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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002134-MR

JOHN MATTHEW WOOLDRIDGE — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 09-CI-007781

LOUISVILLE JEFFERSON COUNTY
METRO GOVERNMENT — APPELLEE

AND

NO. 2014-CA-000033-MR

DELBERT MICHAEL BONZO — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 09-CI-007781

LOUISVILLE JEFFERSON COUNTY
METRO GOVERNMENT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The issue in these appeals is whether the Louisville Jefferson County Metro Government (Metro) has an obligation to indemnify Delbert Michael Bonzo pursuant to Kentucky Revised Statutes (KRS) 65.2005, which is part of the Claims Against Local Government Act (CALGA). We hold that because Bonzo settled the underlying tort action against him without the approval of Metro, Metro has no obligation to pay the judgment entered pursuant to that settlement.

Bonzo was employed by Metro as a uniformed police officer. In 2006, he responded to a domestic violence complaint involving John Matthew Wooldridge and Wooldridge's girlfriend, Kathryn Zimmerer. Wooldridge was arrested. Subsequent to Wooldridge's arrest, Bonzo and Zimmerer began a personal relationship.

While on probation for his domestic violence conviction, Wooldridge was arrested by Bonzo for a probation violation. At the probation revocation hearing, Bonzo denied his relationship with Zimmerer. After it was revealed that Bonzo lied about his relationship with Zimmerer, the Metro police department initiated an investigation and, at its conclusion, Bonzo resigned.

Wooldridge filed an action in federal court against Bonzo and Metro asserting claims for false arrest, false imprisonment, malicious prosecution and abuse of process. Metro was dismissed from the action.

Bonzo requested that Metro provide him a defense under the CALGA. After Metro denied his request, Bonzo retained his own counsel and filed this declaratory judgment action in the Jefferson Circuit Court against Metro seeking the cost of his defense and indemnity for any damages he might owe Wooldridge arising from the federal lawsuit. Metro answered alleging among other defenses that Bonzo was not acting within the scope of his employment with Metro when the acts alleged in the federal action were committed and Bonzo had not properly notified it of the federal action as required by KRS 65.2005.

A partial settlement was reached in this case wherein Metro agreed to provide payment for Bonzo's defense in the federal action. The indemnification issue was not resolved and Metro continued to assert Bonzo was acting outside the scope of his employment. Bonzo later amended his complaint alleging Metro's denial of indemnity was arbitrary in violation of his due process and equal protection rights under the Kentucky and federal constitutions because it had provided indemnity to its officers who provided the identical notice given by Bonzo.

Wooldridge's federal action against Bonzo remained pending and a mediation was held and attended by Metro. Wooldridge initially demanded $950,000 but that demand was not conveyed to Bonzo or Metro. Instead, the only

demand discussed with Metro at the mediation was $450,000. No settlement was reached.

Without consulting with or seeking approval from Metro, on November 9, 2011, Bonzo entered a "confession of judgment" in the federal court action for $750,000. Noting that the Federal Rules of Civil Procedure do not provide for a "confession of judgment," the federal court treated the document as an agreed judgment and issued a judgment against Bonzo for $750,000. The federal court clarified it was not making a finding regarding whether Bonzo was acting within the scope of employment at the relevant times or regarding Metro's obligation to indemnify. The federal order states:

> The Court makes no finding other than that Plaintiff Wooldridge and Defendant Bonzo, in his individual capacity and individually, have agreed to the entry of a judgment against Bonzo in said capacities in the amount of $750,000, exclusive of interest, attorney's fees and cost. The Court does not adopt, ratify or incorporate into this judgment any stipulations or proposed findings of fact set forth in the parties' pleadings.

