

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**MAY 1, 2015 to MAY 31, 2015**

**I. BUSINESS ORGANIZATIONS**

**A. *Fifth Third Bank v. Rogers***

[2013-CA-001723](#) 05/15/2015 2015 WL 2269042 DR Pending

Opinion by Judge Nickell; Judge D. Lambert concurred; Chief Judge Acree dissented and filed a separate opinion. Five brothers launched several family business ventures in which each brother was an equal shareholder and director. Each brother executed a stock purchase agreement for each business stating that upon death of a brother, his shares were to be offered first to the corporation, then to the other shareholders, and if no purchase occurred, the corporations were to be dissolved and liquidated. One brother died in April 2005, the other brothers accepted an offer to purchase his shares, but the purchase was never completed and the corporations were never dissolved. In December 2005, the estate of the deceased brother filed a dissolution action. In August 2006, the surviving brothers approached Fifth Third Bank about a \$2.5 Million loan for which two of the family businesses pledged collateral. In anticipation, Fifth Third requested information including corporate by-laws, contemporaneous borrowing resolutions, and stock purchase agreements. The corporate by-laws required between five and nine directors at all times, but Fifth Third accepted the borrowing resolutions signed by only the four surviving brothers and completed the loan without realizing the estate had an interest and was asserting that interest. Fifth Third apparently never read the corporate by-laws since they had been executed in 1971 and it was assumed they had been superseded or were of no value. The circuit court determined that the estate had both contractual and non-contractual equitable liens as a result of the stock purchase agreements; the equitable liens gave the estate priority over Fifth Third's recorded mortgage and security interest since Fifth Third had extended the loan with actual notice of the equitable liens; and, had Fifth Third performed the due diligence required by its own in-house lending manual, it would never have made the loan. On appeal, Fifth Third argued the stock purchase agreements did not create equitable liens. It additionally argued that if they did create equitable liens, it had no actual notice of them, or at a minimum there was a question about the amount of knowledge it had. Fifth Third further argued that

its own lending policy did not constitute a separate ground for an award of summary judgment to the estate. Fifth Third stressed that the estate had failed to file a *lis pendens* notice, although it cited no case law making filing of such notice mandatory. In a matter of first impression, the Court of Appeals affirmed the circuit court's award of summary judgment to the estate, holding that stock purchase agreements create equitable liens whether the agreement uses the term "equitable lien" or not. Here, the agreements were upheld both as valid contracts and on equitable principles of justice and fair play. Fifth Third had sufficient documentation in its file to put it on actual notice of the estate's interest and to cause a reasonably prudent person to question whether another party had an interest in corporate assets that would be superior to Fifth Third's recorded mortgage.

## II. CONTRACTS

### A. *Kentucky Spirit Health Plan, Inc. v. Commonwealth, Finance and Administration Cabinet*

[2013-CA-001003](#) 05/15/2015 462 S.W.3d 723

Opinion by Judge Maze; Judges Combs and Jones concurred. Kentucky Spirit appealed from a decision granting summary judgment in favor of the numerous appellees in this case (collectively "the Commonwealth"). Specifically, Kentucky Spirit argued that the circuit court erroneously interpreted the terms of its Medicaid Managed Care Contract ("the Contract") with the Commonwealth, pursuant to which Kentucky Spirit provided various Medicaid-eligible services. On cross-appeal, the Commonwealth appealed the circuit court's use of a non-deferential standard of review in addressing the decision of the Finance and Administration Cabinet Secretary. The Court of Appeals affirmed as to both the appeal and cross-appeal, holding that the Contract required Kentucky Spirit to cover the contested services, which were performed by health department registered nurses and licensed practical nurses at school clinics, and that the circuit court applied the correct *de novo* standard of review under KRS 45A.245(1).

