

KENTUCKY COURT OF APPEALS

PUBLISHED OPINIONS

JANUARY 2013

I. CIVIL RIGHTS

A. MEECE v. COMMONWEALTH

[2011-CA-001231](#) 01/11/13

Opinion by Judge VanMeter; Judges Nickell and Taylor concurred. Trial court did not erred in entering summary judgment in favor of Department of Corrections on death row inmate's claim that he was denied access to the penitentiary Institutional Religious Center to observe the Sabbath on Friday evenings and Saturday mornings. Court of Appeals concluded that there was no violation of Kentucky Corrections Policies and Procedures or deprivation of inmate's rights under the Religious Land Use and Institutionalized Inmates Act of 2000. Segregation of death row inmates from general population in religious center is based upon security concerns. Further, prison restrictions constituted a mere inconvenience to inmate's desired approach to the practice of his religion which did not inhibit his expression of religious beliefs.

II. CONSUMER PROTECTION

A. ROBERTS v. LANIGAN AUTO SALES

[2010-CA-000950](#) 01/04/2013

Opinion by Judge VanMeter; Chief Judge Acree and Judge Caperton concurred.

Court of Appeals upheld the dismissal of an action for fraud or for violation of the Kentucky Consumer Protection Act on the basis that purchase contract which contained a "sold as is" clause transfers to buyer the risk that the condition of the goods is not what the seller

represents. By agreeing to purchase a vehicle “as is,” purchaser agreed to make his own assessment of the condition of the vehicle in spite of seller’s representations and thus purchaser cannot later claim he relied on seller’s representations in agreeing to purchase vehicle.

III. EMPLOYMENT

A. HICKS v. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION

[2012-CA-000113](#) 01/04/13

Opinion by Judge Stumbo; Judge Thompson concurred; Judge Maze dissented.

Court of Appeals reversed and remanded a circuit court judgment affirming the denial of unemployment by the commission on the basis that the claimant was not given the chance to meaningfully present his evidence to the commission referee. It was an arbitrary denial of due process for the commission to refuse counsel’s request for an administrative subpoena and for a continuance of the hearing on the basis that the subpoena had not been issued.

IV. FAMILY LAW

A. HUGHES v. HUGHES

[2012-CA-000077](#) 01/04/13

Opinion by Judge Clayton; Judge Combs concurred; Judge Thompson dissented.

Trial court did not err in concluding that a CR 60.02 motion to terminate child support was not brought within a reasonable time where a period of ten years had elapsed since the dissolution proceeding and father was aware during most of that time that he was not the biological father of the parties’ youngest child.

B. YEAGER v. DICKERSON

[2008-CA-000153](#)

01/11/13

Opinion by Judge Stumbo, Judges Nickell and Thompson, concurred. In course of hearing to determine guardianship of minor child, attorney for father questioned mother concerning her medical history particularly concerning her use of prescription drugs, utilizing medicals records father discovered in marital residence after mother had abandoned residence. Guardian *ad litem* testified that mother's use of prescription drugs negatively impacted her ability to act as guardian for child who had recently been severely injured in school bus accident. On the day following the hearing, mother died from an overdose of Oxycodone. Thereafter, Yeager, on behalf of mother's estate, filed suit against attorneys alleging HIPAA violation. Court of Appeals held that KRS 446.070 does not give a private right of action for HIPAA violations; that appellee attorneys were not "covered entities" to which HIPAA regulations and penalties apply because they are not medical providers or custodians entrusted with decedent's medical records; and that trial court erred in imposing Rule 11 sanctions against attorneys.

V. IMMUNITY

A. HURT v. PARKER

[2011-CA-002257](#)

01/04/13

Opinion by Judge Combs; Judges Lambert and Nickell concurred. Principal's responsibility for maintaining school parking lot was ministerial in nature. Trial court did not err in holding that principal was not entitled to qualified immunity in his individual capacity and thus his motion for summary judgment on that basis was properly denied.

B. COPPAGE CONSTRUCTION COMPANY, INC. v. SANITATION DISTRICT NO. 1

[2011-CA-000121](#)

01/25/13

Opinion by Judge Lambert; Judges Dixon and Taylor concurred. Court of Appeals affirmed dismissal of all of appellant's contract, statutory, and tort claims against the defendant sanitation district on

the basis of sovereign immunity. Sanitation district created under KRS Chapter 220 was held entitled to the defense of sovereign immunity on appellant's tort claims because its parent counties are immune and because it performs functions integral to state government. It is entitled to sovereign immunity on appellant's contract claims because there was no valid written contract between the parties.

C. SANITATION DISTRICT NO. 1 v. McCORD PLAINTIFFS

[2011-CA-000891](#) 01/25/13

Opinion by Judge Taylor; Judges Keller and Thompson concurred. Group of homeowners served by the appellant sanitation district sued the district alleging negligence, nuisance, trespass, and inverse condemnation after, on two occasions, raw sewage from sanitary and storm sewers overflowed and invaded homes causing damage. Court of Appeals held that the district was entitled to defense of sovereign immunity homeowners' negligence claims on that basis that it is an arm of its parent counties and carries out integral functions of state government. However, the district is not entitled to sovereign immunity on homeowners' claims for inverse condemnation, nuisance, and trespass.

VI. LICENSING

**A. O'SHEA'S-BAXTER, LLC, D/B/A FLANAGAN'S ALE HOUSE
v. COMMONWEALTH, ALCOHOLIC BEVERAGE CONTROL
BOARD**

[2011-CA-001583](#) 01/04/13

Opinion by Judge VanMeter; Judges Nickell and Taylor concurred. Court of Appeals held KRS 241.075(2) unconstitutional as local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. The Court found no reasonable basis for presuming that

the circumstances associated with a concentration of liquor licenses in a “combination business and residential area” in Louisville are different than in the “downtown business area” of Louisville or in other cities not designated as cities of the first class.

VII. PROPERTY

A. PSP NORTH, LLC v. ATTYBOYS, LLC

[2011-CA-001994](#) 01/18/13

Opinion by Judge Nickell; Judges Taylor and VanMeter concurred. Court of Appeals held that a successor-in-interest, with knowledge of an irrevocable license granted by the previous owner prior to the successor’s purchase of the property, is barred by equitable principles from revoking the license.

B. PBI BANK, INC., F/K/A ASCENSIA BANK v. SCHNABEL FOUNDATION COMPANY

[2011-CA-001135](#) 01/25/13

Opinion by Judge Thompson; Judges Clayton and Combs concurred. Where county clerk erroneously rejected a first lien statement, the Court of Appeals held that the doctrine of equitable tolling applied and an untimely-filed second lien statement related back to the timely, but improperly rejected, unfiled first lien statement.

VIII. WORKERS’ COMPENSATION

A. PRO SERVICES INC. v. WILSON

[2010-CA-001322-WC](#) 01/04/2013

Opinion by Judge Nickell; Judges Clayton and VanMeter concurred.

Workers’ Compensation Board properly reversed and remanded award of the Administrative Law Judge for additional findings

concerning calculation of claimant's average weekly wage based upon his concurrent employment where evidence on this issue had been presented to ALJ, but was not mentioned in the opinion and award. Where ALJ's analysis on an issue is incomplete and insufficient to afford proper review, Board did not substitute its judgment for the fact-finder in remanding for further findings. Board did err, however, in asserting that it "is common knowledge that "full-time" employment is a 40-hour work week," as the Act does not define the number of hours which must be worked to be considered "full-time" employment.