

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
FEBRUARY 2009**

I. ADMINISTRATIVE LAW

- A. Louisville / Jefferson County Metro Govt. v. TDC Group, LLC,
d/b/a Molly Malone’s & Alcoholic Beverage Control Board
[2007-SC-000315-DG](#) 2/19/2009
[2007-SC-000581-DG](#) 2/19/2009**

Opinion by Justice Noble; Justice Abramson not sitting. Molly Malone’s (a restaurant in Louisville) sought to replace its restaurant drink license with a retail liquor drink license. The Alcoholic Beverage Control (ABC) administrator denied the request after he determined Molly Malone’s was within 700 feet of other establishments having a retail liquor license, which is prohibited by KRS 241.075. Molly Malone’s appealed to the ABC Board, who concluded the statute’s requirement that the measurement be taken along the “shortest route of ordinary pedestrian travel” meant a route that is both safe and lawful. The Board determined that the route measured by the administrator was incorrect and that the proper route—as advocated by Molly Malone’s-- was greater than 700 feet, and ordered the application granted. The Court of Appeals affirmed on different grounds, ruling that the administrator’s route was neither unsafe nor unlawful—but held the statute unconstitutionally violated the prohibition on special legislation found in Sections 59 and 60 of the Kentucky Constitution.

The Supreme Court affirmed, but on different grounds than the Court of Appeals-- declining to address the issue of the statute’s constitutionality, despite Molly Malone’s arguments that the Court was required to do so. The Court held that the Board was incorrect when it read KRS 189.570(6)(a) to prohibit crossing the street where the administrator did when making his measurement. However, while the Court found the Board’s determination that the route was unlawful was incorrect, it also found its determination that the route was unsafe was supported by substantial evidence. Accordingly, the Court held that the Board’s decision to adopt the measurement proposed by Molly Malone’s was proper, as was its decision to grant the application.

II. CIVIL PROCEDURE

- A. **James B. Tennill, Sr. v. Cyrus M. Talai**
[2007-SC-000046-DG](#) 2/19/2009
[2007-SC-000673-DG](#) 2/19/2009

Opinion by Justice Schroder; all sitting. Tennill received a default judgment against Talai for personal injuries suffered in a motor vehicle accident. Prior to a hearing on the issue of damages, Talai propounded written interrogatories to Tennill and took Tennill's deposition. The trial court took evidence on damages and awarded Tennill \$45,076. The Court of Appeals reversed the damages award on the grounds that since Tennill did not respond or object to Talai's written interrogatories, he was in violation of CR 8.01(2). Following the rule in Fratzke, the Court of Appeals held that Tennill's failure to specify unliquidated damages in response to written interrogatories amounts to an effective answer that his claim for unliquidated damages was zero dollars. The Supreme Court reinstated the damages award, distinguishing the case from Fratzke. The Court noted that unlike Fratzke, Tennill's failure to respond to interrogatories was harmless since Tennill's counsel waived strict compliance with CR 8.01(2) when he deposed Tennill on the issue of damages but failed to ask about Tennill's unliquidated damages claim.

III. CRIMINAL LAW

- A. **Commonwealth v. Gary Davidson**
[2006-SC-000180-DG](#) 2/19/2009

Opinion by Special Justice Moore; Justice Noble, Justice Venters, Justice Cunningham, Justice Abramson and Special Justice R. Michael Sullivan concur. Davidson was found guilty of unlawful imprisonment in the first degree and assault in the second degree. The Court of Appeals affirmed the unlawful imprisonment conviction, but reversed the assault conviction, holding that the trial court committed palpable error when it instructed the jury on second degree assault on the theory that fists were "dangerous instruments." The Court of Appeals held that double jeopardy prevented retrial on the assault charge since there was insufficient evidence to support a finding that the victim suffered "serious physical injury" as defined by KRS 500.080(15). The Supreme Court affirmed the Court of Appeals, noting that under Burks, double jeopardy prevents retrial when the reviewing court has found the evidence legally insufficient, since the defendant should have received a directed verdict of acquittal at trial. Justice Scott

dissented in part, characterizing reversal as a product of “trial error” which would not preclude retrial on the on assault second charge.

B. Nicholas L. Depp v. Commonwealth
2007-SC-000575-MR 2/19/2009

Opinion by Justice Noble; all sitting. After a trial where he represented himself, Depp was convicted of first-degree rape and first-degree sodomy. On appeal Depp argued that the trial court did not follow the procedures set forth by the U.S. Supreme Court in Faretta concerning criminal defendants who wish to waive their right to counsel and represent themselves. Specifically, Depp argued that he was entitled to reversal because the trial court did not explicitly state on the record that Depp’s waiver was “knowing and voluntary.” In the wake of Faretta, the Kentucky Supreme Court established a bright-line rule in Hill, stating the trial court must hold an evidentiary hearing at which 1) the defendant must testify that his choice to represent himself is voluntary, knowing, and intelligent; 2) the trial court must warn the defendant of the dangers of relinquishing the benefits of an attorney; and 3) the trial court must make a finding on the record that the waiver is done voluntarily, knowingly, and intelligently.

