

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

**I. ADMINISTRATIVE LAW**

**A. Coghill v. Com. ex rel. Kentucky Unemployment Ins. Com'n**

[2012-CA-000428](#) 06/14/2013 2013 WL 2660245 Released for Publication

Opinion by Judge Moore; Judges Lambert and Taylor concurred. The Court of Appeals affirmed a decision of the Kentucky Unemployment Insurance Commission affirming an ALJ's denial of unemployment insurance benefits. The Court held that the "savings statute" found in KRS 413.270 did not apply so as to allow claimant to appeal from the KUIC's decision without filing a verified complaint, which is required by KRS 341.450(1). Because strict compliance to invoke a circuit court's jurisdiction to review an agency decision is mandatory, claimant did not properly commence an action to be "saved" via KRS 413.270.

**B. Department of Kentucky State Police v. Garland**

[2011-CA-000750](#) 08/02/2013 2013 WL 3957338 DR Pending

Opinion by Judge VanMeter; Judges Maze and Moore concurred. The Court reversed a trial court order vacating the decision of the Kentucky State Police Trial Board to terminate appellee's employment as an officer with the KSP Commercial Vehicle Enforcement Division. Appellee was previously employed by the Department of Kentucky Vehicle Enforcement before being reclassified as a CVE officer following the enactment of KRS 16.186, *et seq.* The trial court concluded that the KSP Trial Board had acted arbitrarily by terminating appellee pursuant to the procedures set forth in KRS 16.192, rather than those contained in KRS 18A.095. In holding that this conclusion was erroneous, the Court noted that the incident resulting in appellee's termination occurred after his employment status was reclassified, which eliminated his right to a pre-termination administrative hearing before the Kentucky Personnel Board pursuant to KRS Chapter 18A. Moreover, while appellee did not receive notice of his reclassification until after the incident occurred, he had notice of such before he received KSP's notice of its intent to terminate his employment.

As a result, KSP did not act arbitrarily by pursuing administrative action against appellee pursuant to KRS 16.192, rather than KRS 18A.095.

## II. APPEALS

### A. Wright v. Swigart

[2012-CA-001956](#) 08/16/2013 2013 WL 4246662 DR Pending

Opinion and Order dismissing by Judge Maze; Judge Nickell concurred; Judge Thompson dissented and filed a separate opinion. This matter arose from a motion to reconsider a prior order dismissing an appeal as taken from an interlocutory judgment. The Court of Appeals held that a *nunc pro tunc* order cannot retroactively give finality to a non-final order. The Court also held that the “relation-forward” doctrine, under which a premature notice of appeal will be deemed to relate forward to the date when finality attaches, only applies when a final order is made interlocutory through the intervening filing of a post-judgment motion and the order subsequently becomes final without modification. The doctrine does not apply where the order being appealed was clearly interlocutory and did not include the finality language required by CR 54.02(1). In dissent, Judge Thompson argued that because the filing of a notice of appeal is not jurisdictional, the *nunc pro tunc* rule and the relation-forward doctrine should allow the appeal to proceed on the merits without requiring the filing of a new notice of appeal.

### III. CHILD SUPPORT

#### A. *Bjelland v. Bjelland*

[2012-CA-000114](#) 08/09/2013 2013 WL 4033895 Released for Publication

Opinion by Judge Clayton; Judges Lambert and Thompson concurred. The Court of Appeals held that former husband's testimony constituted substantial evidence supporting his application for partial reimbursement of extraordinary educational expenses, *i.e.*, costs for an eighth-grade field trip. The Court found no error with the trial court's conclusion that, under KRS 403.211, the mandatory field trip costs were required for the child's participation in the class and the non-mandatory field trip costs constituted "a special need of the child" so as to merit reimbursement.

#### B. *Ciampa v. Ciampa*

[2013-CA-000121](#) 08/16/2013 2013 WL 4247075 DR Pending

Opinion by Judge Clayton; Judge Combs concurred; Judge Maze concurred and filed a separate opinion. In affirming the family court's modification of child support, the Court of Appeals held that because the parties' parental income exceeded the maximum amount set forth in the child support guidelines, the family court did not abuse its discretion by deviating from the guidelines in setting the amount of support. The family court's findings of fact were based on the child's expenses and day-to-day needs, as well as parents' resources and ability to pay, and the family court provided extensive information explaining the rationale for its award. The Court specifically rejected appellant's arguments regarding the family court's inclusion of the purchase of a car as a future expense, the admissibility of certain evidence provided by appellee to the family court substantiating the expenses of the child, and the family court's handling of housing and other expenses as reasonable needs of the child.

