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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000080-MR

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 14-CI-00039

PATRICIA SURBER AND
BIZZACK CONSTRUCTION, LLC

APPELLEES

AND
NO. 2016-CA-000081-MR

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 14-CI-00040

DIANE WATTS, VIRGINIA HUFF COLLIER,
AND ORVILLE COLLIER, JR.

APPELLEES

OPINION
REVERSING AND REMANDING

** **

BEFORE: ACREE, CLAYTON AND J. LAMBERT, JUDGES.

ACREE, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (the “Department”), appeals from the Letcher Circuit Court’s December 15, 2015 order denying its motions to dismiss in each of these consolidated cases based upon sovereign and governmental immunity. For the following reasons, we reverse and remand with instructions that the cases be dismissed.

FACTS AND PROCEDURE

The Department, by its Official Order 103411, directed the construction of a public highway improvement project identified as Partridge to KY 15 east of Whitesburg in Letcher County, Kentucky. The project included the construction of a bridge and public roadway. The Department recognized that, to complete the project, it needed to obtain land from surrounding property owners, by contract or condemnation proceedings. This appeal concerns the Department’s

acquisition of property from two landowners – appellee Patricia Surber, and Orville and Lela Collier.

The Department sought to condemn approximately .991 acres of real property then-owned by the Colliers. In 2005, it had the Colliers’ property appraised. The appraisal found the value of the entire property before condemnation to be \$145,000 and the value after acquisition to be \$119,650, with a resulting diminution in value of \$25,950. The Department extended to the Colliers an offer of \$25,950, representing the difference in the before and after fair market value of the Colliers’ property, per the appraisal. The Colliers accepted.

On February 10, 2006, the Department entered into an agreement with the Colliers whereupon the Department agreed to pay \$25,950 to the Colliers in exchange for .991 acres of their property and 230 feet of chain-length fence. The Colliers subsequently conveyed title to the Department by deed of conveyance on March 20, 2006.

Lela Collier died in 2006; Orville Collier died in 2012. Appellees Diane Watts, Orville Collier, Jr., and Jillian Collier claim title to the subject property through inheritance from Lela and Orville.¹

The Department also recognized it needed to acquire part of the property owned by Patricia Surber to complete the bridge project. It sought to condemn .119 acres. Unable to agree on the value to be paid, on August 28, 2009,

¹ For comprehension and ease of reading, we will refer to the appellees in appeal number 2016-CA-000081 as “the Colliers.”

the Department filed a condemnation suit against Surber. An interlocutory judgment was secured, but Surber contested the value of the taking. A report of commissioners was then submitted, wherein the commissioners found the fair market value of the tract as a whole immediately before the taking to be \$60,000, and the fair market value of the tract as remains immediately after the taking to be \$55,000, with a diminution in the amount of \$5,000.

Ultimately, Surber offered to settle the matter for \$15,000. The Department accepted. An agreed order and judgment settling was entered July 18, 2013, and a Master Commissioner's Deed conveying the .119 acres was entered November 5, 2013.

Construction on the bridge began in or about 2013. Immediately, the appellees were concerned. Surber was displeased with the proximity of the bridge to her home, the size of the bridge, and the extensive noise, dust, and chaos caused by the construction. Similarly, the Colliers were displeased with the sound, sand, dust, eyesore issues and the property's post-construction appearance.

On February 18, 2014, Surber and the Colliers filed separate yet virtually identical complaints against the Department alleging negligence. Each complaint alleged, in pertinent part:

(4) The Defendant, Commonwealth of Kentucky, Department of Transportation, Department of Highways, by and through their actions and construction, have destroyed the property owned by the Plaintiffs;

(5) The Defendant, Commonwealth of Kentucky, Department of Transportation, Department of Highways, by and through their actions and construction, has rendered the property belonging to the Plaintiffs unfit for inhabitation;

(6) The Defendant, Commonwealth of Kentucky, Department of Transportation, Department of Highways, by and through their actions and construction, has greatly reduced the value of the Plaintiffs' property.

(7) That as a direct and proximate result of the carelessness, negligence and wanton and willful disregard for the property owned by the Plaintiffs, of the above-named Defendant [the Department], the Plaintiff . . . is entitled to recover punitive damages.

(Surber R. 2; Colliers R. 2-3).

