measuring 40 feet by 30 feet, at the rear of Maynard's junkyard in Lawrence County, Kentucky. The Cabinet also notified Maynard that he must characterize the contents of each of the three pits, conduct corrective action pursuant to KRS² 224.01-400 in order to protect human health and the environment, and submit a groundwater protection plan. Maynard did not respond to this notification from the Cabinet.

On September 11, 1998, Maynard was indicted by a Lawrence County grand jury on two Class D felonies arising from the conditions on the Lawrence County property.³ Count One stated as follows:

From the fall of 1994 until at least May 13, 1998, in Lawrence County, Kentucky, and before the finding of the indictment herein [Maynard] created an open dump when he knowingly transported septic tank and

¹ For convenience, we will refer to all divisions of the Cabinet, including the DWM, as "the Cabinet" throughout this Opinion.

² Kentucky Revised Statutes.

³ Maynard states in his brief that this case was initiated by the Cabinet. While not disputed by the Cabinet, there is no evidence in the record verifying this statement.

restaurant grease waste from throughout the Big Sandy area, and knowingly disposed of such waste in unapproved and unlicensed open dump pits, without a permit at his Lawrence County junk yard near the intersection of US 23 and Ky 581.⁴

Count Two stated that "[f]rom the fall of 1994 until at least May 13, 1998, in Lawrence County, Kentucky, and before the finding of the indictment herein, [Maynard] knowingly operated a waste site without a permit."⁵

Maynard pled guilty in the Lawrence Circuit Court criminal action to an amended criminal charge of failure to be a licensed septage hauler. The final judgment and sentence on probation was entered in this case on February 10, 2001,⁶ which ordered Maynard to pay restitution in the amount of \$20,000.00, and to have the site characterized by a licensed environmental remediation firm and to develop and to execute a plan, approved by the Cabinet, to clean out the pits.⁷ Maynard was also sentenced to a period of unsupervised probation for two years. Maynard was to comply with the remediation in full by January 25, 2002, and to have paid the restitution in full by December 31, 2002.

⁴ KRS 224.40-100 and KRS 224.99-010.

⁵ KRS 224.40-305 and KRS 224.99-010.

⁶ Maynard filed a copy of the final judgment and sentence on probation with his answer to the Cabinet's complaint pending before the Franklin Circuit Court.

⁷ Maynard was to pay the cost of all cleanup.

During a site visit in April 1999, the Cabinet discovered that Maynard had filled in two of the three waste pits without leave of the Cabinet to do so and without characterizing their contents. Further, Maynard did not produce proof of proper disposal of the contents of the pits. In response to citizens' complaints, on April 10, 2000, the Cabinet conducted an inspection of two sites in Martin County owned by Maynard, located at Blacklog Hollow and at Sweetwater Hollow. The Cabinet found at both sites the disposal of various solid waste and other hazardous waste, household garbage, lead acid batteries, and underground storage tanks containing human waste and used oil. The Cabinet issued Notices of Violations (NOVs), dated April 14, 2000, and May 15, 2000, to Maynard for these two sites and ordered Maynard to cease disposing of waste at the sites, to remove all waste and to dispose of it properly, and to submit receipts for such disposal. The Cabinet's subsequent inspections revealed that only some of the waste had been removed.

On September 7, 2000, the Cabinet filed an administrative complaint against Maynard,⁸ alleging that Maynard had engaged in operations that violated environmental laws concerning disposal of waste and had operated waste sites

⁸ File No. DWM-31249-043.

without a permit in both Martin County and Lawrence County.⁹ Although Maynard entered an appearance in the administrative proceeding through counsel, he did not file an answer to the administrative complaint, nor did he participate in the formal administrative hearing held on January 8, 2002, regarding the violations. At the hearing, the Cabinet presented proof through the testimony of witnesses and the introduction of exhibits in support of its case.

