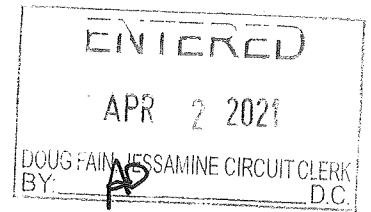


COMMONWEALTH OF KENTUCKY
JESSAMINE CIRCUIT COURT
CIVIL ACTION NO. 20-CI-00494



BOONE DEVELOPMENT, LLC, et al.

PLAINTIFFS/APPELLANTS

v.

ORDER

NICHOLASVILLE BOARD OF ADJUSTMENT, et al.

DEFENDANTS/APPELLEE/

CROSS-APPELLANT

Defendants move this court, pursuant to KRS 100.3471, to require Plaintiffs to post an appeal bond. Plaintiffs object on the grounds that the statute is unconstitutional. Having reviewed the memoranda submitted, the pertinent constitutional provisions and the case law, this court concludes that KRS 100.3471 is unconstitutional for the reasons set forth herein.

BACKGROUND

Plaintiffs, Boone Development, LLC and Via Vitae Development, LLC, d/b/a James Monroe Homes, have appealed this court's decision affirming the Nicholasville Board of Adjustment ("Board") decision that Plaintiffs would not be entitled to a final record plat for a portion of Eastgate Subdivision until it had posted a bond to guarantee construction of a box culvert required by construction plans filed by a previous owner as a condition of a zone change. Defendants have Cross-appealed.

Defendants filed a joint motion on February 4, 2021, requesting that this court: (1) schedule a hearing to determine the amount of bond and order Plaintiffs to post an appeal bond pursuant to KRS 100.3471; and (2) modify the record on appeal by removing two of Plaintiff's filings. On February 9th, Plaintiffs filed a response to the motion which included a challenge to the constitutionality of the statute. On February 11th, this court overruled the second motion and set the first for a hearing on February 25th. As required by statute, the Attorney General was notified of the constitutional challenge. At the hearing on February 25th, this court advised the parties that it did not find the appeal to be presumptively frivolous but that it could not decide the bond motion until it decided the constitutional challenge.

The case was continued to March 11th for any additional submissions and further argument. The case stands submitted as of that date.

ISSUES AND REASONING

I. WHETHER THE TRIAL COURT STILL HAS JURISDICTION TO SET A BOND

KRS 100.3471 provides:

1) Any party that appeals the Circuit Court's final decision made in accordance with any legal challenge under this chapter shall, upon motion of an appellee as set forth in subsection (2) of this section, be required to file an appeal bond as set forth in this section.

(2) Within thirty (30) days of the filing of the notice of appeal in Circuit Court, any appellee may file a motion for the Circuit Court, pursuant to the jurisdictional authority established in Rule 73.06 of the Kentucky Rules of Civil Procedure, to order the appellant to post an appeal bond, which the Circuit Court shall impose, subject to the other requirements of this sections. If an appellee does not move the Circuit Court to require the appellant to post an appeal bond, the right to request an appeal bond is waived.

(3) (a) Within thirty (30) days of an appellee filing a motion in Circuit Court for the appellant to post an appeal bond, the Circuit Court shall conduct a hearing to determine the amount of the appeal bond, issue findings of fact, and set the bond amount with good and sufficient surety.

(b) In determining the amount of the appeal bond, the Circuit Court shall determine if the appeal is presumptively frivolous, including but not limited to:

1. Whether the appeal is of a ministerial or discretionary decision; and
2. Whether or not there exists a reasoned interpretation supporting the appellant's position.

(c) If the Circuit Court determines that an appeal is presumptively frivolous, the Circuit Court shall consider all costs, economic loss, and damages that the appellee may suffer or incur during the pendency of, or that will be caused by, the appeal, including attorney fees and court costs, up to a maximum bond amount of two hundred fifty thousand dollars (\$250,000).

(d) If the Circuit Court determines that an appeal is not presumptively frivolous, the Circuit Court shall consider the costs that the appellee may incur during the pendency of the appeal, including but not limited to attorney fees and court costs, plus interest payable on land acquisition or development loans, up to a maximum bond amount of one hundred thousand dollars (\$100,000).