### III. CRIMINAL LAW

#### A. *Adams v. Commonwealth*

[2013-CA-001864](#) 05/15/2015 2015 WL 2266484 DR Pending

Opinion by Judge J. Lambert; Judges Stumbo and Taylor concurred. Appellant sought review of a judgment following a jury trial convicting him and his co-defendant of trafficking in a controlled substance. First, appellant alleged that he was denied a unanimous verdict because the definition of “traffic” in the jury instructions contained two mutually exclusive concepts. The Court held that because there was sufficient evidence to sustain a conviction under either concept, there was no palpable error. Second, the Court held that the trial court did not err in excluding evidence that appellant’s co-defendant was going to serve as a confidential informant and assist the police in finding drug dealers, on the grounds that the evidence was simply too prejudicial to the co-defendant to be admitted. Third, the Court held that although the prosecutor’s cross-examination of appellant regarding drug-taking at a nightclub where he was shot was prejudicial because it implied he was connected to the drug trade, it did not rise to the level of palpable error. Finally, the Court held that co-defendant’s counsel’s questioning of appellant regarding the truthfulness of a police officer was not sufficiently egregious to rise to the level of palpable error.

#### B. *Baker v. Commonwealth*

[2014-CA-000044](#) 05/08/2015 2015 WL 2148101 DR Pending

Opinion by Judge Combs; Judge Kramer concurred; Judge Taylor dissented without separate opinion. In a case of first impression, the Court of Appeals held that a police officer had reasonable suspicion to support a traffic stop where the tires of appellant’s automobile were on the fog line and very close to the rumble strip for almost two miles, where the automobile swayed within the right lane, and where the officer’s experience dictated that hugging the fog line often indicated the activity of an impaired driver.

C. *Helms v. Commonwealth*

[2013-CA-001822](#) 05/29/2015 2015 WL 3429126 DR Pending

Opinion by Judge Thompson; Chief Judge Acree and Judge Kramer concurred. Appellant challenged an order revoking his pretrial diversion and sentencing him to two years' imprisonment in accordance with his original sentence. He argued that the circuit court abused its discretion when it voided his diversion agreement without considering whether violations of his conditions of diversion constituted a significant risk to prior victims or the community or whether he can be appropriately managed in the community as required by KRS 439.3106. He further contended that a zero-tolerance provision in the diversion agreement erroneously served as the basis for the circuit court's decision. The Court of Appeals reversed and remanded, holding that pursuant to *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), courts must consider the statutory criteria of KRS 439.3106 when revoking diversion and that it is an abuse of discretion for a court to enforce a zero-tolerance provision without consideration of KRS 439.3106. The Court also held that the Department of Probation and Parole is not precluded from considering graduated sanctions when the sentencing judgment contains a zero-tolerance provision. Finally, the Court held that the circuit court erroneously revoked diversion based on appellant's one-time drug use and his technical violations of the diversion agreement. Therefore, the case was remanded for consideration of sanctions other than imprisonment.

**D. Poston v. Commonwealth**

[2013-CA-000255](#) 05/22/2015 2015 WL 2437595 DR Pending

Opinion by Judge Clayton; Judges Combs and Stumbo concurred. In an appeal taken from an order revoking appellant's probation, the Court of Appeals reversed and remanded for further proceedings in compliance with KRS 439.3106 and *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). Appellant's probation was revoked based upon a supervision report stating that he had tested positive for methamphetamine and that he had failed to notify his probation officer of his change of address. The circuit court's order revoking probation largely relied upon the fact that appellant had used methamphetamine. The Court of Appeals held that pursuant to *Andrews*, the circuit court was required to consider whether appellant's use of drugs and failure to report a change of address made him a significant risk to the community, whether he could be managed in the community, and whether alternative sanctions were merited. The Court noted that the record in this case was sparse. It did not reflect whether the circuit court considered measures other than incarceration, and there was nothing in the record reflecting why appellant was not required to enter into drug treatment during his time on probation. Therefore, it was not clear why appellant could not be managed in the community. The record was also silent as to how appellant was a risk to prior victims or to the community. It was also not clear that the circuit court actually made a finding that appellant had changed his address without notifying probation and parole. There was also no evidence in the record that the probation officer had determined that graduated sanctions were inappropriate. Therefore, additional proceedings were merited.