On May 23, 2002, the Hearing Officer filed her report and recommended order, finding that Maynard had failed to report a release, had engaged in the improper operation of a waste facility, and had disposed of waste without a permit. She recommended a civil penalty of \$365,000.00. On June 24, 2002, the Secretary entered a final order adopting the Hearing Officer's report and recommended order. The Secretary found that Maynard had violated the cited statutes and regulations and ordered Maynard to pay a civil penalty in the amount of \$365,000.00 and to remediate¹⁰ the sites in Lawrence County and Martin County within 30 days of entry of the final order.

⁹ At this time, Maynard had not provided the Cabinet with receipts for the proper disposal of the waste that had been removed.

¹⁰ The NOV's issued to Maynard on April 14, 2000, and May 15, 2000, set out the remedial measures required by KRS Chapter 224 and 401 Kentucky Administrative Regulations (KAR) 47:030 and 47:100. The pertinent remedial measures ordered were as follows:

Pursuant to KRS 224.10-470, Maynard had 30 days from the date of entry of the Secretary's final order to appeal to the Franklin Circuit Court. Maynard failed to do so, and the order then became final and not appealable on July 25, 2002. Subsequently, Maynard failed to pay the ordered civil penalty and failed to complete the remedial measures as required by the final order. Consequently, on September 3, 2002, the Cabinet filed its complaint in the Franklin Circuit Court seeking to enforce the Secretary's final order, pursuant to KRS 224.99-010(9). Further, the Cabinet sought injunctive relief to enjoin and to order Maynard to cease all improper waste disposal. Maynard filed an answer to the complaint on November 27, 2002, which included the defenses of estoppel, res judicata, and accord and satisfaction.

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1. Dispose of all waste currently on site at a permitted solid waste facility (transfer station or contained landfill);
 2. Remove all visibly contaminated soil from the site and dispose of it at a permitted facility;
 3. Collect soil samples immediately following the excavation to confirm that all contamination has been removed;
 4. Dispose of all lead acid batteries on site (by one of five enumerated means);
 5. Submit all disposal receipts and laboratory analyses to the Hazard Regional Office;
 6. Submit to the Hazard Regional Office a written statement proving that you currently have garbage collection service and that all future waste will be disposed of through garbage collection or a permitted solid waste facility.

On March 21, 2003, the Cabinet filed a motion pursuant to CR¹¹ 12.03¹² for judgment on the pleadings and Maynard filed a response opposing the motion. After considering the parties' arguments and reviewing the record, memoranda, and applicable law, the trial court entered an order on August 7, 2003, wherein it stated that it would treat the Cabinet's motion as one for summary judgment under CR 56, and it gave both parties an opportunity to present additional support for the positions in their motions. The trial court stated as follows:

Judgment on the pleadings can be granted only if it appears clear that the non-movant can prove no set of facts which would entitle him to judgment.¹³ The motion should not be granted if any defense is sufficient.¹⁴ Whether or not a material issue of fact exists should be determined solely on the pleadings.¹⁵ In determining whether factual disputes exist, this Court must keep in mind that notice pleading is sufficient.¹⁶ In short, it is a heavy burden

¹¹ Kentucky Rules of Civil Procedure.

¹² CR 12.03 provides as follows:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

¹³ Spencer v. Woods, 282 S.W.2d 851, 853 (Ky. 1955).

¹⁴ Bennett v. Bennett, 477 S.W.2d 799 (Ky. 1972).

¹⁵ Archer v. Citizens Fidelity Bank & Trust Co., 365 S.W.2d 727 (Ky. 1963).

¹⁶ LaVielle v. Seay, 412 S.W.2d 587 (Ky.App. 1967).

to establish that judgment on the pleadings is warranted in any case.

Here, Maynard has specifically denied the Cabinet's allegation he has not complied with the Secretary's Final Order. In response, the Cabinet has attempted to present evidence tending to show that Maynard has neither paid the fine nor remediated the waste sites. However, such evidence is outside the pleadings and this Court, pursuant to the language of Rule 12.03, shall treat the motion as one for summary judgment. Both sides shall be given a reasonable opportunity to present evidence relevant to the motion for summary judgment.

