

**Kentucky Court Of Appeals**  
**Cases of Note**  
**January-February, 2017**

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

**INSURANCE**

**Weird v. State Farm Mutual Automobile Insurance Company**

**[2012-CA-000326](#) 02/10/2017 2017 WL 541083**

Opinion by Judge Nickell; Judge Clayton concurred; Judge Acree concurred and filed a separate opinion. Appellant was injured in a motor vehicle collision on December 24, 2007. At the time of the collision, appellant was insured by State Farm under a liability insurance policy including underinsured motorists (UIM) coverage. Just under two years after the final payment of basic reparations benefits (BRB) by State Farm, appellant filed suit against the tortfeasor. Six months later - eighteen months after the final BRB payment - the trial court granted appellant’s motion to amend his complaint to add State Farm as a defendant so he could pursue a claim for UIM benefits. Based on the policy language requiring suit be brought within two years of injury, death, or the last BRB payment, State Farm requested and was granted summary judgment over appellant’s contentions that the policy language contained an unreasonable time restriction on filing claims and that, in any event, the “relation-back” provisions of CR 15.03 were applicable and saved the action. Appellant’s subsequent appeal was placed in abeyance pending a decision of the Supreme Court of Kentucky in *State Farm Mutual Automobile Ins. Co. v. Riggs*, 484 S.W.3d 724 (Ky. 2016). *Riggs* addressed policy limitation language identical to that at issue in the instant matter, concluding that it closely tracked statutory tort claims limitation language and thus constituted a reasonable restriction on filing claims under the policy. The Court of Appeals concluded that it was bound to follow applicable precedent and rejected appellant’s challenge to the policy language pursuant to *Riggs*. Following a detailed analysis of CR 15.03 and its applicability, the Court concluded that the trial court correctly found that appellant’s amended complaint adding State Farm as a defendant did not comply with CR 15.03 and was time-barred. In a concurring opinion, Judge Acree voiced criticism of *Riggs*, positing that its reasoning was flawed and effectively established a statute of repose potentially serving to extinguish contract claims before their discovery - and possibly before their accrual. The concurrence questioned the reasonableness of *Riggs* in real-world scenarios, suggesting that it would serve only to require an injured party to sue its UIM insurer prior to any breach by the carrier and before discovering whether or not the tortfeasor really was an uninsured or underinsured motorist.

**NEGLIGENCE**

**Cales v. Baptist Healthcare System, Inc.**

**[2015-CA-001103](#) 01/13/2017 2017 WL 127731 DR Pending**

Opinion by Judge Thompson; Chief Judge Kramer concurred; Judge Nickell concurred and filed a separate opinion. Appellants brought a negligence and products liability action against a manufacturer and hospital, alleging the improper off-label use of the Infuse Device, an implantable device for use in connection with surgery involving fusion of the lumbar spine, and failure to warn of the off-label use. The circuit court dismissed appellants’ product liability

claims against the hospital based on federal pre-emption by the Medical Device Amendments (MDA) and dismissed the medical malpractice claim on the ground that the hospital had no duty to inform appellants of the Federal Drug Administration (FDA) regulatory status of a medical device used in the surgery. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the product liability claims were pre-empted because once approved by the FDA, a medical device could be used in any manner deemed appropriate, including off-label uses. The MDA contains an express pre-emption provision and, therefore, the device could not be considered unreasonably dangerous. The Court further held that the “middleman statute” of the Kentucky Product Liability Act (KRS 411.340) precluded any product liability claim. As an aside, the Court also noted that the appellants’ claims in this regard were not properly alleged as product liability claims because the allegations concerned the use of the product rather than whether the product was defective. However, the Court then held that appellants’ other medical negligence claims could be maintained and should not have been dismissed. While the off-label use of medical devices is not inherently unreasonable or dangerous, the physician is still held to common law medical practice standards with respect to that use and owes a duty to his or her patient; that duty would likewise fall upon the hospital. Additionally, medical malpractice could also arise from the failure to obtain informed consent. Finally, the Court held that inconsistent allegations in the appellants’ complaint did not preclude their medical malpractice action. The Court pointed out that under our civil rules, a party may assert alternative causes of action.

**McCoy v. Family Dollar Store of Kentucky, Ltd.**

[2015-CA-000926](#) 01/06/2017 2017 WL 65452

Opinion by Judge J. Lambert; Judges Acree and Thompson concurred. In an appeal taken from the entry of summary judgment in favor of appellees in a premises liability case arising from appellant’s fall in a retail parking lot, the Court of Appeals affirmed, holding that appellees did not breach their duty of care by the presence of a wheel stop in the parking lot. The wheel stop was not defective or damaged, and it did not create an unreasonably dangerous condition requiring the need to warn invitees about the condition. The Court also held that appellant’s expert’s opinion was not before the circuit court to review and, therefore, could not be the basis for a factual dispute regarding the safety of wheel stops so as to preclude summary judgment.

