

RENDERED: DECEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001672-MR

KENTUCKY COMMUNITY AND TECHNICAL
SYSTEM, MADISONVILLE COMMUNITY
COLLEGE, AND UNKNOWN DEFENDANTS

APPELLANTS

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 10-CI-00230

VICKI MARKS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellants, Kentucky Community and Technical College System, Madisonville Community College, and unknown employees of each (hereinafter “KCTCS”) appeal from the Hopkins Circuit Court’s order

denying their motion to dismiss. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error and accordingly, affirm the Hopkins Circuit Court.

The facts of this case are not in dispute. On March 31, 2009, Vicki Marks transported a group of students to the Glema Mahr Arts Center on the campus of Madisonville Community College as part of a field trip. While at the center, Marks fell and injured her shoulder. Marks filed a workers' compensation claim against the Hopkins County Board of Education. Thereafter, Marks filed dual actions against KCTCS, one in the Hopkins Circuit Court asserting a negligence action and the other with the Board of Claims.¹

KCTCS moved for dismissal of the circuit court case based on the defense of governmental immunity. The affidavit of J. Kenneth Walker, a Vice-President of KCTCS, filed in support of KCTCS's motion established that the Glema Mahr Center for the Arts is the property of the Commonwealth of Kentucky for the use of KCTCS as part of the Madisonville Community College. KCTCS argued to the trial court that as Marks had not presented any evidence to establish that KCTCS was engaged in a proprietary function in the use of the Glema Mahr Center for the Arts, that it was entitled to dismissal on the grounds of governmental immunity. Marks argued that the issue of whether KCTCS was engaged in a proprietary function required adequate discovery.

The trial court denied KCTCS's motion and stated:

¹ The Board of Claims action is currently in abeyance until resolution of the circuit court case.

It is admitted that the Defendants are state agencies and entitled to governmental immunity, provided they were not engaged in any proprietary function; individual employees are immune provided they were engaged in discretionary and not ministerial functions. The Court is of the opinion that the Plaintiff is entitled to conduct discovery on these issues.

Trial court order August 26, 2010. It is from this order that KCTCS now appeals.

On appeal KCTCS presents a sole argument, namely, that they were entitled to dismissal of the complaint as a matter of law because the Board of Claims has exclusive jurisdiction over negligence claims asserted against state agencies and their employees. This argument may be simplified to whether KCTCS was entitled to governmental immunity. With this argument in mind we turn to our jurisprudence.

At the outset we note that generally, an order denying dismissal of an action is inherently interlocutory and non-appealable. *Gooden v. Gresham*, 6 Ky.Op. 560 (Ky. 1873) (denial of motion to dismiss is not a final order from which a party may appeal); *Parton v. Robinson*, 574 S.W.2d 679 (Ky.App. 1978) (denial of motion to dismiss was not final and appealable order); *see also Louisville Label Inc. v. Hildesheim*, 843 S.W.2d 321 (Ky. 1992) (order denying motion for voluntary dismissal is not appealable and action below merely continues). However, in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), the Kentucky Supreme Court recognized an exception to the general rule and stated “that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.” *Prater* at 887.

Thus, we have jurisdiction to review the trial court's denial of KCTCS's motion to dismiss in the case *sub judice*.

Additionally, we believe that our review of the matter *sub judice* is more properly for the denial of a summary judgment motion because KCTCS filed the affidavit of J. Kenneth Walker, a Vice-President of KCTCS, in support of its motion. CR 12.02 and CR 12.03 require that a motion in which matters outside the pleadings are considered is to be treated as a motion for summary judgment. *See Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky.App. 1994)(affidavit filed in support of motion to dismiss which was considered by the court to be determinative of the issue required motion to be treated as one for summary judgment under CR 56.)

Accordingly, we note that the applicable standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved

in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. See also *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). With this in mind we now turn to KCTCS’s sole argument.

As noted, KCTCS’s sole argument is that it is entitled to governmental immunity² in the present action. In addressing this argument, we turn to the recent Kentucky Supreme Court decision, *Prater, supra*. Therein, the Court noted:

[G]overnmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, i.e., public acts integral in some way to state government. *Id.* The immunity does not

² Similarly, *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) addresses employee immunity for discretionary and not ministerial acts.

extend, however, to agency acts which serve merely proprietary ends, i.e., non-integral undertakings of a sort private persons or businesses might engage in for profit.

Id. at 887.

Thus, if KCTCS is entitled to governmental immunity, i.e., it was not undertaking a proprietary function, then it would also be entitled to be free “from the burdens of defending the action, not merely . . . from liability.” *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). As such, the dispositive issue is whether KCTCS was engaged in a proprietary function or a governmental function in operating the Glema Mahr Center for Arts.

Unlike the trial court in *Prater*, which explicitly ruled that the Appellant was engaged in a proprietary rather than a governmental function when it denied Appellant’s motion to dismiss based on governmental immunity, the trial court in the matter *sub judice* determined that additional discovery was necessary before ruling on the issue of governmental immunity. *See also Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990). We find no error in such a ruling, especially in light of *Hasty v. Shepherd*, 620 S.W.2d 325, 327 (Ky. App. 1981), wherein the court noted “A summary judgment may not properly be granted before a respondent has an opportunity to complete discovery. The key word is “opportunity.” *Id.* citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky.App. 1979). We agree with the trial court that Marks should be provided the opportunity for discovery on the possible dispositive issue of governmental immunity in the case *sub judice*.

While KCTCS cites to KRS 164.300³ and KRS 164.580(1)(h)⁴ in support of the argument that it is entitled to governmental immunity, we note that these statutes do not specifically include or exclude a center for the arts as part of the official legislative purpose of KCTCS. Further, the trial court did not rule upon the effect of these statutes. Regardless, KCTCS can refile their motion to dismiss, if appropriate, once discovery on the issue is fully developed.

Finding no error, we affirm the Hopkins Circuit Court.

STUMBO, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE: Respectfully, I disagree with the decision reached by the majority. Applying the analysis detailed in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), and the cases cited therein granting governmental immunity, KCTCS was engaged in activities that are clearly classified as promoting its mission of education. Accordingly, it is entitled to governmental immunity, and I would reverse the trial court.

³ The purpose of the state universities and colleges is to give instruction at the college level, in residence and through extension study, in academic, vocational and professional subjects and in the science and art of teaching, including professional ethics, to conduct training schools, field service and research, and to render such supplemental services as conducting libraries and museums, dormitories, farms, recreational facilities and offering instruction in such general and cultural subjects as constitute a part of their curricula.

⁴ [One of the goals of KCTCS is to] “Promote the cultural and economic well-being of the communities throughout Kentucky”

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