The parties supplemented the record and on October 21, 2003, the Court entered an order granting the Cabinet's motion for summary judgment. On October 29, 2003, Maynard filed a motion to alter, amend, or vacate the judgment pursuant to CR 59.05. On November 19, 2003, the trial court entered an order denying Maynard's motion. This appeal followed.

On appeal, Maynard raises two issues. First, he argues that the trial court erred by granting the Cabinet summary judgment. CR 56.03 provides that summary judgment may be rendered "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is improper unless it would be "impossible for the respondent to produce

evidence at trial warranting a judgment in his favor and against the movant."¹⁷ "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial."¹⁸

The Cabinet, as the moving party, had the burden of proving its entitlement to summary judgment,¹⁹ which included establishing that there was no genuine issue as to any material fact,²⁰ and showing entitlement to summary judgment with such clarity that there is no room left for controversy.²¹ The trial court must view the record in a light most favorable to the party opposing the motion and all doubts are to be resolved in his favor.²² If there is a genuine issue as to any material fact, the trial court should not render a summary judgment, regardless of its belief as to the opposing party's chance of

¹⁷ Steelevest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991).

¹⁸ Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). See also Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985) (noting that summary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances).

¹⁹ Christie v. First American Bank, 908 S.W.2d 679 (Ky.App. 1995).

²⁰ White v. Rainbo Baking Co., 765 S.W.2d 26 (Ky.App. 1988).

²¹ Williams v. City of Hillview, 831 S.W.2d 181 (Ky. 1992).

²² Dossett v. New York Mining & Manufacturing Co., 451 S.W.2d 843 (Ky. 1970).

success at trial.²³ When faced with a motion for summary judgment, the role of the trial court is not to decide issues of fact, but instead it must be determined whether a real issue exists.²⁴ Because a summary judgment does not involve factual findings, the appellate court is to review the circuit court's decision de novo.²⁵

In the case before us, the Cabinet argues that in an action to enforce an agency's final order, the sole material fact at issue is whether or not the order has been fully complied with, which in this case included (1) whether Maynard had paid the civil penalty imposed by the final order and (2) whether Maynard had completed the remedial measures required by the final order. In response to the Cabinet's summary judgment motion, Maynard filed the affidavit of his daughter, Denise Newsome,²⁶ with evidentiary items attached, which stated in relevant part as follows:

3. The Lawrence County site was the subject of an amended charge and conviction of my father, [] Maynard, for "failure to

²³ Puckett v. Elsnor, 303 S.W.2d 250 (Ky. 1957).

²⁴ Commonwealth, Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./Memphis Line, 116 S.W.3d 488 (Ky. 2003).

²⁵ 3D Enterprises Contracting Corp. v. Louisville & Jefferson Co. Metropolitan Sewer District, 174 S.W.3d 440, 445 (Ky. 2005).

²⁶ The affidavit stated that Newsome was currently in charge of and managing Maynard's business, A-plus Septic Tank Services, because of Maynard's poor health. Newsome further stated that she had been involved in and had personal knowledge of the matters relating to the remediation/cleanup of the three sites relevant to this action.

be a licensed septage hauler". . .
[emphasis original].

4. The restitution of \$20,000.00 in the Lawrence County case has been paid in full. On the remedial measures, an engineering firm has taken soil samples and prepared a cleanup plan, which has been approved by the State. A copy of said approval is attached hereto and made a part hereof by reference as Exhibit 2. Remedial measures will proceed per the plan in Lawrence Circuit Court.
5. The Blacklog Hollow site in Martin County has been cleaned up. On this site were car batteries, household waste, tires and storage tanks. Attached hereto and made a part hereof by reference as Exhibit 3 are receipts for disposal of material. No soil samples were required to be taken and I believe that we are entitled to an abatement of the violations on this site since remedial measures have been fully accomplished [emphasis original].
6. The Sweetwater Hollow site in Martin County has been cleaned up. On this site were underground storage tanks, construction and demolition debris, vehicle parts and ash from burned solid waste. Soil samples were taken prior to and after cleanup at points agreed to with the Cabinet[] Attached hereto and made a part hereof by reference as Exhibit 4 are the analyses of the samples taken, which have been furnished to the Cabinet. I believe that we are entitled to an abatement of the violations on this site since remedial measures have been fully accomplished [emphasis original].