E. *Rider v. Commonwealth*

[2013-CA-000136](#) 01/17/2014 2014 WL 199064 Released for Publication

Opinion by Judge Dixon; Judges Caperton and VanMeter concurred. Appellant filed a *pro se* motion to amend his sentence pursuant to CR 60.02(e) and (f), arguing that the Supreme Court's declaration in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010) that KRS 532.043(5) was an unconstitutional violation of the separation of powers doctrine and the legislature's subsequent amendment of such statute constituted a change in circumstances warranting the amendment of his sentence. The trial court denied the motion, finding that KRS 532.043(5) was not an *ex post facto* law and that it was the intent of the legislature that KRS 532.043 and its amendments apply retroactively. On appeal, the Court of Appeals affirmed, holding that the amendment to KRS 532.043(5) was not an *ex post facto* law because it did not reach back in time to punish acts that occurred before enactment of the law. Instead, the amendment merely established a new procedure for adjudicating the revocation of conditional discharge. It did not create a new crime or enhance an existing crime, it did not in itself enhance the penalty for an existing crime, and it did not in any way alter the rules of evidence in regards to the offense charged. The Court also found no merit in appellant's claim that because KRS 532.043(5) did not expressly declare the statute's retroactivity, KRS 446.080(3) barred retroactive application to his sentence.

F. *Stewart v. Commonwealth*

[2013-CA-001716](#) 05/22/2015 2015 WL 2437555 DR Pending

Opinion by Chief Judge Acree; Judges Kramer and Thompson concurred. The Court of Appeals held that pursuant to KRS 532.050(6), a criminal defendant must be afforded a fair opportunity and a reasonable period of time to challenge the factual contents and conclusions of any presentence investigation report or psychiatric examination, if he requests it. Denial of that right is a violation of due process and, therefore, constitutes palpable error meriting reversal.

G. *Sullivan v. Commonwealth*

[2014-CA-000087](#) 05/01/2015 2015 WL 1966460 DR Pending

Opinion by Judge VanMeter; Judges Dixon and Jones concurred. A probation officer filed an affidavit and a violation of supervision report with respect to appellant, who was on probation for third-degree rape and third-degree sodomy. The circuit court revoked appellant's probation and ordered him to serve his five-year sentence. On appeal, the Court of Appeals affirmed, holding that the fact that the probation officer who testified at the revocation hearing was not the same officer who filed the affidavit and violation of supervision report did not violate appellant's due process rights. The Court noted that reliable hearsay testimony was admissible in a revocation proceeding; that appellant had no absolute right to confront the officer who filed the affidavit and report; that the report contained a detailed account of the underlying violation; that appellant presented no evidence that the testifying officer's testimony was unreliable or not credible; and that appellant had the opportunity to cross-examine the testifying officer, which he did.

H. *Williams v. Commonwealth*

[2013-CA-002112](#) 05/08/2015 462 S.W.3d 407

Opinion by Judge Combs; Judges Jones and Maze concurred. Appellant's conditional discharge was revoked by the district court. The circuit court affirmed the revocation, and the Court of Appeals granted discretionary review. Appellant argued that the trial court erroneously combined his revocation hearing with a preliminary hearing for new criminal charges which he had incurred. He contended that a preliminary hearing determines probable cause that a defendant has committed the crimes underlying the new charges, but a revocation hearing requires the higher standard of preponderance of the evidence of a violation of conditional discharge. The Court of Appeals reviewed for palpable error and initially determined that according to the record, there was sufficient evidence to satisfy the preponderance-of-the-evidence standard. However, after the filing of the briefs in this case, the Supreme Court of Kentucky rendered *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). *Andrews* imposes a burden on trial courts to strictly apply KRS 439.3106 to revocation procedures. The statute requires the court to assess the risk that the probationer presents to the victim and/or community; whether he can be managed in the community; and a range of potential alternative sanctions. In this case, the trial court failed to engage in the requisite statutory analysis. Therefore, the Court vacated and remanded for a hearing which comported with the directives of KRS 439.3106.