(e) Whether the Circuit Court makes a determination under paragraph (c) or (d) of this subsection:

1. Costs and damages shall not include expenses incurred prior to the date the notice of appeal is filed with the Circuit Court: and

2. The appellee has the burden to present sufficient evidence establishing the appellee's cost and damages.

(f) The appeal shall be dismissed if the bond is not posted within fifteen (15) days of the Circuit Court's determination of the bond amount.

(4) (a) Once an appeal pursuant to this section becomes final and unappealable, either the appellant or the appellee may make a motion in the originating Circuit Court requesting that the Circuit Court conduct a hearing to determine the actual costs and damages to be paid to the appellee under the appeal bond.

(b) The Circuit Court shall hold the hearing within thirty (30) days of the request and issue findings of fact as to the costs and damages within an additional thirty (30) days.

(c) Costs and damages awarded under this subsection shall be limited to the amount of the appeal bond.

(d) If neither party moves the Circuit Court within sixty (60) days pursuant to this subsection, the Circuit Court may on its own motion release the appeal bond.

(5) Subsections (1) and (2) of this section shall not apply to the United States, the Commonwealth of Kentucky or any of its municipal corporations or political subdivisions, or any of their agencies or officers acting for or on their behalf, or to a person challenging the creation or expansion of a landfill.

Plaintiffs contend that because no full hearing was conducted within thirty (30) days of the filing of the motion, as required by section (3)(a) above, this court lost jurisdiction to do so. That contention is inconsistent with the clear intent of the statute and with the trial court's continuing authority and responsibility to set and amend bonds throughout the course of any appeal.

The time constraints contained in the statute are to give an appellee time within which to request a bond and to give an appellant due process in contesting both the appropriateness and the amount of the bond. Given the complexity of the proof issues that could arise concerning prospective damages in a land use case, it would not be unusual for a

trial court to need more than thirty (30) days to allow the parties to present and challenge the proof on damages and for the court to render the necessary findings. Add to that a challenge to the constitutionality of the statute, which in this case was raised by the Plaintiff, and it becomes unreasonable to expect that a ruling could be made within thirty (30) days of the filing of the motion. Further, there is nothing in the statute that implies that the failure of the trial court to render a decision within thirty (30) days negatively impacts Plaintiff's appeal rights.

Finally, CR 73.06 provides:

- (1) The sufficiency of the bond or the surety may be determined by the trial court upon motion and hearing.
- (2) During an appeal, the trial court shall retain original jurisdiction to determine all matters relating to the right to file a supersedeas bond, the amount and sufficiency thereof and the surety thereon.

CR 73.06 grants the trial court continuing jurisdiction over all issues related to an appeal bond. That jurisdiction allows the trial court whatever time is needed to determine the initial bond requirements and to amend the terms of the bond if justice requires.

For the above reasons, this court finds that it retains jurisdiction over both the appropriateness and the amount of any bond required by KRS 100.3471. This court has already made a finding that Plaintiff's appeal is not presumptively frivolous, but until it also determines whether a bond is required and, if so, sets a bond amount, the fifteen (15) days within which Plaintiff must post the bond do not begin to run.

II. WHETHER KRS 100.3471 IS UNCONSTITUTIONAL

As to KRS 100.3471, the General Assembly concluded in 2017 that "it is desirable to curb unnecessary appeals of land use cases because they burden the courts, cause loss of jobs and loss of tax revenue, and many times render time-sensitive projects such as multi-family affordable housing projects undevelopable." 2017 Ky. Acts Chapter 181 Section 2. To address the issue, the General Assembly enacted KRS 100.3471, which requires litigants to post a bond if they want to appeal a circuit court's judgment in a property-use dispute.

It is well settled that "when the legislature has enacted a statute, it is presumed to have done so in accordance with the constitutional requirements, and that its provisions are not contrary to any constitutional right," *Cornelius v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001). Further, the one challenging the validity of the statute bears the burden of sustaining such a claim.

A. WHETHER KRS 100.3471 VIOLATES THE SEPARATION OF POWERS DOCTRINE
ESTABLISHED BY SECTIONS 27 AND 28 OF THE KENTUCKY CONSTITUTION

Except for matter of right appeals under Section 110(2)(b), Section 116 of the Kentucky Constitution provides that “The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction....” See *Elk Horn Coal Corp. v. Cheyenne Resources*, 163 S.W.3d 408 (Ky. 2005), footnotes 66 and 67. Pursuant to that authority, the Kentucky Supreme Court adopted the Rules of Civil Procedure. Rule 1(2) provides that

These Rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules.