Maynard argues that the statements made in this

affidavit present genuine issues as to material facts regarding the question of remediation. Further, Maynard argues that the remediation of the Lawrence County site was dealt with through the criminal case in the Lawrence Circuit Court, which was initiated by the Cabinet, and that the Franklin Circuit Court should not have entered judgment regarding this site because it superseded the Lawrence County judgment.²⁷ As to all three sites, Maynard argues that there was evidence that showed that there was a genuine issue as to a material fact as to whether remediation had been completed. Maynard further states as follows:

Even if the huge civil penalty had not yet been paid, the Cabinet would only be entitled to partial summary judgment pursuant to CR 56.04, the matter allowed to proceed to trial on the disputed issues [sic]. Any non-payment of civil penalties would not be dispositive of the issue of remedial measures. Thus, to hold that the Cabinet is entitled to complete summary judgment on the basis that the Secretary's Order has not been fully complied with was erroneous.²⁸

In response, the Cabinet states that it provided affidavits to the trial court prior to its ruling on the summary judgment that negated Newsome's statements in her affidavit. As

²⁷ See Commonwealth v. Crider & Rogers, Inc., 929 S.W.2d 179 (Ky. 1996).

²⁸ Maynard offers as justification of this argument that "[t]he importance of this distinction is because the Cabinet could seek to have [Maynard] held in contempt and incarcerated for failure to comply with the Court's directive to remediate the sites while [Maynard] cannot be deprived of liberty for failure to pay the civil penalty to the Cabinet."

to the Lawrence County site, the Cabinet acknowledges that Maynard was ordered, both in the criminal case in 2001 and through the administrative case in 2002, to submit a site characterization and remediation plan for the waste pits. Maynard did not submit the required plan until on or about March 10, 2003, almost seven months after it was supposed to have been completed according to the Secretary's final order. However, even then, the plan submitted did not contain all the information required. In support of Maynard's argument of compliance, he attached a letter to Newsome's affidavit dated June 9, 2003, from Charles W. Ritchie, a Cabinet employee. The letter clearly stated that the plan submitted had not at that time been accepted and, rather, the letter set out in great detail further information needed by the Cabinet to complete review of the proposed remediation plan. In the letter, Ritchie requested that Maynard submit a site plan, provide information about "bio-solve", and provide information about where the material originated that Maynard used to cover the waste pits. Further, the June 9, 2003, letter from Ritchie to Maynard notified Maynard of the requirement that he record a notice with the property deed in the Lawrence County property records that would notify any potential purchaser of the property of the

location and time period of the operation of the illegal facility.²⁹

The Cabinet also filed an affidavit signed by Jeffrey Cummins that established as of September 8, 2003, Maynard had not paid the civil penalty or any part of it,³⁰ that he had still not submitted the site map, "bio-solve" information or information about where the material used by Maynard to cover the three waste pits originated, and that he had not placed the required notice in the Lawrence County property records, all as requested by the June 9, 2003, letter. The Cabinet argues that this letter and Newsome's admission in her affidavit that "[r]emedial measures will proceed per the plan in Lawrence Circuit Court," clearly show that Maynard had not completed remediation of the waste pits. As of the date of the Cabinet's brief, Maynard had not complied with any of the requirements of the Secretary's final order.

The Cummins affidavit, filed by the Cabinet, also established that, as of September 8, 2003, the following remedial measures had not been completed for one or both of the Martin County sites, located at Backlog Hollow and Sweetwater Hollow:

²⁹ See 401 KAR 47:080 § 6 and 401 KAR 48:090 § 13.

