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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000636-MR

JOSEPHINE HUDSON, Administratrix
of the Estate of Christopher Lee
Pettit — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 95-CI-000810

FRANKLIN COUNTY, KENTUCKY; FRANKLIN
COUNTY SHERIFF'S DEPARTMENT; TED
COLLINS, in his official capacity as
Franklin County Sheriff; JOE THORNSBERRY,
individually and in his official capacity
as a Franklin County Deputy Sheriff;
CITY OF FRANKFORT, KENTUCKY;
FRANKFORT POLICE DEPARTMENT;
TED EVANS, in his official capacity
as Chief of the Frankfort Police
Department; DALE ROBERTS, individually
and in his official capacity with the
Frankfort Police Department; PAUL REED;
and TRENA REED — APPELLEES

AND NO. 1997-CA-000697-MR

JOE THORNSBERRY, in his individual
and official capacities; TED COLLINS,
in his official capacity; FRANKLIN
COUNTY SHERIFF'S DEPARTMENT; and
FRANKLIN COUNTY, KENTUCKY — CROSS-APPELLANTS

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 95-CI-000810

JOSEPHINE HUDSON, Administratrix
of the Estate of Christopher Lee
Pettit CROSS-APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal and a protective cross-appeal from a summary judgment entered in favor of county and city police officials in a wrongful death action alleging that the police failed to warn or protect the decedent, who was an informant who was later murdered by the person he implicated, after the informant's identity was revealed. Upon consideration of appellant's arguments in light of the record herein and the applicable law, we vacate and remand for further proceedings.

In September 1992, Franklin County Deputy Sheriff Joe Thornsberry ("Thornsberry") and Frankfort Police Officer Dale Roberts ("Roberts") were separately receiving information concerning theft/burglary crimes in the Franklin County area. Thornsberry and Roberts subsequently commenced a joint investigation of those crimes.

On September 25, 1992, Thornsberry and Roberts interviewed Christopher Pettit ("Pettit") at the City of Frankfort Police Station regarding the crimes in question. Pettit, who was seventeen years old at the time, voluntarily came to the station and agreed to the interview. The evidence was in dispute as to whether Pettit was advised of his rights before being questioned. During the interview, Pettit provided detailed

information implicating Paul Reed and his wife, Trena Reed, in the series of thefts. Pettit also admitted his involvement with the Reeds in some of the crimes. The deposition of Jonathan Cox ("Cox") estimated that Pettit was involved in approximately 250 burglaries with Paul Reed and Cox. Roberts and Thornsberry promised Pettit that in exchange for his testimony against Paul Reed, no criminal charges would be brought against him.

During the interview, Pettit told the officers that he was afraid of Paul Reed. He apprised them of an incident in which Paul Reed had threatened him with a gun and recounted another incident in which Reed had actually shot at Pettit, blowing a hole in his sweater.

Roberts used the information provided by Pettit to obtain a search warrant for the Reed residence. During the search of Reed's residence, stolen property was found.

On October 20, 1992, Thornsberry filed a criminal complaint against Paul Reed on a felony charge in connection with a stolen truck. The felony charge was subsequently dismissed, at Roberts' and Thornsberry's request, when it became evident that the name of the confidential informant (Pettit) would have to be released to Reed's attorney during the preliminary hearing. Electing not to reveal the identity of the informant, Commonwealth Attorney Burton dismissed the charges against Paul Reed, and decided to proceed directly by grand jury indictment.

In December 1992, Deputy Thornsberry testified before a Franklin County grand jury regarding the crimes associated with the theft of the truck. On December 16, 1992, the grand jury returned indictment nos. 92-CR-00199-1, 2, and 3 against Paul

Reed, Trena Reed and Donald Bryant. All three defendants were represented by Frankfort attorney Max Smith.

On February 1, 1993, Attorney Smith filed a discovery motion on behalf of the defendants. The motion requested, inter alia, disclosure of the names of informants, any agreements reached between authorities and informants, and witness statements. On February 8, 1993, the Franklin Circuit Court sustained Smith's motion and ordered Burton to provide the requested information by February 28, 1993. The case was set for trial on June 14, 1993. According to Commonwealth Attorney Burton's deposition testimony, Pettit was slated to be a significant witness at trial against the Reeds and Donald Bryant.

