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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000615-MR

JIMMY HARSTON; NORMAN COTTRELL;
AND BILL SULLIVAN — APPELLANTS

APPEAL FROM HART CIRCUIT COURT
ACTION NO. 08-CI-00045
v. AND
APPEAL FROM LARUE CIRCUIT COURT
ACTION NO. 08-CI-00026
HONORABLE GEOFFREY P. MORRIS, SENIOR JUDGE

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE

and NO. 2010-CA-001124-MR

JIMMY HARSTON; DONNIE KIMBRO;
AND BRENDA KIMBRO — APPELLANTS

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 08-CI-01262

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE,[1] SENIOR JUDGE.

NICKELL, JUDGE: Jimmy Harston and Norman Cottrell appeal an opinion and order granting summary judgment to the Kentucky Transportation Cabinet, Department of Highways (Cabinet) entered on February 16, 2010, by the Hart Circuit Court. The court found Harston and Cottrell in violation of Kentucky's Billboard Advertising Act[2] by maintaining a "billboard, sign, [or] advertising device" in a protected area. The same opinion and order was entered in LaRue Circuit Court Civil Action No. 08-CI-00026 against Harston and Bill Sullivan. Both cases present identical issues and were consolidated by the trial court on motion of the parties. This Court has become aware of a third case, *Jimmy Harston; Donnie Kimbro and Brenda Kimbro v. Commonwealth of Kentucky Transportation Cabinet, Department of Highways,* No. 2010-CA-001124-MR, with similar issues and on its own motion has consolidated it with the Hart and

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] KRS 177.830 through 177.890.

LaRue actions. Having considered the briefs, the record and the law, the opinion and orders entered by the Hart and LaRue Circuit Courts are affirmed. The final order and judgment entered by the Warren Circuit Court is affirmed in part, and the language requiring appellants to apply for a permit is reversed.

FACTS

On or about November 7, 2004, without securing a permit from the Cabinet, Harston erected a 14 foot by 30 foot sign within 660 feet of the right-of-way of Interstate 65 in Hart County on land leased from Cottrell. The sign reads, "If you died today, where would you spend Eternity?"

On or about March 2, 2005, again without securing a permit, Harston erected a second 14 foot by 30 foot sign within 660 feet of the right-of-way of Interstate 65, this time in LaRue County, on land leased from Sullivan. One side of the sign reads, "Hell is Real." The other side reads, "Thou Shall Not Commit Adultery, Thou Shall Not Kill, Thou Shall Not Steal, Thou Shall Not Bear False Witness, Thou Shall Not Covet."

In March of 2007, Harston erected a third 14 foot by 30 foot sign within 660 feet of Interstate 65 in Warren County on property leased from Donnie and Brenda Kimbro. The messages on the Warren County sign read "Jesus Died For Our Sins" and "Jesus Saves."

Harston maintains he erects the signs as a ministry to the traveling public. He claims Cottrell, Sullivan and the Kimbros share his Christian beliefs and erecting the signs is the only means by which they can practice their religion.

He admits the signs evangelize and proselytize, but argues they do not *advertise* in the traditional sense of that word and therefore, are not subject to regulation under the Billboard Advertising Act. In the alternative, he argues that if the signs are advertising devices, they fall within the "on-premises" exception to the prohibition on billboard advertising because Christianity is practiced on the farms where the signs are located and the ministry to the traveling public occurs at the site of the signs. Finally, Harston argues placement of the signs is protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA), codified in 42 U.S.C. § 2000cc(a)(1), which prohibits application of a land use regulation "that imposes a substantial burden on the religious exercise of a person" unless it furthers "a compelling governmental interest" and does so in "the least restrictive means of furthering that compelling governmental interest." Harston argues the Billboard Advertising Act is a zoning regulation that must comply with RLUIPA.

On February 15, 2008, the Cabinet filed complaints in the Hart and LaRue Circuit Courts alleging the signs: are advertising devices that violate Kentucky's Billboard Advertising Act; were erected after January 1, 1976; are "visible, legible, and identifiable from the main travelway;" are not located in an area that qualifies as an "unzoned commercial" area under KRS 177.830(8); do not qualify as "on-premises" signs; are located in a "protected area" as that term is defined in 603 KAR[3] 3:080 §1(29); are located in an area that was neither industrial nor commercial nor within an incorporated municipality as of September

[3] Kentucky Administrative Regulations.