³⁰ Newsome's affidavit stated that the restitution ordered in the Lawrence County criminal action had been paid, but Newsome made no claim that Maynard's civil penalties ordered by the Cabinet had been paid.

1. Submi[ssion] of receipts documenting proper disposal of used car batteries;
2. Submi[ssion] of receipts documenting proper disposal of household garbage and used car parts;
3. Submi[ssion] of receipts documenting proper disposal of oil-contaminated soil and soil contaminated by burning of solid waste at the Sweetwater Hollow site;
4. Submi[ssion] of receipts documenting proper disposal of tanks containing septic waste which were formerly located at both sites;
5. Submi[ssion] of separate receipts documenting proper disposal of the tanks containing petroleum products and of the tanks, themselves, formerly located at the Blacklog Hollow site.³¹

Further, the Cabinet notes in its brief that Maynard did not submit proof that he had contracted for garbage collection service.

In reviewing the record, we conclude there is no question that Maynard has not fully complied with the Secretary's final order, and the expiration date had passed for his compliance with the final order at the time the Cabinet

³¹ The Cabinet acknowledges that Maynard attached to the affidavit of Newsome copies of two receipts, one for disposal of tires and one for disposal of automobile batteries, both from the Blacklog Hollow site only, but offered no proof of proper disposal of the waste at Blacklog Hollow and no proof of any of the waste at Sweetwater Hollow. The Cabinet argues that Maynard would no doubt characterize failure to submit the required receipts as mere "administrative" or "paperwork" violations; however, "without receipts documenting that the waste was disposed of at a licensed, permitted facility the Cabinet has no proof that the waste was, in fact, properly disposed of and not simply buried deeper on site or thrown over the next hill."

filed its complaint. Thus, short of that compliance, there was no genuine issue as to any material fact, or conclusions to be drawn from the facts of the case³² for the trial court to decide. The circuit court's November 19, 2003, opinion, entered on Maynard's motion to alter, amend, or vacate the circuit court's October 21, 2003, opinion and order, awarding the Cabinet summary judgment, stated as follows:

The Order of this Court neither supersedes nor conflicts with the order of the Lawrence Circuit Court. Further, in addition to having failed to pay the civil penalty ordered by the Secretary's Final Order, documents filed by [Maynard], himself-for example, the June 9, 2003[,] Review Summary letter from the Division of Waste Management to [] Maynard, and affidavits of both parties make it unequivocal that there is no issue of fact as to whether [Maynard] has failed to complete the remedial measures. Again, [Maynard] argues that complying with only some of the remedial measures defeats the [Cabinet's] entitlement to summary judgment. It does not.³³

For the foregoing reasons, we agree and affirm the circuit court's award of summary judgment to the Cabinet.

³² Maynard cites in his reply brief the case of Commonwealth v. Thomas Heavy Hauling, Inc., 889 S.W.2d 807 (Ky. 1994) for the proposition that even if there was no dispute as to the facts, that there was a dispute as to the conclusions to be drawn from the facts. In reviewing the record, we see no merit as to this argument.

³³ The circuit court gave Maynard 60 days from the entry of its opinion and order entered October 20, 2003, to complete all remedial measures and to pay the civil penalty of \$365,000.00.

On February 3, 2004, during the pendency of his appeal, Maynard died.³⁴ On January 6, 2006, Maynard, through his personal representative, filed a motion to include in his brief to this Court, an argument raising the issue of whether the Cabinet's claim for civil penalties owed by Maynard were extinguished by his death.³⁵ The proposed argument is set out as Argument II in Maynard's brief to this Court that was filed after his death. Subsequently on March 6, 2006, the Cabinet filed a response to the motion, asking this Court to allow the Cabinet to supplement its brief and to respond to Maynard's Argument II, if this Court granted Maynard's motion.