Plaintiffs contend that KRS 100.3471 unconstitutionally intrudes on the Supreme Court’s authority to prescribe rules of practice and procedure for the Court of Justice, particularly as those rules apply to its appellate jurisdiction.

Defendants contend that KRS 100.3471 is a special statutory proceeding dealing with an appeal from an administrative agency and that because administrative appeals are a matter of legislative grace the legislature has the authority to impose rules controlling those appeals.

As to Defendants’ argument, it is well-established that there is no constitutional right to appeal to the courts from an action of an administrative agency. When grace to appeal is granted by statute, strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not fully invoked, i.e., the court lacks jurisdiction to decide the controversy. They cite *Kenton Cty. Bd. Of Adjustment v. Meitzen*, 607 S.W.3d 586, 593 (Ky. 2020) (quoting *Nickell v. Diversicare Mgmt. Servs.*, 336 S.W.3d 454, 456 (Ky. 2011)); and *Spencer Co. Preservation, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 329 (Ky. App. 2007).

The difference between the cases cited by the Defendants and the issue before us is that those cases deal with appeals *from the administrative agencies to the Circuit Court*. None of them deal with appeals *from the Circuit Court to the Court of Appeals*. As stated in *Board of Adjustments v. Flood*, 581 S.W. 2d 1, 1978 Ky. LEXIS 460 (Ky. 1978) the civil rules do not apply to administrative agency actions until after the appeal has been perfected to circuit court. But once the appeal has been perfected, the rules applicable to that appeal fall squarely within the authority of the judicial branch.

In *Elk Horn Coal Corp.* (*supra*), the court found that the legislature acted outside its authority when it attempted to impose a penalty upon unsuccessful appellants in KRS 23A.300. It found the penalty to be procedural rather than substantive and that it was an infringement upon the right of the Supreme Court to prescribe rules governing its appellate jurisdiction. The provision of KRS 100.3471 that requires an appellant to post a bond as a condition of an appeal from Circuit Court to the Court of Appeals is a similar infringement.

The Kentucky Civil Rules of Procedure already prescribe the only available methods to stay judgments. CR 62.02 Pending appeal of injunction judgments, states

When an appeal is taken from any judgment granting or denying injunctive relief, the judgment may be stayed as provided in Rule 65.08.

And CR 62.03 Pending appeal of judgment other than injunction judgment, states

(1) When an appeal is taken the appellant may stay enforcement of the judgment by giving a supersedeas bond as provided in Rule 73.04....

The reason for those rules is to impose certain duties on appellants for the privilege of staying, or superseding, a court order. KRS 100.3471 not only invades the province of the judicial branch, it does so by requiring an appellant to post an "appeal bond" which supersedes nothing.

An appeal from a Circuit Court judgment in a Chapter 100 case does not typically fall within CR 62.02 for the obvious reason that no injunctive relief is being granted. The Circuit Court either affirms the decision of the administrative body or reverses it, then remands it back to that body for action consistent with the opinion. Injunctive relief may be sought later to enforce the judgment, but that action would be distinct from a Chapter 100 review.

KRS 100.3471 was adopted to discourage adjoining property owners from appealing land use rulings, such as zone changes and subdivision approvals. If a Circuit Court affirms an administrative body's decision granting such a change, or reverses a decision denying such a change, an appeal can result in a delay that subjects the appellee to significant damages and attorney's fees. Under those circumstances, the appellee would certainly like to be protected with the bond required by KRS 100.3471. But the reason an appellee is not entitled to that protection is that nothing the court has done prevents it from enforcing the Circuit Court judgment. It can proceed with the project; it simply does so at its own risk. Therefore, unlike supersedeas bonds that stay execution on money judgments, and injunction bonds that protect parties from wrongfully issued restraining orders and injunctions, there is no reason for a bond in a typical Chapter 100 appeal.