Following discovery, the Department filed a third-party complaint against appellee Bizzack Construction, LLC. The Department had contracted with Bizzack to provide all materials and perform all labor for the construction of the bridge. The Department alleged that the damages claimed by Surber and the Colliers were causally related to and/or arising from Bizzack's construction activities and construction crews. Therefore, pursuant to the contract between the Department and Bizzack, the Department pleaded that Bizzack was liable to the Department for any damages it may owe on grounds of contractual indemnity.

A few months later, the Department filed motions to dismiss the appellees' complaints against it. The Department argued the appellees' claims should be dismissed based upon the Department's sovereign (governmental)

immunity. It also argued Surber’s claims should be dismissed based upon the doctrine of *res judicata*, and the Colliers’ claims should be dismissed based upon the doctrine of estoppel by deed. The Department further argued any remaining negligence claims were barred by KRS² 44.073, which vests exclusive jurisdiction for such actions against the Department in the Board of Claims.³

By identical orders entered December 15, 2015, the circuit court denied the Department’s dismissal motions without explanation. The Department then brought these interlocutory appeals.

STANDARD OF REVIEW

Issues regarding immunity and jurisdiction “are questions of law to be reviewed *de novo*.” *Madison County Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572, 575 (Ky. 2011).

INTERLOCUTORY APPEAL

² Kentucky Revised Statute.

³ We note that the Board of Claims has been subsumed by amendment of this legislation to become a part of the Kentucky Claims Commission. 2017 Kentucky Laws Ch. 74 (HB 453). The immunity waiver that was expressed in the Board of Claims Act is repeated in Kentucky Claims Commission Act. However, because the circuit court and the parties refer only to the Board of Claims and Board of Claims Act, we do the same in this opinion.

Our jurisdiction is generally restricted to final judgments. *See* CR⁴ 54.01. Ordinarily, an appeal from an order denying a motion to dismiss would not be permitted; such an order is regarded as interlocutory in nature because it fails to adjudicate all the rights of the parties. However, in *Breathitt County Board of Education v. Prater*, the Kentucky Supreme Court recognized an exception to the final judgment rule, stating “an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.” 292 S.W.3d 883, 887 (Ky. 2009). The Supreme Court observed that governmental immunity frees government entities named as defendants “from the burdens of defending the action, not merely . . . from liability”—an entitlement that “cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action.” *Id.* at 886 (internal quotation marks and citation omitted); *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 342 (Ky. App. 2011).

In this case, the appellees challenge this Court’s jurisdiction to consider this interlocutory appeal. They claim the Department has no immediate right to appeal because its claim of immunity is not “substantial.” We find no merit in this argument. While the Department raised alternative dismissal grounds, immunity was a critical and central part of its dismissal motions. We are fully convinced that the circuit court’s orders – silent as they may be as to the grounds

⁴ Kentucky Rules of Civil Procedure.

for the circuit court's decisions – constitute orders denying substantial claims of immunity and are immediately appealable. *Prater*, 292 S.W.3d at 886; *Byrd*, 352 S.W.3d at 342.

ANALYSIS

The Department argues the circuit court erred when it failed to conclude that sovereign and governmental immunity insulates the Department from liability for appellees' claims. It contends the appellees may only pursue their claims against the Department in the Board of Claims. We agree.

Sovereign immunity derives “from the common law of England and was embraced by our courts at an early stage in our nation's history. It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001) (citation omitted). To the extent the appellees claim the Commonwealth of Kentucky itself is liable, their claims fail because of absolute, sovereign immunity. *Reyes v. Hardin County*, 55 S.W.3d 337, 338 (Ky. 2001) (“It seems to be conceded on all hands, that the State cannot be made a party defendant, and is not suable in her own courts.” (quoting *Divine v. Harvie*, 23 Ky. (7 T.B. Mon.) 439, 441 (1828))).

That leaves the Department, an agency of the sovereign government of the Commonwealth of Kentucky. Agencies of state government, such as the Department, are protected from suit by *governmental* immunity, “a policy-derived

offshoot of sovereign immunity,” *Caneyville Volunteer Fire Dep’t v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 801 (Ky. 2009). Governmental immunity provides that “a state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function.” *Id.* That is, an agency of the sovereign government is immune from suit only when performing an essential government function. *Caneyville Volunteer Fire Dep’t*, 286 S.W.3d at 804.

The facts of this case clearly demonstrate the Department is a state agency engaged in a government function. Maintaining the infrastructure of roads and bridges is among those “public acts integral in some way to state government.” *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). The legislature has established the Department as the agency through which state public roads and bridges are established, constructed, and maintained using state funds. KRS 177.020(1); KRS 177.010(3) (“Roads’ includes rural roads; highways; bridges and bridge approaches; city streets, viaducts, and bridges”).

