IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000091-DGE

FINAL
DATE 9-15-11 ELIA Grau, D.C.

LAURA HUDSON (NOW STANBERY) — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2009-CA-002392-ME
JEFFERSON CIRCUIT COURT NO. 09-CI-503251

DONALD HUDSON — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This appeal is from a decision of the Court of Appeals, which affirmed an order of the family court modifying the father's child support obligation. The family court entered its order prior to this Court's April 2010 decision in *Artrip v. Noe*, 311 S.W.3d 229 (Ky. 2010). We remand to the family court with directions to recalculate child support in light of this Court's directives in *Artrip*.

The parties were married February 19, 1993. The marriage was dissolved by decree entered January 19, 1996 in Jefferson Circuit Court. The parties are the parents of a son born July 28, 1994, and per the decree, Appellee (the father) paid child support in the amount of $210 per month. In August of 2009, Appellant (the mother) moved for an increase in child support.

The father is employed as a high school assistant principal, earning approximately $86,000 per year. The mother is currently disabled, receiving Social Security disability benefits in the amount of $1,026 per month. The son, as the mother's dependent, receives $513 per month in Social Security. The money is kept in a savings account for the son's college, though the mother testified that she sometimes makes withdrawals for her son's unexpected needs.

At the hearing, the primary dispute between the parties was over the proper treatment of the son's $513 per month Social Security payment in calculating the father's child support obligation. The mother argued that, while her Social Security disability payments constituted gross income, the payments to the son should not be considered to be part of her income for child support calculation purposes. The father argued that, given the son's independent source of income from Social Security, application of the child support guidelines in KRS 403.212(7) would be inappropriate, and that a deviation was warranted. *See* KRS 403.211(2) ("Courts may deviate from the guidelines where their application would be unjust or inappropriate."); KRS 403.211(3)(d) (permitting deviation from the guidelines based on the independent financial resources of the child).

The family court concluded that a deviation from the child support guidelines was proper "based on the child's receipt of Social Security benefits related to Mother's disability." The court found that the son's Social Security income constituted "an emergency nest egg and college fund" that, when

combined with regular child support from the father, would result in a windfall to the son, and that this justified a deviation from the standard child support guidelines. The family court considered the parties' combined income (excluding the son's Social Security benefits) and found that the parties' base monthly support obligation to the son totaled $969 per month. The court reduced this base monthly total by $513 (the amount of the son's Social Security payments). The family court then calculated the father's portion of this reduced base obligation to be $369.72 per month, and modified the father's child support obligation accordingly.

The mother appealed to the Court of Appeals, filing her brief prior to this Court's decision in *Artrip v. Noe*. In *Artrip*, this Court concluded that Social Security benefits received by a child as a result of a parent's disability—unlike other types of benefits, such as SSI—are not the type of "independent financial resources" that would permit a deviation from the child support guidelines pursuant to KRS 403.211(3)(d). 311 S.W.3d at 233.[1]

Atrip became final before the mother's reply brief was due in the Court of Appeals, giving the mother's counsel an opportunity to cite the case. However, the mother's counsel chose not to file a reply brief. In its opinion, the Court of Appeals noted the mother's counsel's failure to cite *Artrip*, while also

[1] In *Artrip*, this Court also interpreted KRS 403.211(15), and held that the non-disabled parent is not entitled to a credit against that parent's child support obligation for Social Security disability payments to the child grounded upon the disability of the other parent. 311 S.W.3d at 232. In this case, the father did not attempt to claim a credit against his child support obligation based on KRS 403.211(15), and that issue is not before us.

recognizing that *Artrip* had "facts virtually indistinguishable from those before us."

However, the Court of Appeals concluded that the mother had failed to preserve the error, because her brief to the Court of Appeals failed to comply with CR 76.12(4)(c)(v), which requires that the beginning of each argument in an appellant's brief contain "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Therefore, the Court of Appeals concluded that, while the mother's "argument would be persuasive" if properly preserved, the family court's child support calculations did not amount to manifest injustice under CR 61.02. The Court of Appeals affirmed the order of the family court; this Court then granted discretionary review.

The facts in this case are undisputed. The only issue is one of law, i.e., whether a deviation from the child support guidelines is proper based on the Social Security benefits received by the son as a result of the mother's disability. In *Artrip*, this Court concluded that such a deviation is not proper, and amounts to an abuse of discretion by the family court. 311 S.W.3d at 233. The Court of Appeals tacitly acknowledged this, but held that the mother had failed to preserve the issue, because her brief did not comply with CR 76.12(4)(c)(v). The Court of Appeals erred in this conclusion. Error *preservation* is distinct from the requirements of CR 76.12(4)(c)(v).

