

RENDERED: OCTOBER 26, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001946-MR

F.G.R.

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE ANDREW SELF, JUDGE  
ACTION NO. 16-CI-00632

CHRISTIAN CIRCUIT COURT; AND  
M.R.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: F.G.R.<sup>1</sup> appeals from the Christian Circuit Court's summary judgment entered November 9, 2016.<sup>2</sup> For the reasons set forth below, we affirm.

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<sup>1</sup> To protect Appellee's anonymity, we refer to the parties by their initials.

<sup>2</sup> On appeal, Appellant improperly adds the Christian Circuit Court as an Appellee. An Appellee can be generally defined as the party who won in lower court. Because the Christian Circuit Court simply entered judgment as the lower court, the Christian Circuit Court is not a proper Appellee in this case.

## I. BACKGROUND

On September 11, 2013, F.G.R. pleaded guilty to incest, KRS<sup>3</sup> 530.020, and was sentenced to fifteen years' imprisonment by the Christian Circuit Court. Following his guilty plea, F.G.R. was committed to the custody of the Commonwealth. At all relevant times, he has been incarcerated at the Kentucky State Reformatory in La Grange, Kentucky.

The victim of F.G.R.'s crime is his daughter, the Appellee, M.R. The incest was committed between the dates of July 2005 and June 2010, when M.R. was a minor. She has since reached majority.

F.G.R.'s wife and M.R.'s mother, T.R., died in 2011 from injuries sustained during a traffic accident in Tennessee. A civil action was brought in Cheatham County, Tennessee, seeking damages for T.R.'s wrongful death. According to F.G.R., the parties agreed to settle the civil action for \$500,000. By the time the proceeds were ready for disbursement, F.G.R. was already serving his prison sentence. Nevertheless, as T.R.'s lawful spouse at the time of her death, F.G.R. was entitled to a portion of settlement. *See* KRS 391.010. Before the Cheatham Circuit Court disbursed the proceeds to F.G.R., however, the Christian County Attorney filed a lien with the Tennessee Court on behalf of the Commonwealth for expenses associated with M.R.'s foster care and for child

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<sup>3</sup> Kentucky Revised Statutes.

support for another child that F.G.R. fathered. Shortly thereafter, on June 28, 2016, M.R. filed this civil suit against F.G.R. in the Christian Circuit Court seeking punitive and compensatory damages against F.G.R. for the sexual abuse he inflicted on her as a child. *See* KRS 431.082.<sup>4</sup> Two days later, on June 30, 2016, the Cheatham Circuit Court entered an order staying the issuance of F.G.R.'s portion of his deceased wife's estate until the matters in Kentucky are fully resolved.

Along with her civil complaint, pursuant to CR<sup>5</sup> 17.04(1), M.R. also filed an affidavit in support of appointment of a guardian ad litem for F.G.R..<sup>6</sup> On

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<sup>4</sup> KRS 431.082 provides as follows:

- (1) In the event of the conviction of a defendant for the violation of any offense proscribed by KRS Chapter 510 or 531 or any human trafficking offense proscribed by KRS Chapter 529, the person who was the victim of the offense may bring an action in damages against the defendant in the criminal case.
- (2) If the plaintiff prevails, he or she shall be entitled to attorney's fees and all other costs incurred in the bringing of the action, including but not limited to the services of expert witnesses, testing and counseling, medical and psychological treatment, and other expenses reasonably incurred as a result of the criminal act.
- (3) Any award of nominal damages shall support an award of attorneys fees and costs to the prevailing party.
- (4) Punitive damages as well as compensatory damages shall be awardable in cases brought under this section.
- (5) The provisions of this section shall not be construed as repealing any provision of KRS 431.080 or any other applicable statute or of any statutory or common law right of action but shall be construed as ancillary and supplemental thereto.

<sup>5</sup> Kentucky Rules of Civil Procedure.

<sup>6</sup> CR 17.04(1) provides as follows:

June 28, 2016, the trial court appointed Attorney David Rye to represent F.G.R. That same day, the clerk issued a civil summons for F.G.R. The clerk attempted service by mailing a certified copy of the complaint to both F.G.R. and Attorney Rye. The clerk received two return receipts. The return receipt addressed to F.G.R. at the Kentucky State Reformatory indicates that the clerk's mailing was received by David Airington on July 18, 2016. However, it appears undisputed that the complaint as sent by the clerk never made its way to F.G.R. Instead, the prison marked the outside of the envelope as "RTS<sup>7</sup> CLOSED UTF<sup>8</sup> RESTRICTED DELIVERY."<sup>9</sup> On August 8, 2016, the clerk's mailing was returned, unopened, with the following notation "RETURN TO SENDER NOT

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(1) Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.

<sup>7</sup> Return to Sender.

<sup>8</sup> Unable to Forward.

<sup>9</sup> F.G.R. filed a prison grievance regarding his undelivered mail. During the course of that process, it was revealed that Mr. Airington did not see an inmate number on the envelope that the Reformatory received; rather, he only saw a number on the return receipt green card inside of the envelope: 164632. That number did not belong to F.G.R., to whom the envelope and green card was addressed. Presumably, as F.G.R. points out in the Appendix to his appellant brief, that number was intended to reflect the trial court's case number, 16-CI-632. Nevertheless, Mr. Airington perceived the number as 164632, which was the inmate number belonging to another inmate who had been discharged in 2004. As a result, Mr. Airington marked the mailing return to sender.