IV. CUSTODY

A. *Hudson v. Cole*

[2014-CA-001271](#) 05/15/2015 463 S.W.3d 346

Opinion by Judge J. Lambert; Judges Stumbo and Taylor concurred. Father filed a petition for custody of the parties' two-month-old child, seeking temporary orders regarding custody and parenting time. The family court denied father's petition and limited his parenting time to one weekend per month, with no overnight visits. The Court of Appeals affirmed, holding that KRS 403.320(1), which requires a finding of endangerment to support restricted parenting time, did not apply and that the limitation of father's parenting time served child's best interests during child's younger years.

## V. EMINENT DOMAIN

### A. *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*

[2014-CA-000517](#) 05/22/2015 2015 WL 2437864 DR Pending

Opinion by Judge Stumbo; Judges J. Lambert and Taylor concurred. The Court of Appeals held that Bluegrass Pipeline Company, LLC could not utilize eminent domain in order to build pipelines to transport natural gas liquids through Kentucky. The Court determined that KRS 278.502 only granted condemnation powers to entities providing public utilities regulated by the Public Service Commission. Bluegrass Pipeline was not regulated by the Public Service Commission, and the natural gas liquids were not being utilized by Kentucky citizens; instead, they were being transported to a facility in the Gulf of Mexico. The Court also held that appellee had standing to bring the underlying declaratory judgment action.

### B. *Commonwealth, Transportation Cabinet, Department of Highways v. Guess*

[2013-CA-001196](#) 05/15/2015 2015 WL 2266690 DR Pending

Opinion by Judge J. Lambert; Judges Dixon and Taylor concurred. In a condemnation action brought under Kentucky's Eminent Domain Act, the property owner moved to dismiss the action based on the Transportation Cabinet's failure to prosecute the issue of just compensation within 30 days of the date of the entry of an interlocutory order and judgment authorizing the Cabinet to take possession of the property. The circuit court granted the motion and thereafter denied the Cabinet's motion to alter, amend, or vacate judgment. The Court of Appeals vacated and remanded, holding that the Cabinet should not have been dispossessed of the property once possession was granted to it. Even though the Cabinet took no steps to prosecute the issue of valuation and compensation within a reasonable time after entry of the IOJ, the roadway expansion project had already started by the time the property owner filed his exceptions and motion to dismiss the case; moreover, the owner had not contested the Cabinet's right to take the property. Under these circumstances, rather than dismissing the case in its entirety, the circuit court should have set the matter for a jury trial on compensation or made the IOJ final and appealable, especially in light of the fact that the Eminent Domain Act was silent as to a specific amount of time in which a trial on the exceptions and compensation was to be held.

## VI. ENVIRONMENT

### A. *Louisville Gas and Electric Company v. Kentucky Waterways Alliance*

[2013-CA-001695](#) 05/29/2015 2015 WL 3427746 DR Pending

Opinion by Judge Stumbo; Judge Nickell concurred; Judge Maze concurred in part, dissented in part, and filed a separate opinion. The Court of Appeals affirmed a decision of the Franklin Circuit Court determining that the Kentucky Energy and Environment Cabinet failed to comply with the federal Clean Water Act when it issued a permit to the Louisville Gas and Electric Company allowing one of its coal-fired electric power-generating facilities to discharge wastewaters into the Ohio River. The majority opinion of the Court held that 40 C.F.R. § 125.3 mandates that when such a permit is being issued, the Cabinet must perform a case-by-case review of the necessity for alternative methods of limiting or eliminating the discharge of toxic pollutants. The majority concluded that the Cabinet did not perform such a review. Judge Maze dissented in part because he believed a case-by-case review was not required.

