

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
SEPTEMBER 2009**

I. CRIMINAL LAW

**A. Commonwealth of Kentucky v. Michael Baker
2007-SC-000347-CL October 1, 2009**

Opinion of the Court; all sitting. Baker was charged with violating KRS 17.545 which was amended in 2006 to prohibit all sexual offender registrants from living within 1000 feet of a school, preschool, daycare or public playground. The District Court granted Baker’s motion to dismiss the charges, concluding the statute violated the *ex post facto* clauses of the Kentucky and United States constitutions as applied to Baker—who had pled guilty to third degree rape in 1995. The Commonwealth moved the Supreme Court for a certification of law to determine if the statute was an *ex post facto* punishment.

The Court’s analysis turned on whether or not the statute was “punitive” in nature. Even if the General Assembly intended for the statute to be a civil, non-punitive, regulatory scheme, a reviewing court must determine if the purpose or effect of the statute negates the legislature’s intent to deem it civil. Smith sets forth factors for determining if a statute is punitive in purpose or effect, among them whether the regulatory scheme: 1) has been traditionally regarded as punishment; 2) promotes traditional aims of punishment; 3) imposes affirmative disability or restraint; 4) has a rational connection to a non-punitive purpose; and 5) is excessive with respect to the non-punitive purpose. The Court concluded that each of these factors weighed in Baker’s favor.

The Court held that the residency restrictions are akin to the traditional punishment of banishment. The Court also determined the statute was not rationally related to public safety since it only governs where registrants sleep at night and does not prohibit them from spending waking hours near schools, daycares and playgrounds; nor does it prohibit the registrant from living with the victim; nor does it distinguish between offenders who preyed upon adult victims from those whose victims were children. The Court concluded that the statute violated the *ex post facto* clauses and could not be applied against those who committed their offenses prior to the effective date of the statute—July 12, 2006.

Justice Abramson, joined by Chief Justice Minton, dissented, contending that the majority failed to defer to permissible legislative judgment and

engaged in “judicial legislating under the guise of constitutional analysis.” The minority likened residency restrictions to zoning laws and disagreed with the majority drawing a parallel between residency restrictions and banishment—noting that registrants are free to work and visit wherever they choose. The dissent also asserted that the majority was too strict in their analysis of the statute’s connection to public safety, pointing out that the General Assembly is not obligated to fashion perfect statutes and can address part of a problem, leaving other parts for another time.

II. TORTS

A. **Comair, Inc.; and Comair Services, Inc. v. Lexington-Fayette Urban County Airport Corporation et. Al** **2007-SC-000602-TG October 1, 2009**

Opinion by Justice Noble. All sitting; all concur. The estates of persons killed in a commercial airplane crash sued Comair, the flight operator. Comair then filed a third-party complaint against the Lexington-Fayette Urban County Government Airport Board, the LFUCG Airport Corporation and members of the board in their official capacities alleging negligence in operation of the airport where the accident occurred. The circuit court granted the third-party defendants motion to dismiss, holding they were entitled to immunity. Comair appealed and the Supreme Court transferred the case to its docket from the Court of Appeals. The Court affirmed, holding that the airport board and airport corporation were both agencies of the LFUCG, exercising a function integral to state government by providing essential transportation infrastructure—and thus immune from suit.

In reaching this decision, the Court moved away from the two-pronged test for sovereign immunity set forth in Berns (1: direction and control by central state government; 2: supported by funds from the state treasury). The Court concluded the Berns test was overly simple and limiting and that it did not lend itself to analyzing municipal entities. Instead, the Court held a preferable approach is a case-by-case analysis of a) the origins of the organization seeking immunity (i.e. state, county, municipal) to determine the level of immunity enjoyed by the “parent” entity; and b) whether the organization exercised a function integral to state government. The Court rejected Comair’s argument that the airport board was engaged in a purely proprietary function—distinguishing providing transportation services from providing transportation infrastructure (terminals, runways, etc.). The Court concluded that the latter was a “quintessentially governmental function.”

B. Tina Martin, Administratrix of the Estate of Billie Carol Shreve, Deceased; and Donald Ray Shreve, Individually v. Ohio County Hospital Corporation

2008-SC-000211

October 1, 2009

Opinion by Justice Noble. All sitting; all concur. Billie Carol Shreve died after suffering injuries in a car accident. Her estate and surviving spouse brought suit against the hospital under three causes of action: medical negligence, inadequate policies and procedures and violations of the Emergency Medical Treatment & Active Labor Act (EMTALA). The jury returned a verdict in favor of the plaintiffs, which included \$250,000 in damages for Mr. Shreve's loss of consortium for the period of time from the accident until Mrs. Shreve's death (approximately 5 and a half hours). The Court of Appeals reversed, holding that the hospital was entitled to a directed verdict on the EMTALA claim and that Mrs. Shreve had not lived long enough after the accident to allow for loss of consortium damages since such damages terminated at her death.

