

OPINIONS DESIGNATED FOR PUBLICATION

KENTUCKY COURT OF APPEALS

OCTOBER 1, 2013 TO OCTOBER 31, 2013

I. Arbitration

A. *Kindred Healthcare, Inc. v. Cherolis*

[2012-CA-002074](#) 10/11/2013 2013 WL 5583587

Opinion by Judge Maze; Judges Clayton and Nickell concurred. The executrix of the estate of a nursing home facility resident instituted an action against the nursing home facility asserting claims for negligence, medical negligence, personal injury, wrongful death, and a violation of the long-term care resident's rights statute. Relying upon *Ping v. Beverly Enterprises*, 376 S.W.3d 581 (Ky. 2012), the circuit court denied the facility's motion to compel arbitration, finding that a power of attorney executed by the resident prior to her death did not vest executrix, her daughter, with the authority to execute an arbitration agreement on her behalf. The Court of Appeals reversed on appeal, holding that the subject power of attorney conveyed more authority to executrix than the one at issue in *Ping* and permitted executrix to execute an arbitration agreement with the facility on behalf of her mother. Therefore, the facility was entitled to compel arbitration as to the estate's negligence and personal injury claims. The arbitration agreement did not apply, however, with respect to the estate's wrongful death claim.

II. Criminal Law

A. *Boone v. Commonwealth*

[2011-CA-001359](#) 10/18/2013 2013 WL 5663089

Opinion by Chief Judge Acree; Judges Clayton and Dixon concurred. The Court of Appeals affirmed in part, reversed in part, and remanded a judgment convicting appellant/defendant of first-degree sexual abuse. The Court first concluded that the circuit court properly denied appellant's motion for a directed verdict because reasonable jurors could differ as to whether appellant was a person in a position of authority or special trust, as defined by KRS 532.045(1). The Court held that for purposes of the first-degree sexual abuse statute, the definitions of "position of authority" and "position of special trust" are not mutually exclusive, and whether a defendant is such a person is a question of fact for the jury. The Court further held that the circuit court did not err when it declined to instruct the jury on the lesser-

included offenses of third-degree sexual abuse and harassment with physical contact because appellant had waived an instruction on the former and there was no evidence in support of the latter. Finally, the Court reversed and remanded for a finding by the circuit court regarding whether appellant was a “poor person” as contemplated by KRS 453.190(2) and KRS 23A.205(2) and therefore exempted from paying the ordered court costs.

B. Boone v. Commonwealth

[2012-CA-000828](#) Ordered published by S.C. on 10/24/2013 2013 WL 53987
Released for publication

Opinion by Judge Stumbo; Judges Maze and Thompson concurred. The Court of Appeals affirmed a judgment reflecting appellant’s conditional plea of guilty to various trafficking charges and to being a first-degree persistent felony offender (PFO). The Court rejected appellant’s argument that KRS 532.080(8) barred the PFO charge under the facts of this case or was otherwise ambiguous so that lenity required construing the statute in his favor. The Court held that the word “conviction,” as used in the first sentence of KRS 532.080(8), did not bar the circuit court’s reliance on all felony possession convictions, past and present, as a basis for a PFO charge and conviction. Instead, the first sentence only bars the usage of a current or underlying felony possession conviction as a basis for implicating the PFO statute. The Court further noted that the second sentence of KRS 532.080(8) expressly states that prior felony possession offenses “may be used” for this purpose. Thus, under KRS 532.080(8), the Commonwealth may base a PFO charge on a prior felony possession conviction under KRS 218A.1415 when the indictment includes a felony charge other than a felony possession charge.

III. Jurisdiction

A. Nesselhauf v. Baltimore

[2012-CA-000755](#) 10/04/2013 2013 WL 5494674

Opinion by Judge Maze; Judges Combs and Nickell concurred. The Court of Appeals reversed and remanded an order awarding attorneys’ fees stemming from a child custody matter after holding that the circuit court did not have jurisdiction over the issue of fees. Citing to CR 52.02, 52.04, and 59.05, the Court held that because more than ten days elapsed between the circuit court’s order resolving the custody dispute (which the Court held to be a final and appealable order) and appellees’ motions for attorneys’ fees, the circuit court lost jurisdiction over the matter and the doctrines of waiver and *res judicata* prevented it from being revived for purposes of awarding attorneys’ fees.

