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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003064-MR

ANTHONY GRIFFITH — APPELLANT

v. — APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 96-CI-00019

MEADE COUNTY, KENTUCKY
AND JOSEPH HAGER — APPELLEES

AND — NO. 1998-CA-003125-MR

HUBERTA LYNN MILLER — APPELLANT

v. — APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 96-CI-00019

MEADE COUNTY, KENTUCKY
AND JOSEPH HAGER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: These are two appeals from a summary judgment entered in favor of Meade County and the Meade County Judge Executive in an action against them for personal injuries sustained as a result of a motorcycle accident at an intersection in which a stop sign was missing from a county road. We affirm

because the appellants' claims were properly barred by the doctrine of sovereign immunity.

Early in the morning of October 4, 1994, appellant, Anthony Griffith, was driving his motorcycle on Coleman Road in Meade County, with appellant, Huberta Miller, as his passenger. Upon entering the intersection of Coleman Road and Kentucky Highway 1600, Griffith's motorcycle collided with a vehicle operated by Delma Duff. It is undisputed that there was ordinarily a stop sign on Coleman Road at the intersection in question. However, on the night of this accident, the stop sign was missing. The accident occurred when Griffith proceeded through the intersection without stopping and collided with Duff. There was some evidence that the stop sign had been missing from this intersection for two to three weeks prior to the accident. As a result of the accident, Griffith and Miller sustained serious personal injuries.

On February 7, 1996, Griffith and Miller filed a negligence action against Meade County and Meade County Judge Executive Joseph Hager. The complaint alleged that defendants had a duty to install, maintain, and replace all stop signs on county roads and that defendants breached that duty when they failed to replace the stop sign which they knew, or by reasonable due diligence should have known, had been missing for many months. On June 30, 1998, defendants moved for summary judgment on grounds that the claims were barred by the doctrine of sovereign immunity. On November 10, 1998, the court granted

summary judgment in favor of Meade County and Judge Executive Hager. From this judgment, Griffith and Miller now appeal.

Summary judgment is proper only where the trial court, drawing all factual inferences in favor of the nonmoving party, can conclude that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fischer v. Jeffries, Ky. App., 697 S.W.2d 159 (1985). Summary judgment should only be used to terminate litigation when, as a matter of law, it appears it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

Griffith argues that appellees are not entitled to the defense of sovereign immunity because they did not assert sovereign immunity as an affirmative defense in their answer. Griffith maintains that pursuant to CR 8.03 and CR 12.08, sovereign immunity is an affirmative defense that must be pled or it is waived. Appellees concede that they did not raise the issue of sovereign immunity until their motion for summary judgment. However, they argue that they were not required to raise sovereign immunity as an affirmative defense according to Knott County Board of Education v. Mullins, Ky. App., 553 S.W.2d 852 (1977). In addressing the argument that sovereign immunity must be pled as an affirmative defense, the Court in Mullins stated:

> Although some cases hint at a possible waiver and refer to the fact that the defense was raised (see, Board of Education of Leslie County v. Lewis, Ky., 449 S.W.2d 765 (1974)),

> it appears well settled that immunity can only be waived by an act of the legislature. Smith v. Commonwealth, Department of Highways, Ky., 495 S.W.2d 178 (1973); Foley Construction Company v. Ward, Ky., 375 S.W.2d 392 (1964), and Commonwealth, Department of Highways v. Davidson, Ky., 383 S.W.2d 346 (1964). See also, Smiley v. Hart County Board of Education, Ky., 518 S.W.2d 785 (1974).

Mullins, 553 S.W.2d at 853. From our reading of the above language in Mullins, we agree with appellees that their failure to raise the defense of sovereign immunity in their pleadings did not result in a waiver of the defense.

Appellants next argue that County Judge Executive Hager was not entitled to the defense of sovereign immunity because his duty to see that the stop sign in question was replaced was a ministerial duty. From our review of the record, we need not reach this issue because Judge Executive Hager was not sued in his individual capacity.

It is well established that under Section 231 of the Kentucky Constitution, the Commonwealth of Kentucky is immune from civil suit except to the extent that such immunity is specifically waived by the General Assembly. Frankln County, Kentucky v. Malone, Ky., 957 S.W.2d 195 (1997). It has been further established that a county, as a subdivision of the state, enjoys the same sovereign immunity as the state. Id.; Hempel v. Lexington-Fayette Urban County Government, Ky., 641 S.W.2d 51 (1982), overruled on other grounds by Gas Service Co. v. City of London, Ky., 687 S.W.2d 144 (1985). Thus, any action against county officials in their official capacity "is essentially an action against the county which is barred by sovereign immunity."

