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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000805-ME

JOSHUA CLARK

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 14-CI-00448

LAKIN WORKMAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND MCNEILL, JUDGES.

ACREE, JUDGE: Joshua Clark (Father) appeals the Greenup Family Court's May 6, 2019 order that he pay to Lakin Workman (Mother) in monthly child support the sum of \$859.57. Finding no manifest injustice, we affirm.

NONCOMPLIANCE WITH RULES OF APPELLATE PROCEDURE

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.¹ The prodigious

¹ Since May 2018, in the following twelve (12) published opinions, appellate rule compliance was sufficiently lacking that it merited remarks and curtailed review by the appellate court: *Commonwealth v. Roth*, 567 S.W.3d 591, 593 (Ky. 2019) (footnote omitted) (“Commonwealth’s brief . . . plainly failed to comply with these requirements . . . we exercise our discretion to strike the Commonwealth’s brief, which necessarily requires that we also dismiss the Commonwealth’s appeal.”); *Wallace v. Martin*, --- S.W.3d ---, No. 2018-CA-001260-MR, 2020 WL 2781710, at *2 (Ky. App. May 29, 2020) (“brief does not comply with CR 76.12(4)(c)(vii)”); *Petrie v. Brackett*, 590 S.W.3d 830, 834 (Ky. App. 2019) (footnote omitted) (“brief does not state how he preserved any of his arguments in the family court”); *Cotton v. Nat’l Collegiate Athletic Ass’n*, 587 S.W.3d 356, 360 (Ky. App. 2019) (“Court has spoken often about the necessity of following the Civil Rules and . . . warned practitioners that leniency should not be presumed”); *French v. French*, 581 S.W.3d 45, 47 (Ky. App. 2019) (“We regret having to address, yet again, an attorney’s failure to comply with rules of appellate procedure”); *Univ. of Louisville v. Harper*, 576 S.W.3d 595, 598 (Ky. App. 2019) (“University failed to identify whether and how it preserved the error.”); *Prescott v. Commonwealth*, 572 S.W.3d 913, 918 (Ky. App. 2019) (footnote omitted) (“in contravention of CR 76.12(4)(c)(v), [appellant] does not state how he preserved any of his arguments in the trial court”); *Koester v. Koester*, 569 S.W.3d 412, 413-14 (Ky. App. 2019) (“brief does not comply with CR 76.12”); *K.M.E. v. Commonwealth*, 565 S.W.3d 648, 655 (Ky. App. 2018) (“dangerous for counsel to ignore the rules of appellate procedure”); *Curty v. Norton Healthcare, Inc.*, 561 S.W.3d 374, 378 (Ky. App. 2018) (“Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance.”); *Jones v. Livesay*, 551 S.W.3d 47, 50 (Ky. App. 2018) (“Compliance with CR 76.12 is mandatory.”); *Stowe v. Realco LLC*, 551 S.W.3d 462, 465 (Ky. App. 2018) (footnote omitted) (“we note Stowe’s failure to comply with CR 76.12.”).

In addition, during that same two-year period there were eighty-nine (89) unpublished opinions that similarly remarked on the failure to comply with the Civil Rules relating to appellate advocacy. Among them were these twenty-four (24) unpublished opinions rendered in just the first five (5) months of 2020: *Young v. Hanley*, No. 2019-CA-001476-ME, 2020 WL 2510531 (Ky. App. May 15, 2020); *R.J. v. Commonwealth*, No. 2019-CA-001509-ME, 2020 WL 2296982 (Ky. App. May 8, 2020); *Rigsby v. Our Lady of Bellefonte Hosp., Inc.*, No. 2019-CA-

number of attorneys appearing in Kentucky's appellate courts lacking the skill, will, or interest in following procedural rules is growing. In 2005, only two (2) Kentucky opinions addressed appellate rules violations.² In 2010, the number