## VII. IMMUNITY

### A. *Hurt v. Parker*

[2011-CA-002257](#) 05/01/2015 462 S.W.3d 403

Opinion by Judge Combs; Judges J. Lambert and Nickell concurred. On remand from the Supreme Court of Kentucky, the Court of Appeals vacated and remanded an order denying a school principal's motion for summary judgment as to negligence claims filed against him in his official capacity. The Court held that a principal's responsibility for maintaining a school parking lot was discretionary in nature. Therefore, the circuit court erred in concluding that the principal was not entitled to qualified official immunity.

### B. *Mucker v. Brown*

[2012-CA-001013](#) 05/15/2015 462 S.W.3d 719

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. On remand from the Supreme Court of Kentucky, the Court of Appeals held that the circuit court properly denied summary judgment in favor of a school plant operator on the basis of qualified official immunity. A school employee filed an action against the plant operator in her individual capacity after the employee slipped on ice that had accumulated on the school's sidewalk. The Court held that although the plant operator may have had the discretion to decide when and where to begin clearing the sidewalk, she had the ministerial duty to clear the sidewalk of ice prior to the time students, parents, and staff members were reasonably anticipated to arrive at the school. Therefore, because her duties in this regard were ministerial in nature, she was not entitled to qualified official immunity.

C. *Slattery v. J. F.*

[2013-CA-000830](#) 05/29/2015 2015 WL 3424794 DR Pending

Opinion by Chief Judge Acree; Judges D. Lambert and VanMeter concurred. The Court of Appeals held that the denial of a CR 54.02(1) motion to reconsider an order denying the claim of qualified official immunity is immediately appealable for reasons identical to those stated in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009). Fear of abuse by repetitive motions can be addressed by the circuit court's application of CR 11 and such other authorities as are at a court's disposal. Applying well-known guidance regarding qualified official immunity, the Court also held that two teachers and a principal were entitled to such immunity relative to claims by a parent that they were negligent in failing to prevent the bullying of a child by a fellow student.

## VIII. JUDGMENT

A. *Boone v. Boone*

[2014-CA-001672](#) 05/29/2015 463 S.W.3d 767

Opinion by Judge Combs; Judges Kramer and Taylor concurred. An estranged wife sought a domestic violence order (DVO) against her husband. The circuit court granted the DVO petition and husband appealed. The Court of Appeals remanded for written findings, holding that the circuit court's oral findings in the video record, which the court referenced through handwritten notation on a docket sheet in the record, were inadequate to allow the Court to address husband's challenge to the sufficiency of the evidence supporting the DVO. The Court noted that the trial court had made adequate oral findings, but CR 52.01 requires that found facts be included in a written order. In this case, the only written communication from the circuit court was the notation on the docket sheet, which does not constitute a judgment.