21, 1959; and, do not have an approved permit from the Cabinet. As a result, the Cabinet sought an injunction to have the signs declared a public nuisance and removed. A similar complaint was filed in Warren Circuit Court on July 11, 2008.

On January 26, 2009, the Cabinet moved for summary judgment in Hart and LaRue Circuit Courts claiming there were no material issues of fact and the Cabinet was entitled to judgment as a matter of law. The Cabinet argued KRS 177.841, with few exceptions, prohibits all advertising devices within 660 feet of interstate rights-of-way "as far as the eye can see from the main traveled way outside urban areas." Exempt from the general prohibition are:

> (a) Directional and official signs and notices;
>
> (b) Signs advertising the sale or lease of property upon which they are located; or
>
> (c) Signs advertising activities conducted on the property on which they are located.

KRS 177.841(2). Item (c) is the "on-premises" exemption. An "advertising device" is defined in KRS 177.830(5) as "any billboard, sign, notice, poster, display, or other device intended to attract the attention of operators of motor vehicles on the highways . . . ."

To determine whether an advertising device is exempt from regulation, the Cabinet imposes a permit requirement. 603 KAR 3:080, § 4(1). Any advertising device within the protected area[4] and visible from the main

[4] "Protected area" is defined in 603 KAR 3:080 §1(29) as "all areas within the boundaries of this Commonwealth which are adjacent to and within 660 feet (210.17 meters) of the state-owned highway right-of-way of the interstate, parkway, NHS, and FAP highways and those areas which are outside urban area boundary lines and beyond 660 feet (210.17 meters) from the right-of-way

traveled way must have a permit. It is undisputed that the signs at issue in this appeal do not have permits. Furthermore, the appellants admitted in interrogatories that the signs are intended to be seen by motorists. Therefore, the Cabinet argues the signs satisfy the definition of advertising devices, regardless of their religious messages, and are subject to removal from the protected areas due to the lack of a permit.

Anticipating a challenge on constitutional grounds, the Cabinet argued the prohibition on advertising devices is content neutral and narrowly tailored to serve substantial government goals making the message displayed irrelevant to enforcement of the Act. Moreover, the Cabinet argued, since the Act does not apply to areas zoned commercial or industrial, urban areas beyond 660 feet of the right-of-way, signs located on the premises where the activity related to the message is conducted, and areas away from interstate or federal-aid primary highways, there are ample alternate channels for the communication of the desired message.

On June 2, 2009, the appellants responded to the Cabinet's motion for summary judgment and moved for summary judgment in their own right. On February 16, 2010, the Hart and LaRue Circuit Courts entered summary judgment in favor of the Cabinet and ordered removal of the signs within sixty days. The

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of an interstate, parkway, NHS, or FAP highway within the Commonwealth. If this highway terminate (sic) at a state boundary which is not perpendicular or normal to the center line of the highway, "protected area" also means all of these areas inside the boundaries of the Commonwealth which are adjacent to the edge of the right-of-way of an interstate highway in an adjoining state."

analysis was based in part upon *United Sign, Ltd. v. Commonwealth,* 44 S.W.3d 794, 799 (Ky. App. 2000), in which a panel of this Court stated:

> The permitting requirements are rationally related to the Billboard Act's objectives because a permit requirement prevents a proliferation of unregulated advertising devices in an area. Without the permit requirement, any person or entity could erect advertising devices in an area in such a manner as to distract or impair the visibility of drivers and destroy the scenic beauty of the area around the highways. Those potentially dangerous or distracting signs could remain in place for a period of several years while the Cabinet went through the legal process of having them removed, which is precisely the scenario present in the case at hand. If a permit requirement is utilized, no sign may be erected without receiving prior expert permission from the Cabinet that the sign falls within the exceptions to the Billboard Act's general ban on advertising devices in affected areas. Such a plan provides the maximum amount of safety to drivers and passengers on affected highways.
>
> Furthermore, the permit process ensures that one centralized entity will make a determination as to whether a prospective advertising device complies with the objectives of the Billboard Act, rather than have circuit courts make those decisions throughout the state. Finally, although factually distinguishable, *Commonwealth, Department of Transportation v. Central Kentucky Angus Association*, Ky. App., 555 S.W.2d 627 (1977) found that the Billboard Act "envision[s] a program under which only carefully selected signs, *deemed by an administrative agency to be in the interest of the traveling public*, shall be erected." *Id.* at 628 (Emphasis in original). In short, the Cabinet did not exceed its statutory authority by enacting administrative regulations requiring a permit to be obtained before a billboard advertising device may be erected.

