

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
DECEMBER 2013**

I. CORPORATE LAW:

- A. Baptist Physicians Lexington, Inc. et al. v. The New Lexington Clinic, P.S.C.
2012-SC-000242-DG December 19, 2013**

Opinion of the Court by Justice Abramson. All sitting; all concur. When three physicians who served as directors on the board of a medical services corporation left their employment with the corporation to work for a competing medical services provider, the corporation brought suit alleging that the physicians had breached the fiduciary duties they owed under the common law as corporate directors. The trial court entered summary judgment for the defendants, because in its view the plaintiff's common-law claims had been superseded by KRS 271B.8-300, and the plaintiff had failed to plead a statutory claim. Affirming (on other grounds) the Court of Appeals' reversal of the summary judgment, the Supreme Court held that KRS 271B.8-300, while codifying aspects of the common-law business judgment rule, does not abrogate common-law breach of fiduciary duty claims such as the wrongful competition claims alleged here.

II. CRIMINAL LAW:

- A. Kenneth Brown v. Commonwealth of Kentucky
2012-SC-000264-MR December 19, 2013**

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J., Abramson, Keller, Scott, and Venters, JJ., concur. Noble, J., disagrees with the conclusion that playing the short television clip was not error because the defense "opened the door," but concurs in the court's judgment because the error was harmless.

Appellant was convicted of murder, two counts of first-degree wanton endangerment, tampering with physical evidence, and trafficking in marijuana. The trial court was affirmed on each of the following issues: (1) the seizure of privileged material from Appellant's jail cell did not violate his right to counsel because the privileged information was not disclosed and the intrusion was not purposeful; (2) while being interrogated, Appellant's numerous inquiries into the length of time before an attorney could be present was not an unequivocal invocation of his right to counsel; (3) Appellant was not denied a fair trial due to the prosecution's failure to provide the identity or opinion of its expert witness because RCr 7.24(1) required Appellant to first request in writing the desired information; (4) a law enforcement agent was properly qualified as an expert in bullet penetrability of windshields and safety glass based on his experience and training; (5) the victim's toxicology report, which showed recent use of marijuana, was properly excluded as irrelevant; (6) Appellant was not entitled to a directed verdict of acquittal on the trafficking in marijuana charge; (7) the Commonwealth was properly allowed to impeach Appellant on a collateral issue after Appellant opened the door to such issue in his direct testimony; (8)

Appellant was not entitled to a mistrial due to the Commonwealth's failure to redact portions of Appellant's recorded interview wherein detectives commented on Appellant's wrongful actions.

B. Commonwealth of Kentucky v. Lee Andrew Wright
2012-SC-000368-DG December 19, 2013

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Keller, Noble and Scott, JJ., concur. Abramson, J., concurs in result only. Criminal law. The final judgment of the trial court sentenced Appellant Wright to five-years' probation and required him to pay restitution in 30 monthly installments. Appellant failed to pay as required, after the expiration of the five-year period of probation, the Commonwealth moved for revocation. The trial court determined it was without jurisdiction to revoke probation because the probationary period had already expired. The Court of Appeals affirmed. Upon discretionary review, the Supreme Court held that: (1) KRS 533.020 does not provide for an "automatic" extension of an established period of probation because restitution remains unpaid; (2) KRS 533.020(4) authorizes a trial court to extend the period of probation beyond five years only upon findings that such an extension is "necessary" for payment of restitution; (3) that such an extension must be by a duly entered order rendered prior to the expiration of the original period of probation; that KRS 533.020(1) requires that any extension of probation be implemented prior to the termination of the previously established probationary period.

C. Sotoy A. Minter v. Commonwealth of Kentucky
2012-SC-000371-MR December 19, 2013

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Law; Questions Presented: 1) Whether trial court erred in denying motion for directed verdict; 2) Whether trial court improperly applied KRE 412 to prohibit evidence of victim's sexual history; and 3) Whether the trial court erred in allowing Commonwealth to proceed on persistent felony offender charge (PFO). Held: 1) Sufficient evidence was presented at trial to support a reasonable juror's belief Minter had committed first-degree burglary. A jury may choose to believe the testimony of one witness above that of another, and to deny motion was not unreasonable; 2) The language of KRE 412 clearly bars the disclosure of prior sexual acts that have no relevance on the trial. Furthermore, the policy behind KRE 412 allows for no differentiation between heterosexual behavior and homosexual behavior; and 3) The defendant suffered no undue prejudice from the inclusion of the PFO charge.

