

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**JUNE 1, 2015 to JUNE 30, 2015**

**I. ARBITRATION**

**A. *Kindred Nursing Centers Limited Partnership v. Cox***

[2014-CA-000196](#) 06/05/2015 2015 WL 3525113 DR Pending

Opinion by Judge VanMeter; Judges Clayton and Jones concurred. The Court of Appeals affirmed an order denying Kindred's motion to compel arbitration with respect to a wrongful death claim, holding that under Kentucky precedent, wrongful death claims are not subject to arbitration. Following the decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), the Court determined that a decedent cannot agree to arbitrate wrongful death claims because wrongful death claims are not derivative of the decedent's personal injury claims and accrue separately as a means to compensate the pecuniary losses of the wrongful death beneficiaries. The Court further determined that this does not constitute disparate treatment of wrongful death claims as prohibited under the Federal Arbitration Act (FAA). Kentucky contract law applies when determining the validity of arbitration agreements under the FAA, and under Kentucky law, an individual may not agree to arbitrate claims which are not his own.

## **II. CHILD SUPPORT**

### **A. *Sallee v. Sallee***

[2013-CA-001270](#) 06/05/2015 2015 WL 3525111 Rehearing Denied

Opinion by Judge Taylor; Judges Dixon and Maze concurred. After the parties divorced, mother sought to hold father in contempt of court due to nonpayment of child support. The circuit court denied the motion. On appeal, the Court of Appeals vacated and remanded, holding that father, rather than mother, had the burden of proving that he had paid his child support obligation after mother established the validity of the divorce decree setting the obligation.

**B. Smothers v. Baptist Hospital East**

[2013-CA-000947](#) 06/12/2015 2015 WL 3638002

Opinion by Judge Nickell; Judges Dixon and Kramer concurred. Appellant and an unnamed woman are the biological parents of a minor daughter. On two separate occasions, the mother took the daughter to Baptist Hospital East seeking medical treatment for unknown maladies. Appellant alleged he was unaware of the hospital visits and did not consent to any treatment nor agree to be financially responsible for same. He carried a health insurance policy on the child that paid for a majority of the costs. However, when payment for the outstanding balance was not forthcoming, Baptist East instituted a collection action against appellant in the Jefferson District Court. In response to Baptist East's motion for summary judgment, appellant challenged the constitutionality of KRS 405.020, alleging that it improperly shielded women from financial liability and thus constituted gender-based discrimination. Baptist East argued that the common-law doctrine of necessities established liability and contended that addressing the constitutionality of the statute was, therefore, unnecessary. The district court entered summary judgment in favor of the hospital without addressing the constitutional issue and appellant appealed to the Jefferson Circuit Court, which affirmed the decision. In affirming, the circuit court declined to address the constitutional challenge and concluded that the doctrine of necessities requires both parents to be jointly and severally liable for the support of their children, including payment for medical treatments. As appellant was the sole parent before the court and he chose not to implead the mother, the circuit court concluded that the district court did not err in placing full responsibility on him. On discretionary review, the Court of Appeals affirmed. The Court held that the lower courts correctly refused to address appellant's constitutional challenge. The Court then undertook an in-depth examination of the common-law doctrine of necessities, ultimately holding that the duty to support a minor child applies with equal force to both parents. Because appellant was the sole potentially responsible party in the action, the Court found no error in imposing complete liability upon him. Finally, the Court held that appellant's failure to produce any affirmative evidence in responding to the summary judgment motion - choosing to rely instead solely upon bare assertions and arguments - was fatal to his challenge.

### **III. CRIMINAL LAW**

#### **A. *Gill v. Commonwealth***

[2014-CA-000362](#) 06/19/2015 2015 WL 3799587 Released for Publication

Opinion by Judge Stumbo; Judge J. Lambert concurred; Judge Thompson concurred in result only. The Court of Appeals vacated appellant's conviction for violating KRS 189.580(1) for leaving the scene of an accident. Appellant's girlfriend admitted that she intentionally rammed the rear of appellant's vehicle, which caused the vehicle to strike the wall of a bridge. Appellant did not stop his vehicle; instead he continued down the road and stopped at a market because he felt he was in danger. The Court concluded that the intentional striking of appellant's vehicle did not constitute an "accident" as contemplated by KRS 189.580(1). Therefore, appellant could not be convicted under the statute.