000256-MR, 2020 WL 2298830 (Ky. App. May 8, 2020); *Barnes v. Barnes*, No. 2019-CA-000721-MR, 2020 WL 2296985 (Ky. App. May 8, 2020); *Wise v. Newton*, No. 2018-CA-001409-MR, 2020 WL 2095913 (Ky. App. May 1, 2020); *Levatino v. United States*, No. 2019-CA-000553-MR, 2020 WL 2095896 (Ky. App. May 1, 2020); *Nelson v. Sharp*, No. 2019-CA-000441-ME, 2020 WL 1969918 (Ky. App. Apr. 24, 2020); *Kingrey v. Kingrey*, No. 2019-CA-000055-MR, 2020 WL 1898437 (Ky. App. Apr. 17, 2020); *M.C. v. Cabinet for Health and Family Servs.*, No. 2019-CA-001395-ME, 2020 WL 1815981 (Ky. App. Apr. 10, 2020); *Nettles v. Energy and Environment Cabinet*, No. 2018-CA-001382-MR, 2020 WL 1816000 (Ky. App. Apr. 10, 2020); *Adams v. Gregory*, No. 2019-CA-001085-ME, 2020 WL 1815988 (Ky. App. Apr. 10, 2020); *A.G. v. Cabinet for Health and Family Servs.*, No. 2019-CA-000943-ME, 2020 WL 1650670 (Ky. App. Apr. 3, 2020); *Univ. of Louisville v. Stites & Harbison, PLLC*, No. 2019-CA-000248-MR, 2020 WL 1655963 (Ky. App. Apr. 3, 2020); *Chandler v. Robinson*, No. 2018-CA-001899-MR, 2020 WL 1332974 (Ky. App. Mar. 20, 2020); *A.A. v. Cabinet for Health and Family Servs.*, No. 2019-CA-000838-ME, 2020 WL 1074779 (Ky. App. Mar. 6, 2020); *Moore v. PCG Credit Partners, LLC*, No. 2018-CA-001754-MR, 2020 WL 864169 (Ky. App. Feb. 21, 2020); *Blackburn v. Blackburn*, No. 2019-CA-001094-ME, 2020 WL 598239 (Ky. App. Feb. 7, 2020); *Acton Properties, LLC v. Freese*, No. 2018-CA-000564-MR, 2020 WL 598519 (Ky. App. Feb. 7, 2020); *J.H. v. Cabinet for Health and Family Servs.*, No. 2019-CA-001170-ME, 2020 WL 402673 (Ky. App. Jan. 24, 2020); *Montgomery v. Maines*, No. 2019-CA-000301-MR, 2020 WL 402289 (Ky. App. Jan. 24, 2020); *Humble v. Sims*, No. 2019-CA-000549-MR, 2020 WL 402691 (Ky. App. Jan. 24, 2020); *Webb v. Carter Cty. Bd. of Educ.*, No. 2018-CA-000826-MR, 2020 WL 402495 (Ky. App. Jan. 24, 2020); *Barone v. Sanitation Dist. No. 1*, No. 2016-CA-001711-MR, 2020 WL 260666 (Ky. App. Jan. 17, 2020); *Marchese v. Crooks*, No. 2019-CA-000231-ME, 2020 WL 116005 (Ky. App. Jan. 10, 2020).

² *Moody v. Commonwealth*, 170 S.W.3d 393 (Ky. 2005); *Disabled American Veterans, Dep't of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541 (Ky. App. 2005).

jumped to eleven (11).³ In 2015, the number rose slightly to fourteen (14).⁴ The average for the last two years is more than three times that. If this is not a crisis yet, it soon will be if trends do not reverse.