DELIVERABLE AS ADDRESSED UNABLE TO FORWARD.” The clerk placed the unopened envelope in the file behind the summons. The clerk amended the prior docket entry dated July 18, 2016, to read as follows:

Summons Served/Recalled  
[F.G.R.]  
13433  
CERTIFIED MAIL  
S/ DAVID ARLINGTON<sup>10</sup> 08-08-16 UNDE L ENV  
RTN'D MARKED NOT DELIVERABLE AS  
ADDRESSED ***BUT CERT MAIL GREEN CARD HAS  
BEEN REMOVED FROM BACK***

On October 21, 2016, M.R. filed a partial motion for summary judgment on liability, and requested the trial court to set the matter for a trial on the issue of damages. M.R. served Attorney Rye with a copy of her motion. However, it does not appear that the motion was sent separately to F.G.R. Shortly thereafter, on November 1, 2016, Attorney Rye filed a report of Guardian Ad Litem with the trial court. His report states as follows:

Comes now W. David Rye, Attorney at Law, having been appointed by the Christian Circuit Court as Guardian Ad Litem for Defendant, [F.G.R.] for his report to this Honorable Court, and states as follows:

1. This Attorney was appointed by the Christian Circuit Court as Guardian Ad Litem for Defendant, [F.G.R.], on 28 June 2016.
2. Defendant is currently located at the Kentucky State Reformatory, 3001 W. Highway 146, La Grange, Kentucky 40032.

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<sup>10</sup> The docket sheet reads “Arlington.” The prison mail clerk’s name, however, is actually “Airington.”

3. This Attorney has received no contact or communication from Defendant, and is unable to assert any defense on Defendant's behalf.

4. This Attorney on behalf of Defendant, requests that this Court set this matter for trial upon the issue of damages.

WHEREFORE, this Attorney respectfully requests that this Honorable Court accept his Report of Guardian Ad Litem.

M.R.'s motion for summary judgment came before the trial court on November 2, 2016. Thereafter, on November 9, 2016, the trial court entered summary judgment for M.R. on the issue of liability, and set the matter for a bench trial on the issue of damages. It appears that the trial court sent a copy of the summary judgment to F.G.R. because on November 21, 2016, F.G.R. filed a *pro se* "motion to vacate, set-aside, dismiss, and alternatively notice of appeal" with the trial court. Therein, F.G.R. explained that he had never received the complaint, had not been contacted by Attorney Rye, and had not received any notice prior to summary judgment being entered against him.

The trial court proceeded to hold an evidentiary hearing on damages on December 2, 2016. Before hearing testimony, the trial court noted that it had received F.G.R.'s motion. The trial court then looked at the record and noted that a "green card" had been returned from the prison. It is unclear whether the trial court realized that the accompanying mailing had also been returned to the clerk unopened with the "RTS UTF" notation on it. Attorney Rye stated that he had

mailed a letter to F.G.R., but never received a reply. He further stated that he had no defense to offer. Thereafter, the court stated that it was satisfied, and excused Attorney Rye. M.R.'s attorney then presented proof of damages. This proof consisted of the testimony of three witnesses as well as various psychological and medical records belonging to M.R.

The trial court heard testimony from three witnesses and ultimately awarded M.R. \$500,000 in compensatory damages and \$1,000,000 in punitive damages. F.G.R. filed his notice of appeal on December 21, 2016. This appeal followed.

## **II. ANALYSIS**

The first issue we must consider is whether M.R. properly served F.G.R. “Service may be made upon . . . a prisoner, either by certified mail in the manner prescribed in Rule 4.01(1)(a) or by personal delivery of a copy of the summons and of the complaint (or other initiating document) by a person over 18 years of age.” CR 4.04(8). In this instance, certified mail was used to serve F.G.R. “Service by registered mail or certified mail is complete only upon delivery of the envelope. The return receipt shall be proof of the time, place and manner of service.” CR 4.01(1)(a).

In this case, the summons was delivered to the prison via certified mail. A return receipt was issued showing that the envelope was delivered to the

Kentucky State Reformatory on July 18, 2016, and accepted by David Airington, a prison employee. After delivery, Airington returned the summons and complaint to the clerk as undeliverable. Even though it is undisputed that Airington did not deliver the summons and complaint to F.G.R., service was nonetheless effective because it was properly delivered to the prison. The prison's later actions in failing to deliver the envelope to F.G.R. do not affect the validity of the initial service. *See Hall v. Bates*, 257 Ky. 61, 77 S.W.2d 403, 404 (1934) (holding that service was effective where summons was delivered to the penitentiary even though the keeper of the penitentiary failed to deliver to the prisoner the copy of summons and of the petition served upon him).

This brings us to F.G.R.'s next argument regarding Attorney Rye's actions. F.G.R. asserts that Attorney Rye failed to contact him about the suit. However, Attorney Rye averred, and the trial court found, that Attorney Rye did make efforts to contact F.G.R. The record supports this finding. Moreover, Attorney Rye complied with his duties inasmuch as he reviewed the record and made an informed decision that no viable defenses existed. CR 17.04. Following Attorney Rye's report, the trial court was authorized to move forward with the claim, including entry of the judgment against F.G.R. *Davidson v. Boggs*, 859 S.W.2d 662, 664 (Ky. App. 1993) ("The court is required to appoint a practicing



attorney as guardian ad litem and may not proceed with the trial *until* the required duties are performed by the guardian ad litem.).

### **III. CONCLUSION**

For the foregoing reasons, we affirm the Christian Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

F.G.R., *pro se*  
La Grange, Kentucky

BRIEF FOR APPELLEES:

Harold M. Johns  
Lora Lee Robey  
Elkton, Kentucky