

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**SEPTEMBER 1, 2013 to SEPTEMBER 30, 2013**

**I. ADMINISTRATIVE LAW**

**A. *Bulldog's Enterprises, Inc. v. Duke Energy***

[2012-CA-001388](#) 09/27/2013 2013 WL 5423065

Opinion by Judge Lambert; Judges Taylor and VanMeter concurred. The Court of Appeals affirmed an order dismissing appellant's circuit court action for lack of subject matter jurisdiction, holding that the Public Service Commission had exclusive jurisdiction over the central issue of each of the claims raised in the complaint (improper billing) and that appellant had failed to exhaust its administrative remedies. The Court recognized that the PSC has exclusive jurisdiction over the regulation of rates and services of utilities pursuant to KRS 278.040(2) and original jurisdiction over complaints regarding the rates or service of any utility pursuant to KRS 278.260(1). The Court also noted that appellant did not appeal the dismissal of its administrative complaint filed with the PSC to dispute the dismissal of that action for appellant's failure to comply with the PSC's discovery order.

## II. ARBITRATION

### A. *Ison v. Robinson*

[2010-CA-000898](#) 09/20/2013 2013 WL 5297153

Opinion by Judge Taylor; Judges Combs and Nickell concurred. Homeowners, who owned property located on a mine bench, brought an action against a developer alleging that excavation on the developer's property located below the bench undermined the slope of the mountainside, resulting in landslide damage to homeowners' property and access road. Following arbitration, the circuit court affirmed the arbitration award and entered judgment in favor of homeowners in the amount of \$732,500. On appeal, the Court of Appeals affirmed this decision. The Court held that a homeowner's submission of a memorandum to the arbitrator that included damage claims against the developer for loss of credit rating and evidence regarding those claims, without service on opposing counsel, did not rise to the level of undue means or fraud necessary to vacate the arbitration award. The developer agreed to the procedures and terms for the arbitration, including the submission of concurrent memoranda to the arbitrator, and was aware of the fact that the homeowner was seeking lost profits and other business-related damages. The Court also held that the circuit court did not err in its award of pre- and post-judgment interest.

### III. ATTORNEY AND CLIENT

#### A. *Ruby v. Scherzer*

[2012-CA-001724](#) 09/27/2013 2013 WL 5423067 DR Pending

Opinion by Judge Lambert; Judges Moore and VanMeter concurred. The Court of Appeals affirmed the dismissal of a foreclosure action brought by an attorney against his former client in an effort to enforce an attorney's lien filed pursuant to KRS 376.460. The Court held that KRS 376.460 was not applicable to dissolution actions such as the one in which the attorney had represented the former client, when there was nothing "recovered" or obtained in that case to which a lien could properly attach. The former client's marriage was dissolved, and she was merely assigned her non-marital property and awarded her share of the marital property. The Court noted that to properly seek his attorney's fees, the attorney should have filed a suit against the former client to obtain a judgment, which could then be enforced. This would have permitted the parties to litigate the attorney's entitlement to fees and afforded due process to the former client.

### IV. CONTRACTS

#### A. *Smith v. Crimson Ridge Development, LLC*

[2011-CA-001237](#) 09/06/2013 2013 WL 4766543 Released for Publication

Opinion by Judge VanMeter; Judges Maze and Stumbo concurred. In an action to rescind a contract, the Court of Appeals concluded that the circuit court correctly granted Crimson Ridge's motion for summary judgment on grounds that the contract allowed Crimson Ridge to rescind if Smith did not obtain a "survey of the Property satisfactory to Buyer." The Court held that the phrase "satisfactory to Buyer," when read in conjunction with the ordinary meaning of the word "satisfactory," indicates that the contract required the buyer's needs or wants, in relation to the survey, to be satisfied. Furthermore, Kentucky case law has consistently interpreted satisfaction contingency clauses as requiring subjective satisfaction, albeit subject to a good faith requirement. *Crest Coal Co. v. Bailey*, 602 S.W.2d 425, 426 (Ky. 1980); *Humble & McLendon v. Wyatt*, 168 Ky. 597, 598, 182 S.W. 610, 611 (1916); *Kidder Press Co. v. J.V. Reed & Co.*, 133 Ky. 350, 360, 117 S.W. 950, 952-53 (1909). Therefore, because bad faith was not alleged, Crimson Ridge's subjective dissatisfaction with the survey justified rescission.