(Footnote omitted). The opinion also cited *Wheeler v. Comm'r of Highways, Commonwealth of Kentucky,* 822 F.2d 586, 588-90 (6th Cir. 1987), which held:

> The Billboard Act and regulations were adopted in response to the federal Highway Beautification Act of 1965. 23 U.S.C. §§ 131-136 (1982) ("Act"). This Act provides for the regulation and control of outdoor advertising devices adjacent to interstate and federal-aid primary highways. Its purpose is "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." *Id*. § 131(a). The Act requires each state participating in the highway beautification program to exercise "effective control" over outdoor advertising. It prohibits advertising devices located within 660 feet of the interstate or federal-aid primary highway, or if located outside urban areas, such devices are prohibited beyond 660 feet if visible from the highway. "Effective control" means that signs, displays, or devices within the prescribed area shall be limited to directional and official signs, signs advertising the sale or lease of property on which they are located, signs advertising activities conducted on the property on which they are located, signs of historic or artistic significance, and signs advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the interstate or primary system. *Id*. § 131(c). The penalty for not complying with the Act is the forfeiture of ten percent of the state's federal highway funds until such time as the state provides for effective control. *Id*. § 131(b).
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> . . . .
>
> The Supreme Court has recognized that the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner. *Heffron v. International Soc'y for Krishna Consciousness, Inc*., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). Expression, whether oral or written, is subject to reasonable time, place, and manner restrictions. *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82

> L.Ed.2d 221 (1984). Such restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and they leave open ample alternative channels for communication of the information. *Id.* *Accord Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984); *Heffron*, 452 U.S. at 647-48, 101 S.Ct. at 2563-64.
>
> We believe that the statute and regulations in the present case are valid place and manner restrictions. The statute and regulations subject on-premises signs adjacent to interstate highways to size and spacing restrictions. The statute and regulations also prohibit all off-premises signs containing any message in protected areas adjacent to interstate highways. The regulations permit off-premises signs in urban areas if the sign is more than 660 feet from the interstate highway. Additionally, they permit off-premises signs in areas adjacent to the interstate or federal aid primary highways which were zoned commercial or industrial prior to September 21, 1959. These permissible off-premises signs are also subject to size and spacing restrictions. It is apparent from the express purpose and effect of the Billboard Act that the restrictions on the location of off-premises signs regulate the secondary effects, not the content of these signs.

Based upon the foregoing, the Hart and LaRue Circuit Courts concluded: the signs constitute advertising devices under KRS 177.830(5); the signs are located within protected areas; the signs were erected without a permit; the Cabinet is authorized to regulate the placement of advertising devices; the Cabinet has a "compelling government interest in protecting the safety of, and preventing [confusion] to, its motorists, as well as the natural beauty of the state[;]" and, because the signs have

been placed in violation of the Billboard Advertising Act, they are public nuisances under KRS 177.870 and must be removed.

On February 18, 2010, the Warren Circuit Court granted an injunction to the Cabinet upon finding the sign located on the Kimbro property to be a visible advertising device erected within a protected area and without a permit. Taking a slightly different tack than the Hart and LaRue Circuit Courts, the Warren Circuit Court declined to address constitutional issues, specifically the application of RLUIPA, finding those questions were not ripe because the appellants had not exhausted their administrative remedies by seeking a permit from the Cabinet. On June 4, 2010, the Warren Circuit Court denied a motion to alter, amend or vacate its prior order,[5] but stayed the injunction pending completion of appeal.

