Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000575-I

JEROME KUNKEL, ET AL. MOVANTS

v.

ON MOTION FOR INTERLOCUTORY RELIEF
FROM THE BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, JUDGE
CIVIL ACTION NO. 19-CI-00357

NORTHERN KENTUCKY
INDEPENDENT HEALTH
DISTRICT, ET AL. RESPONDENTS

ORDER
DENYING MOTION FOR INTERLOCUTORY RELIEF

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND NICKELL, JUDGES.

This cause comes before the Court on Movants' motion for interlocutory relief under CR[1] 65.07 from an order of the Boone Circuit Court denying their motion for a temporary injunction. Movants have also moved the Court for an oral argument. Finally, Respondents moved the Court to supplement their brief to address the issue of mootness. Having reviewed the record, and being otherwise sufficiently advised, IT IS HEREBY ORDERED that Respondents' motion to supplement their brief is GRANTED. IT IS FURTHER ORDERED that Movants' motion for interlocutory relief shall be, and hereby is, DENIED. The motion for oral argument is DENIED.

I. BACKGROUND

Movant Jerome Kunkel ("Jerome") is an 18-year old who, in spring 2019, was a senior at Assumption Academy, a private, Catholic school in Walton, Kentucky ("the school").[2] Jerome filed a lawsuit in March 2019 alleging Respondents violated his right to freedom of religion, equal protection, and procedural and substantive due process of law under the United States and

[1] Kentucky Rules of Civil Procedure.

[2] The school consists of an upper school, Assumption Academy, and a lower school, Our Lady of the Sacred Heart Elementary school, which is across the street from Assumption Academy. The upper and lower school are collectively referred to herein as "the school," but will be distinguished where necessary for clarity.

Kentucky Constitutions. The remaining Movants[3] are parents of other children attending the school, which serves grades K-12, who joined in the lawsuit.

The school has a student body of 240 students. Eighty-two percent of the students are not vaccinated against varicella (commonly known as "chickenpox"). The parents[4] of the unvaccinated children each signed a document titled "Parent or Guardian's Declination on Religious Grounds to Required Immunizations" under which they exercised their right to a religious exemption from vaccination under KRS[5] 214.036. The form provides:

> In the event that the county health department or state health department declares an outbreak of a vaccine-preventable disease for which proof of immunity for a child cannot be provided, he or she may not be allowed to attend childcare or school for up to three (3) weeks, or until the risk period ends.

Movants' Complaint stems from a series of actions undertaken by the Northern Kentucky Independent Health District ("Health Department") beginning on February 5, 2019. On that date, the Health Department required the school to send a letter to parents and guardians informing them of a suspected outbreak of varicella among the students. When the illness continued to spread, the Health

---

[3] We refer to Movants collectively herein, but we will distinguish between Movants, Jerome, and his parents, the Kunkels, when necessary.

[4] Mrs. Kunkel signed a form on Jerome's behalf before he turned 18. Each of the remaining parents also executed a form on behalf of their children.

[5] Kentucky Revised Statutes.

Department, on February 21, 2019, required the school to cancel all school events until 21 days after the onset of rash for the last ill student ("the activities ban").

On February 26, 2019, Jerome and the Kunkels met with Mr. Zack Raney ("Mr. Raney"), an epidemiologist with the Health Department. Movants allege that during the February 26 meeting, Mr. Raney "confirmed . . . that the activities ban did nothing other than mete out punishment to a religious group that Mr. Raney disagreed with." On cross-examination at the hearing, Mr. Raney was asked whether the March 7 email threatening suit made him "mad," to which he replied, "no." Movants' attorney then played a portion of a recording[6] of the February 26 meeting between the Kunkels and Mr. Raney, specifically, the following exchange:

Mr. Kunkel:	The best you guys can come up with is I have the right to say this kid does not get . . . one of your virus shots.
Mr. Raney:	That is correct.
	[unintelligible]
Mr. Raney:	That's within your right. But, as a result of that decision, we are here.
Mrs. Kunkel:	So we're penalized.
Mr. Raney:	Unfortunately – if –

[6] The Kunkels recorded the meeting without Mr. Raney's knowledge.

Thereupon, Movants' counsel stopped the recording. The remainder of the statement made by Mr. Raney at the February 26 meeting was not introduced into evidence at the hearing. After Movants played the excerpt from the recording, the following colloquy occurred:

Movants' Counsel:	Okay. So you told him the exercise of his right not to be vaccinated is why we're here?
Mr. Raney:	Yes, that's right.
Movants' Counsel:	Okay, and you told them that they're being penalized for exercising that right, correct?
Mr. Raney:	No.
Movants' Counsel:	Do I need to play it again? Here. [Movants' counsel plays the recording excerpt a second time].
Movants' Counsel:	So in response to Mrs. Kunkel's question to you about whether they were being penalized you said "unfortunately," correct?
Mr. Raney:	Yes, but I'm not sure if that was the beginning of another statement.