## IX. MUNICIPAL CORPORATIONS

### A. *Berger Family Real Estate, LLC v. City of Covington*

[2013-CA-001482](#) 05/29/2015 464 S.W.3d 160

Opinion by Judge Thompson; Judge Stumbo concurred; Judge Combs concurred in result and filed a separate opinion. Appellant, the owner of commercial property in a proposed business improvement district, filed the subject action after a petition was circulated to designate a business area as a management district. The circuit court dismissed the action for lack of a justiciable case or controversy. On appeal, the Court of Appeals first held that appellant's failure to identify the issue of whether there existed a current controversy subject to judicial review in its prehearing statement did not preclude the Court's review of the issue. As to the merits of the appeal, the Court concluded that appellant's challenge to the validity of the petition was not ripe for judicial determination. At the time the subject action was filed, the only step in the statutory process to establish a management district to occur was the circulation of a petition. The requisite number of signatures on the petition had not been obtained, and there was only speculation that the petition would lead to the passage of an ordinance creating the district. The Court further held that the "capable of repetition, yet evading review" and "public interest" exceptions to the mootness doctrine did not apply to appellant's claim that it and other property owners had the right to withdraw their signatures from the petition. The City of Covington had allowed appellant to remove its name from the petition, and it would not be subject to the same action again after it withdrew its signature. The Court further noted that it was not likely that a substantial number of potential signers would sign and then seek to rescind their signatures. In her concurring opinion, Judge Combs wrote that the existence of inconsistency as to the jurisdictional impact of CR 76.03(8) is a matter of concern for the practicing Bar to alert it to proceed with caution on this issue.

## X. ORIGINAL ACTIONS

### A. Wood v. Woeste

[2015-CA-000011](#) 05/01/2015 461 S.W.3d 778

Opinion and order granting petition for writ of prohibition by Judge Thompson; Judge Jones concurred; Judge Maze dissented and filed a separate opinion. After the Campbell Family Court denied the father's motion for a stay, under the federal Servicemembers Civil Relief Act (SCRA), of proceedings on mother's motion for temporary primary custody of child during father's overseas military deployment, father and child, through child's *guardian ad litem*, filed a petition for a writ of prohibition, as well as emergency motions for a stay. While the petition and motions were pending, the family court granted mother's motion. The Court of Appeals granted the petition, holding that the injury resulting from the family court's erroneous failure to grant the stay was real and irreparable. Of particular note, the Court held that where a service member complies with the requirements for a stay under the SCRA, it is mandatory that the trial court grant a stay. In dissent, Judge Maze argued that under the circumstances, the family court had the discretion to deny father's motion for a stay and that given the limited record before the Court, it was not appropriate to disturb that finding when ruling on a writ. Judge Maze further contended that father had an adequate remedy by appeal and that a disputed child custody determination did not amount to irreparable injury.

## XI. PROPERTY

### A. *Williams v. City of Kuttawa*

[2013-CA-001854](#) 05/29/2015 2015 WL 3429102 Released for Publication

Opinion by Judge Kramer; Judge Clayton concurred; Judge Nickell concurred and filed a separate opinion. The Court of Appeals affirmed the circuit court's interpretation of an 1896 deed conditionally dedicating real property to the City of Kuttawa and the court's summary judgment order vesting fee simple title in the City, but denying its request to abolish covenants restricting use of the dedicated lands to a public park. The Court also affirmed the dismissal of appellant's counterclaims alleging that the City violated its duties as trustee of a charitable trust created by the deed. Judge Nickell concurred, writing that the grantors were the heirs of notable Kentuckian and former governor of Ohio, Charles Anderson, who founded, designed, chartered, and developed the City of Kuttawa during the 1870s.

## **XII. ROADS**

### **A. *Greene v. Greenup County***

[2014-CA-000236](#) 05/29/2015 2015 WL 3424755 DR Pending

Opinion by Judge VanMeter; Judge Dixon concurred; Judge Stumbo dissented and filed a separate opinion. On review from a judgment of the Greenup Circuit Court affirming the decision of the Greenup County Fiscal Court, the Court of Appeals vacated and remanded. Appellants owned property accessible only by either a county roadway or by a permissive easement across a neighboring property. The fiscal court closed the county roadway providing access to appellants' property after finding that the roadway was not "necessary" as that term is used in KRS 178.116(1)(b), and appellants sought review. In vacating, the Court of Appeals held that "necessary access" as used in KRS 178.116(1)(b) does not mean absolutely necessary access. Here, the only access to appellants' property, other than the county roadway, was a passway created by a temporary, oral, limited permissive easement subject to termination without notice. Since the limited permissive easement, regardless of the length of use, would never become a permanent right of ingress and egress without the landowner's permission, and given the fact that appellants, as landowners, have a right to reasonable access to the public highway system, the Court held that the county road provided "necessary access" to appellants' property pursuant to KRS 178.116(1)(b) and, for that reason, the roadway could not be closed by the fiscal court.