D. Kathleen Wise v. Commonwealth of Kentucky
[2012-SC-000633-MR](#) December 19, 2013

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, and Scott, JJ., concur. Venters, J., concurs in result only by separate opinion in which Keller, J., joins. The issues reviewed on appeal included: (1) whether the trial court erred when it did not suppress statements Wise made after a polygraph examination, and (2) whether palpable error was committed by the trial court when it failed to instruct on the lesser-included offense of first-degree manslaughter.

Wise's suppression motion arose from statements she made after taking a polygraph examination in connection with the death of her husband. Prior to the examination, Wise signed a form that stated her Miranda rights. The form did not contain an explicit waiver of her rights. After the examination, Wise confessed to poisoning her husband to the polygraph examiner, and later, to other officers investigating her husband's death. On appeal, the Court addressed whether the polygraph waiver form was sufficient to inform Wise of her Miranda rights as to any post-polygraph questioning and whether she had, in fact, knowingly and voluntarily waived her constitutional rights.

The Court held that the form was sufficient to inform Wise of her rights as to any post-polygraph questioning, and that she had impliedly waived those rights by being advised of her rights and continuing to not assert them by talking with police. Two Justices found that the form was not sufficient to inform Wise of her rights as to her second interview with police, but found the error to be harmless.

The Court also concluded that the trial court did not commit palpable error when the trial court did not instruct on the lesser-included charge of first-degree manslaughter because Wise did not request the instruction at trial.

E. Alvin McDaniel v. Commonwealth of Kentucky
[2012-SC-000564-MR](#) December 19, 2013

Opinion of the Court by Justice Scott. Minton, C.J.; Cunningham and Venters, JJ., concur. Keller, J. concurs in part and dissents in part by separate opinion in which Abramson and Noble, JJ., join. A Kenton Circuit Court jury found Appellant, Alvin McDaniel, guilty of two counts of first-degree assault and of being a second-degree persistent felony offender (PFO). Appellant was sentenced to twenty-five years' imprisonment. He appealed as a matter of right, Ky. Const. § 110(2)(b), asserting that (1) the trial court erred in failing to strike three prospective jurors for cause, (2) the trial court erred in failing to provide limiting instructions to witness testimony, (3) the trial court erred in allowing the expert opinions of a witness not identified as an expert, (4) the Commonwealth improperly admitted evidence of other crimes, and (5) his right to due process was violated when he was convicted of first-degree assault after the Commonwealth failed to prove one of his victims suffered a "serious physical injury." The Supreme Court affirmed in part and reversed and remanded in part, holding: (1)

the trial court did not err by not striking three prospective jurors for cause; (2) threat evidence may be admissible if it aids the jury on an issue of witness credibility and admission of witness testimony in this case did not amount to palpable error; (3) the trial court's errant admission of expert opinions was harmless error; (4) the trial court did not err in allowing evidence of other crimes; and (5) the Commonwealth failed to prove the element of "serious physical injury," therefore, the Supreme Court reversed Appellant's conviction for first-degree assault and remanded for retrial on Appellant's lesser-included offenses.

**F. Shelby Little, Jr. v. Commonwealth of Kentucky
2011-SC-000628-MR December 19, 2013**

Opinion of the Court by Justice Abramson. Minton, C.J.; Noble and Venters, JJ., concur. Cunningham, J., dissents by separate opinion in which Keller and Scott, JJ., join. Little appealed as a matter of right from a judgment sentencing him to 70 years' imprisonment for two counts of first-degree assault, first-degree wanton endangerment, operating a motor vehicle under the influence of alcohol, driving without an operator's license, and being a persistent felony offender in the first degree. Little argued that the trial court violated his due process right to a fair trial by failing to remove two jurors for cause, that his right to confrontation was violated by the introduction of a toxicology report without the testimony of the author, and that the wanton endangerment conviction violated double jeopardy. The Supreme Court concluded that the trial court did not abuse its discretion in refusing to strike a juror for cause when that juror, who had lost family members in DUI accidents, stated that she could remain impartial and unbiased. The Court further held that the introduction of a hospital laboratory report without the testimony of the report's author did not violate Little's right to confrontation, as the report was created for the purposes of medical diagnosis. Finally, the Court determined that the Commonwealth's apparent abandonment of the wanton endangerment claim as to one of the victims in Little's first trial barred re-prosecution of that charge in his subsequent trial. Little's first-degree wanton endangerment conviction and sentence as to that victim was reversed and remanded.