The only time CR 62.02 might apply would be in the unlikely event that an appellant asks the trial court for a stay of a decision while the appeal is pending. Although appellees are rarely willing to take the risk of relying on a judgment and moving ahead on a project, if they do so there is authority in other types of cases to indicate that the appellant could ask for injunctive relief to stop it. In *Crady v. Cranfill*, 37 S.W.2d 640 (Ky., 1963), the Supreme Court noted that there was nothing in the Civil Rules specifically dealing with a stay of a portion of a criminal judgment but found that "an appellate court has inherent power to issue such remedial orders as are appropriate to maintain the status quo of a case pending before it on review." More specifically, the Court of Appeals affirmed the right to injunctive relief to stay the taking in a condemnation action in *Stillpass v. Kenton County Airport*, 403 S.W.2d 46 (Ky.,

1966). If such injunctive relief is requested and granted, the appellant would then fall within the requirements of CR 62.02 and CR 65.08.

A more recent decision indicates that if an appellant seeks to maintain the status quo in a condemnation case, a bond may be required under CR 62.03. *Barone v. Sanitation Dist. No. 1*, 2020 WL 260666 (Unpublished, but cited pursuant to CR 76.28(4)(c)). In *Barone*, the trial court granted possession of an easement to the utility company in a condemnation action. To prevent execution of the judgment, the affected property owners moved to stay the order, which the trial court granted on the condition that they post a supersedeas bond. The Court of Appeals held that the appellants were not required to post a supersedeas bond to file their appeal, but they would have to post a bond to stay enforcement of the judgment pending appeal. Although the bond in *Barone* was ordered under the authority of CR 62.03 and CR 73.04, rather than CR 62.02, the trial court's inherent authority to impose a bond when its order changes the status quo was reaffirmed.

In this court's opinion, because the order in *Barone* effectively enjoined the utility from taking the property, the procedure suggested in *Stillpass* is on firmer ground. But regardless of whether CR 62.02 or 62.03 is used, it is clear that the Rules of Civil Procedure control and that they are only meant to apply when an appellant requests a stay of a Circuit Court order or judgment.

The logic of *Stillpass* and the authority of the Supreme Court to prescribe its own appellate rules is also supported in the general statute dealing with judicial review of final orders of other administrative agencies. KRS 13B.140(4) provides

A petition for judicial review shall not automatically stay a final order pending the outcome of a review unless:

- (a) An automatic stay is provided by statute upon appeal or at *any point in the administrative proceeding*;
 - (b) A stay is permitted by the agency and granted upon request; or
 - (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.
- (emphasis added)

KRS 13B.150 then states how judicial reviews shall be conducted, and KRS 13B.160 specifically provides for judicial appeal from the Circuit Court to the Court of Appeals "in accordance with the Kentucky Rules of Civil Procedure."

As an aside, even though a petition filed in Circuit Court pursuant to KRS Chapter 100 is an appeal of an administrative decision, it is an original action in the courts. (KRS 23A.010(4)). Since actions under KRS Chapter 100 are a matter of legislative grace, it is arguable that the legislature could allow the recovery of damages, costs and even attorney's fees to the prevailing party, similar to other statutory causes of action. Further, when a statute allows recovery of attorney's fees, those fees can include fees incurred during the course of an appeal. In *Moore v. Roberts, By & Through Roberts*, 684 S.W.2d 276, 278 (Ky. 1982), the court held:

KRS 304.39-220 allows a reasonable attorney's fee to be awarded if the denial or delay of benefits from the reparations obligor was without reasonable foundation. The trial court held that the delay of payments to Lisa Roberts by Farm Bureau was unreasonable, and a fee was assessed against Farm Bureau. This decision was affirmed on appeal in *Kentucky Farm Bureau Mutual Insurance Company v. Roberts*, Ky. App., 603 S.W.2d 498 (1980). Subsequently, the trial court imposed an additional attorney's fee to cover the representation on that appeal.

Appellant argues that its constitutional right to an appeal cannot be subjected to an assessment of damages on the first appeal as a matter of right contemplated by Section 115 of the Constitution of Kentucky. *See* KRS 264A.300(1).

KRS 304.39-220 provides for a penalty of reasonable attorney's fees "on a claim or in an action for basic or added reparation benefits ... if the denial or delay was without reasonable foundation." The only issue of that appeal was the reasonableness of the delay. Until that issue is fully resolved either through the appellate process or through failure to perfect an appeal, the appellee has no basis upon which to enforce her judgment. Had the Court of Appeals determined that the delay was not unreasonable, then the appellee would not have been able to collect any additional attorney's fees.