Malone, 957 S.W.2d at 201. However, the legislature cannot extend sovereign immunity to the personal liability of the state's employees. Blue v. Pursell, Ky. App., 793 S.W.2d 823 (1989). A state employee can be individually liable for his negligence in performing a ministerial function. Gould v. O'Bannon, Ky., 770 S.W.2d 220 (1989). If a public official is acting within the general scope of his authority in performing a discretionary duty, he is shielded from individual liability under the doctrine of official immunity. Malone, 957 S.W.2d at 201.

In order to bring a claim against a public official in his individual capacity, the complaint must state a separate cause of action for personal liability against the particular individual. Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, Ky., 805 S.W.2d 133 (1991). While we acknowledge that the standard for determining whether a claim has been sufficiently brought against a party in his individual capacity was relaxed by our Supreme Court in McCollum v. Garrett, Ky., 880 S.W.2d 530 (1994), from our reading of McCollum, there still must be some indication in the complaint that the plaintiff is alleging personal liability against the official. The caption in the complaint in the instant case states the defendants as "Meade County, a Kentucky County and Joseph Hager, County Judge Executive of Meade County" and gives the same address for both parties. The complaint does not state that Hager is being sued individually, and under McCollum, we

recognize that such is not necessary. However, the complaint does state:

> That at all times complained of herein the Defendant, Joseph Hager, was County Judge Executive of Meade County and, therefore, is the proper party in interest to name herein to sue the county of Meade County. (Emphasis added.)

In our view, the above language demonstrates that Hager was sued only in order to sue the county. Further, in the remainder of the complaint, Meade County and Hager are always collectively referred to as the "Defendant" or the "Defendants". Nowhere in the complaint are there any allegations which expressly or impliedly refer to Hager's individual conduct. In the demand for judgment, plaintiffs seek "Judgment against the Defendants, jointly and severally". Unlike McCollum, the allegations of misconduct in the present case are directed at the County along with Hager (the "Defendants"), and, clearly, plaintiffs were seeking damages from the County. Accordingly, we deem appellants' complaint to be against Hager only in his official capacity, and, as stated previously, he is therefore immune from suit.

Appellants next argue that, even if appellees were entitled to the defense of sovereign immunity, said defense was waived by Meade County's membership in a self-insurance fund. Appellants cite to Green River District Health Dept. v. Wigginton, Ky., 764 S.W.2d 475 (1989), Kestler v. Transit Authority of Northern Kentucky, Ky., 758 S.W.2d 38 (1988), and Dunlap v. University of Kentucky Student Health Services Clinic, Ky., 716 S.W.2d 219 (1986), which all held that to the extent

that a governmental entity purchases insurance or establishes a self-insurance fund pursuant to statutory authority, sovereign immunity is waived. However, those cases were overruled by Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997), wherein it was held that the University of Kentucky's purchase of insurance under the University of Kentucky Medical Center Malpractice Insurance Act does not act as an express waiver of sovereign immunity. Appellants argue that since the accident at issue occurred in 1994 and the action herein was filed on February 7, 1996 when Dunlap and its line of cases cited above were in effect, Withers, rendered February 27, 1997, cannot be applied retroactively to bar their claim. We do not agree.

From our review of the case law at issue, we see that Withers turned on the Court's interpretation of the 1986 Amendments to the Board of Claims Act, KRS 44.072-44.073, which had been in effect for eight years at the time of appellants' accident in the instant case:

> We hold that the 1986 statutory changes abrogated the rule in Dunlap and its line of decisions which found waiver of immunity based on the purchase of liability insurance whether or not pursuant to statutory authorization.

Withers, 939 S.W.2d at 346. Neither Dunlap, Wiggington, nor Kestler interpreted the 1986 Amendments to the Board of Claims Act in their decisions because the causes of action in each of those cases arose prior to the effective date of the 1986 Amendments (July 15, 1986), and under KRS 446.080(3), statutes cannot be retroactively applied unless they expressly so state. Thus, although Dunlap and its progeny were rendered after the

1986 Amendments were in effect, those cases only applied to causes of action that arose prior to the effective date of the 1986 Amendments. Accordingly, Withers is not being retroactively applied in the present case.

We reject Miller's remaining argument that the doctrine of sovereign immunity is archaic and should be reformed or discarded by this Court. We do not have the authority to reform or discard a doctrine which has its basis in our state Constitution. We would also note that sovereign immunity in Kentucky has previously withstood a constitutional challenge before this Court. See Rooks v. University of Louisville, Ky. App., 574 S.W.2d 923 (1978), overruled in part by Guffey v. Cann, Ky., 766 S.W.2d 55 (1989).

Accordingly, as we have determined that there are no issues of fact to be resolved and that appellees were entitled to judgment as a matter of law, the judgment of the Meade Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS.

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