On March 7, 2019, through counsel, Jerome, a member of the boys' basketball and baseball teams, threatened to file suit against the Health Department unless the activities ban was lifted. On March 14, 2019, the Health Department,

having received additional reported cases of varicella at the school since February 21, required the school to send a third letter to parents and guardians, stating:

> [a]s a result of the continued increase in cases and to prevent further spread of this illness, beginning Friday, March 15, 2019, all students, Grades K-12, without proof of vaccination or proof of immunity against varicella virus will not be allowed to attend school until 21 days after the onset of rash for the last ill student or staff member.[7]

Jerome filed suit on March 14, 2019. A Second Amended Complaint was filed on March 22, 2019, and an Intervening Complaint was filed on March 25, 2019. Movants moved the circuit court for a temporary injunction pursuant to CR 65.04. The circuit court conducted a hearing on April 1, 2019. Witnesses at the hearing included Jerome, Mrs. Kunkel, Mr. Raney, Dr. Toni Bark ("Dr. Bark"), and Dr. Gary Marshall ("Dr. Marshall"). On April 2, 2019, the circuit court entered an order denying the motion for a temporary injunction. Movants' motion for relief under CR 65.07 followed. Respondents filed a motion for leave to supplement their brief on June 13, 2019, asserting the matter is moot because: 1) all restrictions on the school expired on May 18, 2019 because there had not been a new onset of varicella since April 27, 2019; and 2) the school recessed for summer break as of June 1, 2019.

[7] The March 14, 2019 letter is referred to herein as the "school ban."

I. ANALYSIS

As a threshold matter, we must determine whether Movants' motion for relief under CR 65.07 is moot, and if so, whether it falls within an exception to the mootness doctrine. Movants argue the matter is not moot because, with the exception of Jerome,[8] the remaining children will return to the school in the fall. Movants further argue Respondents have not stated they will not "impose the restriction in the fall when school resumes if there is another case of reported varicella," asserting "[c]ases continue to occur among the population, whether or not they happen to be reported to the Health Department []."

"[A] 'moot case' is one which seeks to get a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014) (citation omitted) (emphasis original). Our jurisprudence recognizes certain exceptions to the mootness doctrine, such as where a matter is capable of repetition, yet evading review.

> The exception for cases "capable of repetition, yet evading review," has two elements: (1) the challenged action must be too short in duration to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party will be subjected to the same action again.

---

[8] Jerome graduated from Assumption Academy in or about May 2019. He also ultimately contracted varicella during the pendency of this action.

Id. at 100.

In this case, the parents and next friends of 25 minor students also attending the school joined in the action filed by Jerome. The Intervening Complaint filed by Seante Carter, as Next Friend and Guardian of AC, EC, MC, OC, NC, SC, and RC, like the Complaint filed by Jerome, alleges Ms. Carter's children are not vaccinated for varicella due to religious beliefs and were not permitted to attend school; and that "but for the Health Department and Raney's directive, Father Muscha would have permitted Mr. Kunkel, and for that matter the other students, to participate in sports and other extracurricular activities."

The Second Amended Complaint alleges Christina Bell's five children are in ninth grade or lower at the school; that Maria Kunkel's seven children are in eighth grade or lower at the school; and that David Kunkel's six children are in tenth grade or lower at the school. The Second Amended Complaint alleges: "None of the children of [these] Plaintiffs have received the Varicella Vaccine, and all of them refuse, under grounds of religion to do so."

The parties agree the vaccination rate for varicella at the school is 18%. Experts for both Movants and Respondents have testified and agreed varicella is highly contagious. Although the request for injunctive relief is moot as to Jerome, we conclude it may not be moot as to some or all of the remaining 25 students and that even if moot, the question is capable of repetition yet evading

review. Therefore, this exception to the mootness doctrine applies, and we turn to the merits of the motion for CR 65.07 relief.

Under CR 65.07, this Court may grant a party interlocutory relief where the circuit court has denied a motion for a temporary injunction. The circuit court reviews applications for temporary injunctive relief under CR 65.04 on three levels.

> First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions.

Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky. App. 1978).

> The Supreme Court of Kentucky has explained:
>
> [b]ecause the granting or denial of a temporary injunction under CR 65.04 is addressed to the sound judicial discretion of the trial judge[,] a party seeking interlocutory relief from a trial court's decision to grant or deny a temporary injunction bears an enormous

> burden . . . . And an appellate court may not disturb a trial court's decision on a temporary injunction unless the trial court's decision is a clear abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Com. ex rel. Conway v. Thompson, 300 S.W.3d 152, 162 (Ky. 2009), *as corrected* (Jan. 4, 2010) (citations and quotation marks omitted). With these principles in mind, we turn to the instant case.

A. Irreparable Harm

A movant must show irreparable harm to obtain injunctive relief. *Maupin*, 575 S.W.2d at 698. "In addition to showing that personal rights are at stake, CR 65.04 further requires a clear showing that these rights will be immediately impaired." *Id.*

The circuit court determined Movants had shown irreparable harm with respect to the school ban but not with respect to the activities ban. We can discern no abuse of discretion in the circuit court's findings.

Movants do not have a right to participate in school athletics under Kentucky law. *See Thompson v. Fayette Cty. Pub. Sch.*, 786 S.W.2d 879, 882 (Ky. App. 1990) (holding where student was released from school wrestling team for failure to maintain 2.0 grade point average, "[t]he authorities do not support [the student's] claim of a property or liberty interest infringement"); *Lowery v.*

Euverard, 497 F.3d 584, 588 (6th Cir. 2007) ("It is well-established that students do not have a general constitutional right to participate in extracurricular athletics"). Although Movants have a right to direct the education and upbringing of their children, *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 2267, 138 L.Ed. 2d 772 (1997) (citation omitted), "[t]he fundamental right of parents to control the education of their children does not extend to a right to demand that their children be allowed to participate without restrictions in extracurricular sports in the educational setting that the parents have freely chosen." *Seger v. Kentucky High Sch. Athletic Ass'n*, 453 F. App'x 630, 634 (6th Cir. 2011).

