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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000687-MR

NORTHERN KENTUCKY AREA
PLANNING COMMISSION AND
ROB ZWICK — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 13-CI-00036

CHRIS JEFFERIES — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: The Northern Kentucky Area Planning Commission and Rob Zwick, a building inspector for the Commission, bring this interlocutory appeal

from a Kenton Circuit Court order granting in part and denying in part their motion for summary judgment against Chris Jefferies.[1]

Jefferies owns a single family residence in Independence, a city in Kenton County. When he purchased the property, only his side of the street was developed. In 2009, Finke Homes began to develop the New Haven subdivision on the other side of the street, opposite his lot. According to Jefferies, Finke Homes negligently rebuilt its side of the street at a level higher than his side, causing water to drain onto and damage his property.

Jefferies filed suit on January 4, 2013, against the Commission, Rob Zwick, the City of Independence, Finke Homes,[2] and Sanitation District No. 1 of Northern Kentucky. Jefferies's complaint alleged in part that the Commission and its employee, Rob Zwick, were charged with inspecting the reconstruction of the road by Finke Homes to ensure it complied with the applicable subdivision regulations. The complaint further alleged that the Commission and Zwick were liable for failing to inspect Finke's work adequately, thereby permitting the condition which led to Jefferies's damages.

Following a two-year period of discovery, the Commission and Zwick moved for summary judgment. The Commission claimed that it was entitled to sovereign or governmental immunity, and also immunity under the Claims Against

[1] The appellee's name is spelled "Jeffries" throughout the circuit court record and in the parties' briefs. It is spelled Jefferies in the body of the notice of appeal; therefore, that is the spelling we have adopted in this opinion.

[2] The record contains an agreed order entered on February 12, 2013, dismissing Finke Homes, Inc. as a defendant and substituting Great Development Properties, Inc.

Local Governments Act, Kentucky Revised Statutes (KRS) 65.200 *et seq*, on the theory that inspecting a road is a regulatory and, therefore, a quasi-judicial function of the government. Zwick argued that he was entitled to qualified official immunity. Jefferies did not respond to the motion.

The Kenton Circuit Court entered an order on April 10, 2015, ruling that the Commission was entitled to sovereign or governmental immunity to the extent that Jefferies's complaint asserted a negligence claim, but that it was not entitled to immunity against claims of trespass or nuisance seeking to recover for an unconstitutional taking of private property. The court further ruled that Zwick was entitled to official immunity except insofar as he may have acted in bad faith, and that the record had not been sufficiently developed to meet the summary judgment standard in that regard. This appeal followed.

This interlocutory appeal is permissible because an "order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). The cloak of immunity entitles its possessor 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) (citations omitted).

In reviewing a grant of summary judgment, our inquiry focuses on "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); Kentucky Rules of Civil

Procedure (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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482 (citations omitted). "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004) (citations omitted).

In denying the motion for summary judgment in part, the trial court stated that

> it is well-established that sovereign immunity is no bar to inverse or reverse condemnation. *Commonwealth, Natural Resources & Environmental Protection Cabinet v. Stearns Coal and Lumber Co*., 678 S.W.2d 378, 381 (Ky. 1984). It matters not whether the claim is based on theories of trespass or nuisance, government action constituting a "taking" of real property creates liability for just compensation. Therefore a claim of trespass or nuisance seeking to recover for an unconstitutional taking of private property without just compensation is not barred by sovereign immunity, even when invoked by an entity cloaked with immunity, and to the extent that Plaintiff's claim is based on those theories it is not barred.

A "taking" is defined as "'the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment.'" *Siding*

Sales, Inc. v. Warren County Water Dist., 984 S.W.2d 490, 494 (Ky. App. 1998) (quoting *Commonwealth Natural Resources and Environmental Protection Cabinet v. Stearns Coal & Lumber Co*., 678 S.W.2d 378, 381 (Ky. 1984)).

The concept of a "taking" is rooted in Sections 13 and 242 of the Kentucky Constitution. Section 13 of the Constitution declares that no "man's property [shall] be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." "This declaration of an 'inherent and inalienable' right has been a part of all four Constitutions of Kentucky, and there is no exception in favor of the state or its subdivisions." *Stathers v. Garrard County Bd. of Educ*., 405 S.W.3d 473, 483 (Ky. App. 2012) (citations omitted).

"Section 242 of the Constitution requires that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall pay or secure the payment of just compensation before the taking thereof." *Id*. at 483-84 (footnote omitted). "This allows compensation for injury or destruction of property unattended by an actual taking. Both sections prohibit the actual taking of property without payment." *Id*. at 484.

"Inverse condemnation is the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used." *Stearns Coal & Lumber Co*., 678 S.W.2d at 381.

The Commission argues that Jefferies's complaint failed to raise claims of trespass, nuisance, or unconstitutional taking and that the circuit court erred in denying sovereign immunity on these grounds.