The Supreme Court affirmed the convictions, holding that the requirements of Hill notwithstanding, an appellate court must review the record to determine if the waiver was actually voluntary, knowing and intelligent and not rely upon “magic words” scripted for trial courts. “To the extent Hill purports to require a rigid, formulaic review of waiver of counsel, it is modified to comport with common sense,” stated the majority, adding that “to require that trial courts adhere to a script or be found in error is to elevate form over substance.” The Court also rejected Depp’s argument that he did not accept standby counsel because the trial court erroneously led him to believe that if he did, he would be prohibited from cross-examining witnesses personally.

Chief Justice Minton (joined by Justice Schroder) dissented, disagreeing with the majority’s conclusion that the record supported the trial court’s implicit finding that Depp’s waiver of counsel was voluntary, knowing and intelligent. The minority stated that the trial court erred when it informed Depp that he would not be able to personally conduct cross-examination of witnesses. The minority noted that under Partin a defendant, following an evidentiary hearing, may be precluded from cross-examination of victim witnesses, but the defendant can still participate by preparing questions. Furthermore, Partin does not prevent defendants from

cross-examining non-victim witnesses. The minority also expressed their disapproval of the abrogation of Hill, noting that criminal defendants in Kentucky enjoy more expansive rights in the area of self-representation under Section 11 of the Kentucky Constitution than those provided by the Sixth Amendment to the U.S. Constitution.

C. Tyrone Antoine Hartsfield v. Commonwealth
2007-SC-000077-DG 2/19/2009

Opinion by Chief Justice Minton; Justice Abramson not sitting. Hartsfield was indicted on rape and sodomy charges. The alleged victim, M.B., died before the indictment went to trial. The trial court excluded statements made by M.B. as violative of Hartsfield's Sixth Amendment right to confront adverse witnesses. The first set of excluded statements was made by M.B. to the Sexual Assault Nurse Examiner (SANE) at the hospital following the alleged rape. The second set of statements were made by M.B. when she fled her house immediately after the alleged rape. M.B. was said to have cried out to a passerby, "He raped me! He raped me!" She then ran to her daughter's house and made similar statements to her daughter. The Court of Appeals reversed, holding, *inter alia*, that the statements to the SANE nurse did not violate the confrontation clause.

The Supreme Court reversed the Court of Appeals, on the grounds that under the U.S. Supreme Court's decision in Crawford, the confrontation clause precludes admission of the statements of a witness unavailable to testify at trial if the witness' out-of-court statements were "testimonial," unless the accused had a prior opportunity to cross-examine the witness. Since M.B.'s statements were made to the SANE nurse-- an agent of law enforcement and active participant in a formal criminal investigation-- and since the statements were elicited for the purpose of gathering evidence and were not related to resolving an ongoing emergency, the Court concluded the statements were testimonial and thus barred by the confrontation clause.

The Court affirmed the Court of Appeals regarding the admissibility of the statements made by M.B. to the passerby and her daughter under the excited utterance exception to the hearsay rule. Justice Schroder concurred in result only, noting that he believed that the statements to the passerby and daughter fell into the "ongoing emergency" exception to Crawford found in Davis since the record indicated M.B. was fleeing from her attacker when the statements were made.

D. Commonwealth v. Bobby A. Jones
2006-SC-000650-DG 2/19/2009

Opinion by Justice Abramson; all sitting. Jones was convicted of possession of a firearm by a convicted felon. On appeal, Jones argued that the prosecution failed to prove the operability of the firearm-- which Jones contended was an element of the offense. The Court of Appeals reversed, holding that even if Jones had failed to properly preserve the issue, as was argued by the Commonwealth, the lack of proof that the rifle was an operational firearm rendered the conviction manifestly unjust under the palpable error standard in RCr10.26. The Supreme Court agreed with the Court of Appeal's conclusion that Jones had not properly preserved the sufficiency-of-the-evidence issue, noting that Jones' trial counsel did not state specific grounds for relief when making the motion for a directed verdict and did not renew the motion for directed verdict upon conclusion of the prosecution's rebuttal. However, the Supreme Court disagreed with the Court of Appeal's finding of palpable error and reinstated the jury's guilty verdict. The Court held that under Campbell, the KRS 527.010(4) definition of "firearm" incorporates the pre-penal code presumption that firearms work. Further, in Arnold, the Court held that inoperability of the firearm is an affirmative defense for which the defendant bears the burden of proof. Accordingly, the Court held proof of operability of the firearm is not necessary "unless there is non-speculative evidence at trial which calls the presumption into reasonable doubt." In his concurring opinion Justice Venters (joined by Justice Noble and Justice Schroder) stated that the statutory definition of a firearm as "any weapon which will expel a projectile by the action of an explosive" does not create an operability element to the offense, rather it is intended to distinguish firearms from weapons that expel projectiles via other means (i.e. air rifles, crossbows, etc.).