**A.A. By and Through Lewis v. Shutts**

[2016-CA-000365](#) 02/17/2017 2017 WL 655472

Opinion by Judge Clayton; Judge J. Lambert concurred; Judge Acree concurred and filed a separate opinion. Multiple children were placed in the foster care of their aunt and uncle. One of the children was abused and murdered by the same uncle. Their treating physician was sued for allegedly failing to report suspected child abuse. The circuit court granted the physician immunity from civil suit pursuant to KRS 620.050(1) because the trial court believed that the physician acted in good faith by not making a report of suspected abuse. The Court of Appeals reversed and remanded on that issue, holding that a person is only entitled to immunity under KRS 620.050(1) if the person “acts” by making a report of suspected child abuse. A person who does not report suspected child abuse is not entitled to KRS 620.050(1)’s immunity from civil suit. The circuit court alternatively found that summary judgment was proper because appellants could not prove that the physician breached her duty of care. The Court also reversed and remanded on that issue, holding that because the standard is simply whether it was unreasonable for a jury to find in appellants’ favor on the breach-of-duty issue, and because the facts were such that a jury could reasonably conclude both that the physician did or did not breach her duty, then summary judgment on this issue was inappropriate.

**DAMAGES**

## **Hazel Enterprises, LLC v. Ray**

**[2015-CA-000628](#) 01/13/2017 2017 WL 127732**

Opinion by Judge Maze; Judges Jones and Nickell concurred. The owner of a certificate of delinquency on property taxes brought an action against a real property owner seeking foreclosure upon and sale of the owner's real property. After a final judgment and order of sale was entered, the property owner moved for avoidance of post-judgment interest accrued from the order. The circuit court granted the motion and overruled the certificate owner's motion to reconsider. The Court of Appeals affirmed, holding that the sum to which the certificate owner was entitled constituted "unliquidated damages"; therefore, the circuit court had discretion over the award and rate of post-judgment interest. The Court further held that the circuit court did not abuse its discretion in permitting the property owner to avoid payment of post-judgment interest. The Court noted that the property owner tendered full and unconditional payment in almost immediate compliance with the circuit court's order, but the certificate owner refused payment in hopes of recovering additional, unspecified expenses. The Court concluded that the certificate owner should not benefit from a 15-month delay for which it was solely responsible after rejecting payment and deciding not to appeal the judgment.

## **CIVIL PROCEDURE**

### **Bryant v. Allstate Indemnity Company**

**[2015-CA-001451](#) 02/24/2017 2017 WL 728126 Rehearing Pending**

Opinion by Judge Clayton; Judges Dixon and D. Lambert concurred. Appellants challenged an order compelling them to participate in pre-litigation depositions and to produce documents to Allstate Property and Casualty Company. The order was based on CR 27.01, which allows pre-litigation depositions. Appellants were involved in a car accident. The driver of the vehicle who struck Bryant's car was insured by Allstate. Appellants claimed insurance benefits from their insurance company. Their company then submitted the claims to Allstate for subrogation. The trial court granted Allstate's "Petition to Compel Pre-Litigation Depositions." Appellants received notice of the petition on the same day that the trial court signed the order granting the relief requested in the petition. Appellants did not have an opportunity to respond to the petition or to have a hearing. They argued that they were denied due process and that Allstate did not have standing to bring this action. The Court of Appeals reversed, holding that certain requirements must be met by Allstate before the petition can be granted. Those requirements include: (1) that the petition must establish an imminent cause of action by Allstate against appellants; (2) that without granting the petition, the testimony would be lost and must be preserved to forestall a failure of justice; (3) that the petition must be verified; and (4) that there must be notice and a hearing. Allstate did not meet any of those requirements; therefore, the trial court was in error when it granted the relief requested.

## **ARBITRATION**

### **Diversicare Leasing Corp. v. Adams**

**[2015-CA-001061](#) 01/06/2017 2017 WL 65451 DR Pending**

Opinion by Judge J. Lambert; Judges Acree and Thompson concurred. A nursing home resident, through her guardian, brought an action against the nursing home and nursing home administrator alleging negligence, medical negligence, corporate negligence, and violations of long term care resident's rights. The nursing home filed a motion to compel arbitration, and the circuit court granted the motion in part and denied it in part. The Court of Appeals affirmed the

portion of the order denying the motion, holding that a readmission agreement could not be reformed to incorporate a prior agreement that contained an arbitration agreement because the nursing home was unable to establish with any certainty which unspecified document was intended to be incorporated.