Meanwhile, Bonzo's declaratory judgment action remained pending in the Jefferson Circuit Court. Seeking to enforce the confession of judgment, Wooldridge intervened in that action in December 2011. With no action having been taken by Bonzo or Wooldridge in the Jefferson Circuit Court action since the court granted Wooldridge's motion to intervene, on October 16, 2012, the circuit court issued a notice to dismiss for lack of prosecution. Wooldridge filed a response stating that his motion to intervene had been filed less than one year ago

and he was preparing a motion for summary judgment. However, Bonzo or Wooldridge did not file a motion for summary judgment until after Metro filed a motion for summary judgment on May 26, 2013.

During oral argument on the motions, Bonzo's counsel admitted he did not seek or otherwise have Metro's permission to settle with Wooldridge. After conducting oral argument on the parties' motions, the circuit court concluded Metro was not obligated to indemnify Bonzo because no prior permission from Metro was obtained by Bonzo to settle with Wooldridge and Bonzo's actions had never been adjudicated to be within the scope of his employment.[1]

This appeal involves an interpretation and application of KRS 65.2005 and, therefore, is subject to *de novo* review. *Lexington-Fayette Urban County Health Dept. v. Lloyd*, 115 S.W.3d 343, 347 (Ky.App. 2003). When interpreting a statute "[t]he cardinal rule . . . is to ascertain and give effect to the intent of the legislature." *Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000). The rules of construction when interpreting a statute are summarized as follows: (1) legislative intent is to be determined by first looking at the statutory language giving the words their plain and ordinary meaning; (2) the statute must be read as a whole; (3) if a statute is unambiguous, extrinsic evidence of legislative intent and public policy is not considered; (4) a statute will not be construed to reach a manifestly unjust result; and (5) a statute is

[1] The circuit court issued an opinion and order granting Metro's motion to dismiss. However, because the trial court considered matter outside the pleadings, we will review the dismissal as a summary judgment. *See Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361 (Ky.App. 2004).

to be liberally construed to promote its purpose and effectuate the legislative intent. *Richardson v. Louisville/Jefferson County Metro Government*, 260 S.W.3d 777, 779 (Ky. 2008).

The provision of the CALGA pertinent to this appeal is found in KRS 65.2005 which states:

> (1) A local government shall provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which it has been given notice pursuant to subsection (2) of this section. The local government shall pay any judgment based thereon or any compromise or settlement of the action except as provided in subsection (3) of this section and except that a local government's responsibility under this section to indemnify an employee shall be subject to the limitations contained in KRS 65.2002.
>
> (2) Upon receiving service of a summons and complaint in any action in tort brought against him, an employee shall, within ten (10) days of receipt of service, give written notice of such action in tort to the executive authority of the local government.
>
> (3) A local government may refuse to pay a judgment or settlement in any action against an employee, or if a local government pays any claim or judgment against any employee pursuant to subsection (1) of this section, it may recover from such employee the amount of such payment and the costs to defend if:
>
> (a) The employee acted or failed to act because of fraud, malice, or corruption;
>
> (b) The action was outside the actual or apparent scope of his employment;
>
> (c) The employee willfully failed or refused to assist the defense of the cause of action, including the failure to

> give notice to the executive authority of the local government pursuant to subsection (2) of this section;
>
> (d) The employee compromised or settled the claim without the approval of the governing body of the local government; or
>
> (e) The employee obtained private counsel without the consent of the local government, in which case, the local government may also refuse to pay any legal fees incurred by the employee.

For purposes of the statute, employee is defined as "any elected or appointed officer of a local government, or any paid or unpaid employee or agent of a local government, provided that no independent contractor nor employee nor agent of an independent contractor shall be deemed to be an employee of a local government." KRS 65.200(2). KRS 65.2005 applies to "[e]very action in tort against any local government in this Commonwealth for death, personal injury or property damages proximately caused by . . . [a]ny act or omission of any employee, while acting within the scope of his employment or duties[.]" KRS 65.2001(1)(b).