Then on April 5, 2006, the Cabinet filed a second response to Maynard's motion and argued that Maynard's motion should be denied and that Argument II of Maynard's brief should be stricken. On March 16, 2006, Maynard, through his personal representative, filed a response stating no opposition to the Cabinet's request to be allowed an opportunity to respond to Argument II, but she stated that Maynard's personal representative should be allowed a period of time to reply to

³⁴ Suggestion of Death was filed on January 6, 2006, with an attached affidavit of Maynard's wife, Martha Ann Maynard, who also became the personal representative of his estate. Attached to the document was a certified copy of Maynard's death certificate. Prior to Maynard's death, he had filed his notice of appeal on December 17, 2003, and his pre-hearing statement on January 6, 2004.

³⁵ CR 76.24 allows for proceedings to proceed as the court may direct upon the death of a party during the pendency of the appeals process.

the Cabinet's supplemental response brief once it is filed. This Court by Order entered on August 9, 2006, granted Maynard's personal representative's motion to submit Argument II and denied the Cabinet's motion to dismiss the motion and to strike the argument. This Court also gave the Cabinet an opportunity to supplement its brief and to respond and it gave Maynard's personal representative an opportunity to reply. Both have done so and, thus, this issue is ready for our review.

Maynard's personal administrator argues that the Cabinet's claim of a civil penalty of \$365,000.00 ceased or died at Maynard's death. Further, she argues as follows:

The term "civil penalty" by its very nature is punitive rather than pecuniary. It is imposed as a punishment of the defendant for his offense. In that respect, civil penalties are akin to fines in criminal cases. . . . Likewise, the penalty calculation of the Hearing Officer demonstrates that the civil penalties are for punishment and have no relationship to damages for injury.

KRS 411.140 relates to survival of actions and enumerates certain actions which did not survive at common law, but which by that statute are made to survive.³⁶ KRS 411.140 states as follows:

No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring

³⁶ Galvin v. Shafer, 130 Ky. 563, 113 S.W. 485 (Ky. 1908). KRS 411.140 is the successor to Section 10 Kentucky Statutes referred to in Galvin.

or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury. For any other injury an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract.

Actions enumerated in KRS 411.140 that are not extinguished by the death of a party are those that relate to "personal injury", "injury to real or personal property" and "other injury." Maynard's personal administrator argues that these are the only actions to survive as specified in KRS 411.140. She further argues that it is a primary rule of statutory construction that the enumeration of particular items excludes other items that are not specifically mentioned.³⁷ While we agree that Maynard's personal administrator correctly states this rule of statutory construction, we disagree that KRS 411.140 does not set out other causes of action that survive. The second sentence of the statute unambiguously states that "[f]or any other injury . . . an action may be brought or revived . . . in the same manner as causes of action founded on contract." Thus, we are not persuaded that KRS 411.140 omits all other causes of action based on the rules of statutory construction.

³⁷ See Commonwealth of Kentucky, Board of Claims v. Harris, 59 S.W.3d 896, 900 (Ky. 2001) (citing Smith v. Wedding, 303 S.W.2d 322 (Ky. 1957)).

Maynard's representative also argues that this case should be analogized to the one presented in Crooker v. United States,³⁸ which dealt with the extinguishment of a criminal fine as the result of the death of the defendant. The Court in Crooker stated as follows:

A fine is not something to which the United States is entitled by way of compensation or damages, but only as a matter of punishment being thereby meted upon the defendant. "It was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but upon his death, there is no justice in punishing his family for his offenses" [citation omitted].³⁹

Maynard's personal executor argues that because civil penalties are like criminal fines, as they are both punitive in nature, this Court should find Crooker persuasive and should abate the penalty portion of the judgment.⁴⁰

The Cabinet argues that KRS 411.140 is not applicable to this case for the following reasons:

The Cabinet did not have a "right of action" pending against [Maynard] at the time of his death; the Cabinet had a final, enforceable judgment against [Maynard] for a civil penalty and remediation. The

³⁸ 325 F.2d 318 (8th Cir. 1963).