On the other hand, "[w]e recognize that education is a fundamental right in Kentucky." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989). In *S.B. ex rel. Brown v. Ballard County Board of Education*, 780 F.Supp.2d 560, 569 (W.D. Ky. 2011), the Court held a student placed in alternative school due to a narcotics violation would not suffer irreparable harm in the absence of injunctive relief because the alternative school "provides her with sufficient resources to complete her regularly assigned class work and receive additional aid should she require it." Contrarily, "total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the [] child." *Goss v. Lopez*, 419 U.S. 565, 576, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975). In this

case, Movants were excluded from the educational process, with the exception of collecting their homework and taking tests, for a lengthy period of time. The circuit court did not abuse its discretion in finding Movants have demonstrated irreparable harm.

B. Substantial question on the merits

1. Introduction

The circuit court is not to decide the merits of the case in ruling on a motion for a temporary injunction. *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760, 762 (Ky. 1958). Rather, the complaint should be evaluated to determine whether a substantial question has been presented. *Maupin*, 575 S.W.2d at 699. "To support a temporary injunction, one must show that a substantial question exists that *tends to create a 'substantial possibility' that the [movant] will ultimately prevail on the merits.*" *Norsworthy v. Kentucky Bd. of Med. Licensure*, 330 S.W.3d 58, 63 (Ky. 2009) (emphasis original).

Movants argue the burden of showing a substantial question was "shifted" to Respondents under KRS 446.350 "once sincerely held religious beliefs were at issue." However, *Maupin* makes clear the movant bears the burden of showing he is entitled to the "extraordinary remedy" of a temporary injunction. *See Maupin*, 575 S.W.2d at 698-99 ("If the *party requesting relief* has shown . . .") (emphasis added).

2. Freedom of religion

a. Kentucky Constitution

Under the Kentucky Constitution "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of worshipping Almighty God according to the dictates of their consciences." Kentucky Constitution, §1.

KRS 446.350 provides:

> [g]overnment shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

KRS 446.350 applies a strict scrutiny standard of review to a claim the government has substantially burdened a sincerely held religious belief under the Kentucky Constitution.

i. Sincerely held religious belief

Movants are Catholic and object to the varicella vaccine because it "is derived from aborted fetal cells." At the hearing, Jerome and Mrs. Kunkel testified as to their religious beliefs, and Movants produced a letter from the Vatican dated

June 9, 2005, addressing the issue. The parties ultimately stipulated that Movants chose not to vaccinate the children against varicella because of their sincerely held religious beliefs.

ii. Substantial burden

KRS 446.350 applies only where the state government "substantially burdens" a person's freedom of religion. Under Kentucky law, "[e]xcept as provided in KRS 214.036, no child shall be eligible to enroll as a student in any public or private elementary or secondary school without first presenting a certificate [of immunization] from a medical physician, osteopathic physician, or advanced practice registered nurse licensed in any state." KRS 158.035. KRS 214.036, in turn, gives parents the option to claim exemption from vaccination on religious grounds.

In the instant case, the religious belief is that the varicella vaccine is morally objectionable. The religious act or "refus[al] to act" is the failure to vaccinate the children. There is no evidence Respondents required or purported to require Movants to vaccinate the children.[9] Even assuming *arguendo* Respondents substantially burdened Movants' religious belief, Movants have not shown a

[9] The Kunkels assert Mr. Raney stated, at the February 26 meeting, the Vatican permits or allows Catholics to receive the varicella vaccine. Mr. Raney testified he did not recall making that statement. But at no point has it been alleged that any officials ordered or directed Movants to vaccinate the children.

substantial possibility they will prevail on their freedom of religion claim under the remaining elements of KRS 446.350.

iii. Compelling interest

Movants assert: 1) the infection at issue was not shown to be varicella, and the Health Department could not act without a laboratory confirmation; 2) there was no "outbreak;" and 3) varicella is a mild "infection"[10] and not a public health threat. Movants conclude the Health Department lacked a compelling interest and was without authority to act. We address each of these arguments in turn.

a. Was the illness varicella, and was a laboratory confirmation necessary?

The Cabinet for Health and Family Services promulgates the controlling regulations. KRS 214.020. The regulations do not require laboratory confirmation of a disease or infection before the Health Department may act to contain it.

> 902 KAR[11] 2:050 states:
>
> Section 1. Property. Whenever any private or public property has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall take such measures as are

[10] The experts disagreed as to whether varicella is an "infection" or a "disease." We find this point to be irrelevant to our analysis.

[11] Kentucky Administrative Regulations.

necessary to secure adequate cleaning, disinfection, or other control procedures necessary to insure cessation of transmission.

Section 2. Persons. Whenever any person has been implicated as a *possible* reservoir or *possible* source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall employ such measures as are necessary to secure adequate isolation, restriction of employment or other control procedures that may be necessary to insure cessation of transmission of infection.

(Emphasis added).

902 KAR. 2:030, Section 1(2) further provides:

Control procedures. Local health departments or the Cabinet for Human Resources shall:

(a) Make or cause to be made such investigations as may be necessary for the purpose of securing data regarding clinical diagnosis, reservoir, and time, place and source of infection and contacts.

