

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**JULY 1, 2018 to JULY 31, 2018**

**I. CHILD SUPPORT**

**A. Wilson v. Inglis**

[2017-CA-000831](#) 07/06/2018 2018 WL 3313939

Opinion by Judge Dixon; Judges D. Lambert and Smallwood concurred.

The Court of Appeals vacated an order granting appellee’s motion to modify child support and ordering appellant to pay \$4,000 per month in support. The family court found that appellee had demonstrated a change in circumstances that was material, substantial, and continuing as required by KRS 403.213. However, the Court of Appeals agreed with appellant that other than the child’s normal growth, all of the “circumstances” alleged by appellee were heard and largely rejected by the family court one year earlier when it first entered an order modifying child support. The Court noted appellee’s concession that there had been no real change in circumstances, but rather she had researched the actual amount of the expenses more extensively than she did for the previous modification hearing. In light of this, the Court concluded that appellee had failed to “definitively establish” that “a material change in circumstances that is substantial and continuing” had occurred since the prior order modifying child support was entered. The Court also took exception with the family court’s calculation of child support. Although the family court acknowledged that application of the child support guidelines would have been inappropriate because the parties’ combined monthly adjusted parental gross income exceeded the upper level of the guidelines, it nevertheless calculated appellant’s support obligation according to the method used under the guidelines without any consideration of his support obligation for his other two children or his responsibility for the child’s medical insurance and other expenses related thereto. In simply calculating the percentages of the parties’ income and applying those percentages to each party’s responsibility for the child’s reasonable needs, the family court abused its discretion. Finally, the Court concluded that the family court misinterpreted dicta in *McCarty v. Faried*, 499 S.W.3d 266 (Ky. 2016) in concluding that it was required to take into consideration appellant’s very high income and look at the style of living

that his income provided. While appellant was obligated to contribute to the support of the child's reasonable needs, he was not required to afford the child the same lifestyle or subsidize all of appellee's expenses.

## II. CRIMINAL LAW

### A. *Brank v. Commonwealth*

[2017-CA-000642](#) 07/27/2018 2018 WL 3595989

Opinion by Judge Nickell; Chief Judge Clayton and Judge Kramer concurred.

After being arrested for burglary, appellant appeared ill while being evaluated by detention center medical staff before booking. He denied taking anything contributing to his illness and was eventually transported by a deputy to a local emergency room. At the ER, appellant was again asked if he had taken anything that may have made him ill. In response, appellant said that he did not want to incriminate himself. The deputy advised appellant to tell the nurse what he had taken or he could die. Appellant eventually admitted to swallowing a bag of methamphetamine. The nurse administered charcoal to appellant, who then vomited a plastic bag onto the floor. Lab analysis revealed that the bag contained methamphetamine. Appellant moved to suppress the statements admitting that he had ingested a bag of methamphetamine, claiming that he was too intoxicated to knowingly and voluntarily waive his right to remain silent. The circuit court found that while appellant may have been in distress, the evidence demonstrated that he was able to understand the questions and give relevant answers. On appeal, appellant argued that the circuit court erred in denying his suppression motion because he was not Mirandized, the deputy improperly continued to “interrogate” him after he invoked his right to remain silent, and the deputy’s statement that appellant might die unless he told the nurse what he had taken was coercive. The Court of Appeals affirmed, holding that appellant was not “interrogated” because the questions were relevant to appellant’s medical treatment for a possible drug overdose; therefore, the procedural safeguards of *Miranda* were inapplicable.

**B. Marks v. Commonwealth**

[2016-CA-000583](#) 07/27/2018 2018 WL 3595825

Opinion by Judge Thompson; Chief Judge Clayton concurred; Judge Kramer concurred in result only.

Appellant challenged an order denying his motion to withdraw his guilty plea pursuant to RCr 8.10. He argued that the circuit court erred in not permitting him to withdraw his guilty plea, not appointing substitute counsel, and not conducting an evidentiary hearing. The Court of Appeals reversed, holding that appellant was effectively denied counsel when the same counsel who advised him to enter a guilty plea also represented him in his attempt to withdraw the same plea and did not advocate for withdrawal. The Court concluded that in such a situation, counsel was not conflict-free and substitute counsel should have been appointed. The matter was remanded to permit appellant to again seek to withdraw his guilty plea with the assistance of substitute counsel.