The Supreme Court first addressed the loss of consortium issue, noting that at common law, damages terminated at the death of the spouse since the loss would then be covered by a wrongful death suit. However, the General Assembly enacted a loss of consortium claim by statute (KRS 411.145) which creates a cause of action for the spouse, not the estate. The Court noted that the statute is silent as to when the loss terminates. The Court determined that the focus of KRS 411.145 is compensatory in nature. Thus, the Court reasoned—full compensation could not be gained if damages are required to terminate at death. Further, the Court held that to put a value on loss of consortium while a spouse is incapacitated but to then say the loss is worthless after death defies common sense. The Court also pointed out that terminating loss of consortium damages at death provides a “perverse incentive” for tortfeasors to kill their victims instead of leaving them disabled. Lastly, the Court noted that the vast majority of states have statutory or case law providing that loss of consortium damages do not terminate at death. For these reasons, the Court reinstated the jury award and held that it would not impose a limitation on damages where the statute was silent on the matter.

The plaintiffs had also prevailed at trial on their claim that the hospital's failure to follow EMTALA—the federal act designed to prevent hospitals from “dumping” patients who lack insurance or cannot pay—resulted in delayed treatment which caused Mrs. Shreve's death. The Court upheld the Court of Appeals' ruling that the hospital was entitled to a directed verdict on the EMTALA claim—agreeing that all statutory requirements were met. However, the Court held that the trial court's refusal to grant a directed verdict on the EMTALA claim was harmless since the jury found liability for wrongful death on three theories of causation. Lastly, the

Court provided appropriate jury instructions for use in EMTALA claims. These instructions do not include a general negligence instruction, since negligence is not a proper element of an EMTALA claim.

III. ATTORNEY DISCIPLINE

A. **Kentucky Bar Association v. Patrick Edward Moeves**
2009-SC-000270-KB October 1, 2009

Attorney was ordered to show cause why the Court should not impose reciprocal discipline after the Ohio Supreme Court prohibited the attorney from appearing *pro hac vice* in that state for two years. The Ohio Supreme Court determined that the attorney and his firm entered into an agreement with a non-accredited consumer debt counseling agency to represent people whose homes were in foreclosure. Generally, the agency would attempt to negotiate a settlement with the lender while the attorney would file boilerplate pleadings and motions with the court. In the event of a judgment for the lender, the law firm would send a form letter advising the client to contact a bankruptcy attorney. No alternate remedies were considered, and the firm never actually met with the client. The Ohio Supreme Court determined the attorney violated numerous ethical rules, including aiding non-lawyers in the unauthorized practice of law, sharing legal fees with non-lawyers, forming a partnership with non-lawyers and handling legal matters without adequate preparation.

The attorney argued that he should not be given a two-year suspension in Kentucky since that was not the equivalent of a two year injunction against *pro hac vice* practice in Ohio. The Kentucky Supreme Court agreed, noting that the other members of attorney's firm who were licensed in Ohio had received a public reprimand and a conditionally discharged one year suspension, respectively. Accordingly, the Court imposed a one year suspension, conditionally discharged for two years. Justice Venters not sitting.

B. **Bruce A. Smith v. Kentucky Bar Association**
2009-SC-000336-KB October 1, 2009

The Supreme Court restores attorney's license to practice law. The attorney had previously voluntarily withdrawn from the Kentucky bar in 2005.

C. **Julia Belle Langerak v. Kentucky Bar Association**
2009-SC-000372-KB October 1, 2009

The Supreme Court ordered attorney reinstated to the practice of law. The attorney had previously been suspended for non-payment of KBA dues.

D. Kentucky Bar Association v. Joseph A. Yocum
2009-SC-000403-KB October 1, 2009

Attorney, appearing *pro hac vice* in a Kentucky workers' compensation case, was determined by the ALJ to have filed medical report forms with the court which were completed by the attorney rather than physicians as required. At the ALJ's request, the attorney produced his out-of-state certification form, from which the ALJ determined that the attorney had filed the petition months before being certified by the KBA. After the ALJ entered an order finding the attorney had committed workers' compensation fraud, the attorney's local co-counsel (required for *pro hac vice* practice under SCR 3.030(2)) withdrew from the case. Despite this, the attorney continued to file motions and pleadings in the case. The attorney attributed the Inquiry Commission's subsequent charges against him to the KBA's bias against Indiana attorneys.

The Supreme Court adopted the trial commissioner's finding that Yocum was guilty of unlawfully altering a document that had evidentiary value (SCR 3.130-3.49(a)), engaging in the unauthorized practice of law (SCR 3.130-5.5(a)), and engaging in conduct involving dishonesty, fraud, deceit and misrepresentation (SCR 3.130-8.4). The Court ordered the attorney prohibited from seeking permission to practice law in Kentucky for 120 days. Justice Schroder concurred in result only and would have suspended the attorney for one year. Justice Venters not sitting.

E. Jacqueline L. Chauvin v. Kentucky Bar Association
2009-SC-000404-KB October 1, 2009

The Court granted attorney's motion for a five year suspension from the practice of law, resolving five separate KBA files representing 23 charged violations. The attorney admitted to multiple instances of failing to act with due diligence, failing to communicate with clients, failing to return unearned fees, conduct involving fraud deceit, dishonesty or misrepresentation, failing to expedite her clients' cases and failing to respond to a disciplinary authority, among other charges. In addition to the suspension, the attorney was ordered to participate in a supervision agreement with KYLAP and to reimburse her former clients. Justice Venters not sitting.