#### IV. CIVIL PROCEDURE

##### A. *Hughes v. Haas*

[2012-CA-000892](#) 04/26/2013 2013 WL 1776021 DR Pending

Opinion by Judge Combs; Judges Clayton and VanMeter concurred. The Court of Appeals affirmed the circuit court's order granting summary judgment in a negligence action resulting from a workplace accident. Appellant, an employee with Louisville Metro Corrections, sued the Clark County (Indiana) Sheriff's Department and appellee Haas after suffering permanent hearing loss at a Metro training session held at a facility owned by Clark County and provided by the Sheriff's Department. On appeal, appellant argued that Kentucky's long-arm statute (KRS 454.210) applied to the Sheriff's Department because its agreement with Metro was a contract that provided new skills for Metro employees to bring back to Kentucky. The Court rejected this position, noting that the skills learned by Metro employees at the training benefited the Commonwealth of Kentucky rather than the state of Indiana. Additionally, the training was not provided by the Sheriff's Department in Indiana; it merely provided the facility and did not otherwise participate. Moreover, the service provided by the Sheriff's Department - the use of its facility - was provided in Indiana. Merely making arrangements within the state of Kentucky to use the facility did not invoke the long-arm statute. Thus, the circuit court did not have jurisdiction over the Sheriff's Department. The Court further held that appellee Haas was properly dismissed pursuant to KRS 342.690 because he and appellant were both acting as Metro employees at the time of the subject incident. Although Haas was also a volunteer special deputy of the Sheriff's Department, he could not be sued as its agent because he was acting as a Metro employee at the time of appellant's injury.

## V. CONTRACTS

### A. *Pinnacle Development II, LLC v. RML Construction, LLP*

[2012-CA-000826](#) 08/30/2013 2013 WL 4620471 Released for Publication

Opinion by Judge Moore; Chief Judge Acree and Judge Clayton concurred. In an appeal and cross-appeal from a judgment in a breach of contract action, the Court of Appeals held that the action merited dismissal as time-barred. The Court held that because the action was actually based upon an obligation created by statute rather than by contract, the circuit court erred in failing to dismiss the action as time-barred pursuant to KRS 413.120(2), which applies a five-year limitations period upon actions based upon obligations created by statute. Pinnacle sought an award of “privilege fees” that RML had allegedly failed to pay, as described in a “privilege fee agreement” Pinnacle had executed with the Lexington-Fayette Urban County Government. Pursuant to the agreement, Pinnacle paid the costs of installing a sewage trunk line and LFUCG agreed to partially reimburse Pinnacle by collecting a privilege fee from the owners of land benefitted by the trunk line, one of whom was RML. The Court held that Pinnacle's action against RML was essentially an action against a property owner to collect a special assessment qualifying as a statutory liability. Because RML was not a party to the privilege fee agreement, its obligation to pay the privilege fees could only be characterized as an enforced contribution on a property owner for the public benefit. Therefore, the five-year limitations period set forth in KRS 413.120(2) applied and dismissal was merited.

## VI. COUNTIES

### A. *Herman v. Jessamine County Fiscal Court*

[2012-CA-000623](#) 08/02/2013 2013 WL 3957447 DR Pending

Opinion by Judge Combs; Judges Maze and Nickell concurred. Owners of real estate in Jessamine County filed a declaratory judgment action against the county's fiscal court and its fire district regarding the formation of a fire protection subdistrict and the imposition of applicable *ad valorem* taxes. The owners sought a refund of taxes paid or, alternatively, an audit of the tax revenue expenditure. Discovery revealed that the fire district had unintentionally deposited revenue into its own accounts but that its board had later developed written policies to prevent a repetition of such a misappropriation of revenues. The trial court dismissed the action against the fiscal court. In affirming the trial court, the Court of Appeals held that the fiscal court was empowered to create the fire protection subdistrict, but the underlying authority to levy the *ad valorem* tax belonged solely to the trustees of the subdistrict under KRS 75.015(5). Therefore, no action based on the tax levy or administration could be asserted against the fiscal court.