#### **B. *Melcher v. Commonwealth***

[2014-CA-001739](#) 06/19/2015 2015 WL 3799602 Rehearing Denied

Opinion by Judge J. Lambert; Judges Stumbo and Thompson concurred. The Court of Appeals affirmed an order denying appellant's motion for post-conviction relief under RCr 11.42. The Court held that KRS 532.043, which governs the conditional discharge of sex offenders and which places responsibility for revocation with the Kentucky Parole Board rather than the trial court, was not unconstitutional as applied to appellant because the statute was amended prior to his indictment and the amendments were not applied retroactively to him. Further, even if the amendments had been applied retroactively, they were procedural in nature and could be applied.

C. ***Peak v. Commonwealth***

[2014-CA-000500](#) 06/26/2015 2015 WL 3918821 Rehearing Pending

Opinion by Judge VanMeter; Judges D. Lambert and Thompson concurred. The Court of Appeals affirmed an order denying appellant's motion for post-conviction DNA testing, holding that the circuit court's dismissal for lack of jurisdiction was harmless error since DNA testing was unlikely to exonerate appellant, lead to a more favorable verdict or sentence, or otherwise be exculpatory. The Court held that KRS 422.285 statutorily extends the circuit court's jurisdiction beyond the usual ten-day period following entry of a final judgment when a convict petitions the court for DNA testing and analysis. However, such a petition is properly denied when the petitioner cannot show that the DNA evidence sought is reasonably likely to exonerate him, lead to a more favorable verdict or sentence, or otherwise be exculpatory.

## **IV. ELECTIONS**

### **A. *Hardin v. Montgomery***

[2015-CA-000305](#) 06/12/2015 2015 WL 3643448 Rehearing Pending

Opinion by Judge Maze; Judge D. Lambert concurred; Judge Thompson dissented and filed a separate opinion. After being declared the losing candidate by 28 votes, Hardin brought an action to contest the results of a general election for the office of Magoffin County Judge-executive, naming the incumbent candidate and the election board as defendants. The circuit court entered a judgment voiding the election results and declaring the office vacant, finding that the board violated election laws and that the opposing candidate, or those at his direction, engaged in fraud and intimidation. The board appealed and Hardin cross-appealed. The Court of Appeals affirmed as to both appeals. The Court held that: 1) the contest petition was sufficient under election contest pleading rules; 2) the circuit court appropriately granted Hardin an extension of the expedited 30-day discovery period; 3) the evidence established that the incumbent candidate violated the Corrupt Practices Act; 4) the candidate's violation of the Corrupt Practices Act was not, by itself, sufficient to set aside the election; 5) the evidence was sufficient to establish that the election board and election officials failed to substantially comply with the laws governing absentee voting; 6) the incumbent candidate's misconduct and the board's noncompliance with voting law was sufficient to justify the extraordinary remedy of setting aside the election; and 7) Hardin would not be declared the winner of the election given the remaining uncertainty as to the outcome of the election based on legitimate ballots cast.

## V. EVIDENCE

### A. Parrish v. Commonwealth

[2013-CA-001445](#) 06/12/2015 2015 WL 3638003 Released for Publication

Opinion by Judge Jones; Judges Dixon and VanMeter concurred. This appeal concerned the termination of a Department of Corrections (DOC) employee after his urine tested positive for cocaine. The Court of Appeals held that substantial evidence supported the circuit court's findings that: 1) evidence existed to establish the integrity of the urine sample; and 2) the proof was sufficient to make a finding that appellant had violated the DOC's policies when his urine sample collected during work hours tested positive for cocaine. The Court explained that alleged gaps in custody of the urine sample did not render the results inadmissible where appellee complied with appropriate procedures in handling the urine sample; appellant signed the chain of custody documents related to the sample; the sample was delivered to the laboratory intact; and the sample was tested according to the laboratory's general testing procedures and protocols. Further, the Court held that under Kentucky's Penal Code, given the fact that the General Assembly has defined cocaine as a Schedule II controlled substance, sufficient evidence existed to find that cocaine would clearly fall within the type of substances prohibited by the DOC's policies. As such, the Court concluded that substantial evidence supported the DOC's decision to terminate appellant.

## **VI. INSURANCE**

### **A. Adams v. State Farm Mutual Automobile Insurance Company**

[2013-CA-002152](#) 06/12/2015 2015 WL 3638004 DR Pending

Opinion by Judge Clayton; Judges J. Lambert and Thompson concurred. The Court of Appeals reversed a circuit court order granting a declaratory and summary judgment to the appellee insurer on appellants' uninsured motorist and personal injury protection benefit claims. Appellee argued that appellants had not complied with the terms of the insurance contract when the passengers failed to participate in an Examination Under Oath (EUO). The circuit court agreed and dismissed appellants' complaint. In reversing, the Court of Appeals held that in a case such as this where there were medical and police reports reflecting the injuries and events that had occurred, a policy clause requiring an EUO prior to payment of a claim (and as a bar to the claim should one not be done) would be in direct opposition to the purpose of the Motor Vehicle Reparations Act.