C. *Smoot v. Commonwealth*

[2015-CA-001893](#) 07/27/2018 2018 WL 3595827

Opinion by Judge Acree; Judges Jones and Kramer concurred.

Appellants were convicted of one count each of complicity to first-degree robbery. Appellants argued that the circuit court abused its discretion when, in violation of KRE 404, it permitted the Commonwealth to present evidence that appellants and their friends referred to themselves collectively as “Love and Loyalty.”

Appellants also argued that the circuit court erred when it: (1) excluded prior bad act, “reverse” KRE 404(b), evidence offered against a Commonwealth witness; (2) improperly limited impeachment of the same witness; and (3) failed to suppress statements appellant Kenneth Smoot made to police after he requested counsel.

The Court of Appeals affirmed. As to the “Love and Loyalty” evidence, the Court held that the evidence was properly admitted because it was not offered to prove appellants’ character. Instead, it demonstrated that the relationship between appellants, their co-defendants, and the witnesses who testified against them was “more than casual.” For example, the affiliation tended to prove the motive for conspiring to rob the victim, it showed that a witness’s house presented an opportunity to plan and launch the robbery and a place to hole up afterward, and it identified the separate defendants as a group in complicity with one another.

Next, the Court held that the circuit court did not err in excluding proffered “reverse” KRE 404(b) evidence regarding a witness’s prior crime because the evidence was too dissimilar from the charged crime to qualify as an exception to KRE 404(b)(1), and that even if it would qualify under that rule as proof of identity, its probative value was substantially outweighed under KRE 403 by the danger of undue prejudice and confusing or misleading the jury. The Court also held that the circuit court properly applied *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013) to limit impeachment evidence under KRE 608 and KRE 609.

Finally, the Court affirmed the circuit court’s decision not to exclude appellant’s statements made during a police interview because he had not invoked his right to counsel.

### III. EMPLOYMENT

#### A. *Lipson v. University of Louisville*

[2015-CA-000487](#) 07/27/2018 2018 WL 3595829

Opinion by Judge Kramer; Judge Nickell concurred; Judge Thompson concurred in part, dissented in part, and filed a separate opinion.

These appeals concerned a dispute between Steven F. Lipson, the University of Louisville (the University), and the University Medical Center Inc. (UMC) regarding Lipson's pay for serving as Medical Director of the Outpatient Surgery Center (OSC), a UMC facility. An administrative error led to the University overpaying Lipson for eleven months. When Lipson refused to remit the overpaid sum, the University began withholding portions of his paychecks. Lipson subsequently resigned and filed suit against the University and UMC. In his complaint, Lipson alleged that the overpayments at issue were not actually overpayments; instead they were compensation for his services as director of the OSC. The University counterclaimed, asserting claims of conversion and unjust enrichment, and asked that Lipson pay back the remaining total of overpaid wages. The circuit court ultimately granted summary judgment in favor of the University and UMC, which resulted in the dismissal of all of Lipson's claims, and held Lipson liable to the University. Lipson was ordered to remit all overpaid wages back to the University and was further ordered to pay pre-judgment and post-judgment interest. The Court of Appeals affirmed in part, reversed in part, and remanded for entry of a new judgment. The Court held that: (1) Lipson's breach of contract claims failed because he received more total wages than what were due him under the terms of his written contract; (2) Lipson's unjust enrichment claim was barred by government immunity; (3) Lipson's Wage and Hour Act claim failed because KRS 44.030 permitted the University to withhold wages; (4) Lipson's procedural due process claim failed because he had no property interest in the overpaid wages; (5) the circuit court properly found Lipson liable to the University for unjust enrichment and conversion because he refused to pay the overpaid wages back; (6) Lipson could not recover from UMC for unjust enrichment because UMC never agreed to pay Lipson directly under any agreement; (7) the circuit court did not err in awarding pre-judgment interest; and (8) the circuit court erred in its determination of post-judgment interest because such interest begins to accrue from the date of the order awarding post-judgment interest, not the date liability was determined.