On June 8, 1993, Attorney Burton met with Thornsberry and Roberts at Burton's office concerning the Reed case to discuss the discovery documents that would be provided to Attorney Smith. Up until that time, Burton withheld the investigative file containing Pettit's statement from defense counsel. At the meeting, Thornsberry, Roberts and Burton discussed turning over Pettit's statement and there was a concern that such disclosure raised a safety issue for Pettit. Burton testified that "[w]e had a conversation on that date [June 8th] concerning notification of Chris Pettit and Steve Stosberg." Burton then instructed Roberts and Thornsberry to locate Pettit and bring him in so that Burton could prepare him for his trial testimony against the Reeds.

Burton filed the entire investigative file, including Pettit's statement, in the court record on June 8, 1993. He delivered a copy of the documents to Attorney Smith that same

day. Attorney Smith had the file delivered to the Reed residence on June 8, 1993. Upon receipt of the file, Trena Reed stated, "[h]ere's the rat" referring to Pettit's statement.

Deposition testimony of several witnesses established that on June 8, 1993, Paul and Trena Reed conspired to murder Pettit for acting as an informant and to prevent him from testifying against them at their upcoming criminal trial. On June 9, 1993, one day before Pettit's murder, James Reed, then acting as a confidential informant for Frankfort Police Department Detective Terry Harrod, called the Frankfort Police Department and advised them that Paul Reed was planning to hurt Pettit.

It is undisputed that no one from the Frankfort Police Department ("FPD"), the Franklin County Sheriff's Office ("FCSO"), or the Franklin County Commonwealth Attorney's Office ever notified or warned Pettit that his identity had been disclosed to the Reeds as the informant against them. Nor was Pettit ever brought into Commonwealth Attorney Burton's office in preparation for trial.

In late February or March 1993, Pettit left Frankfort to stay with his relatives in Ohio. He did not return to Frankfort until approximately June 6, 1993. Between June 6, 1993 and the date of his death, Pettit was staying at Oscar Maggart's house.

According to the deposition testimony of Jonathan Cox, in the early morning hours of June 10, 1993, Paul Reed and Jonathan Cox picked up Pettit at Oscar Maggart's house under the pretext of taking him to Ohio to spend some money. At some

point, after arriving in Ohio, Paul Reed instructed Pettit to pull off the road as he wanted to show Pettit a house nearby that could be burglarized. Pettit exited the vehicle and began walking with his back to Reed and the vehicle. Paul Reed then took a .22 caliber pistol and shot Pettit three (3) times. Pettit then began running away, screaming as he ran. Paul Reed then followed Pettit and shot him five (5) more times. Cox then used a knife to cut Pettit's throat. Pettit died that day from multiple gunshot wounds to the head and stab wounds to the neck. Subsequently, Paul Reed pled guilty to aggravated murder in Ohio. He was sentenced to life in prison with parole eligibility after twenty (20) years.

On June 9, 1995, appellant, the estate of Chris Pettit, filed an action in the Franklin Circuit Court against the following defendants: the City of Frankfort; Franklin County; the Franklin County Sheriff's Office; the Frankfort Police Department; Ted Evans, in his official capacity as Chief of the Frankfort Police Department; Dale Roberts, individually, and in his official capacity as an officer of the Frankfort Police Department; and Joe Thornsberry, individually, and in his official capacity as a Franklin County Deputy Sheriff. The complaint alleged several causes of action related to the disclosure of Pettit's identity and the failure of the various police authorities to inform him of said disclosure and protect him from any harm resulting from his cooperation with them as an informant. The causes of action alleged against the various police authorities were based on common law negligence;

negligence per se; violation of a statutory duty; negligent supervision; and the tort of outrageous conduct.

After extensive discovery, the defendants moved for summary judgment. The court granted the motion, ruling that the defendants owed no duty to Pettit under the "special relationship" test enunciated in Fryman v. Harrison, Ky., 896 S.W.2d 908 (1995). The court further ruled that Thornsberry could not be held liable to appellant because he had resigned his position as a Deputy Sheriff in March of 1993, some three months before the disclosure of Pettit's identity. From that judgment, the estate of Chris Pettit now appeals. Appellees, Franklin County, Franklin County Sheriff's Department, Joe Thornsberry, and Ted Collins filed a protective cross-appeal regarding the constitutionality of KRS 421.500(4) and the failure to join indispensable parties.