E. Robert Dickerson v. Commonwealth
2008-SC-000074-MR 2/19/2009

Opinion by Chief Justice Minton; all sitting. After the Supreme Court reversed his original convictions, Dickerson pled guilty to criminal abuse in the first degree and firearm possession by a felon. On appeal, he argued that he was denied his constitutional right to a speedy trial and that the Commonwealth engaged in prosecutorial vindictiveness when it obtained a new indictment containing new charges. As a threshold issue, the Supreme Court determined that even though there was nothing in the judgment of conviction indicating his guilty plea was conditional, Dickerson had S

nonetheless adequately preserved his appellate rights. The Court noted that even though the issues upon which appellate review was sought were not set forth in the plea documents, Dickerson had submitted motions for a speedy trial and to dismiss based on prosecutorial vindictiveness prior to entering into the guilty plea. In order to prevent situation like this from occurring in the future the Court urged the bench and bar “to specify in the record in conditional guilty pleas the precise issues being reserved for appellate purposes.”

Turning to the merits of the appeal, the Court rejected Dickerson’s speedy trial claim. Although the Court acknowledged that Dickerson had timely and adequately asserted his right to a speedy trial and suffered a presumptively prejudicial delay attributable in part to the prosecution’s failure to comply with discovery obligations, the Court held that Dickerson had failed to show actual prejudice. The Court also rejected Dickerson’s claim of prosecutorial vindictiveness, holding that even if Dickerson could make a *prima facie* showing of vindictiveness, the Supreme Court’s previous reversal had identified evidentiary problems that warranted the prosecution obtaining a new indictment with additional charges.

IV. DOMESTIC RELATIONS

A. Julie Anne Gaskill v. Jon Kevin Robbins

[2007-SC-000190-DGE](#) 2/19/2009

[2007-SC-000207-DGE](#) 2/19/2009

Opinion by Justice Noble; Chief Justice Minton not sitting. In a case of first impression in Kentucky, the Supreme Court held that the goodwill of a closely-held or sole proprietorship business can have both personal and enterprise value. The Court held that enterprise goodwill—based on a business’ established relationship with employees, customers and suppliers—is a marital asset, while personal goodwill—the goodwill that depends on the continued presence of a particular person is non-marital. The Court remanded the dissolution case back to the Family Court for a valuation based on its decision and held that the Family Court’s adoption of husband’s expert’s valuation of the wife’s oral surgery practice was an abuse of discretion where the expert reached his figure by taking the average of four different methods of valuation. The Court also held that Family Court’s decision to divide the marital estate equally was not an abuse of its discretion. Justice Abramson concurred in part, dissenting only from the portion of the majority’s opinion which precluded the trial court from presuming a

non-compete clause into the valuation, noting that such clauses are integral and typical in the sale of professional practices.

V. TORTS

A. **Lois DeVasier (Administratrix of the estate of Kenneitha Crady) v. William James, M.D.**

[2007-SC-000130-DG](#) 2/19/2009
[2007-SC-000365-DG](#) 2/19/2009

Opinion by Justice Venters; all sitting. Kenneitha Crady was murdered by her boyfriend, Rene Crissell, shortly after he had been seen by Dr. James. Crady's estate brought suit against Dr. James alleging he breached the duty to warn Crady imposed by KRS 202A.400. The jury returned a verdict in favor of Dr. James. The Court of Appeals affirmed, interpreting the statute to require that the threat triggering the duty to report be made directly to the mental health professional, not through an intervening agent, such as a nurse. Since there was no evidence that Cissell had directly expressed a threat to Dr. James, the Court of Appeals held that Dr. James was entitled a directed verdict. The Supreme Court, affirmed but on different grounds. The Supreme Court held that the Court of Appeals construed the word "communicated" as used in the statute too narrowly and ruled that the statute includes threats communicated by a patient to the mental health professional indirectly through agents who have a duty to relay the patient's information. The Court concluded that even though Dr. James knew of previous acts of violence by Cissell towards Crady, there was no evidence that Cissell communicated an actual threat to inflict harm upon Crady by physical violence. The Court rejected the estate's argument that the information communicated to Dr. James demonstrated that Cissell himself constituted a "threat" to Crady that would trigger the statutory duty to warn. The Court noted that the legislature, by the language of the statute, showed they intended that the patient communicate a threat towards an identifiable person, not that they simply are a threat.