The award of the additional fee is not, as suggested by Farm Bureau, a penalty imposed upon its right to appeal, but *rather an item of monetary damages allowed by the legislature due to the continuing representation upon the issue of reasonableness*. An appeal is always at one's own peril. Clearly KRS 304.39-220 envisages that the fee shall attach to the logical and legal conclusion of litigation.

Therefore, since a portion of this appeal relates to that same issue, the trial court may permit additional attorney's fees for this appeal proportionate with this issue as to the overall appeal. (emphasis added)

But unlike KRS 304.39-220 and other statutes which specifically allow the recovery of attorney's fees, KRS 100.3471 does not address the rights of the parties to recover attorney's fees in the original action. Instead, it attempts to impose those fees, as well as damages and costs, in the form of a bond as a condition of the appeal from Circuit Court to the Court of Appeals.

Because Section 116 of the Kentucky Constitution gives the Supreme Court the sole authority to prescribe rules governing its appellate jurisdiction, and because appeals of Chapter 100 cases from Circuit Court to the Court of Appeals fall within that jurisdiction, KRS 100.3471 is unconstitutional in that it violates the doctrine of separation of powers established by Sections 27 and 28 of the Kentucky Constitution.

B. WHETHER KRS 100.3417 IMPOSES AN UNCONSTITUTIONAL PENALTY ON APPELLANT'S RIGHT OF APPEAL UNDER SECTION 115 OF THE KENTUCKY CONSTITUTION

In addition to violating the separation of powers doctrine, KRS 100.3417 violates Section 115 of the Constitution of Kentucky which provides:

In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo.

Prior to 1976, there was no constitutional right to appeal in Kentucky. Until then the right to appeal was statutory. If an appeal affirmed the lower court decision, or if the appeal was dismissed, damages were awarded pursuant to the now repealed KRS 21.130. The award was mandatory; there was no discretion to be exercised by the court to determine, for example, the validity or frivolity of an appeal. *U.S. Fidelity & Guaranty Co. v. Citizens National Bank*, 147 Ky. 810, 145 S.W. 750 (1912); *Preece v. Burns Adm'r*, 261 Ky. 202, 87 S.W.2d 375 (1935). With the implementation of the judicial article in 1976, came the addition of Section 115 of the Kentucky Constitution. The legislature repealed KRS 21.130 and enacted KRS 26A.300 to assure that there would be no penalty assessed for an appeal brought as a matter of right under Section 115. KRS 26A.300 provides

(1) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by Section 115 of the Constitution of Kentucky.

....

Although KRS 26A.300 was held unconstitutional in *Elk Horn Coal Corp. (supra)*, its mere enactment confirms the intent of Section 115 to afford a first appeal to another court without penalty.

In lieu of any automatic penalty imposed on an appellant when an appeal is affirmed or dismissed, CR 73.02(4) provides

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

The Court of Appeals has confirmed that the authority to impose such an award lies with the appellate court, not the trial court (*Walters v. Smith*, 2013 Ky. App. LEXIS 98 (unpublished)).

This court is unaware of any other statute in this state that attempts to do what KRS 100.3471 does. The only analogous statute it could find is KRS 383.255, which attempted to impose on tenant-appellants a requirement that they

(1) ...deposit with the circuit clerk the amount of rent owing and due from the onset of the forcible entry and detainer proceedings as well as the amount of all future rents, as it becomes owing and due in each succeeding month during the pendency of the appeal....

(2) Upon the aggrieved party perfecting his appeal by the payment of moneys into court pursuant to subsection (1) of this section the court shall stay all further proceedings on the inquisition....

The constitutionality of that statute was addressed in *Fickey v. Cross Creek Apartments, Ltd.*, 700 S.W.2d 807, 808 (Ky. Ct. App. 1985) where the court held that the right to appeal a forcible detainer judgment under KRS 383.255 could not be conditioned on the tenant paying past rent and rent that accrues during the pendency of the appeal. Specifically, it found that

... when applied to an indigent person without sufficient funds to make the required payment into court, the statute creates a financial barrier between him and the circuit court which forecloses his avenue of appeal. Aside from any federal constitutional question which this might present, *cf. Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), we are convinced that as to such a person, the statute constitutes an unreasonable and, therefore, impermissible regulation of the exercise of the right of appeal secured by the Kentucky Constitution.