## **XIII. TAXATION**

### **A. *Farmers National Bank v. Commonwealth, Department of Revenue***

[2013-CA-000001](#) 05/22/2015 2015 WL 2437874 DR Pending

Opinion by Chief Judge Acree; Judges Taylor and VanMeter concurred. Appellants and their trade association challenged the constitutionality of certain provisions of KRS Chapter 134 establishing a legislative scheme by which delinquent tax certificates are sold to third-party purchasers who then pursue collection, sometimes resulting in a foreclosure action that affects appellants' interests as mortgagees. The Court of Appeals held that the legislative scheme was constitutionally sound generally; specifically, the Court held that the notice provisions afforded appellants and those similarly situated the constitutionally-required due process.

## XIV. TORTS

### A. *Fortney v. Guzman*

[2013-CA-000419](#) 05/22/2015 2015 WL 2437551 DR Pending

Opinion by Chief Judge Acree; Judges Maze and Stumbo concurred. The Court of Appeals affirmed a circuit court order granting summary judgment to appellees on appellant's defamation claim. The circuit court determined that the allegedly defamatory statements were protected by a qualified privilege, and that appellant adduced no evidence sufficient to create a genuine issue of fact that appellees abused or waived the privilege. Appellant relied on *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004), for the proposition that the fact of falsity justifies an inference of malice and argued that her allegations of falsity were sufficient to create genuine issues as to both falsity and malice. In affirming, the Court of Appeals relied on the recent decision of *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2015), and concluded that *Toler* overrules *Stringer* to the extent that the case could be cited for the proposition that malice can be inferred from the fact of falsity alone. Because appellant produced no evidence of appellees' malice, relying entirely on the now defunct inference, the Court held that appellant failed to create a genuine issue of material fact regarding malice that would have defeated the qualified privilege.

## XV. TRUSTS

### A. *Dishman v. Dougherty*

[2013-CA-000558](#) 05/01/2015 2015 WL 1966724 Rehearing Denied

Opinion by Judge J. Lambert; Judge Thompson concurred; Judge Clayton concurred in result only. An appeal and cross-appeal were taken from rulings concerning whether attorney's fees expended by a trustee were payable by the trust. Prior to their marriage, the husband and wife entered into an antenuptial agreement that kept their assets separate. Several years later, they signed mutual powers of attorney that named the other as the attorney-in-fact and that gave the other the authority to convey real or personal property to the trustee of a trust agreement between that person and the trustee. When the husband became ill, and without informing him or his family members, the wife used that provision of the power of attorney to create an irrevocable trust and transferred all of the husband's property that she could into the trust in his name. The husband commenced a lawsuit to dispute the wife's action, which was continued by his daughter after his death. The daughter argued that the wife did not have the authority to create a trust and that she had acted in bad faith in expending money from the trust on attorney's fees to create the irrevocable trust and to file guardianship proceedings against the husband. The circuit court determined that the power of attorney gave the wife the authority to create the trust and, following a bench trial, found that some of the fees were payable by the trust while others were not. The wife appealed from the portion failing to award her all of the fees she had personally expended, while the daughter cross-appealed to argue several issues related to the wife's authority to create a trust and whether the circuit court properly determined that any attorney's fees were payable by the trust. Considering the cross-appeal first, the Court of Appeals reversed the circuit court's interlocutory summary judgment, holding that the circuit court erred as a matter of law and that the wife did not have the authority to create a trust because the power of attorney only gave her the authority to convey property into a trust, not the express authority to create one. Because the power of attorney specifically addressed trusts, the parties should have included the express authority to create a trust in light of the antenuptial agreement that deliberately kept their respective property separate.