## V. CRIMINAL LAW

### A. *Carrigan v. Commonwealth*

[2012-CA-000841](#) 09/13/2013 2013 WL 5014781 Released for Publication

Opinion by Judge Combs; Judges Caperton and Lambert concurred. The Court of Appeals held that appellant's lack of representation by counsel at sentencing, following his guilty plea to 19 counts of various felonies and driving misdemeanors, rendered his sentencing unfair, as sentencing was a critical stage of the proceedings. The Court further held that the trial court erred by not holding an evidentiary hearing on appellant's request to withdraw his guilty plea. Although a "formal" motion was never filed, appellant indicated to the trial court - both orally and by written communication - that he desired to withdraw the plea. This gave the trial court sufficient notice of appellant's intent to withdraw the plea, and it should have acted as if a formal motion had been filed. The Court finally held that appellant was entitled to court-appointed counsel with respect to his motion to withdraw his guilty plea because a motion to withdraw and the resulting hearing are critical stages for which counsel is guaranteed.

### B. *McDonald v. Commonwealth*

[2012-CA-000717](#) 09/27/2013 2013 WL 5422981

Opinion by Judge Lambert; Judges Taylor and VanMeter concurred. The Court of Appeals held that the trial court did not abuse its discretion by admitting an entire 911 call into evidence. The Court determined that the call was not testimonial in nature and, therefore, did not warrant confrontation clause protection because it did not involve the formality associated with a police interrogation. The Court noted that the call took place as an assault was occurring, the caller was under the influence of fear and anxiety caused by an ongoing emergency, the caller described the assault as it was occurring, and the defendant left the scene only moments before the call ended. The Court also concluded that the emergency operator's decision to elevate the call to a "code three" was not testimonial in nature, but only reflected that the call was intended to address an ongoing emergency.

C. *Perdue v. Commonwealth*

[2012-CA-001031](#) 09/27/2013 2013 WL 5422986

Opinion by Judge Lambert; Judges Taylor and VanMeter concurred. The Court of Appeals affirmed appellant's conviction, holding that he was not entitled to a directed verdict on resisting arrest and disorderly conduct charges and that the jury was properly instructed on a possession of drug paraphernalia charge. The Court first held that even though appellant had already been handcuffed, the police officer had not yet "effected" his arrest, for purposes of the offense of resisting arrest (KRS 520.090), when appellant became enraged and began kicking and yelling. Therefore, the jury could conclude that appellant had used physical force or violence in an attempt to prevent the officer from effecting his arrest, as required to support a conviction for resisting arrest. In reaching this conclusion, the Court noted that the effecting of an arrest does not necessarily end with the handcuffing of a defendant, but is a process that occurs over time, and that the purpose of the resisting arrest statute is to protect peace officers and citizens from a substantial risk of physical injury. The Court also held that the trial court properly limited the location of the disorderly conduct charge to the street address where appellant's offensive conduct took place, which met the definitions of "public" and "public place." Finally, the Court held that the jury was properly instructed on the possession of drug paraphernalia charge because the word "knowingly" was not included in the statutory language and would add a new element to the offense.

## VI. EMPLOYMENT

### A. *Foster v. Jennie Stuart Medical Center, Inc.*

[2011-CA-001136](#) 09/20/2013 2013 WL 5296292 Rehearing Pending

Opinion by Judge Clayton; Judges Stumbo and Thompson concurred. In a wrongful termination and defamation action brought by two registered nurses against their former employer, a hospital, and certain individual hospital administrators, the Court of Appeals affirmed in part and reversed and remanded in part the summary judgment orders entered in favor of appellees. The nurses were terminated after an anonymous e-mail reporting suspect nursing practices, manager retaliation against staff, and harassment of staff was sent to the Kentucky Board of Nursing (it was later discovered that one of the nurses had sent the email). On appeal, the Court held that the nurse who did not send the email did not have a cognizable “whistleblower”/unlawful retaliation claim against the hospital under KRS 216B.165(3), the health-care facility whistleblower provision of the Kentucky Patient Safety Act, because she was not the actual whistleblower. The Court further held, however, that this nurse should have been allowed to proceed on her common-law claim against the hospital for wrongful termination, and that both nurses should have been allowed to proceed on their claims that their employee appeal rights had been violated. The Court also held that the nurses’ defamation claims had been properly dismissed. The fact that the nurses were told that it was “in the best interests of the institution that they no longer be associated with the hospital” and that they were put on a no-rehire list did not constitute defamation. The Court finally held that the individual hospital administrators could not be held liable under KRS 216B.165(3) because the statute only applied to health-care facilities, not individual employees.