We will not reiterate all that has been said too many times before on this subject. If a lawyer is curious about the importance of these procedural rules or the practical reasons for following them, we recommend reading these opinions in chronological order: *Commonwealth v. Roth*, 567 S.W.3d 591 (Ky. 2019);

³ *Hallis v. Hallis*, 328 S.W.3d 694 (Ky. App. 2010); *J.M. v. Commonwealth, Cabinet For Health and Family Servs.*, 325 S.W.3d 901 (Ky. App. 2010); *Brannan v. Brannan*, No. 2009-CA-001400-MR, 2010 WL 3927929 (Ky. App. Oct. 8, 2010); *Phillips v. Thompson*, No. 2009-CA-001643-ME, 2010 WL 3360102 (Ky. App. Aug. 27, 2010); *Davis v. Commonwealth*, No. 2009-CA-000249-MR, 2010 WL 3270067 (Ky. App. Aug. 20, 2010); *White v. FHC Cumberland Hall*, No. 2008-CA-002110-MR, 2010 WL 2867805 (Ky. App. July 23, 2010); *Duffy v. Dawson*, No. 2009-CA-000285-MR, 2010 WL 1926077 (Ky. App. May 14, 2010); *Bryant v. Prather*, No. 2008-CA-001096-MR, 2010 WL 985296 (Ky. App. Mar. 19, 2010); *T.M. v. S.L.(D.)R.*, No. 2009-CA-001401-ME, 2010 WL 569549 (Ky. App. Feb. 19, 2010); *Reams v. Buckles*, No. 2007-CA-001622-MR, 2010 WL 199312 (Ky. App. Jan. 22, 2010); *Kentucky Employers' Mut. Ins. Co. v. Walbert Trucking, Inc.*, No. 2008-CA-001505-MR, 2010 WL 199414 (Ky. App. Jan. 22, 2010).

⁴ *Smothers v. Baptist Hosp. East*, 468 S.W.3d 878 (Ky. App. 2015); *Van Pelt v. Van Pelt*, No. 2014-CA-001352-MR, 2015 WL 9264429 (Ky. App. Dec. 18, 2015); *Sisco v. Univ. of Pikeville*, No. 2013-CA-002099-MR, 2015 WL 8527838 (Ky. App. Dec. 11, 2015); *Johnson v. Johnson*, No. 2013-CA-001894-MR, 2015 WL 7573919 (Ky. App. Nov. 25, 2015); *Farley v. Farley*, No. 2014-CA-001384-ME, 2015 WL 4978767 (Ky. App. Aug. 21, 2015); *J.S.D. v. Cabinet for Health and Family Servs.*, No. 2014-CA-001311-ME, 2015 WL 4880326 (Ky. App. Aug. 14, 2015); *Watkins v. Noe*, No. 2013-CA-000770-MR, 2015 WL 4385274 (Ky. App. July 17, 2015); *Dhawan v. Naumchenko*, No. 2014-CA-000088-MR, 2015 WL 3533214 (Ky. App. June 5, 2015); *Stengel v. Stengel*, No. 2013-CA-001108-MR, 2015 WL 3429428 (Ky. App. May 29, 2015); *Gaddie v. Gaddie*, No. 2013-CA-001444-MR, 2015 WL 2357144 (Ky. App. May 15, 2015); *Kidd v. Kidd*, No. 2014-CA-000060-MR, 2015 WL 2331318 (Ky. App. May 15, 2015); *Haroon v. Haroon*, No. 2013-CA-000232-MR, 2015 WL 300757 (Ky. App. Jan. 23, 2015); *Chas Coal, LLC v. Collins*, No. 2013-CA-000640-MR, 2015 WL 300735 (Ky. App. Jan. 23, 2015); *Bailey v. Bailey*, No. 2013-CA-002166-ME, 2015 WL 136235 (Ky. App. Jan. 9, 2015).

Koester v. Koester, 569 S.W.3d 412 (Ky. App. 2019); *Hallis v. Hallis*, 328 S.W.3d 694 (Ky. App. 2010); *Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990).