We shall first address appellant's argument that appellees owed a common law duty to warn and/or protect Pettit. Appellant maintains that when law enforcement officers use a juvenile as an informant/witness in a criminal investigation, there arises a reciprocal duty to protect and/or warn the informant/witness when he has been placed in a position of danger. As support for this argument, appellant cites the "universal duty to all" principle established in Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328 (1987). Recently, the holding in Grayson was narrowed by Commonwealth of Kentucky, Corrections Cabinet v. Vester, Ky., 956 S.W.2d 204 (1997). The Vester Court stated that notwithstanding the "universal duty of care" principle enunciated

in Grayson, "[p]ublic officials in an individual capacity or otherwise, cannot be expected to protect every individual whether known to them or not from any possible harm by third parties." Vester, 956 S.W.2d at 206, citing Fryman v. Harrison, Ky., 896 S.W.2d 908, 909-910.

In Vester, three prisoners who escaped from the Kentucky State Penitentiary in Eddyville, traveled to Tennessee, some 50 miles from the prison, where they brutally murdered two people. The Administrators of the estates filed an action in the Board of Claims, asserting that the negligence of the Corrections Cabinet in allowing the perpetrators to escape from custody caused the deaths of the victims. The Vester Court further quoted from Fryman:

> To establish a negligence claim against a public official, the complaint must allege a violation of a special duty owed to a specific identifiable person, and not merely the breach of a general duty owed to the public at large.

Vester, 956 S.W.2d at 206, quoting Fryman, 896 S.W.2d at 910. The Court in Vester held that although the Corrections Cabinet had a duty to prevent the escape of the inmates from the penitentiary, it did not owe a duty to the victims to prevent them from the harm caused by the escapees because they were not readily identifiable as persons likely to be injured as a result of the escape, nor did a "special relationship" exist between them and the Cabinet. As to what constitutes a "special relationship" between a victim and a public official, the Vester Court recognized that Fryman adopted the following test first enunciated in Ashby v. City of Louisville, Ky. App., 841 S.W.2d 184 (1992):

> a "special relationship" exists only when the victim is in state custody or is otherwise restrained by the state at the time in question.

Vester, 956 S.W.2d at 206, citing Ashby, 841 S.W.2d at 190.

Upon reading Ashby and Fryman, we see that the "special relationship" test is actually a two-prong test:

> It must be demonstrated that "the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor."

Fryman, 896 S.W.2d at 910, quoting Ashby, 841 S.W.2d at 190.

In Fryman, the issue was whether a county jailer and circuit clerk could be held liable when an inmate who was mistakenly released assaulted the plaintiff. The Court stated that in the analysis of legal duty, "the major issue is the question of foreseeability." Fryman, 896 S.W.2d at 909. The Court found that injuries were not foreseeable and the victim was not identifiable. The Court then went on to apply the two-prong "special relationship" test and found that said test had not been met since the victim was never in state custody and the offender was not a state actor.

In Ashby, a victim of domestic violence was murdered when the police failed to arrest the defendant pursuant to a court order mandating that the defendant be arrested for violation of an emergency protective order relating to the victim. The Court stated:

> [T]he general rule of thumb, in the absence of some "special relationship," is that a municipality or a law enforcement agency or official does not owe individual citizens a duty to protect them from crime. Thus, courts generally will not consider the "reasonableness" of actions taken to protect individual citizens from crime.

Ashby, 841 S.W.2d at 189. The Court then applied the two-prong "special relationship" test and concluded that no duty was owed to the victim.

Appellant contends that Ashby should be distinguished from the instant case because Ashby involved claims arising under 42 U.S.C. § 1983 and, thus, the "special relationship" test was articulated in the context of constitutional, as opposed to common law, duties. Upon reviewing Ashby, we see that the plaintiff alleged a breach of the common law duty of care in failing to protect the victim, as well as a breach of constitutional duties under 42 U.S.C. § 1983. Moreover, the Court in Fryman specifically held that the requirement of a "special relationship" between the victim and the public official(s) "relates not only to actions pursuant to 42 U.S.C. § 1983, but to an ordinary tort case such as this one." Fryman at 910.