IV. Mines and Minerals

A. *Taggart Global Operations, LLC v. Elk Horn Coal Co., LLC*

[2012-CA-000329](#) Ordered published by Court on 10/25/2013 2013 WL 3968607

Opinion by Judge Dixon; Judges Moore and Taylor concurred. A landlord brought an action against the assignee of a commercial lease for certain coal mining properties and reserves seeking rent due pursuant to a landlord lien against personal property and equipment, a writ of attachment, termination of the lease, and a declaration that certain surface leases reverted to the assignor. The Court of Appeals affirmed in part and dismissed in part as to the circuit court's summary judgment order determining the priority of all parties' respective interests in assignee's property. The Court first held that the landlord perfected a valid first landlord lien, pursuant to KRS 383.030 and 383.070, on assignee's personal property. The Court concluded that KRS 383.030 provides landlords a more lenient attachment procedure than Chapter 425; therefore, the subject lien was valid even though it did not comply with the strict attachment motion requirements of KRS 425.307(2). The Court then held that, pursuant to KRS 383.070(3), the landlord's lien was superior to other lienholders' liens to the extent of one year's rent, where the landlord "sued out" its claim within 120 days from the time the rent was due, and the rent was for premises leased for coal mining purposes. The Court finally held that any issues on appeal regarding the other lienholders' claims against assignee's assets were rendered moot and no longer justiciable once it was determined that their liens were inferior to the landlord's lien, which exceeded the amount brought through the sale of assignee's assets.

V. Securities

A. *Bishop v. Alliance Banking Co.*

[2012-CA-001605](#) 10/11/2013 2013 WL 5583574

Opinion by Judge Taylor; Chief Judge Acree and Judge Maze concurred. In an action where a bank brought suit against a backhoe buyer, asserting that it had a prior and perfected security interest in the backhoe and that buyer was not a bona fide purchaser without notice, the Court of Appeals affirmed a summary judgment entered in favor of the bank. The Court held that buyer was not a bona fide purchaser without notice of bank's security interest. The Court noted that the financing statement filed by the bank, which specifically described the collateral for the promissory note as a "1999 Case Backhoe 580L," was sufficient to have placed a subsequent buyer of the backhoe on notice of the bank's perfected security interest, even though the serial number listed for the backhoe was incorrect. If buyer had made further inquiry, he could have identified the backhoe he purchased from mortgagor as the same collateral described in the financing statement. The Court also concluded that the serial

number, whose last seven numbers were listed correctly, was not seriously misleading.

VI. Torts

A. *Keaton v. G.C. Williams Funeral Home, Inc.*

[2012-CA-000297](#) 10/25/2013 2013 WL 5763238

Opinion by Judge Nickell; Judges Combs and Lambert concurred. In an action where a family sued the operators of a funeral home and cemetery in connection with the burial of their mother in the wrong plot, the circuit court granted summary judgment against the family as to their claims of negligence, intentional infliction of emotional distress (IIED), fraud, negligent misrepresentation, and Kentucky Consumer Protection Act (KCPA) violations. On appeal, the Court of Appeals discussed the applicability of the recent holding in *Osborne v. Keeney*, 399 S.W. 1 (Ky. 2012), which abandoned the “impact rule” in relation to claims for mental anguish resulting from negligence, thereby requiring cases such as the one *sub judice* to be decided under general negligence principles. In light of *Osborne*, the Court concluded that to the extent the entry of summary judgment as to the family’s negligence claim relied on the absence of an impact, it was infirm. However, because the family had failed to present adequate proof to sustain their negligence claim, *i.e.*, a showing of “severe emotional distress,” any such error was deemed harmless. The Court further held that the family had failed to make a *prima facie* showing of outrageous conduct sufficient to support their IIED claim. Similarly, the Court determined that insufficient evidence had been provided to sustain a claim for a violation of the KCPA against the funeral home, and a lack of standing prohibited bringing a similar claim against the cemetery. On cross-appeal, the Court concluded that the circuit court correctly denied summary judgment as to the family’s breach of contract claim against the funeral home as genuine issues of material fact existed.