> [Kentucky] Civil Rule (CR) 8.01 requires pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief...." It is not necessary to state a claim with technical precision under this rule, as long as a complaint gives a defendant fair notice and identifies the claim.

Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 844 (Ky. 2005) (citing *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962)).

Jefferies's complaint contains no allegation or mention of a "taking" or an "unconstitutional taking" or "inverse or reverse condemnation." It also contains no allegation or mention of "nuisance." The term "trespass" appears twice, in Paragraphs 20 and 21 of Count I, which state as follows:

> Defendant Zwick and NKAPC based on the clear photographic, as well as topography evidence, intentionally and/or negligently performed requisite inspections, or failed to inspect said inspections, resulting in the alteration of a roadway which has caused water trespass upon Plaintiff's property.

and

> The actions of Defendants NKAPC, Zwick, and/or Finke has caused trespass to Plaintiff's property and/or intentional/negligent conduct set forth herein has caused damage to Plaintiff's property, rendering it worthless.

Even if, for the sake of argument, we concede that the complaint adequately pleads a cause of action for trespass, the facts of this case, even when viewed in a light most favorable to Jefferies, do not rise to the level of an unconstitutional taking because the alleged damages to Jefferies's property were not caused by the Commission in the course or furtherance of a public project or for a public purpose. This important distinction was highlighted in *Stathers, supra,* in which the appellants brought suit against their local board of education, alleging that their homes were damaged by vibrations emanating from blasting to build a nearby public high school. The school board argued that it was entitled to sovereign immunity in reliance on *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340 (Ky. App. 2011), a case in which the damages to a homeowner's property were caused by the water district's failure to turn off service to a rental property. In that case, the water district was granted immunity. The *Stathers* court factually distinguished the cases, however, by pointing out that the water district in *Byrd* was granted immunity, in part because the "facts do not involve any governmental action that involves or implicates a public use, e.g. the construction of a public high school." *Stathers*, 405 S.W.3d at 487. Similarly, in Jefferies's suit, the Commission and Zwick were not charged with having caused the damages to his property in furtherance of some public purpose, but only with having indirectly failed to prevent the flow of water onto his land by negligently inspecting the reconstruction of the road by Fiske, a private contractor.

By contrast, in *Commonwealth, Dep't of Highways v. Cochrane*, 397 S.W.2d 155 (Ky. 1965), the plaintiffs brought suit against the Department of Highways, alleging injury to their land when mud and silt resulting from the construction of a highway ran into their lake. The court held that "[w]hether this case involves riparian rights, trespass or a nuisance, the Commonwealth must respond in damages if the use of its land wrongfully causes injury to the lands of others." *Cochrane*, 397 S.W.2d at 156 (citations omitted). An action against the Commonwealth is appropriate to recover for "damages growing out of the taking, injuring, or destroying of private property for public purposes." *Lehman v. Williams*, 301 Ky. 729, 731, 193 S.W.2d 161, 163 (1946). Jefferies has failed to allege or show that his damages resulted from the Commission using its land or destroying his land for a public purpose.

In *Bolden v. City of Covington*, 803 S.W.2d 577 (Ky. 1991), the plaintiffs alleged that the city's failure to enforce its safety regulations caused a fire in the building next door to spread to their building, causing damages. The city was found to be exempt from liability under the circumstances because "[t]ort liability does not extend to 'cases where the "government takes upon itself a regulatory function," . . . which is different from any performed by private persons or in private industry, and where, if it were held liable for failing to perform that function, it would be a new kind of tort liability.'" *Id.* at 581 (citations omitted).

The Commission's alleged failure to adequately inspect Fiske's rebuilding of the road was much more akin to the negligent performance of a regulatory

function, rather than to an unconstitutional taking. Consequently, the trial court erred in withholding summary judgment on the claim of an unconstitutional taking.

The Commission further argues that it was entitled to immunity under the Claims Against Local Governments Act (CALGA). CALGA states that

> "a local government shall not be *liable* for injuries or losses" except as provided by therein. KRS 65.2003 (emphasis added). As a statutory defense to liability only, its denial can be vindicated following a final judgment as with any other liability defense.
>
> Consequently, to the extent it denied . . . [the appellants'] motion to dismiss on this ground, the circuit court's order remains interlocutory; it is not made reviewable by the collateral order doctrine or other jurisprudence.

South Woodford Water Dist., 352 S.W.3d at 343. Consequently, we are without jurisdiction to review this claim on an interlocutory appeal.

The appellants also argue that the trial court erred in denying Zwick qualified official immunity. The trial court found that Zwick was entitled to qualified official immunity under *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001), insofar as his allegedly negligent inspection involved the exercise of discretion and judgment and was within the scope of his authority. The court further stated, however, that although "[t]here does not appear in the record currently before the court to be the type of 'bad faith' required to negate immunity, . . . the court cannot at this time find it would be impossible to prove such so as to meet the standard for summary judgment."