**G. Commonwealth of Kentucky v. Asia Bucalo
2012-SC-000123-DG December 19, 2013**

Opinion of the Court by Justice Cunningham. Abramson, Keller, Scott and Venters, JJ., concur. Noble, J., dissents by separate opinion in which Minton, C.J., joins. Trial court did not err in denying Appellant's motion to suppress evidence seized during a traffic stop and resulting dog sniff. A total detention time of 105 minutes went beyond the appropriate time necessary to complete the purpose of the traffic stop. Although the traffic stop was unduly prolonged, further detention was justified by a reasonable and articulable suspicion that criminal activity was afoot.

III. DOMESTIC RELATIONS:

A. **Shane Thomas Masters v. Dena Sue Greer Masters**
[2012-SC-000420-DG](#) December 19, 2013

Opinion of the Court by Justice Venters. All sitting; all concur. Family Law: Questions Presented: 1) Whether a family court loses jurisdiction over a motion to amend child custody where the affidavit requirement of KRS 403.340 is not met. Held: 1) An error with respect to the affidavit requirement of KRS 403.340 does not affect subject matter jurisdiction. The Family Court has jurisdiction over child custody motions as delineated in the Kentucky Constitution and statutes. This “type of case” jurisdiction is not removed because of statutory error. Rather, the error provides a party with an opportunity to pursue relief based on the court’s improper exercise of its power. Reversed and remanded to Court of Appeals for further proceedings.

IV. OPEN RECORDS:

A. **Leonard Lawson v. Office of the Attorney General and Jack Conway, as Attorney General of Kentucky, et al.**
[2012-SC-000201-DG](#) December 19, 2013

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, and Venters, JJ., concur. Scott, J, concurs in part and dissents in part by separate opinion in which Keller, J., joins. Noble, J., not sitting. When the Attorney General’s Office announced its intention to give newspapers access to certain records pertaining to a 1983 investigation into alleged attempts to “rig” the bids on contracts with the Department of Transportation for highway construction, one of contractors brought a reverse Open Records Act suit, claiming that release of the records would violate the Act’s provisions against unwarranted invasions of personal privacy. Affirming the Court of Appeals’ denial of relief to the contractor, the Supreme Court held that records apt to shed light on Department of Transportation decisions and policies in 1983 and on the Attorney General’s investigation of the alleged improprieties retained a sufficient public interest to require their release. The Court also held that the contractor did not have standing to invoke the Act’s exemption for prosecutorial records.

B. **Kentucky New Era, Inc. v. City of Hopkinsville, Kentucky**
[2012-SC-000290-DG](#) December 19, 2013

Opinion of the Court by Justice Abramson. All sitting; all concur. In response to a newspaper’s Open Records Act request for access to certain arrest citations and incident reports, a city and its police department disclosed most of the records, but redacted from them, pursuant to the Act’s privacy exemption, personal information (e.g. addresses, phone numbers, social security numbers, drivers license numbers) of the witnesses, victims, and uncharged suspects involved. Affirming the Court of Appeals’ approval of the redactions, the Supreme Court held that release of the redacted information would not serve the Act’s purpose of opening the government to public scrutiny, but rather the non-disclosure furthered the Act’s intent to shield citizens from unwarranted invasions of their privacy.

V. SCHOOL LAW:

**A. Knott County Board of Education, et al. v. Grace Patton
2012-SC-000139-DG **December 19, 2013****

Opinion of the Court by Justice Venters. All sitting; all concur. Civil. Whistleblower actions; Governmental Immunity. After being reprimanded by the principal at Knott Central High School Appellee, a Knott County school teacher, complained to the principal and to the school superintendant that the reprimand was invalid. Shortly thereafter, the Knott County Board of Education and the Knott Central High School's Site Based Decision-Making Council made school curriculum changes that resulted in the elimination of her job. She then brought suit alleging violation of rights in the termination of her job; the trial court dismissed her complaint. On appeal, the Court of Appeals reversed, holding that the teacher had stated a valid cause of action under Kentucky's whistle-blower statute, KRS 61.102. On discretionary review, the Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court dismissing the action, holding: (1) that teacher's communiqué to the principal and the school superintendent was simply an expression of her personal opinion that the reprimand placed in her file was invalid, and did not constitute the kind of reporting of violations of law or "suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety" that would trigger her rights under KRS 61.102; and (2) that the members of the school board and the site-based decision making council of a public school the local school have qualified official immunity in deciding what courses are to be taught because such a decision is purely an exercise of judgment and is a discretionary act.

