

**KENTUCKY SUPREME COURT
NOVEMBER 2020**

EMERGENCY POWERS:

Hon. Andrew Beshear, in His Official Capacity as Governor, et al. v. Hon. Glenn E. Acree, Judge, Kentucky Court of Appeals, et al.

[2020-SC-0313-OA](#)

November 12, 2020

Opinion of the Court by Justice Hughes. All sitting; all concur. After Governor Andy Beshear declared a state of emergency due to the COVID-19 pandemic and issued additional executive orders and emergency regulations to address public health and safety issues, three Northern Kentucky business owners (Plaintiffs) filed suit in Boone Circuit Court challenging various orders affecting the reopening of their businesses and the Governor’s authority generally in emergencies. The Attorney General intervened, and the parties obtained a restraining order that prohibited enforcement of certain of the emergency orders. After a similar action was filed elsewhere in Scott County, the Supreme Court entered an order on July 17, 2020 staying all injunctive orders directed at the Governor’s COVID-19 response until those orders were properly before the Court. The order authorized the Scott and Boone Circuit Courts to proceed with matters pending before them and issue all findings of fact and conclusions of law they deem appropriate, but no order, however characterized, would be effective. On July 20, 2020 the Boone Circuit Court issued an order that would have granted the temporary injunction against enforcement of the Governor’s orders but for the Court’s July 17 stay order. The Court heard oral argument on September 17, 2020, focused on the legal issues that Plaintiffs and the Attorney General raised in the Boone Circuit Court challenging the Governor’s COVID-19 executive orders and regulations.

The Supreme Court held that (1) the Governor properly declared a state of emergency and validly invoked the emergency powers granted to him in Kentucky Revised Statute (KRS) Chapter 39A; (2) KRS 39A is a constitutional delegation of legislative authority and does not violate the separation of powers provisions of Sections 27 and 28 of the Kentucky Constitution; (3) the Governor was not required to address the COVID-19 emergency solely through regulations pursuant to KRS Chapter 13A; (4) the challenged orders did not violate Sections 1 or 2 of the Kentucky Constitution because the challenged orders were not arbitrary, i.e., lacking a rational basis, except for one subpart of one order regarding social distancing at entertainment venues that initially made no exception for families or individuals living in the same household; and (5) the Boone Circuit Court improperly issued injunctive relief prohibiting enforcement of the Governor’s orders and regulations. The Court lifted the stay as to any affected cases challenging the Governor’s COVID-19 response and allowed those cases to proceed consistent with the Court’s Opinion. As to the Boone Circuit Court litigation, the July 20, 2020 Order that was held in abeyance was reversed and remanded for further proceedings, if any, consistent with the Court’s Opinion.

QUALIFIED IMMUNITY:

Upper Pond Creek Volunteer Fire Department, Inc. v. Ronnie Kinser, et al.

2019-SC-0563-DG

November 12, 2020

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Minton, C.J.; Hughes, Keller, Lambert, and VanMeter, JJ., concur. Wright, J., dissents by separate opinion. Nickell, J., not sitting. Members of the Upper Pond Creek Volunteer Fire Department (“Pond Creek”) responded to an incident where they found Ronnie Kinser lying beside his car, with his arm pinned beneath the car’s front tire. The first responders ultimately freed Kinser, but he suffered serious injuries, and his arm was eventually amputated. Relevant to this appeal, Kinser and his wife filed a complaint against Pond Creek and unknown employees of the fire department. They alleged claims against the fire department of intentional or negligent training, supervision, hiring, and retention. They alleged that the employees of the fire department intentionally or negligently failed to follow their training in providing care and intentionally or negligently failed to provide proper care to Kinser.

Pond Creek asserted government immunity under Kentucky Revised Statute (“KRS”) 75.070, which provides that a volunteer fire department “shall [not] be liable in damages for any omission or act of commission or negligence while answering or returning from any fire or reported fire, or doing or performing any fire prevention work under and by virtue of this chapter.” The trial court found that it could not make a determination of immunity based on the limited information in the record. It stated, “at this point the Upper Pond Creek Volunteer Fire Department is not entitled to immunity, and the parties shall continue to conduct discovery on this matter.” The trial court also clarified that the fire department could raise the issue of immunity “after sufficient proof has been discovered to allow the Court to make sufficient findings on this issue.”

The fire department appealed. The Court of Appeals dismissed the appeal holding that the trial court’s order was an interlocutory order that was not immediately appealable, and as a result, the Court of Appeals lacked jurisdiction.

The Supreme Court granted discretionary review and concluded that the trial court did not make a final ruling on the issue of immunity. The Court stated that additional factual development was necessary to answer the questions of whether the fire department’s actions were governmental as opposed to proprietary and whether the employee’s actions were discretionary as opposed to ministerial. Accordingly, the Court affirmed the Court of Appeals.