(b) Establish and maintain quarantine, isolation or other measures as required by law or by administrative regulations of the Cabinet for Human Resources relating to communicable disease control.

(c) Provide, or cause to be provided, for the instruction of persons affected and their attendants in the proper methods of such concurrent and terminal disinfection as may be required by the Cabinet for Human Resources or local board of health having jurisdiction.

> (d) Afford all contacts of persons suffering from those diseases for which there is a reliable and approved means of immunization the opportunity to be immunized.
>
> (e) Make inquiry or investigation to see that control measures are being properly observed during the period of communicability.
>
> (f) Introduce such other measures, not inconsistent with law or the administrative regulations of the Cabinet for Human Resources and the local board of health having jurisdiction, as are necessary because of *widespread infection* or *threatened* epidemic.

(Emphasis added). Finally, 902 KAR 2:030, Section 1(2) provides:

> Uncertain diagnosis. Whenever a case of unrecognized illness shall be reported to, or otherwise brought to the attention of the local health department or Cabinet for Human Resources which upon investigation presents symptoms of a communicable disease but in which sufficient time has not elapsed to render a positive diagnosis, the local health department or the Cabinet for Human Resources *may establish the control measures applicable in actual cases of the suspected communicable disease*, until such time as a positive diagnosis can be established. If the disease proves to be noncommunicable the temporary control measures shall be terminated at once.

(Emphasis added).

The Health Department clearly had the regulatory authority to act without a laboratory confirmation the disease or infection at issue was varicella. In

addition, Movants have not shown a substantial possibility they will prevail on their claim the disease was not varicella, but rather, a noncommunicable illness.[12]

In an email dated March 8, 2019, the school's registrar, Vanessa Dredger ("Ms. Dredger"), stated "[a]ll parents involved assert that it is chickenpox when I talk to them, but none took their children to the doctor." Therefore, the parents of the children self-reported the illness as "chickenpox."

On February 19, 2019, one of the students presented at Cincinnati Children's Hospital for treatment. That child was diagnosed with varicella by a physician, although no laboratory test was performed. The child also suffered from complications of varicella–a superinfection, pain in the joints, and resultant difficulty moving. The child received intravenous antibiotics.

Movants attempted to counter the evidence of a clinical or positive diagnosis by having several witnesses testify the doctor at Cincinnati Children's Hospital refused to give the child a note excusing his school absence due to chickenpox. However, Dr. Marshall testified he reviewed the child's medical records, which confirm he was diagnosed with varicella.[13] Dr. Marshall further testified a laboratory test is unnecessary for a trained physician to make a clinical

---

[12] Movants suggested the "rash" could be poison ivy.

[13] Mr. Raney also testified Cincinnati Children's Hospital "faxed over" a patient sheet with a doctor's notes that "explained chickenpox was suspected" and the "current diagnosis was a secondary infection due to the chickenpox."

diagnosis because varicella is typical in the way it presents. On cross-examination, Dr. Bark agreed physicians are competent to make a clinical diagnosis of varicella without laboratory confirmation.

There is also evidence Movants simply did not take the children to a doctor for diagnoses or testing. At the hearing, Movants relied on a chart prepared by Ms. Dredger which indicates only one child was seen by a doctor. Movants cannot decline to take the children to a doctor for diagnoses and/or laboratory tests, then be heard to complain the government acted without having "laboratory confirmation." Regardless, laboratory confirmation is not required under the regulations.

b. Was there an outbreak?

The trial court did not abuse its discretion in finding there was an "outbreak" requiring the Health Department to act. 902 KAR 2:020(10)(a) defines an "outbreak" as "[t]wo (2) or more cases . . . that are epidemiologically linked or connected by person, place, or time." The plain language of the regulation is met here. The regulation does not require a laboratory confirmation before an outbreak may be declared. *See, e.g., Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) ("[t]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source") (citation omitted).

c. *Is varicella a public health threat?*

The experts, Dr. Bark for Movants and Dr. Marshall for Respondents, both confirmed a varicella vaccine was developed in 1995. Before the vaccination was developed, approximately 4 million people contracted varicella in the United States each year; around 11,000 of them were hospitalized annually; and approximately 100 people died each year.

Both experts agree varicella is highly contagious.[14] Ninety percent of a nonimmune population will contract varicella if exposed to an infected person. Both experts testified varicella is spread through the air. Dr. Bark and Dr. Marshall also agree a person may be infected with varicella and be contagious for up to two days before the onset of the rash.

The experts each confirmed herpes zoster, or shingles, is a serious complication of varicella, which occurs in about one-third of adults who have had varicella. The pregnant, elderly, infants, and the immunocompromised suffer a higher rate of complications.

Dr. Marshall testified varicella is a type of herpes virus. Although Dr. Marshall stated he agreed with CDC[15] literature describing varicella as "mild," he

---

[14] Dr. Marshall testified varicella "spreads very rapidly through populations."

[15] United States Centers for Disease Control and Prevention.

also testified there is a threat to public health if varicella is not contained. He described the symptoms of varicella as follows:

> [t]he lesions are initially little red bumps. They evolve into vesicles, which is a little clear blister, it's described as a dewdrop on a rose petal. The average healthy person who gets chickenpox gets 200-500 of these lesions. They also have fever, they have malaise. Then the lesions turn into pustules, which are little blisters filled with puss. Those eventually crust, and they fall off. And once the last lesion crusts and falls off, they're -- the patient is no longer contagious.