In *Sloas*, 201 S.W.3d at 475, the Kentucky Supreme Court set forth the following discussion of the interplay between qualified official immunity and "bad faith":

> an official sued in his or her individual capacity 'enjoy[s] only qualified official immunity, which affords protection ... for good faith judgment calls made in a legally uncertain environment.'" *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 833 (Ky.2004) (quoting *Yanero v. Davis*, 65 S.W.3d 510 (Ky.2001)). Thus, "[o]fficials are not liable for bad guesses in gray areas," *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir.1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993), and "[m]ost government officials are not expected to engage in 'the kind of legal scholarship normally associated with law professors and academicians.'" 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 9A.09[B] (4th ed.2006) (citation omitted). Thus, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).
>
> "Once the officer or employee has shown prima-facie that the act was performed within the scope of his/her discretionary authority, **the burden shifts to the plaintiff** to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith." *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky.2001). "Good faith," however, is somewhat of a misnomer, as the proof is really of "bad faith." In fact, in most cases, "good faith" is just a presumption that exists absent evidence of "bad faith."
>
> > [B]ad faith can be predicated on a violation of a [causally related] constitutional, statutory, or other clearly established right which a person in a public employee's position presumptively would have known was afforded to a person in the plaintiff's position ... or if the officer or employee

> willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.
>
> *Yanero*, 65 S.W.3d at 523.
>
> Thus, under our jurisprudence, "good faith" is still at times fact dependant [sic].

Sloas, 201 S.W.3d at 475 (emphasis supplied).

Our review of the record indicates that Jefferies filed his complaint on January 4, 2013. His deposition was taken in three parts, on October 16, 2013, February 5, 2014, and June 4, 2014. On May 21, 2014, a notice to dismiss for lack of prosecution was entered. Jefferies responded by explaining that his deposition had taken three separate sittings, that the parties had agreed to proceed to mediation, and that if mediation was unsuccessful, he would be moving to set a trial date. Mediation was canceled on September 22, 2014. The case was set for a jury trial on July 7, 2015, by order entered on December 23, 2014. The appellants filed their motion for summary judgment on January 14, 2015. Jefferies did not respond.

Summary judgment may be granted 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,* 807 S.W.2d at 483 (internal quotations omitted). "While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense, not in an absolute sense.' " *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

"[T]he hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact." *Benningfield v. Pettit Environmental, Inc*., 183 S.W.3d 567, 573 (Ky. App. 2005). "A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present some affirmative evidence showing that there is a genuine issue of material fact for trial." *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007) (citation and internal quotation marks omitted). Moreover, such a showing must be made in a timely fashion.

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, like Mr. Micawber's, that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479–80 (Ky. 1968) (internal citation omitted).

Absolutely no showing has been made by Jefferies that Zwick acted with the requisite bad faith, beyond bare allegations. The appellee's brief states that in order to conclusively prove or disprove the existence of bad faith, "much more information – namely the sworn statement of Mr. Zwick – must be available." But throughout the lengthy course of this litigation, Jefferies never sought such a statement from Zwick, nor made an effort to seek discovery of any kind. Under these circumstances, the circuit court erred in refusing to grant summary judgment on the individual claim against Zwick.

Finally, Jefferies has raised numerous arguments in his appellee's brief challenging the trial court's order, specifically its ruling that the Commission is protected by governmental immunity against his negligence claims. He has, however, failed to file a cross-appeal under CR 74.01.

> Some of our past opinions suggesting the necessity of a cross-appeal in order for an appellee to bring an adverse ruling of the trial court under review by an appellate court appear to have fostered confusion by failing to distinguish between those instances in which the judgment gives the appellee the ultimate relief for which he has contended and those in which the judgment gives him something less. In the latter case he cannot challenge the shortcomings of the judgment without a cross-appeal.

Brown v. Barkley, 628 S.W.2d 616, 618-19 (Ky. 1982) (footnote omitted). Because the order did not give Jefferies all the relief he demanded, he was required to file a cross-appeal. Where judgment goes partially against one party and partially in his favor, if the other side appeals from such favorable part, the part unfavorable to the appellee cannot be considered in said appeal unless the appellee takes a cross-appeal. *Oliver v. Crewdson's Adm'r*, 256 Ky. 797, 77 S.W.2d 20 (1934). We cannot, therefore, review his arguments concerning immunity as it relates to his negligence claims.

For the foregoing reasons, the Kenton Circuit Court order is (1) affirmed insofar as it granted sovereign or governmental immunity to the Commission on any negligence claims; (2) reversed insofar as it denied sovereign or governmental immunity for claims of trespass or nuisance seeking to recover for an

unconstitutional taking; and (3) reversed insofar as it denied summary judgment to Zwick in his individual capacity. The case is remanded for entry of an order in accordance with this opinion.

ALL CONCUR.

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