**B. *Miller v. Kentucky Unemployment Ins. Com'n***

[2012-CA-001167](#) 09/27/2013 2013 WL 5423063

Opinion by Judge Lambert; Judge Maze concurred and filed a separate opinion; Judge Caperton concurred with the majority opinion and joined the concurring opinion written by Judge Maze. On appeal from an order affirming the Kentucky Unemployment Insurance Commission's decision to deny appellant's application for unemployment benefits, the Court of Appeals held that the Commission did not exceed its authority in reopening the hearing process and returning the case to the referee to take additional evidence pursuant to KRS 341.430(1) and 787 KAR 1:110 § 2(2)(c)1, despite the employer's failure to attend the first hearing. The Court also discussed the "residuum" rule and held that substantial evidence supported the Commission's decision that appellant had voluntarily left her employment.

## VII. FAMILY LAW

### A. *M.L.C. v. Cabinet for Health and Family Services*

[2012-CA-002021](#) 09/13/2013 2013 WL 5015157 Released for Publication

Opinion by Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals held that that in certain circumstances, it is appropriate for a parent to testify by telephone in a termination of parental rights proceeding, as long as there is adequate notice of the proceedings and adequate time for the parent to testify, be cross-examined, and to fully participate in the hearing process. In this case, the trial court did not err by refusing to continue a hearing for termination of an incarcerated mother's parental rights until such time as mother was released from custody, where mother testified at hearing by telephone. Had mother been present in person to testify, her testimony would have been the same as the testimony she gave by telephone, *i.e.*, that she had little contact with her children during her incarceration but wished to maintain contact with them and to be reunified with them once she was released. However, the Court nonetheless vacated and remanded the trial court's order terminating mother's parental rights due to a lack of adequate factual findings.

### B. *Mattingly v. Fianza*

[2012-CA-001087](#) 09/13/2013 2013 WL 5014953 Released for Publication

Opinion by Judge Lambert; Judges Moore and VanMeter concurred. The Court of Appeals reversed a portion of the family court's final decree relating to the designation of funds in certain financial accounts as non-marital and remanded the matter for additional findings. The Court held that the family court did not make any findings related to the separate accounts at issue or the balance in each account at the time of dissolution.

C. *Penner v. Penner*

[2011-CA-002238](#) 09/27/2013 2013 WL 5422978

Opinion by Judge Lambert; Judges Moore and VanMeter concurred. In a divorce action, the Court of Appeals held that the trial court abused its discretion when it considered husband's restrictive stock shares as an asset to be divided between the parties and as income to husband. The Court noted that the trial court could equally divide the stock upon vesting and not include the stock as income to either party, treat the stock as income to husband upon vesting instead of marital property, or divide the stock upon vesting and attribute half as income to wife and half as income to husband. The Court also held that gift income of \$3,700 per month provided wife by wife's parents was required to be imputed to wife in determining child support and maintenance. The Court also held that the trial court's refusal to award father a credit for the private school tuition he paid during the pendency of the divorce action was not an abuse of discretion. However, the Court held that the trial court did abuse its discretion when it refused to award husband a credit for funds he had to pay to cure a mortgage default that resulted from wife's failure to pay the first or second mortgage on their residence. During the time wife resided in the marital home and failed to pay the mortgage, husband paid wife \$3,600 per month in maintenance and \$1,639 per month in child support. Wife was also receiving \$2,000 in cash per month from her father.

## VIII. IMMUNITY

### A. *Transit Authority of River City v. Bibelhauser*

[2011-CA-002039](#) 09/27/2013 2013 WL 5423061

Opinion by Judge VanMeter; Judges Clayton and Combs concurred. In a negligence action, the Court of Appeals affirmed the denial of Transit Authority of River City (TARC)'s motion for summary judgment on grounds of immunity. The Court held that TARC was not entitled to sovereign immunity by virtue of KRS 67C.101(2)(e) and KRS 96A.020(1) since, under those statutes, TARC's authority is more corporate than governmental. TARC was also not entitled to governmental immunity under the two-prong test set forth in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). The Court noted that TARC is an agency of the consolidated Louisville Metro, which enjoys immunity from suit, but concluded that TARC had failed to show that it performs a "function integral to state government," as is required to satisfy the *Comair* test.

## IX. OPEN RECORDS

### A. *Department of Revenue v. Eifler*

[2012-CA-000302](#) 09/20/2013 2013 WL 5296751 DR Pending

Opinion by Judge Clayton; Judges Lambert and Thompson concurred. The Court of Appeals held that pursuant to the Kentucky Open Records Act, the Department of Revenue was obligated to provide appellee with the names, addresses, and dates of registration of all taxpayers currently registered with the Department for the Utility License Tax. The Kentucky Taxpayers' Bill of Rights did not create grounds for a blanket denial of appellee's request because any private information could be redacted before appellee was allowed to inspect the records.