

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**DECEMBER 1, 2013 to DECEMBER 31, 2013**

**I. CIVIL PROCEDURE**

**A. *Hughes v. Lawrence-Hightchew***

[2012-CA-002140](#) 12/20/2013 2013 WL 6710196 DR Pending

Opinion by Judge Combs; Judges Lambert and Thompson concurred. On appeal from an order dismissing a personal injury complaint on grounds of misjoinder, the Court of Appeals vacated and remanded. The Court relied upon CR 21, which expressly provides that misjoinder is not a basis for dismissal of any action. The Court noted that the provisions of CR 21 instead permit the trial court, in its discretion, to sever a claim if it finds that there has been a misjoinder. The Court further noted, however, that in cases involving separate motor vehicle collisions linked closely in time, courts in other states often favor a joinder of claims - particularly where there are common factual questions as to the nature, cause, and extent of a party's injuries.

## II. CRIMINAL LAW

### A. *Rhodes v. Commonwealth*

[2013-CA-000596](#) 12/13/2013 2013 WL 6516397

Opinion by Judge Moore; Chief Judge Acree and Judge Jones concurred. In exchange for appellant's guilty plea to the misdemeanor charge of possession of drugs not in original container, the Commonwealth recommended dismissing without prejudice various felony drug counts against appellant. The circuit court accepted the plea agreement. More than thirteen years later, and after she had completed her sentence, appellant moved to expunge the dismissed felony charges and her misdemeanor conviction, as well as another unindicted felony offense, but her request was denied. On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that because the felony counts and the unindicted offense were either dismissed without prejudice or presented "No True Bill," KRS 431.076 was inapplicable and did not allow for expungement of those charges. However, the Court further held that the circuit court was still required under KRS 431.078 to consider separately the requirements for expungement of appellant's misdemeanor conviction and to make findings thereon. Because the circuit court had failed to do so, remand for further consideration was required.

### III. DAMAGES

#### A. *Saint Joseph Healthcare, Inc. v. Thomas*

[2012-CA-000941](#) 12/06/2013 2013 WL 6385845 DR Pending

Opinion by Judge Maze; Judge Combs concurred; Judge Nickell concurred in part and dissented in part by separate opinion. The Court of Appeals affirmed the circuit court's denial of appellant's motions for a directed verdict or a new trial as to a punitive damages award. The award resulted from a medical negligence claim and a claim brought under the Emergency Medical Treatment and Active Labor Act (EMTALA) by the estate of an emergency room patient. In finding for the estate, the jury awarded compensatory damages of \$25,000, with 15% of the fault apportioned to appellant. However, the jury also ultimately assessed punitive damages against appellant in the amount of \$1.45 million. On appeal, the Court held that appellant was not entitled to a directed verdict re punitive damages because the estate had submitted sufficient evidence of ratification, as required by KRS 411.184(3), and that appellant had acted with gross negligence. On the ratification issue, the Court held that the concerted actions of the emergency room staff and appellant's subsequent statements of approval of those actions were sufficient to show ratification. The Court also held that appellant's actions were sufficient to show gross negligence in relation to EMTALA's stabilization requirement even though appellant provided some medical care to the decedent. The Court also rejected appellant's claim that the punitive damages award of \$1.45 million was excessive under the standards set out in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). While the Court agreed that the punitive damages award was disproportionate to the underlying compensatory damages award, the majority concluded that the ratio of punitive to compensatory damages was not controlling in light of more significant factors: the reprehensibility of appellant's actions; the decedent's position of vulnerability; the disparity between the relatively low award of compensatory damages and the harm caused; the statutory purposes of appellant's duties under EMTALA; and the amount of civil and criminal penalties imposed by EMTALA for violation of those duties. Based upon these factors, the majority concluded that the jury's award of punitive damages was not excessive. In dissent, Judge Nickell argued that the vastly disproportionate ratio of punitive to compensatory damages could not be upheld even in light of appellant's egregious conduct.

#### IV. TAXATION

A. *Estate of McVey v. Department of Revenue, Finance and Admin. Cabinet*

[2012-CA-000840](#) 12/13/2013 2013 WL 6516395 DR Pending

Opinion by Judge Clayton; Judges Caperton and Taylor concurred. The Court of Appeals affirmed an order of the Franklin Circuit Court that reversed the decision of the Kentucky Board of Tax Appeals and reinstated the decision of the Department of Revenue in an inheritance tax matter. Pursuant to the language of the decedent's will, the estate deducted the payment of inheritance taxes as a "cost of administration" and paid the inheritance taxes of certain bequests from the residual estate per the language of the will. Thereafter, the Department conducted an audit and determined that it was improper under KRS 140.090(1) to deduct the payment of inheritance taxes as a "cost of administration." The Department also adjusted certain beneficiaries' distributive shares to reflect an additional inheritance tax on the "bequest of tax" mandated by the will. The Court determined that notwithstanding the language of the will, the estate was statutorily prohibited from deducting the payment of inheritance taxes as a "cost of administration" since the payment of inheritance taxes does not meet any specifically-stated deduction in KRS 140.090(1). Additionally, the Court determined that a "bequest of tax" is a gift and, therefore, is itself subject to an inheritance tax. Under KRS 140.010, an inheritance tax is not a tax on property itself but rather a tax on the transfer of property, *i.e.*, an excise tax. Thus, because an inheritance tax is an excise tax, it is not improper to assess a tax on a "bequest of tax." The Court further held that this did not constitute "double taxation" because there were essentially two separate bequests.