On February 22, 2010, the appellants moved to alter, amend or vacate the Hart and LaRue Circuit Court opinion and order under CR[6] 59.05 arguing the court's reliance on *Wheeler* was misplaced because that case was decided prior to passage of RLUIPA which they maintain is a complete bar to the Cabinet's complaint. Alternatively, the appellants moved for additional findings under CR 52.02 and CR 52.04 because the opinion and order did not address the applicability of RLUIPA. That same day, appellants moved the court to stay enforcement of the judgment until pending motions and a potential appeal were resolved. Three days

[5] Appellants sought time to request a permit for the Warren County sign. The appellate record does not indicate the status of said request.

[6] Kentucky Rules of Civil Procedure.

later, appellants filed a supplemental motion to alter, amend or vacate the opinion and order because the Warren Circuit Court had directed them to exhaust their administrative remedies by applying for a permit. The Cabinet responded to the motions arguing that the court had addressed RLUIPA; the appellants had not shown removal of the signs would substantially burden their exercise of religious freedom; and there was no need to wait for appellants to apply for a permit because the Warren Circuit Court case was wholly separate from the Hart and LaRue Circuit Court actions.

On March 17, 2010, the Hart and LaRue Circuit Courts entered an order denying the motions to alter, amend or vacate the opinion and order; declining to make additional findings of fact; specifying appellants were not entitled to administrative relief; consolidating the Hart and LaRue actions; and granting a stay until conclusion of any appeal. This appeal followed.

ANALYSIS

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v.*

Scansteel Serv. Ctr, Inc., 807 S.W.2d 476, 480 (Ky. 1991). For the reasons that follow, we conclude summary judgment was properly granted to the Cabinet.

The Cabinet is authorized to implement Kentucky's Billboard Advertising Act. KRS 177.860. It has chosen to do this by requiring issuance of a permit for any visible advertising device located within 660 feet of an interstate highway. KRS 177.841(1). As previously noted, an "advertising device" is defined in KRS 177.830(5) as "any billboard, sign, notice, poster, display or other device intended to attract the attention of operators of motor vehicles on the highways . . . ." The appellants admit they intend the signs to be seen by the motoring public. Furthermore, it is undisputed that the signs are located within 660 feet of Interstate 65, which constitutes a protected area; are visible from the main portion of the traveled roadway; and were erected without benefit of a permit. Thus, as the trial court found, the signs constitute advertising devices and are subject to removal as public nuisances due to the lack of a permit. Whether the signs "advertise" in the traditional sense of that word is irrelevant in light of the clear, unambiguous statutory definition of "advertising device" found in KRS 177.830(5). *Consolidated Infrastructure Mgmt. Auth., Inc. v. Allen,* 269 S.W.3d 852, 855-56 (Ky. 2008) (citing *Commonwealth v. Reynolds,* 136 S.W.3d 442 (Ky. 2004) (court without authority to construe clear and unambiguous statute to the contrary)). Based on the foregoing, the grant of summary judgment to the Cabinet was proper.

However, that is not the end of our inquiry. Because the messages displayed are religious in nature, appellants claim special consideration is required so as not to run afoul of the Constitution. Specifically, they argue the "on-premises" exemption found in KRS 177.841(2)(c) applies because the signs promote Christianity which is occurring on the family farms where the signs are located. However, freedom of religion is not absolute. Its "[e]xpression, whether oral or written, is subject to reasonable time, place, and manner restrictions." *Wheeler,* 822 F.2d at 589 (citing *Clark,* 468 U.S. at 293, 104 S.Ct. at 3069). Furthermore, a party's religious belief cannot justify commission of an overt act that contravenes civil law. "The claim of religious freedom cannot be extended to make the professed doctrines superior to the law of the land and in effect to permit every citizen to become a law unto himself." *Jones v. Hallahan,* 501 S.W.2d 588, 590 (Ky. 1973) (citing *Reynolds v. United States,* 98 U.S. 145, 167, 1878 WL 18416 (1878)).

In *United Sign, Ltd.,* 44 S.W.3d at 799, a panel of this Court reviewed the permit requirement and found it to be "rationally related" to the objectives of the Billboard Act. In *Wheeler,* 822 F.2d at 589-90, the Sixth Circuit found the Act and its implementing regulations to be "valid place and manner restrictions." It also found the Act to be content neutral as it was directed at the secondary effects of the signs and not the content of the messages displayed. *Id.,* at 590. Both decisions remain valid law today and dictate that the "on-premises" exemption not be extended to the subject signs.

