

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2014**

I. CRIMINAL LAW:

**A. General Tackett, Jr. v. Commonwealth of Kentucky
2013-SC-000208-MR October 23, 2014**

Opinion of the Court by Justice Keller. All sitting. Justice Abramson, Justice Cunningham, and Justice Scott concur. Justice Venters concurs in result only by separate opinion. Justice Noble dissents by separate opinion in which Chief Justice Minton joins. Tackett was convicted of two counts of first degree sexual abuse and three counts of first degree sodomy involving two victims, and he was sentenced to thirty years' imprisonment. On appeal Tackett raised numerous issues, the majority of which were unpreserved.

The Court first held that a physician's testimony that the victim's hemorrhoidal tag might or might not support a finding of sexual abuse did not prejudice Tackett. Furthermore, Tackett failed to show that it is probable a different result would have occurred if that testimony had been excluded. Next, the Court held that the Commonwealth's reference to uncharged acts in its opening statement, while erroneous, did not rise to the level of palpable error. Third, the Court held that the indictment was sufficiently broad to cover allegedly "prior bad acts" testimony and that admission of the testimony was not erroneous. Fourth, testimony from the victims and their mothers either did not amount to bolstering or was admissible because it was offered in response to attacks on the victims' credibility by Tackett's counsel. Fifth, Tackett waived the issue that a juror should have been excused, and he failed to establish how that juror's absence would have resulted in a different verdict. Sixth, the Court held that a drawing the male victim made when he was approximately six years old allegedly depicting sexual acts was relevant and admissible. Finally, the Court held that, although Tackett had preserved issues regarding his right to a speedy trial, he failed to show that the Commonwealth caused a delay in bad faith, and he failed to specifically identify any prejudice.

Justice Venters concurred in result only, writing that he agreed with Justice Noble's dissent, but could not join it because Tackett failed to preserve the majority of the alleged errors for appellate review, and the accumulation of those unpreserved errors did not amount to palpable error.

Justice Nobel, joined by Chief Justice Minton, dissented because she believed that Tackett raised legitimate issues about the admission of prior bad acts evidence and the admission of that evidence, in conjunction with all of the unpreserved errors, precluded Tackett from obtaining a fair trial.

B. Ethan Thomas Hughes v. Commonwealth of Kentucky
[2013-SC-000291-DG](#) October 23, 2014

Opinion of the Court by Justice Scott. Cunningham, Noble, and Venters, JJ., join. Abramson, J., dissents by separate opinion in which Minton, C.J., and Keller, J., join. Appellant, Ethan Hughes, was convicted of second-degree rape, for which he was sentenced to ten years' imprisonment. The Court of Appeals affirmed his conviction. The Supreme Court granted Appellant's request for discretionary review and reversed his conviction, finding that an irrelevant and prejudicial photograph of the victim was improperly introduced at trial.

C. Pamela S. Bartley v. Commonwealth of Kentucky
[2013-SC-000219-DG](#) October 23, 2014

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, Keller, and Venters, J.J., concur. Cunningham, J., dissents by separate opinion in which Scott, J., joins. Bartley was convicted of second-degree manslaughter for killing her husband and was sentenced to eight years imprisonment. The evidence in the Commonwealth's case-in-chief included a recorded conversation between Bartley and a police detective during which she was repeatedly silent in the face of accusatory questions. Before the interview began, the officer read Bartley her *Miranda* rights. On discretionary review, the primary issue was whether the admission of the recorded conversation violated Bartley's right against self-incrimination, requiring the Court to determine whether the Commonwealth may introduce a criminal defendant's pre-arrest, post-*Miranda* silence as substantive evidence in its case-in-chief.

The Court reversed Bartley's conviction and sentence and remanded for retrial. The Court held that (1) the giving of *Miranda* warnings generally bars admission of otherwise non-custodial silence as substantive evidence because the warnings include an implicit promise that silence will not be used against the accused; (2) due process bars the use of an accused's post-*Miranda*-warning "selective silence"; (3) Bartley did not implicitly waive her right to remain silent through her few tangential references to her husband's murder when the interrogating officer persistently ignored her attempts to remain silent on the matter; (4) the trial court erred in admitting the recording of the interrogation; and (5) the error was not harmless beyond a reasonable doubt. In his dissent, Justice Cunningham stated that he would find the error to be harmless beyond a reasonable doubt.

II. INJUNCTION

A. **Salahadin M. Gharad, M.D. v. St. Claire Medical Center, Inc.** **2014-SC-000470-I** **October 23, 2014**

Opinion and Order. All sitting. All concur. Dr. Salahadin Gharad, a cardiologist, was terminated from St. Claire Medical Center following various alleged violations of employee conduct and corporate policy. The terms of Gharad's employment included a noncompetition provision, prohibiting Gharad's performance of medical services in the hospital's nine-county service area for a period of two years following the termination. Gharad sued St. Claire for wrongful termination and sought, among other things, a declaration that the noncompetition provision is unenforceable. The trial court granted Gharad a temporary injunction, which prevented St. Claire from enforcing the noncompetition provision. St. Claire then successfully petitioned the Court of Appeals to have the injunction dissolved. Gharad sought interlocutory relief from the Court. In sum, without making any pronouncement regarding the general enforceability of noncompetition provisions involving physicians, the Court held Gharad failed to show the requisite extraordinary cause for interlocutory relief. According to the Court, the physician-patient relationship, in and of itself, was not sufficient to render Gharad's claim extraordinary or Gharad's injuries irreparable. The Court acknowledged damages may be more difficult to calculate as a result of the noncompetition provision, but they are not impossible, and, therefore, Gharad suffered no irreparable injury.