Dr. Marshall cited the complication rate as 5-10%. In describing the possible complications, he stated:

> [m]ost of the complications are secondary bacterial infections. Those can be anything from an ear infection, to pneumonia, to severe invasive streptococcal syndrome, which I've personally taken care of in the hospital and I've lost patients to that. That's where the Group A strep, the bacteria that normally causes sore throat, actually gains entry into the skin lesions and then into the blood stream and causes shock and often death. That's one of the most serious complications. Besides secondary bacterial infections, you can actually have complications from the virus itself. So the virus can get into your brain, and cause encephalitis, which is brain infection. It can get into the lungs and cause pneumonia . . . 10% of women who get chickenpox while they're pregnant wind up in the hospital in the intensive care unit from varicella pneumonia.

Dr. Bark conceded the school population is at a greater risk of infection because varicella is highly contagious, and 82% of the students are unvaccinated. Dr. Bark further testified varicella is a mild infection. She testified

it is preferable if children contract the "wild" strain rather than being vaccinated. She opined varicella is not a serious public health threat.

Courts have traditionally recognized the government's compelling interest in public health, even in light of competing religious beliefs. In *Mosier v. Barren Cty. Bd. of Health*, 308 Ky. 829, 215 S.W.2d 967 (1948), the plaintiffs sought to enjoin a government resolution requiring all schoolchildren to be vaccinated against smallpox, or else be excluded from school. The plaintiffs argued vaccination was against their religious beliefs. The trial court denied the motion for an injunction. Kentucky's highest court affirmed, holding:

> [a]s pointed out in *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 886, 88 L.Ed. 1148, religious freedom embraces two conceptions, 'Freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' The *Ballard* opinion quoted from *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, where it was written that one may have any religious belief desired, but one's conduct remains subject to regulation for the protection of society. A learned and exhaustive opinion was written by Judge Tilford while a member of this Court, *Lawson v. Commonwealth* 291 Ky. 437, 164 S.W.2d 972, wherein he pointed out that the constitutional guarantee of religious freedom does not permit the practice of religious rites dangerous or detrimental to the lives, safety or health of the participants or to the public.

Id. at 969. *See also Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300, 101 S.Ct. 2352, 2373, 69 L.Ed. 2d 1 (1981) ("Protection of the

health and safety of the public is a paramount governmental interest which justifies summary administrative action"); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 361, 49 L.Ed. 643 (1905) ("According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety").

Although there was conflicting testimony presented at the hearing as to whether varicella is a public health risk, we cannot say the circuit court's findings were "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Com. ex rel. Conway*, 300 S.W.3d at 162. *See also Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) ("[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court"). The Commonwealth has a compelling interest in taking limited and temporary steps to control an outbreak of a vaccine-preventable disease, even in the absence of a serologically confirmed case.

iv. Least restrictive means

The Health Department first took action with respect to the school on February 5, 2019. In a letter sent to all parents and guardians, the Health Department stated the school was "currently experiencing an outbreak of an illness that is accompanied by a blister-like rash suspected to be chickenpox." At that

time, the school had reported six suspected varicella cases to the Health Department. The February 5, 2019, letter described the symptoms of chickenpox; advised parents to monitor their children; and advised them to contact their doctor if chickenpox was suspected. The letter further advised the parents to "ensure all members of your household are up-to-date on all vaccinations," but it did not require or purport to require vaccination.

By February 21, eighteen cases of the illness had been reported to the Health Department by the school. The Health Department had received one student's medical records from Cincinnati Children's Hospital showing that he was diagnosed with complications of chickenpox. Mr. Raney testified the Health Department found the increase from six to eighteen cases concerning because it represented a threefold increase in two weeks. On February 21, 2019, the Health Department required the school to send a follow-up letter to parents and guardians cancelling school events until 21 days after the onset of rash for the last ill student. The letter again advised parents to monitor their children; described the symptoms of varicella; and recommended, but did not order, vaccination.

On or about February 22, 2019, Father Muscha telephoned the Health Department to inquire whether the boys' basketball team could participate in the state tournament. Mr. Raney initially informed Father Muscha the team could not participate. Mr. Raney testified the Health Department was concerned about the

spread of varicella to pupils of other schools. The basketball team played against schools from other regions, including Hopkinsville, Kentucky; Somerset, Kentucky; Ohio; and Indiana.

After consultation with his superior at the Health Department, Mr. Raney informed Father Muscha the players on the basketball team could participate in the tournament if they passed a varicella titer test. The titer test indicates whether a person is immune to varicella, either due to having had varicella previously or having been vaccinated. On February 23, 2019, the Health Department advised Father Muscha two of the basketball team's ten players (Jerome and AC) did not show immunity to the virus and could not play, but the other eight players could participate.

By March 14, 2019, 32 cases of the illness had been reported by the school. By this point, 13% of the total student body had been reported as having the illness. Following telephone consultation with the Kentucky Department of Public Health, the Health Department required the school to send the third letter, imposing the school ban, to parents and guardians.

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), the United States Supreme Court considered whether the HHS[16] could require three closely-held corporations to provide health insurance

[16] United States Department of Health and Human Services.

coverage for four methods of contraception "that violate the sincerely held religious beliefs of the companies' owners." *Id.*, 573 U.S. at 689-90, 134 S.Ct. at 2759. Applying the federal statute that mirrors KRS 446.350, the Court determined the HHS mandate "plainly fails" the least restrictive means test. *Id.*, 573 U.S. at 692, 134 S.Ct. at 2759. The Court held:

> HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. . . . The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown . . . that this is not a viable alternative.