B. **Flegles, Inc. v. Truserv Corporation**

[2006-SC-000471-DG](#) 2/19/2009
[2007-SC-000155-DG](#) 2/19/2009

Opinion by Justice Abramson; all sitting. Flegles Inc., which operated a family-owned True Value hardware store, sued its wholesale cooperative, Truserv claiming that Truserv made fraudulent misrepresentations which induced Flegles to build a new expanded store—which did not perform up to expectations. The

jury found for Flegles and awarded \$1.3 million in damages. The Court of Appeals reversed and ordered dismissal of Flegles' complaint. The Supreme Court affirmed the Court of Appeals, holding that Truserv's predictions of future performance did not support a claim of fraud. Generally, misrepresentation must relate to past or present material fact. Opinion or prediction may not be the basis for a misrepresentation action, unless the opinion either incorporates falsified past or present facts or the declarant falsely represents his true opinion of a future happening. In his dissent, Justice Scott (joined by Justice Schroder and Justice Venters) wrote that Truserv's concealment of business projections that were less optimistic than the one actually presented to Flegles amounted to a false representation of a future happening, sufficient to take the issue to the jury

VI. WORKERS' COMPENSATION

A. Clark County Board of Education v. Audeen Jacobs; Hon. Sheila C. Lowther, CALJ; Workers' Compensation Board [2008-SC-000222-WC](#) 2/19/2008

All sitting; all concur. Claimant was employed as a high school teacher and served as sponsor of the school's chapter of the Beta Club—a national honor student organization. While accompanying the club to a convention in Louisville, claimant fell and fractured her shoulder in four places. The school board asserted the injury was not work-related and denied the claim. The ALJ determined the injury was work-related, noting claimant attended the convention with her principal's approval and that she was not required to take sick or vacation time to do so. Further, the ALJ found that the club provided a service to claimant's employer by advancing the school's responsibility to educate students and prepare them for adult life. In affirming, the Supreme Court restated the test from Spurgeon for determining if an activity arises in the course of employment: 1) that an employer must exercise a sufficient degree of compulsion to permit a reasonable finding that it brought the disputed activity within the scope of the employment; and 2) that evidence of a specific employer benefit may bolster evidence of compulsion.

VII. ATTORNEY DISCIPLINE

A. Ky. Bar Assn. v. Robert N. Trainor [2008-SC-000827-KB](#) 2/19/2009

The Court imposed reciprocal discipline on an attorney publicly reprimanded by the Supreme Court of Ohio for violating their rule requiring lawyers to notify clients if they maintain malpractice insurance less than \$100,000 per occurrence and \$300,000 in aggregate. The Kentucky Supreme Court noted that while Kentucky has no equivalent requirement, by failing to follow an obligation under the rules of the Ohio Supreme Court, the attorney violated Kentucky SCR 3.130-3.4(c) which prohibits a lawyer from intentionally disobeying a tribunal.

B. James W. Conway v. Ky. Bar Assn.
2008-SC-000947-KB 2/19/2009

The Court granted attorney's request for order of permanent disbarment. Attorney had previously pled guilty in federal court to conspiracy to engage in monetary transactions in criminally derived property and was sentenced to 30 months in prison, followed by two years supervised release and ordered to pay restitution in the amount of \$5.4 million.

C. Ky. Bar Assn., CLE Commission v. Robert Paul Martin
2008-SC-000964-KB 2/19/2009

The Court fined attorney \$100 for failing to timely complete minimum CLE requirements. The Court found that the attorney failed to show cause for his deficiency of 1.0 hours of ethics credit.

D. Ky. Bar Assn., CLE Commission v. Adam Boyd Bleile
2008-SC-000962-KB 2/19/2009

The Court fined attorney \$175 for failure to accrue minimum CLE credits as required under SCR 3.661(1). The Court noted extenuating circumstances, namely that he participated in an online class that was erroneously listed on the ALI-ABA website as being accredited by the KBA. However, the Court noted that even if the course had been accredited, the attorney would still have been .25 credits deficient.

E. Ky. Bar Assn., CLE Commission v. John Rudd McGeeney
2008-SC-000969-KB 2/19/2009

The Court fined attorney \$750 for failure to accrue minimum CLE credits as required under SCR 3.661. The Court noted that an increased workload does not excuse a failure to comply with CLE obligations.