VI. STATUTORY CONSTRUCTION:

**A. Edna Bratton, Etc. v. CitiFinancial, Inc.
2012-SC-000630-DG **December 19, 2013****

Opinion of the Court by Justice Keller. Abramson, Cunningham, Keller, Noble, Scott and Venters, JJ., sitting. All concur. Minton, C.J., not sitting. Edna Bratton and her late husband, R.G. Bratton, sold a parcel of property to Boyd and Nannie Brooks. The Brooks obtained financing through CitiFinancial and gave CitiFinancial a mortgage on the property. At the closing, the parties did not notice that the deed from the Brattons to the Brooks and the mortgage the Brooks executed contained, in addition to a description of the parcel the Brooks purchased, the descriptions of two other parcels the Brattons owned. The Brattons noticed this error and contacted the local CitiFinancial manager to have the two erroneous descriptions removed from the deed and mortgage and to have the mortgage released on those two parcels. When CitiFinancial did not take steps that were satisfactory to the Brattons, they filed suit arguing that KRS 382.365 compelled CitiFinancial to release the mortgages. Furthermore, the Brattons argued that they were entitled to the "automatic" damages set forth in KRS 382.365.

The trial court granted summary judgment in favor of the Brattons and awarded damages under KRS 382.365. Before the Court of Appeals, CitiFinancial argued that the Brattons had not complied with the notice requirements in KRS 382.365. The Court of Appeals agreed and reversed the trial court.

The Supreme Court affirmed the Court of Appeals, but for different reasons. The Supreme Court noted that KRS 382.365 applies to mortgages that have been "satisfied" not to mortgages that have been erroneously filed. Because the mortgage in question had never been satisfied, the Brattons could not avail themselves of the relief provided in KRS 382.365, although they may have had other causes of action.

VII. WORKERS' COMPENSATION:

**A. Saint Joseph Hospital v. Angela Frye, Honorable R. Scott Borders,
Administrative Law Judge; and Workers' Compensation Board
2012-SC-000691-WC **December 19, 2013****

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Noble, Scott and Venters, JJ., concur. Abramson, J., concurs in result only. Angela Frye suffered a work-related injury on January 3, 2008. The parties litigated her claim related to that injury. The ALJ held a final hearing on April 9, 2009, and he rendered an opinion and award on June 2, 2009. On April 23, 2009, (following the final hearing but before the ALJ rendered his opinion) Frye suffered another work-related injury. She filed her claim for that injury on April 20, 2010. The ALJ dismissed Frye's 2010 claim, finding that Frye's 2008 claim was pending when she suffered her 2010 injury and she was required by KRS 342.270 to join those two claims. The Board reversed the ALJ, holding that there was no mechanism for the ALJ to reopen proof after the final hearing; therefore, a claim is not "pending" after the final hearing. The Court of Appeals affirmed.

The Supreme Court affirmed. In doing so, the Court noted that an ALJ only has 60 days after holding a final hearing to render an opinion. Thus, even if Frye had filed a claim for her 2010 injury the day it occurred and the ALJ had consolidated the two claims, there is no provision for reopening proof after a final hearing, and the parties would not have had time to litigate the 2010 claim before the ALJ was required to render an opinion. The Court concluded that, absent a regulatory framework to deal with this situation, a claim is no longer pending between the time of the final hearing and the ALJ's opinion. However, the Court also held that the preceding does not "extend to claims pending on appeal before the Board, the Court of Appeals," or the Supreme Court. Those appellate bodies have the power to remand a claim to the ALJ for additional proceedings, which contemplates the reopening of proof.

VIII. WRITS:

- A. Ridgeway Nursing & Rehabilitation Facility, LLC, Etc., et al. v. Honorable William E. Lane, Judge, Bath Circuit Court, Division I, et al.**
2013-SC-000219-MR December 19, 2013

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Keller, J., not sitting. Ridgeway Nursing and Rehabilitation Facility sought a writ of mandamus requiring the dismissal of claims brought against it or, alternatively, the disqualification of opposing counsel, Wilkes & McHugh. As grounds for the writ it sought, Ridgeway alleged that an investigator working at the direction of Wilkes & McHugh contacted employees of Ridgeway in contravention of Kentucky Rules of Professional Conduct 4.2. In declining to issue a writ, the Court found that Ridgeway presented no evidence that the investigator obtained any prejudicial information during the alleged improper contacts, and that the trial court had already announced that it would take appropriate action to prevent the admission of any unethically obtained evidence. As a result, the Court held that Ridgeway had an adequate remedy by appeal if any impermissibly obtained were to be introduced at trial, and that Ridgeway would not suffer irreparable harm in the absence of a writ. Further, the Court stressed that the civil arena is not the proper venue for the imposition of attorney discipline and that attorney disqualification should only be employed to remedy an ethical violation when necessary to protect the aggrieved party. The Court was careful to note, however, that its denial of the writ does not allow ethical violations to go unpunished, as there is always a potential for KBA disciplinary proceedings.

