

RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002654-MR

RODERICK DALE WHITNEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 95-CI-005328

JEFFERSON COUNTY FISCAL COURT
AND OFFICER WALTER ELDERS

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Roderick Dale Whitney appeals from an order of the Jefferson Circuit Court dismissing his action against Jefferson County and Officer Walter Elders. We affirm.

The opinion of the learned trial court clearly, adequately, and accurately sets out the applicable facts and law of this case. We adopt it as our own.

On June 15, 1995, Mr. Whitney was detained by Officer Elders of the Jefferson County Police Department for approximately two hours. Officer Elders' actions were based upon information received during a "911"

telephone call that mistakenly identified Mr. Whitney as Aaron Wilson, a suspect in a murder investigation.

On September 21, 1995, Mr. Whitney filed an action for false arrest/false imprisonment against Fiscal Court, the governing body of Jefferson County. On February 13, 1997, Fiscal Court filed a motion for summary judgment on the basis of sovereign immunity. On February 18, 1997, Mr. Whitney filed a motion to amend his complaint to add Officer Elders as a party defendant. Officer Elders was served with summons and the amended complaint on March 28, 1997.

On April 14, 1997, Officer Elders filed a motion to dismiss on the basis that the amended complaint against him is barred by the applicable statute of limitations. Mr. Whitney filed a response to said motion, and Officer Elders was given leave to file a reply.

On April 23, 1997, the Court entered an Opinion and Order denying the motion for summary judgment brought by Fiscal Court. While the Court found that the doctrine of sovereign immunity applies to Fiscal Court as to Mr. Whitney's state law claims, the Court determined (based upon the case law at that time) that the purchase of insurance under KRS 65.150 would be an implied waiver of said immunity.

On May 6, 1997, Fiscal Court renewed its motion for summary judgment, alleging that it had not purchased liability insurance coverage of any kind for the acts of Officer Elders. Fiscal Court subsequently filed a second renewed motion for summary judgment on the basis of Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997), a new case which holds that the purchase of liability insurance does not constitute a waiver of sovereign immunity.

On June 18, 1997, Mr. Whitney filed a motion to expand and clarify the Court's decision of April 23, 1997, so as to hold that Fiscal Court has the obligation under

KRS 65.2005 to defend and indemnify Officer Elders in this action. Fiscal Court filed a response to said motion on July 3, 1997, and Mr. Whitney was given leave to file a reply.

OPINION

A county is a political subdivision of the Commonwealth and as such, it is an arm of state government protected by the same sovereign immunity as the state. Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967). Thus, in the absence of a legislative waiver of immunity, a county (just like the state) is immune from tort liability.

Based on a line of cases following Dunlap v. University of Kentucky Student Health Services Clinic, Ky., 716 S.W.2d 219 (1986), this Court held that KRS 65.150, which authorizes a county to purchase insurance covering the liability of its employees and officials but not for itself, was an implied waiver of immunity to the extent, if any, of the purchased insurance.

The recent case of Withers, 939 S.W.2d at 346, however, holds that the legislature abrogated the Dunlap decision by subsequently amending KRS 44.072, to require an express waiver of immunity, and by adding KRS 44.073(14), which provides that the purchase of liability insurance shall not be construed as a waiver of immunity.

KRS 44.070 et. seq., the Board of Claims Act, is applicable to counties since a county is an arm of state government. Cullinan, 418 S.W.2d at 408. Consequently, KRS 65.150 does not constitute an implied waiver of Fiscal Court's immunity from suit in tort.

Notwithstanding said immunity, Mr. Whitney argues that Fiscal Court has an obligation to defend and indemnify Officer Elders in this case based upon KRS 65.2005 of the Claims Against Local Governments legislation. Fiscal Court disagrees. It argues that Officer Elders in his official capacity is also cloaked with sovereign immunity and KRS 65.2005 only becomes relevant when an officer

is sued in his or her individual capacity, which Mr. Whitney has not done.

Suit against an individual in his or her official capacity is the equivalent of an action against the governmental entity (i.e., county). The immunity of the county, however, does not extend to its agents or employees who are sued in their individual capacities. Gould v. O'Bannon, Ky., 770 S.W.2d 220 (1989).

Whether or not the cost of this action and the liability for payment of any judgment rendered against Officer Elders, individually, rests with the county, pursuant to KRS 65.2005, need not be answered unless Mr. Whitney's suit against Officer Elders was timely filed and sought personal liability against said officer.

Officer Elders argues that Mr. Whitney's claim against him is time-barred by the applicable one-year statute of limitations in KRS 413.140(1)(c). The alleged incident involving Mr. Whitney occurred on June 15, 1995, but Mr. Whitney did not seek to amend his complaint (filed September 21, 1995) to add Officer Elders as a defendant until February 18, 1997. Thus, Mr. Whitney's claim against Officer Elders is time-barred unless it relates back to the date of the original complaint under CR 15.03.

In order for an amended complaint to relate back to the date of the original complaint, the requirements of CR 15.03 must be met. Nolph v. Scott, Ky., 725 S.W.2d 860 (1987). The parties agree that the only issue involves the requirements of subsection (2) of CR 15.03, which read, in relevant part, as follows:

An amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the

action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Mr. Whitney argues that notice under CR 15.03(2) should be imputed to Officer Elders based on an identity of interest between the officer and Fiscal Court. In 6 Philipps, Kentucky Practice, CR 15.03, Comment 4 (5th ed.), it states that an "identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other."

Even if this Court were to impute notice of the litigation to Officer Elders based upon an identity of interest with Fiscal Court, such would only satisfy subsection (a) of CR 15.03(2). Subsection (b) of said rule requires that Officer Elders knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Mistake, as used in CR 15.03(2)(b), involves inadvertence due to mistaken identity or misnomer or mislabeling. Kentucky Practice, supra at Comment 7. It does not involve the situation where a plaintiff has overlooked a potential claim during the limitation period and thereafter seeks to add the new defendant.

As argued by Officer Elders, he was named in the body of the original complaint as the officer who falsely arrested/falsely imprisoned Mr. Whitney. Mr. Whitney clearly knew the identity of the officer. He is not trying to substitute Officer Elders as a defendant because of a mistake concerning the identity of the proper party.

The Complaint named only Fiscal Court as a defendant and stated that Fiscal Court was

liable for the wrongful acts of Officer Elders under KRS 65.2001(1)(b) and KRS 65.2002. Mr. Whitney could have also named Officer Elders as a defendant, but he made the choice or tactical decision to proceed solely against Fiscal Court.

Consequently, Mr. Whitney's claim against Officer Elders fails to meet the requirement of subsection (b) of CR 15.03(2). Thus, the amended complaint does not relate back to the date of the original complaint, and summary judgment in favor of Officer Elders is proper on the basis that the claim against him is time-barred.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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