III. REAL PROPERTY LAW:

A. **Sheila T. Kircheimer, et al. v. Regina S. Carrier, et al.** **2012-SC-000716-DG** **October 23, 2014**

Opinion of the Court by Justice Abramson, reversing. All sitting. All concur. Subdivision developers appealed from an order of the Breckinridge Circuit Court declaring a subdivision roadway a private road and enjoining the developers from allowing homeowners on nearby property to install driveways and culverts which would open onto that road. The Court of Appeals reversed the trial court, concluding that the disputed road, Sandy Beach Lane, was a public roadway that was dedicated by estoppel involving plat. The Supreme Court concluded that the Court of Appeals erred in applying that doctrine to the facts presented. The Court determined that legally enforceable documents established Sandy Beach Lane's status as a private road, and that well-established Kentucky law prohibited the enlargement of the easement for use of the road. Accordingly, the Court reversed the Court of Appeals and reinstated the order of the Breckinridge Circuit Court.

IV. TORTS:

A. **Rueben J. Wright, et al. v. Kim Carroll, et al.**
2013-SC-000528-DG **October 23, 2014**

Opinion of the Court by Justice Scott. All sitting. All concur. Appellants, Reuben J. Wright and Matthew Keeton Trucking, sought discretionary review by the Supreme Court of the Court of Appeals' opinion which held that the trial court abused its discretion by not granting a directed verdict in favor of Appellee, Kim Carroll. The Supreme Court granted discretionary review and affirmed the Court of Appeals, holding that when a motorist enters the opposite lane of traffic and an accident results, that motorist is presumptively negligent. To rebut the presumption, the motorist must present evidence that his presence in the wrong lane of traffic was not the result of either his own negligence or a situation that the motorist could have reasonably anticipated. Because vehicles stopped at an intersection is a normal traffic condition that Wright could have reasonably anticipated, the Supreme Court held that Wright failed to rebut the presumption of negligence. Thus, Carroll was entitled to a directed verdict on the issue of Wright's liability and the case was remanded to the trial court for retrial on the issue of damages.

V. ATTORNEY DISCIPLINE:

A. **Kentucky Bar Association v. John Scott Benton**
2014-SC-000399-KB **October 23, 2014**

Opinion and Order. All sitting; all concur. Benton pleaded guilty to one count of second-degree wanton endangerment and one count of fourth-degree assault (both of which are Class A misdemeanors) arising from a physical altercation with a former girlfriend outside a bar in downtown Lexington. Several months later, he pleaded guilty to third-degree terroristic threatening (also a Class A misdemeanor) for sending threatening text messages and voicemails to an 18-year-old male schoolmate of his daughter. Benton served a 60-day term of imprisonment for the latter offense. For the former offenses, Benton was sentenced to concurrent 12-month terms of imprisonment, probated for two years subject to several conditions, including that he undergo substance abuse evaluation and treatment and submit to regular drug-testing.

The convictions resulted in disciplinary proceedings. Rather than issuing a charge to initiate the full, formal disciplinary process, the Inquiry Commission gave Benton private admonitions with conditions under SCR 3.185. Subsequently, he twice violated the conditions of his criminal probation by testing positive for marijuana, and he eventually absconded from probation supervision. The Inquiry Commission took up the disciplinary matters again and issued two one-count charges of professional misconduct for violations of SCR 3.130-8.4(b) ("commit[ting] a criminal act that reflects adversely on the lawyer's honesty,

trustworthiness or fitness as a lawyer”) related to the separate convictions. Benton filed no response to either charge, and the matter was submitted to the Board of Governors as a default case. The Board voted unanimously to find Benton guilty of the charges and, in light of his lack of any prior disciplinary history, other suspensions, withdrawals, or resignations of his membership in the KBA, recommended a 181-day suspension and referral to KYLAP. The Court declined to undertake review under SCR 3.370(8) and adopted the Board’s recommendation under SCR 3.370(9).

B. Charles David Keen v. Kentucky Bar Association
2012-SC-000410-KB October 23, 2014

Opinion of the Court. All sitting. All concur. Keen received a public reprimand in 2012. Keen agreed that if he received any additional charges in the year following the reprimand, he would be subject to a 30 day suspension. During that one-year period, Keen received two new charges, and the Court suspended his license for 30 days pursuant to the 2012 opinion.

The two new charges involved Keen's failure to file an answer in one dissolution matter and his failure to file a petition for dissolution in another matter. As a result of those charges, Keen moved for a public reprimand. The KBA did not object on the condition that Keen not receive any new charges for a period of 2 years. In the event Keen receives new charges, he will be subject to a 61 day suspension. The Court granted Keen's motion and publicly reprimanded him, subject to the preceding condition.

C. Adrienne A. Thakur v. Kentucky Bar Association
2014-SC-000543-KB October 23, 2014

Opinion of the court. All sitting. All concur. Thakur negotiated a suspension of 5 years for the theft of funds from her previous firm and clients of said firm. Thakur has repaid all the funds and admitted to her ethical violations. She has also agreed to take the KBA Ethics and Professionalism Enhancement Program and pass the exam given at the end of the program before applying for reinstatement.