The purpose of CR 76.12(4)(c)(v)[2] is "to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal." *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990) (quoting 7 Bertelsman and Phillips, *Kentucky Practice*, CR 76.12(4)(c)(iv), Comment 4 (4th ed. 1989 supp.)). However, a failure to comply with CR 76.12(4)(c)(v) does not render a properly preserved issue unpreserved; rather, a substantial failure to comply permits the appellate court to strike the noncompliant brief. CR 76.12(8)(a).[3] The exercise of an appellate court's authority to strike a brief that does not comply with CR 76.12 is, however, discretionary. *Simmons v. Commonwealth*, 232 S.W.3d 531, 533 (Ky. App. 2007) ("While Simmons's brief did not fully comply with the rule, dismissal for failure to comply with the provisions of CR 76.12 is discretionary rather than mandatory."); *Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 482 (Ky. App. 2005) ("But dismissal based upon a failure to comply with CR 76.12 is not automatic."); *see also Sanderson v. Commonwealth*, 291 S.W.3d 610, 612 (Ky. 2009) (exercising discretion and not striking a brief for a technical violation of CR 76.12).

In particular, Kentucky's appellate courts have been reluctant to strike a brief for violation of CR 76.12(4)(c)(v) when the record is not voluminous and preservation is clear from the face of the record. In *Cornette v. Holiday Inn*

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[2] Formerly CR 76.12(4)(c)(iv), renumbered CR 76.12(4)(c)(v) effective February 1, 2001.

[3] Where an appellant has failed to comply with CR 76.12 with respect to a particular argument, an appellate court is also free to disregard that argument, rather than strike the entire brief. *See Dixon v. Commonwealth*, 263 S.W.3d 583, 587 n.11 (Ky. 2008); *Smith v. Smith*, 235 S.W.3d 1, 4-5 (Ky. App. 2006).

Express, an appeal from a summary judgment, the appellant's brief failed to comply with CR 76.12(4)(c)(iv) (current CR 76.12(4)(c)(v)). 32 S.W.3d 106, 109 (Ky. App. 2000). The Court of Appeals nevertheless concluded "that the failure to comply with the rule is not fatal in this instance because the record consists only of a few pleadings, a few brief hearings related to the motions for summary judgment, and a few very brief depositions." *Id.* In *Baker v. Campbell County Board of Education*, the appellant appealed from a motion to dismiss, but failed to comply with CR 76.12(4)(c)(v). 180 S.W.3d at 481-82. The Court of Appeals noted that "dismissal based upon a failure to comply with CR 76.12 is not automatic. In fact, as the record in this case is sparse and it is clear that Baker vigorously opposed the [appellee's] motion to dismiss, sanctions for Baker's technical violation of CR 76.12 are not warranted." *Id.* at 482 (footnotes omitted).

The written record in this case consists of 75 pages, and much of that is from the parties' original divorce action in 1995 and 1996. The proceedings in this case consist of a 21-minute hearing. The facts are undisputed and the record is uncomplicated. The only disputed issue before the family court was the proper treatment of the son's Social Security payments in calculating the father's child support obligation. While the Court of Appeals erred in concluding that the issue was unpreserved, we opine that, as in *Cornette* and

Baker, striking the mother's brief in this case would have been too harsh a penalty given that preservation was clear from the face of the limited record.[4]

Artrip is authority clearly on point, which this Court did not render until after the mother tendered her brief in the Court of Appeals. Although an issue may not be raised for the first time in a reply brief, *see Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006), an appellant is, of course, free to cite new authority in a reply brief. Also, this Court routinely grants motions for leave to file supplemental authority when new cases are rendered after briefing has been completed. However, even when the parties fail to cite clearly controlling legal authority, the Court of Appeals is still bound by the precedents of this Court. *See* SCR 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."); *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 822 (Ky. App. 2008); *Wright v. Dolgencorp, Inc.*, 161 S.W.3d 341, 345 (Ky. App. 2004); *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000).

This case falls squarely within the holding of *Artrip v. Noe*, 311 S.W.3d at 233. For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the case remanded to the Jefferson Circuit Family Court for consideration under *Artrip*.

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[4] The mother's counsel has, unfortunately, once again failed to comply with CR 76.12(4)(c)(v) in his brief to this Court. We decline to strike the mother's brief, however, for the reasons just stated.

Minton, C.J.; Abramson, Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., dissents herein for the reasons stated in her dissent in *Artrip v. Noe.*

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