## **CONTRACTS**

### **Grego v. Jenkins**

[2015-CA-001142](#) 01/13/2017 2017 WL 127729

Opinion by Judge Thompson; Judges Combs and VanMeter concurred. Appellant challenged a summary judgment entered in favor of Woodland Baptist Church and church chaperones who accompanied appellant at a youth ministry camp. The circuit court ruled that release forms signed by appellant's mother precluded her personal injury claim. The Court of Appeals reversed, holding that the releases did not exculpate the church from liability. Specifically, the releases did not mention the word "negligence" and did not explicitly release the church from liability for personal injuries. Furthermore, the releases could reasonably be construed to only release the church from vicarious liability in connection with medical treatment rather than its own conduct. Finally, the releases were broadly written and not specific as to the type of harm contemplated. The Court also declined to recognize an exception to release requirements for charitable organizations.

## **INDEMNITY**

### **Louisville/Jefferson County Metro Government v. Braden**

[2015-CA-001238](#) 01/27/2017 2017 WL 382408

Opinion by Judge Maze; Judges Clayton and Combs concurred. Appellee John Lewis was a police officer with the Louisville Metro Police Department (LMPD). Lewis's departmental vehicle, an unmarked van, also served as his take-home vehicle. LMPD owned this vehicle but permitted Lewis to use it for official and personal tasks pursuant to a voluntary departmental program. As a condition of this privilege, Lewis signed a personal use agreement setting forth, in part, that Louisville Metro would provide him with liability protection for up to \$100,000 per accident while the van was being used for personal tasks. In the personal use agreement, Lewis also stated that he understood that he might be responsible for any claim that exceeded \$100,000 and that he could obtain supplemental, private insurance (Lewis did not do so). One day after leaving work, picking up his children, and stopping at a drug store, Lewis was involved in an auto accident that resulted in the death of Don Braden. Braden's wife and administratrix subsequently filed suit against Lewis, and Louisville Metro intervened to file a defense. However, Louisville Metro also filed a motion for declaratory judgment on the question of its liability for Lewis's liability beyond \$100,000 pursuant to the personal use agreement and the applicable collective bargaining agreement between LMPD and Louisville Metro. Lewis and Braden each filed motions for declaratory judgment opposing Louisville Metro's position and asking the court to hold that Louisville Metro must indemnify Lewis for damages beyond \$100,000 because Lewis was acting within the scope of his employment at the time of the accident. The trial court granted Braden's and Lewis's motions for declaratory judgment, reasoning that, at the time of the accident, Lewis was operating his vehicle in compliance with LMPD's standard operating procedures (SOPs) regarding its take-home vehicle policy. For this reason, the trial court concluded that Lewis "was acting within the scope of his employment at the time of the accident" for purposes of the Claims Against Local Governments Act (CALGA). KRS 65.200, et seq. The Court of Appeals disagreed, holding that the trial court's exclusive reliance upon Lewis's compliance with LMPD SOPs was misplaced. At the time of the accident,

Lewis was not operating within the scope of his employment for purposes of triggering Louisville Metro's statutory obligation to defend and indemnify him under CALGA. Immediately prior to the accident in this case, Lewis was off-duty; he had run two personal errands, had his children in the vehicle with him, and was on his way home; he was not responding to a call for assistance; he did not have his lights and sirens activated; and his vehicle was unmarked. Thus, Lewis was performing no realizable police action at the time of the accident and, per the A. 2015-CA-001238 01/27/2017 2017 WL 382408 personal use agreement, Louisville Metro was not obligated to indemnify him beyond the first \$100,000 for which he was found liable.

## **WORKERS' COMPENSATION**

### **Ford Motor Company (LAP) v. Curtsinger** **[2016-CA-001423](#) 02/17/2017 2017 WL 655471**

Opinion by Chief Judge Kramer; Judges Acree and Stumbo concurred. An Administrative Law Judge (ALJ) dismissed a worker's claim for benefits due to an alleged work-related injury to the left shoulder. In doing so, the ALJ explained that the worker's alleged injury was, at most, an exacerbation of a pre-existing condition. Upon review, the Board of Workers' Claims vacated in part and remanded for a determination of whether the worker did indeed sustain an exacerbation of a pre-existing injury and, if so, whether the exacerbation was work related. Finding no error, the Court of Appeals affirmed. The Court explained that a work-related exacerbation of a pre-existing condition qualifies as a new and separate "injury" within the meaning of KRS 342.0011(1), even if it does not warrant an impairment rating. The work-related exacerbation supplies a basis for an award of medical benefits, per KRS 342.020(1), at least until the date the worker returns to his or her pre-exacerbation baseline state of health.