## VII. LABOR AND EMPLOYMENT

### A. Beckhart v. Jefferson County Board of Education

[2014-CA-000530](#) 06/05/2015 2015 WL 3525107 DR Pending

Opinion by Judge Combs; Judges Jones and Maze concurred. The Court of Appeals affirmed the circuit court's dismissal of a putative class action in which several non-teaching employees of the Jefferson County school system had sought declaratory and injunctive relief. At issue was the authority of the system to enter into collective bargaining agreements affecting those employees who were assessed union "fair share" fees even though they had declined union membership. The agreements essentially made the union the exclusive bargaining representative of the class of employees to which they belonged. The Court held that such fees may be withheld from those who - though not union members - were nonetheless eligible for union representation, and that the school system had the authority to enter into multi-year collective bargaining agreements with a representative of its employees.

### B. Hisle v. CorrectCare-Integrated Health, Inc.

[2013-CA-000937](#) 06/12/2015 2015 WL 3638006 DR Pending

Opinion by Judge J. Lambert; Judges Dixon and Kramer concurred. Former employees who provided services under an employer contract with the Kentucky Department of Corrections (DOC) filed suit under the Kentucky Wages and Hours Act, seeking compensation for unpaid 30-minute meal breaks based on a DOC requirement that they carry and/or monitor two-way radio at all times. Following a jury trial, the circuit court entered judgment on the jury's verdict for the employer and then entered a subsequent amended judgment awarding the employer costs. The employees appealed, and the employer cross-appealed the award of costs. The Court of Appeals affirmed in part, vacated in part, and remanded. The Court held that the employees' meal periods, for which their employer automatically deducted 30 minutes from their daily shift, were compensable only if the employees spent that time predominantly for the benefit of the DOC. It was also the employees' burden to prove that they informed their employer that they missed a specific meal break and requested compensation for it. The Court further held that the circuit court did not lack jurisdiction to consider the employer's bill of costs more than ten days after judgment was entered.

## **VIII. NEW TRIAL MOTION**

### **A. *Eggemeyer v. Jefferson***

[2013-CA-000686](#) 06/12/2015 2015 WL 3643420 Rehearing Pending

Opinion by Judge J. Lambert; Judge Jones concurred and filed a separate opinion; Chief Judge Acree dissented and filed a separate opinion. A patient filed suit for medical malpractice against a surgeon. The first trial ended in a mistrial due to misconduct by counsel for the surgeon. Following a retrial, the circuit court entered a judgment on the jury's verdict for the surgeon, denied the patient's motion for a new trial, and imposed sanctions on the surgeon in the form of attorney's fees to the patient in the amount of \$58,858.82. The patient appealed, and the surgeon cross-appealed the imposition of sanctions. The Court reversed and remanded as to the patient's appeal, holding that a new trial was warranted due to repeated violations by the surgeon's counsel of a court order prohibiting the introduction of new defenses, theories, and evidence that were not presented in the first trial. The Court then affirmed as to the cross-appeal, holding that the sanctions assessed against the surgeon were warranted and were not excessive.

## **IX. OPEN RECORDS**

### **A. Pike County Fiscal Court v. Utility Management Group, LLC**

[2013-CA-000929](#) 06/12/2015 2015 WL 3638198 Rehearing Pending

Opinion by Judge Jones; Judge Maze concurred and filed a separate opinion; Judge Kramer concurred and also joined in Judge Maze's concurring opinion. This appeal concerned a challenge to a declaratory judgment, wherein the circuit court determined that appellee was not a public agency subject to the disclosure requirements of Kentucky's Open Records Act (KORA). Appellee was a privately owned, for-profit limited liability company, which provided management and operational services for a water district and provided water, sewer, garbage pickup, street services, and park maintenance for the city of Pikeville. The circuit court's decision hinged, at least partially, on its determination that the amended version of KRS 61.870(1)(h), which became effective July 12, 2012, was a remedial clarification of the law that applied to appellant's 2011 KORA request. Alternatively, the circuit court concluded that both versions of KRS 61.870(1)(h) were unconstitutionally vague. The Court of Appeals held that the pre-amendment version of KRS 61.870(1)(h) applied to appellant's 2011 KORA request. The Court also held that the pre-amendment version of KRS 61.870(1)(h) was not void for vagueness because it is capable of being understood and applied by men of common intelligence. Based on the undisputed evidence, the Court ultimately concluded that appellee qualified as a public agency as defined by the pre-amendment version of KRS 61.870(1)(h), which defined a public agency to include "[a]ny body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds." Consequently, the Court reversed and remanded for further proceedings.