#### IV. FAMILY LAW

##### A. *Fry v. Caudill*

[2017-CA-000514](#) 07/13/2018 2018 WL 3397799

Opinion by Judge D. Lambert; Judge Acree concurred and filed a separate opinion; Judge Thompson dissented and filed a separate opinion.

Appellant challenged an order denying his petition for visitation with his former stepchildren. In a 2-1 vote, the Court of Appeals vacated and remanded, holding that the circuit court failed to adequately explain why the children's mother did not waive her superior rights to custody. In his concurring opinion, Judge Acree encouraged the Supreme Court of Kentucky to revisit *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) and the issue of the waiver of parental rights in light of *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

##### B. *Keith v. Keith*

[2017-CA-001480](#) 07/27/2018 2018 WL 3595297

Opinion by Judge Maze; Judges Acree and Combs concurred.

Jolie Keith appealed from a judgment concerning the dissolution of her marriage to Toby Keith (not that one). Jolie challenged the sufficiency of the factual findings adopted by the circuit court, particularly with respect to the court's award of joint custody of their children. She also argued that the circuit court erred by excluding child-care costs from its support order, by allocating the children's tax exemption to Toby, and by awarding both marital vehicles to Toby. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court agreed with Jolie that the circuit court failed to make sufficient factual findings supporting the conclusion that awarding the tax exemption to Toby would be in the best interests of the children. The domestic relations commissioner (and the circuit court) implied that the children would receive a greater benefit if Toby exercised the exemption because he had greater income to offset; however, this implied finding was insufficient to meet the heavy burden to justify why the assignment of the exemption to Toby inured to the children's benefit. The Court also held that the lower court's award of both vehicles to Toby amounted to an abuse of discretion. However, the Court concluded that there was no error or abuse of discretion as to the other issues.

## V. JUVENILES

### A. C.S. v. Commonwealth

[2017-CA-000606](#) 07/27/2018 2018 WL 3595311

Opinion by Judge Jones; Judges Acree and Thompson concurred.

Appellant, a minor child, appealed an order holding her in contempt of court for running away from a Breathitt County Sheriff. Appellant had originally been charged with the status offense of being a habitual runaway. Although the family court never adjudicated that charge, appellant later knowingly and voluntarily admitted to violating her conditions of release by running away on two different occasions. As a result, the family court entered two orders holding appellant in contempt of court for running away. Appellant challenged only the second order, which held her in contempt for running away from the sheriff. The Court of Appeals reversed after being unable to locate in the record any valid court order entered as part of appellant's status offense case that regulated her future conduct. Under the Juvenile Code, a court may only hold a child in contempt of court to enforce a valid court order previously issued by the court. Accordingly, because the record did not include a valid court order under the Juvenile Code, the Court of Appeals held that appellant was not properly charged with contempt and reversed the lower court's decision.

## VI. OPEN RECORDS

### A. *Salinas v. Correct Care Solutions, LLC*

[2017-CA-000743](#) 07/13/2018 2018 WL 3397793

Opinion by Judge Jones; Judges Kramer and D. Lambert concurred.

The central issue in this appeal was whether Correct Care Solutions, LLC, a health care company that provides health care services to inmates at jails and prisons in Kentucky, was a public agency subject to the disclosure requirements of Kentucky's Open Records Act, KRS 61.870 *et seq.* Appellant, an inmate at the Kentucky State Penitentiary, asked Correct Care to provide him with a copy of the current Hepatitis Management Plan for the Department of Corrections. Only the public records of public agencies are subject to disclosure under the Open Records Act. Pursuant to 61.870(1)(h), the Court of Appeals held that Correct Care does not meet the definition of a public agency for purposes of the Act as all the funds received by Correct Care in Kentucky are received as a consequence for services provided pursuant to a contract obtained through a public competitive procurement process. Because Correct Care does not receive at least 25% of its expended funds in Kentucky from non-exempted state or local authority funds, it is not a public agency under the Act and it had no obligation to respond to appellant's request for records.