Appellants' next argument is that RLUIPA authorizes placement of the signs. The Act specifies:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). We agree with the appellants and hold that Kentucky's Billboard Act is the equivalent of a zoning ordinance in that it "limits the manner in which a claimant may develop or use property in which the claimant has an interest." *Prater v. City of Burnside, Kentucky,* 289 F.3d 417, 434 (6th Cir. 2002). Therefore, Kentucky's Billboard Act is subject to analysis under RLUIPA.

As explained in *Cutter v. Wilkinson,* 544 U.S. 709, 714-15, 125 S.Ct. 2113, 2118 (2005),

> RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents. Ten years before RLUIPA's enactment, the Court held, in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-882, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), that the First Amendment's Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. In particular, we ruled that the Free Exercise Clause did not bar Oregon

from enforcing its blanket ban on peyote possession with no allowance for sacramental use of the drug. Accordingly, the State could deny unemployment benefits to persons dismissed from their jobs because of their religiously inspired peyote use. *Id*., at 874, 890, 110 S.Ct. 1595. The Court recognized, however, that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use. *Id*., at 890, 110 S.Ct. 1595.

Responding to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*. RFRA "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne v. Flores*, 521 U.S. 507, 515-516, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (quoting § 2000bb-1; brackets in original). "[U]niversal" in its coverage, RFRA "applie[d] to all Federal and State law," *id*., at 516, 117 S.Ct. 2157 (quoting former § 2000bb-3(a)), but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment. *Id*., at 532-536, 117 S.Ct. 2157. (Footnote omitted.)

Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U.S.C. § 2000cc; (footnote omitted) § 3 relates to religious exercise by institutionalized persons, § 2000cc-1.

Previous courts have already held Kentucky's Billboard Act is supported by compelling state interests relating to public safety and aesthetics. *Unisign, Inc. v. Commonwealth,* 19 S.W.3d 652, 655 (Ky. 2000). Therefore, we need not revisit the claim of the appellants that the Cabinet has not, nor can it, establish a compelling governmental interest for the general prohibition on placing billboards within 660 feet of interstate highways. We hold the Billboard Act is supported by the same compelling state interests previously identified. *Id.*

This brings us to the remaining question of whether the Act uses "the least restrictive means" to accomplish its goals. We hold the Act utilizes the least restrictive means to meet its objectives because it does not totally ban communication. For example, signs in urban areas beyond 660 feet of the interstate right-of-way or areas away from interstate or federal-aid primary highways are not prohibited. Further, while appellants claim the only way they can conduct their evangelism is by erecting signs in protected areas, it appears to us there are ample alternate channels for them to communicate their desired message to the motoring public and to the public at large, especially in this ever-expanding technological age.

While we recognize the right of the appellants to express and share their religion with the motoring public, we also recognize the Commonwealth's right to place reasonable restrictions on the place and manner that message is conveyed, particularly when aimed at protecting public safety and preserving the public environment. While *Wheeler* was decided prior to enactment of RLUIPA,

we deem its analysis equally applicable and its reasoning compelling in regard to the present controversy. "[G]overnment acts often inadvertently frustrate certain citizens' "search for spiritual fulfillment," yet the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Prater,* 289 F.3d at 429 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 452, 108 S.Ct. 1319, 1327, 99 L.Ed.2d 534 (1988)).

Finally, we take exception to that portion of the Warren Circuit Court judgment requiring appellants to apply for a permit. "[A] party may have direct judicial relief without exhaustion of administrative remedies when there are no disputed factual questions to be resolved and the issue is confined to the validity or applicability of a statute or ordinance." *Harrison's Sanitarium, Inc. v. Commonwealth, Dept. of Health,* 417 S.W.2d 137, 138 (Ky. 1967). There are no disputed factual questions here and the issue is confined to the validity of Kentucky's Billboard Act and the applicability of RLUIPA. Thus, requiring a permit application is unnecessary.

For the reasons expressed above, the opinion and orders entered by the Hart and LaRue Circuit Courts are affirmed. The final order and judgment entered by the Warren Circuit Court is affirmed in part, and the language requiring appellants to apply for a permit is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

(Hart and LaRue Circuit Court cases)

John B. Baughman
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