## VII. CRIMINAL LAW

### A. *Cox v. Commonwealth*

[2012-CA-000957](#) 08/09/2013 2013 WL 4033908 DR Pending

Opinion by Judge Maze; Judge Caperton concurred; Judge Lambert dissented without filing a separate opinion. On discretionary review of an order affirming a conviction for DUI 2nd, the Court of Appeals reversed after holding that a police roadblock was not conducted in a constitutional manner. The Court noted that the roadblock at issue was not established and operated according to a systematic plan with established guidelines. In particular, advance supervisory approval given for the roadblock was insufficient to limit officers' discretion concerning where, when, and for how long the roadblock would be operated. The officers at the scene also retained an impermissible level of discretion as to how they chose to conduct the roadblock. Therefore, the Court concluded that the stop of appellant's vehicle was unconstitutional and any evidence obtained pursuant to that stop must be suppressed.

### B. *Grider v. Commonwealth*

[2010-CA-002171](#) 08/16/2013 2013 WL 4271430 DR Pending

Opinion by Judge Thompson; Judges Moore and Nickell concurred. In an appeal from a denial of appellant's motion for RCr 11.42 post-conviction relief, the Court of Appeals held that appellant's supporting allegation - that he was not informed that his guilty plea to first-degree robbery rendered him ineligible for parole until serving 85% of his sentence - was sufficiently stated to support the deficiency prong of the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The case was remanded to the circuit court to determine whether appellant had adequately claimed prejudice resulting from his plea counsel's alleged misadvice as to his parole eligibility so as to be entitled to a hearing on his motion.

C. *Milam v. Commonwealth*

[2012-CA-000739](#) 08/30/2013 2013 WL 4620425 DR Pending

Opinion by Judge Clayton; Judge Lambert concurred; Judge Thompson dissented and filed a separate opinion. The Court of Appeals affirmed the circuit court's denial of a motion to suppress evidence that was seized during a warrantless search of a fraternity house. Police detectives went to a fraternity house for a "knock and talk" encounter after receiving a tip that appellant was selling marijuana from the fraternity house. After no one answered the door, which contained a keypad lock, the detectives entered the "breezeway" or "foyer" of the building since the door was ajar and unlocked. Without venturing past the interior of the breezeway, they announced their presence. Shortly thereafter, a young man (later determined to be a fraternity member) greeted them and said that appellant lived at the fraternity house. He then led them up the stairway, which was located in the breezeway, to the second floor where appellant's room was located. When the door to the second floor was opened, the detectives immediately smelled the odor of marijuana. Once the detectives knocked on his door, appellant opened the door where the detectives saw marijuana in plain sight. In affirming, the Court noted that the keypad lock was nonfunctional and testimony reflected that the door was often unlocked. The Court also noted that the detectives entered an area where any member of the public could go and that appellant's fraternity brother gave a valid consent for the officers to enter the second floor. Therefore, based on the specific facts of this case, the Court held that appellant's Fourth Amendment rights had not been violated. In dissent, Judge Thompson opined that a fraternity house is comparable to a private residence, that the entry door was within the protected curtilage of the building, and that an unlocked door does not reduce a person's expectation of privacy.

D. *Spencer v. Commonwealth*

[2012-CA-000996](#) 08/09/2013 2013 WL 4033897 DR Pending

Opinion by Judge Lambert; Judges Caperton and Maze concurred. In an appeal from a conviction for assault and tampering with physical evidence, the Court of Appeals affirmed the judgment and sentence, finding that no palpable error existed to justify a reversal of two unpreserved issues. First, the Court held that RCr 9.40 and KRS 29A.290(2)(b) did not include an improper delegation of legislative authority as to the number of peremptory challenges provided to each party. Second, the Court held that appellant's argument relating to whether the jury was properly instructed on self-protection was improper because he had requested essentially the same instruction ultimately used in the jury instructions.

VIII. IMMUNITY

A. *Louisville Arena Authority, Inc. v. Ram Engineering & Construction, Inc.*

[2011-CA-001389](#) 08/30/2013 2013 WL 4620214 Rehearing Pending

Opinion by Judge Thompson; Judges Caperton and Stumbo concurred. In an action arising from the procurement of subcontractors for the construction of the KFC Yum! Center (Arena) in downtown Louisville, the Court of Appeals held that the circuit court erroneously denied summary judgment to the Finance and Administration Cabinet on grounds of immunity but affirmed the circuit court's denial of summary judgment in favor of the Louisville Arena Authority. The Court first concluded that the Finance and Administration Cabinet, as a direct arm of the state, was entitled to sovereign immunity and that the General Assembly had not waived immunity from monetary damages for claimed violations of the Kentucky Model Procurement Code. However, because the General Assembly had expressly waived immunity for the Commonwealth's breach of a written contract, the case was remanded to the circuit court for further proceedings to determine whether there was a written contract between the parties. The Court then held that even if the Louisville Arena Authority could be considered a public entity, the conduct at issue concerned the performance of a proprietary function; therefore, it was not entitled to governmental immunity. The Court reasoned that the Louisville Arena Authority's construction and management of an entertainment facility was not an integral state function.