Id., 573 U.S. at 728, 134 S.Ct. at 2780. The Court also noted a second less restrictive means would be to establish an accommodation applying to for-profit organizations with religious objections to the mandate, as an exemption for non-profit organizations with religious objections already exists. *Id.*, 573 U.S. at 730-31, 134 S.Ct. at 2782.

In the case *sub judice*, the circuit court found Movants had not shown a substantial likelihood of success on the merits as to the elements of KRS 446.350. We cannot discern an abuse of discretion. The Health Department initiated less restrictive means before implementing the school ban. It increased its

level of regulation and response as the outbreak continued to grow: first, it issued an advisory letter; second, it implemented the activities ban; third, it initiated the school ban. Dr. Marshall opined the Health Department's response was reasonable, measured, and "incremental."

Movants argue the Health Department could have imposed a less restrictive alternative such as only banning symptomatic children from school, but Dr. Marshall testified just banning those children would not stop the outbreak because varicella may be transmitted before the sufferer is symptomatic. Dr. Bark conceded a person may transmit the infection prior to developing the rash, although she maintained the sufferer would have fever and malaise during that time.

Movants further assert the Health Department could have banned only populations at risk for complications from school premises (*i.e.,* pregnant women, infants, the elderly, and the immunocompromised). Dr. Marshall testified varicella itself is a public health risk, while Dr. Bark disagreed. At least one child at the school had already suffered complications. We must defer to the circuit court's weighing of the testimony and expert opinions at this juncture, and we do not discern an abuse of discretion. *See, e.g., Gingerich v. Commonwealth,* 382 S.W.3d 835, 850 (Ky. 2012) (Scott, J., dissenting) (internal quotation omitted) (emphasis added) ("[T]o be a 'less restrictive alternative,' [the alternative] must be both less

restrictive in the sense that it inhibits [the free exercise of religion] to a lesser degree *and* it must be a viable alternative in that it allows the Government to achieve the ends that are its compelling interest.").

Finally, Movants argue the school ban was an ineffective means to prevent the spread of the illness because the students could and did regularly interact outside of school, including attending daily mass at the church, which shares a ventilation system with Assumption Academy; having coffee and donuts together after mass on Sundays; and receiving communion on the tongue at mass. Movants assert an employee of the Health Department conceded at the February 26 meeting that a school ban would be pointless.

If anything, this argument supports a conclusion the Health Department could have done more, not less, to prevent the spread of the outbreak. 902 KAR 2:050. Nonetheless, Dr. Marshall opined the restrictions imposed by the Health Department were effective because, at the time of the hearing on April 1, 2019, only two new cases had been reported since the school ban, *i.e.,* in the period between March 15, 2019, and April 1, 2019. We further note the Cabinet for Health and Family Services could have implemented an emergency regulation requiring vaccination of all persons within the epidemic area, notwithstanding the religious exemption in KRS 214.036. We cannot determine an abuse of discretion under the facts and circumstances of this case.

b. United States Constitution

The First Amendment to the Constitution of the United States provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The First Amendment is made applicable to the States by the Fourteenth Amendment. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). In addition to their claim under the Kentucky Constitution, Movants brought claims under 42 U.S.C. § 1983, which provides a civil action for deprivation of federal Constitutional rights.

Movants rely on *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 2226, 124 L.Ed. 2d 472 (1993). There, church congregants practiced Santeria. "The basis of the Santeria religion is the nurture of a personal relationship with *orishas*, and one of the principal forms of devotion is an animal sacrifice." *Id.*, 508 U.S. at 524, 1135 S.Ct. at 2222. The city of Hialeah, Florida, enacted ordinances prohibiting religious animal sacrifice. The Eleventh Circuit upheld the regulations as constitutional, and the United States Supreme Court reversed. Movants assert *Hialeah* prohibits the "targeting of religious views," and "[h]ere . . . there were not orders of general applicability to the entire community–the orders were addressed to Assumption, a private Catholic church and school."

The *Hialeah* Court, noting the ordinances at issue used the words "ritual" and "sacrifice" and prohibited "few if any killings of animals . . . other than the Santeria sacrifice," *id.* 508 U.S. at 536, 1135 S.Ct. at 2228, concluded the ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." *Id.*, 508 U.S. at 545, 1135 S.Ct. at 2233 (citation omitted). In contrast, KRS 158.035, requiring immunization of schoolchildren, applies to both public and private school students.

In *Miller v. Davis*, 123 F.Supp.3d 924 (E.D. Ky. 2015), Davis, a state circuit court clerk, refused to issue marriage licenses to same-sex couples. A state statute required an authorization statement of the county clerk to appear on each marriage license, bearing "the signature of the county clerk or deputy clerk issuing the license." *Id.* at 932. Following the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed. 2d 609 (2015), the Governor of Kentucky issued a directive to county clerks requiring them to issue marriage licenses to same-sex couples. *Miller*, 123 F.Supp.3d at 932. Davis argued the Governor's directive substantially burdened her right to free exercise of religion under the First Amendment. *Id.* at 939.