The appellees tacitly acknowledge that the Department is cloaked with governmental immunity; however, they claim the Department has waived the right to claim immunity by electing to pursue a third-party action against Bizzack pursuant to CR 14.01.⁵ The appellees contend that “[b]y filing and then

⁵ CR 14.01 addresses when a defendant may bring in a third party and provides, in relevant part: “A defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.”

prosecuting a third-party complaint against Bizzack in circuit court, the [Department] purposefully waived any argument that the matter could only be brought in the Board of Claims.” (Surber Appellee’s Brief, p. 8). This argument does not withstand scrutiny.

Appellees are correct that immunity can be waived. *Yanero*, 65 S.W.3d at 523–24. The power of waiver is granted to our legislature by Section 231 of the Kentucky Constitution which provides that “[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.” When the legislature enacted the Board of Claims Act, KRS 44.070, *et seq.*, it did so by the authority of Section 231. That Act is a limited waiver of immunity for negligence by the state, its subdivision, officers, employees and agents in the performance of ministerial acts. KRS 44.073(2); *Commonwealth, Transp. Cabinet, Dep’t of Highways v. Sexton*, 256 S.W.3d 29, 32 (Ky. 2008). Obviously, the Board of Claims Act is an express waiver.

This Court “will find waiver only where stated ‘by the most express language or by such overwhelming implications from the text [of legislation] as [will] leave no room for any other reasonable construction.’” *Dep’t of Corrections v. Furr*, 23 S.W.3d 615, 616–17 (Ky. 2000) (citation omitted); KRS 44.072 (“It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies . . . in all other situations except where sovereign immunity is

specifically and expressly waived as set forth by statute.”). Section 231 of the Kentucky Constitution “would be of small stature if its precepts could be ‘waived’ by any state officer or agent other than the general assembly.” *Commonwealth, Dep’t of Highways v. Davidson*, 383 S.W.2d 346, 348 (Ky. 1964).

We find that the Department’s claims against Bizzack are in no way inconsistent with its assertion of immunity from suit by the appellees. Nor does the filing of a third-party complaint operate to waive its immunity. Appellees contend that CR 14 is a legislatively-mandated exception to the supposed exclusivity of the Board of Claims. Appellees cite no authority for this proposition, and we have found none. The law is clear – only the General Assembly can waive immunity through “express language” or “overwhelming implication,” neither of which is found in CR 14.01. The Department engaged in no action which convinces this Court that it intended to waive immunity, even if it had the authority to do so, which it does not.

Appellees also fault the Department for taking contradictory legal positions within the same lawsuit. They argue the Department should not be permitted to file and prosecute a third-party complaint against Bizzack in circuit court, while simultaneously arguing that the appellees’ claims are not justiciable in circuit court. By doing so, appellees contend, the Department purposefully waived any argument that the matter could only be brought in the Board of Claims. Again, we disagree.

“[P]leading in the alternative is of course a standard legal practice, and absent extraordinary circumstances such alternative pleading is not binding as a judicial admission.” *Roach v. Hedges*, 419 S.W.3d 46, 49 (Ky. App. 2013) (quoting *Huddleston v. Hughes*, 843 S.W.2d 901, 904–05 (Ky. App. 1992)). We find no fault in the Department’s decision to plead alternative legal positions, even if contradictory. Doing so certainly did not compromise or waive the Department’s governmental immunity defense.⁶

While the Department is shielded by governmental immunity, the appellees were not without a remedy. As noted, the Board of Claims Act offers a limited waiver of immunity. KRS § 44.070, *et seq.* The waiver extends to negligence claims involving the performance of ministerial acts. KRS 44.073(2); *Commonwealth v. Sexton*, 256 S.W.3d 29, 32 (Ky. 2008). Such claims against the Department cannot proceed in circuit court. KRS 44.073(5) (“No action for negligence against the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any officers, agents, or employees thereof may be brought initially in any other court or forum in the Commonwealth except the Board of Claims[.]”).

The claims contained in the appellees’ respective complaints against the Department allege negligence. As such, they are barred by governmental immunity from prosecution in the circuit court.

⁶ And we will disregard the question whether these complaining appellees have standing to challenge the authority of the Department to pursue action against Bizzack.

Accordingly, we reverse the circuit court's December 15, 2015 order and remand to the Letcher Circuit Court for an order dismissing the complaints in both cases from which these appeals have been taken.

ALL CONCUR.

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