" The statutory language clearly evidences the General Assembly's intent to provide a defense to employees—both current and former—in civil litigation, *so long as the claims arise from public duties*." *Richardson*, 260 S.W.3d at 780. The purpose of KRS 65.2005 is to "allow public employees to diligently and faithfully serve the Commonwealth without worrying about the financial burdens and other adverse consequences of civil litigation, which may stem from their civil service." *Id*. at 781.

Although *Richardson* set forth the general purpose of KRS 65.2005, the facts in that case differ markedly from those now presented. Unlike in *Richardson* where Metro refused to defend a former employee, here Metro agreed to pay for Bonzo's defense and only the question of indemnity is at issue. In the context of insurance law, the duty to defend is broader than the duty to indemnify and is separate and distinct from the duty to pay a claim. *Wolford v. Wolford*, 662 S.W.2d 835, 838 (Ky. 1984). This same distinction was made by the General Assembly when it enacted KRS 65.2005.

The statute provides that a local government shall provide a defense in any tort action committed by its employee within the scope of employment and upon proper notice of such action. KRS 65.2005(1) and (2). In contrast, a local government's obligation to pay a judgment or settlement is much narrower and subject to the five exceptions set forth in KRS 65.2005(3). Among those exceptions is that a local government may refuse to pay a judgment or settlement in any action against an employee "compromised or settled" by the employee "without the approval of the governing body of the local government[.]" KRS 65.2005(3)(d).

Despite the plain language of the statute, Bonzo did not seek Metro's approval of the settlement with Wooldridge. Bonzo and Wooldridge do not attempt to apply any other meaning to KRS 65.2005(3)(d) but argue Bonzo's noncompliance is excusable because Metro previously committed to a position that it would not settle the federal litigation. They argue the legal adage "the law does

not require a futile act" is applicable. *Hardy v. City Optical, Inc.*, 39 F.3d 765, 770 (7th Cir. 1994). First, we differ with the conclusion Metro unequivocally rejected any possibility of settlement. Second, we cannot ignore the plain statutory language.

Although Metro maintained throughout this litigation that it had no duty to indemnify, it does not logically follow that it would not entertain a reasonable settlement. Parties frequently negotiate settlements even where liability is disputed. Moreover, an affidavit submitted by Bill O' Brien, an attorney and Director of the Civil Division of the Jefferson County Attorney's office, stated that following the unsuccessful mediation which Metro attended, Wooldridge made a demand of $250,000 by an e-mail sent to Bonzo's attorney, which was forwarded to O'Brien. O'Brien responded to the e-mail advising Bonzo's attorney to submit a settlement authorization request form. No response was received. Thus, despite Metro's advice to submit a settlement authorization request form, remarkably, Bonzo and Wooldridge entered into a settlement for $750,000 without seeking or receiving Metro's approval. We are unable to accept Bonzo's and Wooldridge's initial premise that Metro unequivocally stated it would not consider a settlement of the federal action.

Regardless of Bonzo's and Wooldridge's perception that Metro would not entertain a settlement offer, the undisputed fact is that Bonzo did not seek Metro's approval before entering into the settlement with Wooldridge. He and Wooldridge now seek to hold Metro and, consequently, the taxpayers liable for a $750,000

judgment when Metro had no knowledge of the settlement and did not agree to the settlement. Under the circumstances, the statute expressly permits Metro to deny payment of the federal court judgment.

The remaining issue presented by Bonzo and Wooldridge regarding Metro's alleged arbitrary and capricious original denial of a defense and indemnity based on proper notice of the federal action is meritless. As the case has evolved, the issue now is whether Metro is responsible for payment of the federal court judgment entered following a settlement that it did not authorize. We are firmly convinced that under the clear language of KRS 65.2005, it is not responsible.

We conclude by clarifying that today we do not comment on what remedies an employee may have when a local government refuses to engage in or consent to a reasonable settlement with a third party or if there is a remedy. Because Metro's approval of the $750,000 settlement was not sought, that issue is not before this Court.

Based on the foregoing the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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