It is more than apparent that Father’s counsel failed to make a sincere attempt to comply with CR⁵ 76.12, the rule governing submission of briefs to this Court. Some rule violations are alone sufficient to justify applying a manifest injustice standard of review or, worse, striking the brief. CR 76.12(8); *see also Roth*, 567 S.W.3d at 593; *Mullins v. Ashland Oil, Inc.*, 389 S.W.3d 149, 154 (Ky. App. 2012). Other violations are less profound; however, “there is an important purpose behind each of these rules.” *Hallis*, 328 S.W.3d at 696 (referring by footnote to the purpose underlying some of the more mundane rules). Below are eleven (11) subsections of CR 76.12 the appellant’s brief violates, listed as they appear in the rule:

- Subsection (4)(a)(ii) (requiring “1 1/2 inch margin on the left side”);
- Subsection (4)(a)(iii) (requiring cover to include “the file number(s) of the circuit court action(s)”);
- Subsection (4)(c)(iii) (requiring Statement of Points and Authorities to include “appellant’s contentions with respect to each issue of law relied upon for a reversal”);
- Subsection (4)(c)(iv) (requiring Statement of the Case 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, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary”);

⁵ Kentucky Rules of Civil Procedure.

- Subsection (4)(c)(v) (requiring the Argument to include “ample supportive references to the record”);
- Subsection (4)(c)(v) (requiring “at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner”);
- Subsection (4)(c)(vi) (requiring “[a] ‘CONCLUSION’ setting forth the specific relief sought from the appellate court”);
- Subsection (4)(c)(vii) (requiring that “[t]he first item of the appendix shall be a listing or index of all documents included in the appendix”);
- Subsection (4)(c)(vii) (requiring that “[t]he index [*i.e.*, appendix listing] shall set forth where the documents may be found in the record”);
- Subsection (4)(c)(vii) (requiring that “[t]he appellant shall place the judgment, opinion, or order under review immediately after the appendix list [*i.e.*, or index] so that it is most readily available to the court”); and
- Subsection (4)(c)(vii) (requiring that documents in the appendix be marked by “appropriate extruding tabs”).

The appellant’s brief does not cite even once to the record despite the rule’s requirement that such citation permeate both the Statement of the Case and the Argument, specifically requiring that there be citation to the record “supporting *each* of the [factual] statements narrated” CR 76.12(4)(c)(iv) (emphasis added). Furthermore, there is no indication that any argument was preserved for review. Notwithstanding these calamitous errors, this Court will not strike the brief and dismiss the appeal, but it will review for manifest injustice only.

REVIEW FOR MANIFEST INJUSTICE

There is no reason to disturb the family court's ruling. Father earns \$6,666.67 per month (or 78% of the parties' joint gross monthly income) and Mother earns \$1,819.86 per month (or 22% of the parties' joint monthly income). Applying the support guidelines to the parties' combined monthly income of \$8,486.53 yields a base support obligation for their two children of \$1,410.00. Adding in child care and health insurance premium costs gives a total child support obligation of \$2,284.96. Father's 78% share of that obligation is \$1,782.26; after giving him credit for the premiums he pays for the children's medical insurance coverage, Father's share of the obligation is \$1,362.26. In accordance with KRS⁶ 403.211, KRS 403.212, and the AOC⁷ forms required to be used, the rebuttable presumption is that Father must pay \$1,362.26 to Mother who would make up the difference of the total obligation in the amount of \$502.69.

However, notwithstanding that the custodial arrangement was not "split custody," *see* KRS 403.212(2)(h), it appears the family court considered the parties' relative equal timesharing situation reason enough to overcome the presumption in the child support guidelines and reduced Father's share of the obligation by Mother's share of the obligation. We need not consider in our

⁶ Kentucky Revised Statutes.

⁷ Administrative Office of the Courts.

manifest injustice review whether the rationale for doing so is sound. It is sufficient for our purposes to say that reducing Father's presumed obligation from \$1,362.26 to \$859.57 does not constitute a manifest injustice.

Father's remaining arguments do not merit further review.

CONCLUSION

We affirm the Greenup Family Court's May 6, 2019 order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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