³⁹ Crooker, 325 F.2d at 321.

⁴⁰ The civil penalties imposed against Maynard are contained in KRS 224.99-101, the "Penalty" section of the statute under which the Cabinet proceeded against Maynard.

Cabinet's action against [Maynard] for violations of environmental laws had already been adjudicated in the administrative forum and a Final Order entered before [Maynard] died. . . . [Maynard] did not appeal the administrative Final Order within thirty days and so it became final and unappealable by operation of law. KRS 224.10-470. The Cabinet's action in the circuit court did not seek an award of civil penalties but, rather, sought affirmance of the Final Order and an order that [Maynard] comply with it. The court's Opinion and Order affirming the Final Order and ordering [Maynard] to comply with it was entered and final before [Maynard's] death . . . in fact, the Cabinet had already perfected the statutory lien created by the circuit court judgment by filing the requisite notice of judgment lien⁴¹ in the real property records.

In the alternative, the Cabinet argues that even if KRS 411.140 were deemed to be applicable, it would in fact support survival of [the Cabinet's] action against [Maynard] for penalties for violations of environmental protection statutes, based on the second sentence of the statute.

We agree with the Cabinet that KRS 411.140 is not applicable in this case, and because "[t]he death of a party does not abate a judgment for money or one which involves personal property[,]"⁴² "even where the judgment is based on a cause of action that would not have survived had the party died

⁴¹ KRS 426.720 "Final judgment to act as lien on realty[.]"

⁴² Peoples State Bank & Trust Co. v. Hardy, 243 S.W.2d 480, 482 (Ky. 1951).

before judgment,"⁴³ we hold that the Cabinet's judgment remains enforceable in its entirety. We find the holding by the Sixth Circuit in Howard v. Wilbur,⁴⁴ persuasive, where it stated as follows:

Although the rule in criminal cases is that the death of a defendant pending appeal abates the appeal . . . the general rule with respect to civil actions is that the death of a party subsequent to the entry of a judgment in favor of the plaintiff in the lower court and pending a review proceeding does not abate the appeal. . . . In such cases the cause of action has been merged into the judgment, even though it would not have survived if death had occurred prior to judgment.

"With the exception of certain excepted cases, under our statutes, all actions for money or breach of contract or duty survive and may be prosecuted against the personal representative of the deceased."⁴⁵ Even if we determined that KRS 411.140 did apply and this was in fact an issue of whether a "right of action" survived Maynard's death, we agree with the Commonwealth that "that statute is a survival of actions statute, not a denial of survival of statue," and, further,

⁴³ 1 Am.Jur.2d Abatement, Survival, and Revival § 58 (2006).

⁴⁴ 166 F.2d 884, 885 (6th Cir. 1948).

⁴⁵ Prescott v. Grimes, 143 Ky. 191, 136 S.W. 206, 207 (Ky. 1911).

"[u]nless survival of the action is specifically precluded," the action survives the death of the defendant.⁴⁶

Further, we reject Maynard's personal representative's argument that the assessment of civil penalties against Maynard should be analogized to criminal penalties and cease at Maynard's death. While civil penalties assessed by the Cabinet do have a punitive effect, they serve other purposes, such as preventing violators from being unjustly enriched through commercial advantage, and serving remedial purposes. It is important to also note that under KRS 224.99-010 the Cabinet is allowed to assess both criminal and civil penalties, and in this case the penalties were civil. Thus, we find Maynard's reliance on the criminal case of Crooker to be unpersuasive.

Having concluded that summary judgment was proper in this case, and that the civil penalties assessed against Maynard survived his death, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Donald Duff
Frankfort, Kentucky

BRIEFS AND ORAL ARGUMENT FOR
APPELLEE:

Mary Stephens
Frankfort, Kentucky

⁴⁶ Ohio Casualty Insurance Co. v. Atherton, 656 S.W.2d 724, 726 (Ky. 1983).