Appellant also asks that we distinguish Fryman and Ashby because neither case involved a juvenile victim. We would note that Pettit was eighteen years of age at the time of his murder, although he was seventeen years old in September 1992, when he gave his statement to the police. In any event, there is no authority for making an exception to the "special relationship" test where the victim was a juvenile informant.

In the case at bar, while the victim (Pettit) was identifiable and there was evidence that the injury was foreseeable, there was nevertheless no "special relationship" between Pettit and the various police authorities pursuant to strict constraints of the above-stated two-prong test. Pettit

was not in state custody or otherwise restrained by the authorities, nor was the offender a state actor. Accordingly, there was no duty of common law to warn or protect Pettit.

The next argument before us is that Officers Roberts and Thornsberry had a statutory duty to warn Pettit of the disclosure of his identity. The statute which appellant maintains created the duty is KRS 421.500(4) which provides as follows:

> Law enforcement officers and attorneys for the Commonwealth shall provide information to victims and witnesses on how they may be protected from intimidation, harassment, and retaliation as defined in KRS 524.040, 524.045 and 524.055.

Appellees, Thornsberry, Ted Collins, the Franklin County Sheriff's Department, and Franklin County, argue on cross-appeal that KRS 421.500(4) is void because it is unconstitutionally vague. Appellees, Ted Evans, Dale Roberts, City of Frankfort, and the Frankfort Police Department, likewise argue that KRS 421.500(4) is void for vagueness. In addition, they argue that the statute does not apply to them because they are or were employed by a municipality, not the Commonwealth.

A statute is impermissibly vague when it either forbids or requires the doing of an act in terms so vague or indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Raines v. Commonwealth, Ky. App., 731 S.W.2d 3 (1987). In deciding whether an act of the General Assembly is unconstitutional, there is a presumption in favor of constitutionality. Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446 (1994).

In reading KRS 421.500(4) in terms of the facts in the present case, we cannot say that the statute is so vague or indefinite that it cannot be determined what the legislature intended by the statute. As to the terms "victims" and "witnesses," we believe those individuals would be clearly identifiable by the law enforcement officers and attorneys for the Commonwealth involved in the case. Further, there is a definition for "victim" set out in KRS 421.500(1). As to the term "law enforcement officer," the definition in KRS 15.310(3) specifically includes city and county police officers:

> "Law enforcement officer" means a member of a lawfully organized police unit or police force of county, city or metropolitan government who is responsible for the detection of crime and the enforcement of the general criminal laws of the state, as well as sheriffs, sworn deputy sheriffs, campus security officers, law enforcement support personnel, public airport authority security officers, other public and federal peace officers responsible for law enforcement, and special local peace officers licensed pursuant to KRS 61.360.

Further, the term "attorneys for the Commonwealth" would clearly apply to Attorney Burton, as he was the Commonwealth Attorney for Franklin County who was involved in the case.

Regarding what "information" is required to be provided to victims and witnesses under the statute, the statute specifies that it is information "on how they may be protected from intimidation, harassment, and retaliation as defined in KRS 524.040, 524.045, and 524.055." While no further guidance was provided in the statute as to what constitutes "information," we do not believe the statute is thereby impermissibly vague since information as to how a particular victim or witness may be so

protected would necessarily differ as to each victim and witness depending on the known facts of each case. In our view, in order to serve its purpose (crime victim and witness protection), the language of the statute could not be more specific. Thus, in some cases, ascertaining the duty owed under the statute according to the facts may not be so clear. However, in the instant case, we believe that the police officials and the Commonwealth Attorney had a minimum duty under the statute to inform Pettit that his identity was being revealed to the Reeds so that he could take measures to protect himself.

There was evidence that Officers Thornsberry and Roberts knew Pettit was afraid of Reed and that Reed had once shot at Pettit. There was also evidence that the FPD was informed that Reed was planning to hurt Pettit. Finally, Commonwealth Attorney Burton's deposition testimony established that he, Thornsberry, and Roberts discussed their concern regarding Pettit's safety in the event his identity was revealed. They also discussed notifying Pettit. However, Pettit was never notified that his identity was being revealed. Although there was some evidence that Officer Thornsberry told Pettit to stay away from Reed during the September 1992 interview, we do not feel that absolved the police officials and the Commonwealth Attorney of their duty to inform Pettit that his identity was being revealed.