The Court applied rational basis review to the state action under the First Amendment because the Governor's directive was neutral and generally applicable. *Id.* at 940. "Under rational basis review, laws will be upheld if they

are rationally related to furthering a legitimate state interest." *Miller*, 123 F.Supp.3d at 938 (citations omitted). "A law or regulation subject to rational basis review is accorded a strong presumption of validity." *Id.* (internal quotation omitted).

In this case, because the state action survives a strict scrutiny analysis, we need not consider whether the action would also satisfy the more deferential rational basis test.

3. Retaliation for protected speech

It is undisputed Jerome's lawyer sent an email to the Health Department on March 7, 2019, threatening to file suit unless the activities ban was lifted. On March 14, 2019, the school ban was implemented, the same day the lawsuit was filed. The remaining plaintiffs, as next friends and guardians of their children, joined in Jerome's lawsuit.

Citizens have the constitutional right "to petition the Government for a redress of grievances." United States Constitution, First Amendment. *See also* Kentucky Constitution, §1. This Court has explained:

> [i]n order to state a retaliation claim under the First Amendment a plaintiff must show that: 1) [she] engaged in constitutionally protected speech; 2) [she] was subjected to adverse action or was deprived of some benefit; and 3) the protected speech was a 'substantial' or a 'motivating factor' in the adverse action."

Mendez v. Univ. of Kentucky Bd. of Trustees, 357 S.W.3d 534, 546 (Ky. App. 2011) (citation omitted).

In *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999), two inmates appealed a grant of summary judgment against them on their claims of retaliation by prison officials "for their efforts to litigate a civil rights claim on plaintiff'[s] . . . behalf." *Id.* at 383. The Sixth Circuit vacated in part, explaining:

> [o]nce the plaintiff has met his burden of establishing that his protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). If the defendant can show that he would have taken the same action in the absence of the protected activity, he is entitled to prevail on summary judgment.

Id. at 399.

"Unlike in the *McDonnell Douglas*[17] burden-shifting framework, the burden does not shift back to a plaintiff to show pretext in First Amendment retaliation claims." *Dye v. Office of the Racing Commission*, 702 F.3d 286, 295 (6th Cir. 2012). A summary denial of the plaintiff's allegations is insufficient to support summary judgment in favor of the defendant. *Thaddeus-X*, 175 F.3d at 399. On the other hand, "[i]t is obvious, of course, that bare allegations of malice

---

[17] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794, 93 S.Ct. 1817, 1820, 36 L.Ed. 2d 668 (1973), holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed. 2d 338 (1993).

would not suffice to establish a constitutional claim." *Id.* (internal citations omitted).

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, ___ U.S. ___, 138 S.Ct. 1719, 201 L.Ed. 2d 35 (2018), a Christian baker refused to create a cake in celebration of the wedding of a same-sex couple because of his religious opposition to same-sex marriage. *Id.*, 138 S.Ct. at 1723. The couple filed a complaint with the Colorado Civil Rights Commission. The Commission determined the baker violated the Colorado Anti-Discrimination Act ("Act"), and the Colorado Court of Appeals affirmed. The United States Supreme Court reversed the decision of the Colorado Court of Appeals, holding the Commission's "actions here violated the Free Exercise Clause." *Id.*, 138 S.Ct. at 1724.

Although *Masterpiece* did not involve a claim of First Amendment retaliation, the Court's discussion as to the statements made by the Commission in initially finding a violation of the Act is instructive. The Court noted the record reflected "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." *Id.*, 138 S.Ct. at 1729. At one public hearing, several of the seven commissioners "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain . . . ." *Id.* Two months later, at a second public meeting, another commissioner stated:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id., 138 S.Ct. at 1729. The Court concluded: "[t]his sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation." *Id.*

Movants rely on Mr. Raney's use of the word "unfortunately" at the February 26 meeting as evidence of animus. The Oxford Living Dictionaries define "unfortunately" as "unluckily, sadly, regrettably, unhappily, woefully, lamentably, alas, sad to say, sad to relate."[18] We are unable to conclude that "unfortunately" *necessarily* connotes an admission of animus or an affirmative response as to whether Movants were "penalized," particularly when considered as a single word of an unfinished sentence.

---

[18] https://en.oxforddictionaries.com/definition/unfortunately. Last accessed 5/9/19. This Court may take judicial notice of the dictionary definition of "unfortunately." *Stokes v. Commonwealth*, 275 S.W.3d 185, 188 (Ky. 2008).

In a February 20 email between Mr. Raney and Julie Miracle,[19] before the activities ban and the school ban were implemented and before a lawsuit was threatened, Ms. Miracle stated:

> [h]ere is the guidance on [CDC] exclusion: Children who lack evidence of immunity and whose parents refuse vaccination should be excluded from school from the start of the outbreak through 21 days after rash onset of the last identified case.[20]

Therefore, the possibility of a school closure was being discussed prior to the threat of a lawsuit. On February 21, 2019, Mr. Raney made clear, when implementing the activities ban, that "[i]f cases continue or if any of these measures are not followed, additional prevention and control measures may become necessary."

Mr. Raney testified the Health Department became aware of over ten additional cases of varicella at the school on or about March 12. This made a total of 32 cases, or 13% of the student population. The school ban was implemented after telephone consultation with Dr. Doug Thoroughman of the Kentucky

---

[19] Ms. Miracle is a registered nurse who works for the Cabinet for Health and Family Services.