IX. ATTORNEY DISCIPLINE:

- A. Kentucky Bar Association v. Unnamed Attorney**
2012-SC-000388-KB December 19, 2013

Opinion of the Court. All sitting. Minton, C.J.; Keller, Noble and Venters, JJ., concur. Abramson, J., concurs by separate opinions. Scott, J., concurs in part and dissents in part by separate opinion in which Cunningham, J., joins. During the court of Unnamed Attorney's representation of a fellow attorney in a disciplinary matter, Unnamed Attorney negotiated a settlement between his client and the complaining party. The terms of the negotiated settlement resulted in charges of professional misconduct against Unnamed Attorney because the terms of the settlement agreement required the complaining party to refuse to cooperate voluntarily with the Kentucky Bar Association in any investigation into the matter. The Trial Commissioner adjudged Unnamed Attorney guilty of professional misconduct for entering into such an agreement with a witness but the KBA Board of Governors overturned that determination on appeal. Neither party appealed but the Court exercised its discretion to review under SCR 3.370(8). On review, the Court reversed, in part, and affirmed, in part, the decision of the Board of Governors, finding Unnamed Attorney guilty of violating SCR 3.130-3.4(g) but not guilty of violating SCR 3.130-3.4(a) and issuing a private reprimand.

**B. Kentucky Bar Association v. George W. Woodcock, Jr.
2013-SC-000436-KB December 19, 2013**

Opinion of the Court. All sitting; all concur. Woodcock was suspended from the practice of law in Illinois for a period of six months. He promptly notified the Court of his suspension. Upon the KBA's motion, the Court issued an order requiring Woodcock to show cause why identical reciprocal discipline against him should not be imposed in Kentucky under Supreme Court Rule 3.45. The Court found that Woodcock's misconduct warranted the imposition of the same discipline and retroactively suspended him from the practice of law for a period of six months, effective as of the date of his suspension in Illinois.

**C. Kentucky Bar Association v. D. Anthony Brinker
2013-SC-000591-KB December 19, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Keller, J., not sitting. The Board of Governors recommended that the Court publicly reprimand Brinker for violating Supreme Court Rule (SCR) 3.130-8.1(b) (knowingly failing to respond to a lawful demand for information from an admissions or disciplinary authority). Brinker was suspended from the practice of law in October 2010 for violating a Supreme Court Order requiring him to pay a fine for failing to comply with CLE requirements. As a result, Brinker had 10 days to notify all clients and courts in which he had pending cases of his suspension. Brinker sent the notices, albeit outside of the 10-day time period. Thereafter, a judge mailed a Notice to Dismiss for Failure to Prosecute to Brinker in a case in which he was counsel of record. In April 2012, Brinker filed a court pleading styled "Motion to Maintain Action," wherein he explained that he had been temporarily suspended from the practice of law and that arrangements were being made for a successor attorney to take over the case. The judge contacted the Office of Bar Counsel, expressing concern that Brinker continued to show his law office as his address and that he did not believe that Brinker had notified either opposing counsel or the client of his suspension. An Inquiry Commission complaint was served on Brinker, who failed to respond. The Board of Governors found Brinker guilty of violating SCR 3.130-8.1(b) and, taking into account Brinker's prior discipline and the applicable law, recommended that the Court publicly reprimand Brinker for his misconduct. The Court agreed with the recommendation and publicly reprimanded Brinker.

**D. F.J. Anderson v. Kentucky Bar Association
2013-SC-000722-KB December 19, 2013**

Opinion of the Court. All sitting; all concur. Anderson moved the Court to enter an Order resolving the pending disciplinary proceedings against him by suspending him from the practice of law for 30 days, with the condition that he attend a remedial ethics program offered by the Office of Bar Counsel. The motion was the result of a negotiated agreement with the Office of Bar Counsel. As part of the agreement, Anderson admitted violating SCR 3.130-3.1 and SCR

3.130-1.7(a). The Court found Anderson guilty of violating the Rules of Professional Conduct and suspended him from the practice of law for 30 days.