## VII. TORTS

### A. *Feltner v. PJ Operations, LLC*

[2016-CA-001536](#) 07/06/2018 2018 WL 3312127

Opinion by Judge Nickell; Judges Dixon and Kramer concurred.

On the way home after clocking out from work, a Papa John's pizza delivery driver struck a pedestrian, who subsequently died. The decedent's estate sued appellees alleging negligence; vicarious liability; negligent hiring, supervision, and retention; and franchisor liability. The circuit court granted appellees' motions for summary judgment, and the Court of Appeals affirmed. The case primarily presented the question of whether the driver was acting in the scope and course of his employment at the time of the accident, thereby making his employer vicariously liable. Appellant contended that the trip was within the "service to employer exception" to the well-established "going and coming rule." Appellant argued that because the driver's travel to and from work in a required vehicle was subject to his employer's control and was serving a purpose of the employer (*i.e.*, bringing an instrumentality to use to make deliveries), he was acting within the scope of his employment. The Court disagreed and held that the determinative factor was whether the driver was operating his vehicle in furtherance of the employer's business or his own. Because the driver was at liberty at the time of the accident and no longer providing a benefit to the employer, the Court declined to apply the "service to employer exception." The Court also affirmed the dismissal of appellant's other claims because there was no causal relationship between the employment and the accident. Any imposition of liability would serve to render the employer responsible for the personal conduct of the driver, which it had neither the right nor the opportunity to control.

## VIII. TRIALS

### A. *City of Nicholasville Police Department v. Abraham*

[2017-CA-001071](#) 07/27/2018 2018 WL 3595308

Opinion by Judge Acree; Judges Combs and Maze concurred.

Burke Rhoads, a police officer with the City of Nicholasville, died as a result of a three-car accident. A jury apportioned most of the fault for the accident to Rhoads, though it also apportioned some to the other two drivers. Rhoads's estate and the City of Nicholasville Police Department claimed that the circuit court erred by refusing to give a "sudden emergency" instruction and by limiting the testimony of an expert witness. They also raised several arguments about the collateral source rule. The Court of Appeals vacated and remanded. The Court first held that the circuit court abused its discretion by refusing to give a sudden emergency instruction. The circuit court determined that Rhoads caused the sudden emergency; however, conflicting evidence about the reasonableness of his speed entitled appellants to the instruction on their theory of the case. The Court also held that the circuit court erred in prohibiting testimony from appellants' expert regarding the speed of Rhoads' vehicle at the time of the first of two impacts, having previously allowed similar testimony regarding the speed at the time of the second impact. Finally, the Court held that the circuit court properly applied the collateral source rule.

## IX. WORKERS' COMPENSATION

### A. *Taylor v. McCoy Elkhorn Coal Corporation*

[2017-CA-000137](#) 07/27/2018 2018 WL 3595313

Opinion by Judge D. Lambert; Judge Combs concurred; Judge Nickell concurred and filed a separate opinion.

Appellant challenged an order of the Workers' Compensation Board that affirmed the denial of benefits for an allegedly work-related neck injury. Appellant argued that the evidence relied upon by the Administrative Law Judge contained sufficient inaccuracies to preclude the ALJ from such reliance. The Court of Appeals held that the ALJ improperly relied on unsubstantial evidence and reversed. The Court noted that the independent medical examination (IME) primarily relied upon by the ALJ began with an assumption that appellant may have been exaggerating his symptoms and that he must have lied regarding both of his work accidents. The IME spent significant time justifying this assumption and in actively ignoring any evidence contradicting this opinion. The Court ultimately determined that the IME did not reflect a measured examination of all evidence available and that its conclusion was based purely on assumption and "a willfully incomplete examination of the facts." As a result, the IME was too corrupt to constitute substantial evidence and reversal was merited.