The statute is written to protect the property interests of both landlord and tenant. If the former is successful in the district court, he is sure to get his rent, while the latter can maintain possession of the premises at least until the appeal is disposed of. This is a reasonable objective, and we do not for one minute question the authority of the legislature to condition any tenant's right to continued occupancy of the premises during the pendency of an appeal upon the payment of rental monies into court. What it cannot do is also condition the right of appeal upon this payment when the appellant cannot pay because of poverty. An indigent person has no constitutional right to supersede a judgment without posting security, but he does have a constitutional right to one appeal without having to do so. Otherwise reasonable, the deposit provision of the statute becomes unreasonable when applied to a person who is unable to make the deposit because of poverty and, therefore, must be disregarded as to such a person.

Of course, if he does not make the deposit, the provision of subsection (2) of KRS 383.255, which has the effect of staying enforcement of the district

court's judgment, is not triggered, with the consequence being that the landlord might obtain possession of the premises before the appeal is disposed of.

Although *Fickey* addressed that statute's impact on indigent appellants, its premise is applicable to any appeal. For that reason, this court finds that KRS 100.3471 violates Section 115 of the Kentucky Constitution by imposing what constitutes a penalty on the right to a first appeal regardless of whether an appellant is indigent or not.

KRS 100.3471 requires the trial court to impose a bond to cover all costs, economic loss, and damages that the appellee may suffer or incur during the pendency of, or that will be caused by, the appeal, including attorney fees and court costs up to \$250,000 if the court determines that the appeal is presumptively frivolous and up to \$100,000 if not. Due to the complexity of the cases under Chapter 100, attorney's fees alone easily run into the tens of thousands of dollars, and economic losses can be staggering if a downturn in the economy impacts the value of a project. There is no doubt that the requirement of a bond of that amount is a penalty which could essentially negate many appellants' constitutional right to a first appeal. To require an appellant to post a bond of that magnitude is a violation of Section 115 regardless of the appellant's financial condition.

B. WHETHER THE STATUTE DENIES EQUAL PROTECTION

A constitutional challenge to a statute on equal protection grounds is facial and, as such, is "the most difficult challenge to mount successfully." *Williams v. Commonwealth*, 213 S.W.3d 671, 681 (Ky. 2006) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). A party making such a challenge "must establish that no set of circumstances exists under which the [law] would be valid." *Id.* The presumption of the law's validity requires a challenger to show a constitutional violation that is "clear, complete and unmistakable." *Ky. Indus. Util. Customers, Inc. v. Ky. Util. Co.*, 983 S.W. 2d 493, 499 (Ky. 1998).

The Attorney General correctly argues that the guarantee of equal protection does not prohibit all differential treatment among citizens, particularly in cases where the differential treatment results from a classification pertaining to economic matters rather than a suspect classification such as race or religion. When differential treatment among citizens results from a classification based on economic policy, courts evaluate it under rational basis review—the lowest level of scrutiny. *Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018). The rational basis test simply asks "whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 596. Because the statute is presumed constitutional, the burden is on the Plaintiffs to "negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. (quoting *Steven Lee Enters v. Varney*, 36 S.W.3d 391, 395 (Ky. 2000)).

On its face, KRS 100.3471 applies equally to all appellants in appeals of land use cases from the Circuit Court to the Court of Appeals except for governmental entities or persons challenging the creation or expansion of a landfill.

Plaintiffs claim that there is an equal protection violation because subsection (5) of the statute exempts from the bond requirement

... the United States, the Commonwealth of Kentucky or any of its municipal corporations or political subdivisions, or any of their agencies or officers acting for or on their behalf, or to a person challenging the creation or expansion of a landfill.

But the exemptions set forth in the statute have both a practical and a legal basis. The exemptions for the government and its subdivisions parallel those set forth in CR 81A and CR 62.03(2). Civil Rule 81 A states:

Whenever a bond is or may be required by these rules in order to take any proceeding, to indemnify any party, or to stay proceedings under or the enforcement of a judgement, such requirement shall not apply to the United States, the commonwealth or any of its municipal corporations or political subdivisions, or any of their agencies or officers acting for or on their behalf. Unless otherwise exempted by law such governmental unit shall be obligated to the same extent as if it had given the bond required.