[20] At the hearing, Movants objected to introduction of this email chain (beginning February 20, 2019, and concluding March 12, 2019), Respondents' Exhibit P, on the basis that it was hearsay. The trial court overruled the objection based on Respondents' counsel's statement that he was introducing the email to show why the Health Department took the actions taken, but not for the truth of the matter asserted, *i.e.*, not to show what the CDC recommendations actually were.

Department for Public Health, on or about March 14. Mr. Raney further stated the increase in cases between February 26 and March 14 was "quick and alarming."

In the case at bar, following a careful review of the record, we cannot discern an abuse of discretion by the trial court in finding Movants have not shown a substantial likelihood of success on the merits of their First Amendment retaliation claim.

4. Equal protection

"It is a violation of equal protection to treat similarly situated individuals differently without any justification." *Roberts v. Mooneyhan*, 902 S.W.2d 842, 843 (Ky. App. 1995). Movants argue they were "targeted" by the Health Department because of their religious beliefs and their attendant decision to not vaccinate the children. Strict scrutiny review is applied to an equal protection claim involving a suspect class or a fundamental right. *Commonwealth v. Howard*, 969 S.W.2d 700, 702-03 (Ky. 1998).

Movants' evidence of "targeting" consists of: 1) Mr. Raney's purported admission that the Health Department was "punishing" Movants for exercising their religious beliefs; and 2) their contention the Health Department has not imposed similar restrictions on non-parochial schools. As previously noted, Mr. Raney's statement is not necessarily probative of animus toward Movants.

Moreover, Mr. Raney testified the February 6 letter was routine, and the Health Department has in the past issued similar letters for "multiple communicable diseases," "especially in schools." Mr. Raney further testified the Health Department has issued control measures in response to influenza outbreaks within the last four years to "many facilities within our region throughout Northern Kentucky." While he stated those control measures have not included school bans, he testified that control measures "vary, depending on the facility type and layout and structure and the staffing." He further stated: "[w]e take a lot [] of things into account when we implement those control measures." Because there is a dearth of evidence in the record to support a claim of animus or targeting, we cannot discern an abuse of discretion by the trial court as to this claim.

5. Procedural due process; substantive due process

For their procedural due process claim, Movants allege KRS 214.036 "required the adoption of emergency regulation to enact quarantines or other preventative measures for a specific area." Movants further contend a public hearing was required under KRS 13A.190, which prescribes the procedures for enactment of emergency regulations.

Under KRS 214.036, the mandate of an emergency regulation, and any attendant rights enumerated in KRS Chapter 13A, applies only where the Cabinet for Health and Family Services seeks to require the immunization of all

persons within the area of epidemic. In this case, Respondents have not required or purported to require Movants to be vaccinated for varicella. Therefore, an emergency regulation was not necessary, and KRS Chapter 13A does not apply.

"Substantive due process, a much more ephemeral concept [than procedural due process], protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action." *Moffitt v. Commonwealth*, 360 S.W.3d 247, 253 (Ky. App. 2012) (internal citation omitted).

In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27, 25 S.Ct. 358, 361-62, 49 L.Ed. 643 (1905), a state statute gave the local health board the authority to enact a regulation requiring vaccination "if, in its opinion, it is necessary for the public health and safety." *Id.*, 197 U.S. at 12, 25 S.Ct. at 358. A local health board adopted a regulation requiring vaccination against smallpox during an outbreak. The defendant was convicted of violating the regulation, and he alleged the statute and regulation deprived him of due process of law. *Id.*, 197 U.S. at 13, 25 S.Ct. at 359. In affirming the judgment, the Court held:

> it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a

> board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, *nor an unreasonable or arbitrary*, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.

Id., 197 U.S. at 27, 25 S.Ct. at 361-62 (emphasis added). *See also Mosier*, 215 S.W.2d at 969 (citing *Jacobson*). In the instant case, we cannot conclude the circuit court abused its discretion in finding Movants did not show they were likely to prevail on their substantive due process claim. Similar to *Jacobson*, the statutes and regulations implemented in Kentucky do not appear to be unreasonable or arbitrary.

C. Equities of the Situation

In weighing the equities of the situation, the circuit court "should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Maupin*, 575 S.W.2d at 699.

The Health Department asserted an injunction would endanger public health. It argued it had implemented narrowly-crafted measures to control the outbreak, pursuant to applicable regulations.

Movants have educational and religious rights at stake. Movants argue the issuance of an injunction would not threaten the public health because a sufficient control measure would be to ban only the symptomatic children. As previously noted, this argument was contradicted at the hearing by testimony to the effect that varicella is contagious even before the rash appears.

The circuit court adequately weighed the equities of the situation in denying Movants' motion for a temporary injunction. "[W]e give considerable deference to the circuit court's evaluation of the dispute, the issues involved, the weighing of the equities, and whether an injunction is proper under the particular circumstances at hand." *Boone Creek Properties, LLC v. Lexington-Fayette Urban Cty. Bd. of Adjustment*, 442 S.W.3d 36, 38 (Ky. 2014). *See also Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944) (citations omitted) ("The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. . . . [W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.").

II. CONCLUSION

WHEREFORE, Respondents' motion to supplement their brief is GRANTED. Movants' motion for interlocutory relief under CR 65.07 is DENIED. The motion for oral argument is DENIED.

ENTERED: JUN 2 6 2019

JUDGE, COURT OF APPEALS