The next issue before us is the defense of sovereign immunity asserted by Franklin County, FCSD, Ted Collins, and Joe Thornsberry. It is well settled that a county is a political subdivision of the state and, as such, is entitled to the

protective cloak of sovereign immunity from tort liability. Upchurch v. Clinton County, Ky., 330 S.W.2d 3228 (1960). Sovereign immunity can only be waived by express act of the legislature. Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997). Thus, Franklin County is immune from the suit.

As to Sheriff Ted Collins and the FCSD, KRS 70.040 provides:

> The sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section. When a deputy sheriff omits to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission.

The above stated statute appears to us to be an express waiver of sovereign immunity. Thus, the sheriff and the FCSD are not immune from suit.

Joe Thornsberry, who was sued individually and in his official capacity as a Franklin County Deputy Sheriff, is immune from suit in his official capacity. As to personal liability, it has been held that "individuals cannot avoid personal liability for tortious misconduct by cloaking themselves in sovereign immunity." Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, Ky., 805 S.W.2d 133, 139 (1991). Personal liability for a public officer's negligence depends on whether the duties he was performing were ministerial or discretionary in nature. Thompson v. Huecker, Ky. App., 559 S.W.2d 488 (1977). In our view, the duty that was to have been performed under KRS 421.500(4) was ministerial in nature since

the language of the statute is mandatory, not permissive, and there is little room for discretion under the statute. Accordingly, the defense of sovereign immunity was not available to Thornsberry.

Thornsberry also contends he could not be held liable for Pettit's murder because he resigned as a deputy on March 8, 1993, some three months prior to Pettit's murder. In Sudderth v. White, Ky. App., 621 S.W.2d 33 (1981), it was held that a deputy jailer who went off-duty some hours before a detainee's suicide could not be held liable for his negligence while on duty because the deputy's responsibility ended when he went off-duty. In the present case, there was evidence that Thornsberry continued to assist the police and the Commonwealth Attorney in the prosecution of the case after he resigned. Nonetheless, under the reasoning of Sudderth, he would not owe a duty to Pettit because he had no legal responsibility for Pettit after he resigned. The FCSD, however, would still have been responsible for the case after Thornsberry resigned.

Finally, appellees argue on cross-appeal that the trial court erred in failing to join indispensable parties under CR 19.01. One of the persons appellees maintain should have been joined was Commonwealth Attorney Max Burton. We agree that Burton was an indispensable party since it was he who actually disclosed Pettit's identity and given the duty imposed on him by KRS 421.500(4). However, in his official capacity, he would be shielded from liability on grounds of sovereign immunity as he was employed by the state. As to the other persons that

appellees sought to join, we do not deem them to be indispensable parties under CR 19.01.

Summary judgment can only be used 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 and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). There are many issues of fact that are yet to be resolved in this case before liability can be imposed, and we believe the trial court erred in entering summary judgment as a matter of law on the basis of a lack of duty owed to Pettit. Therefore, we vacate the judgment as to all appellees except Thornsberry and Franklin County (not including the Franklin County Sheriff's Department) and remand for further proceedings.

GUIDUGLI, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur in part and respectfully dissent in part. I concur as to the holding on the cross-appeal that KRS 421.500(4) is not unconstitutional. I dissent on the cross-appeal as to the trial court's failure to join indispensable parties. I believe that allegations were properly pled against all of these parties and that they were required to be joined as defendants.

As to the direct appeal, I would vacate the summary judgment against all the appellees and remand for further proceedings on the complaint. I believe the case sub judice is distinguishable from Vester, Fryman and Ashby based on Hudson's

claim of common law negligence and the fact that Pettit was a foreseeable victim. I do not believe that sovereign immunity is available as a defense to any of the parties under Withers because I believe KRS 421.500(4) and KRS 70.040 constitute waivers of sovereign immunity. This case presents an excellent opportunity for the Supreme Court to clarify its previous holdings in Vester, Fryman, Ashby and Winthers.

BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Thomas C. Lyons
Covington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES: CITY OF FRANKFORT, TED EVANS, FRANKFORT POLICE DEPARTMENT AND DALE ROBERTS:

J. Michael Brown
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES/CROSS-APPELLANTS: JOE THORNSBERRY, TED COLLINS, FRANKLIN COUNTY SHERIFF'S DEPARTMENT, AND FRANKLIN COUNTY, KENTUCKY

C. Thomas Hectus
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