And Civil Rule 62.03(2) provides:

If the appellant is a governmental unit exempted from execution of a bond under the provisions of Rule 81A, the filing of a notice of appeal by such party shall stay enforcement of the judgment as to it in all cases where the giving of a supersedeas bond would effect such a stay.

Neither CR 81A nor CR 62.03 have ever been constitutionally challenged. One reason for that is the one made by the Defendants that the government should have unfettered access to its own courts. The other more practical reason is that bonds are required to provide financial protection from certain types of court action. Presumably, the government has the resources to pay judgments or damages from wrongfully issued injunctions, making a bond unnecessary.

As to the exemption for persons challenging the creation or expansion of a landfill, the impact of a decision concerning that particular land use is potentially so damaging to the challengers, and at the same time potentially costly to the applicant, that there is a rational basis for treating it differently than other land use cases.

Although this court finds no denial of equal protection to parties described within KRS 100.3471, appellate courts have also examined similar statutes to see whether they deny appellants equal protection to litigants for other reasons.

Plaintiffs cite *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408 (KY. 2005) which held that KRS 26A.300 denied equal protection by imposing a ten percent penalty on any appellant who superseded a money judgment against it then took a “second appeal” by filing a motion for discretionary review with the Supreme Court. The holding noted that the penalty applied only to unsuccessful appellants from money judgments (i.e., defendants) who superseded the judgment – not to other types of unsuccessful appellants. *Elk Horn* cited and applied the rationale of the United States Supreme Court in *Lindsey v. Normet*, 405 U.S. 56 (1972), which held that an Oregon statute which required tenants challenging an eviction to post a bond of twice the amount of the rent expected to accrue pending appellate review denied equal protection on the grounds that it arbitrarily and irrationally discriminated between tenant-appellants and other types of appellants. *Elk Horn* also distinguished the Supreme Court’s holding in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), which considered an equal protection challenge to Mississippi’s “appellate penalty statute” which required unsuccessful appellants from money judgments and all other judgments whose money value could be easily determined to pay an additional assessment of 15% of the judgment. The court said that unlike the *Lindsey* statute, which bore no reasonable relationship to the objective of deterring frivolous appeals, the *Bankers Life* statute did not single out a class of appellants in an arbitrary and irrational fashion. Instead, the statute applied to both plaintiffs and defendants, and to all money judgments. Further the penalty was imposed only *after* the judgment was affirmed without modification, and so did not discourage appellants who believed they had a meritorious appeal on the “front end.”

Applying *Elk Horn* in light of *Bankers Life*, this court finds that KRS 100.3471, in addition to violating the separation of powers doctrine in Sections 27 and 28 of the Kentucky Constitution and the right to a first appeal in Section 115 of the Kentucky Constitution, violates appellants’ right to equal protection under the law guaranteed by Section 3.

Bankers Life upheld the Mississippi statute because the statute applied “to both plaintiffs and defendants” and “to all money judgments.” Further, by setting the penalty at a predictable and reasonable 15%, parties to an appeal could factor in the potential cost in deciding whether to appeal a decision or to contest an appeal. Unlike that statute, KRS 100.3471 applies only to land use cases and then only to appellants in those cases. Further, it applies regardless of whether an appeal is frivolous, and it subjects appellants to such significant and unpredictable damages that it not only discourages legitimate appeals but may preclude them altogether.

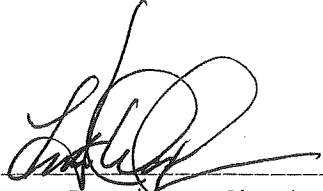
For those reasons, this court finds that the statute is arbitrary and irrational under the rational-basis standard of review and violates the guarantee of equal protection afforded by Section 3 of the Kentucky Constitution.

DECISION

For the reasons set forth above, this court finds KRS 100.3471 unconstitutional and that Plaintiff/Appellant shall not be required to post a bond pursuant to that statute to perfect its appeal.

This Order is final and appealable.

April 1, 2021



Hunter Daugherty, Circuit Judge
Jessamine Circuit Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy the foregoing was served by mailing a copy to the following of record on this the 2 day of April, 2021:

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