## IX. NEGLIGENCE

### A. *Nissan Motor Co., Ltd. v. Maddox*

[2012-CA-000952](#) 08/30/2013 2013 WL 4620488 DR Pending

Opinion by Judge Combs; Judge Nickell concurred; Judge Maze concurred in part, dissented in part, and filed a separate opinion. The Court of Appeals held that the circuit court properly denied appellant's motion for a directed verdict in a negligence action stemming from an automobile accident. Appellee alleged that appellant's negligent design of appellant's vehicle's restraint system caused the severity of her injuries resulting from a head-on collision with another vehicle. In affirming, the Court held that evidence supported the jury's finding of negligent design and that the circuit court did not err when it allowed a jury instruction regarding failure to warn. Additionally, the Court held that - based on the facts - appellee met the requirements for a *prima facie* claim of crashworthiness. Thus, the circuit court did not err in allowing the jury to be instructed on crashworthiness or in denying a directed verdict based on the elements of crashworthiness. The Court further held that the circuit court did not abuse its discretion by admitting evidence of a recall of a vehicle produced by a different automobile manufacturer for the limited purpose of proving that the amount of excess webbing spooling from appellee's seatbelt was dangerous. The Court finally held that the issue of punitive damages was properly presented to the jury because appellee's claims were related to a flawed vehicle design and lack of warning. Judge Maze dissented solely on the issue of punitive damages, disagreeing that appellant's actions surmounted the threshold of gross negligence.

## X. STATUTES

### A. *Kindred Nursing Centers Limited Partnership v. Overstreet*

[2011-CA-002294](#) 08/09/2013 2013 WL 4033906 DR Pending

Opinion by Judge Stumbo; Chief Judge Acree and Judge VanMeter concurred. The Court of Appeals held that Kentucky's Resident Rights Statute (KRS 216.515) did not create a new cause of action. Instead, it merely clarified and codified that residents of certain long-term care facilities had the enumerated rights previously established in the common law. Therefore, an estate's action against a nursing home for violations of the statute was a personal injury action subject to either the one or two-year limitations period set forth in KRS 413.140 and KRS 413.180 rather than a claim subject to the five-year limitations period applicable to causes of action created by statute.

## XI. TAXATION

### A. *Klas Properties, LLC v. Tax Ease Lien Investments 1, LLC*

[2011-CA-002319](#) 05/31/2013 407 S.W.3d 564

Opinion by Judge Dixon; Judge Caperton concurred; Judge Combs concurred in result only. In a case involving the rights of third-party purchasers of tax liens, the Court of Appeals vacated the decision of the trial court after concluding that the trial court erroneously relied upon KRS 91.517 to award appellee costs prior to the *pro rata* distribution of other tax claims. The Court held that in revising Chapter 134 in 2009, the General Assembly demonstrated a clear intent to afford all tax liens equal and superior priority to other liens. The Court interpreted the term "costs" in KRS 134.420 as including the litigation and court costs associated with the collection of the delinquent tax bills as part of the lien. Thus, while the third-party purchaser who initiates a foreclosure action is entitled to costs, such are included within the lien itself and there is no authority for awarding that purchaser "super priority" over other lien holders. In the event the proceeds are insufficient to pay all tax liens, as occurred in this case, the purchaser is only entitled to a *pro rata* share of its lien, including the costs associated therewith.

## XII. WORKERS' COMPENSATION

### A. *Falk v. Alliance Coal, LLC*

[2012-CA-000624](#) 08/16/2013 2013 WL 4246048 DR Pending

Opinion by Judge Stumbo; Chief Judge Acree and Judge Maze concurred. The Court of Appeals held that appellee was immune from tort actions pursuant to KRS 342.690(1) as a self-insurance carrier. Three miners were killed while working for two of appellee's subsidiary companies, and the estates of the miners were awarded workers' compensation benefits. The Court held that because appellee had self-insured itself and its subsidiaries under one self-insurance scheme, it was a "carrier" for immunity purposes pursuant to KRS 342.690(1). The Court further held that even assuming that appellee did not strictly meet the definition of a carrier or self-insurer, as a matter of public policy it still merited immunity from tort liability as a guarantor of the workers' compensation obligations of its self-insured subsidiaries.