

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002151-MR

CARL PASQUALINI; ANN PASQUALINI;  
RAINBOW ESTATES, INC.

APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE LEWIS B. HOPPER, JUDGE  
ACTION NO. 95-CI-00076

THE CITY OF LONDON, KENTUCKY;  
FARMER (BUD) SHELL, Building Inspector;  
and FARMER (BUD) SHELL, Individually

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUDGEL, Chief Judge; COMBS and McANULTY, Judges.

COMBS, JUDGE: The appellants, Carl Pasqualini, Ann Pasqualini, and Rainbow Estates, Inc., appeal from the orders of the Laurel Circuit Court granting summary judgment in favor of the appellees, the City of London, Kentucky, and Farmer Shell. Having carefully reviewed the record on appeal, we affirm the judgment of the circuit court.

This appeal arises out of a negligence action filed by Carl and Ann Pasqualini (the Pasqualinis) and Rainbow Estates, Inc., against the City of London, and Farmer Shell, individually.

In 1992, the Pasqualinis initiated a project to build apartments on property which they owned in London, Kentucky. They developed building plans for the site and applied for a building permit. In October 1993, Farmer Shell, the building inspector for the City of London at that time, issued a building permit for the project.

Upon receiving the building permit, the Pasqualinis began construction. However, shortly after the foundation for one of the buildings had been poured, the Pasqualinis received a letter from the Douglas Gilbert (Gilbert), the new building inspector, notifying them that they were in violation of one of the city's zoning ordinances.<sup>1</sup> Specifically, Gilbert found that they had violated Ordinance Number 749, which mandates a setback of forty (40) feet where the rear yard of a commercially zoned property abuts a district zoned as residential. The Pasqualinis' property was zoned as commercial property, and they had not provided for a setback of forty (40) feet from the adjacent residential property.

In response to the letter, the Pasqualinis applied for a variance. After conducting a hearing on the matter, the City of London Board of Zoning Adjustment (the Board of Zoning Adjustment) denied their application. They appealed the decision to the circuit court, and in an order entered December 21, 1994, the circuit court affirmed the denial of the Board of Adjustment.

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<sup>1</sup> The incumbent mayor lost his position in the 1994 local elections. Upon taking office, the newly elected mayor appointed Douglas Gilbert as the new building inspector.

It does not appear that the circuit court's order was appealed by any of the parties.

In February 1, 1995, the Pasqualinis and Rainbow Estates, Inc.,<sup>2</sup> filed a negligence action against the City of London, Kentucky, and against Shell, individually. In their complaint, the Pasqualinis alleged that as the building inspector, Shell owed them a duty to accurately review the city's zoning ordinances and to inform them of the regulations accordingly. They asserted that Shell failed to perform this duty. The Pasqualinis stated that they had received assurances from Shell in a letter dated February 25, 1993, that their project exceeded all city requirements. They claim that they relied upon Shell's assurances and accordingly commenced construction based upon the building permit that had been issued to them. However, the new building inspector found that the project did not in fact comply with zoning ordinances, and construction was halted. The Pasqualinis asserted a claim against Shell individually and against the City of London by virtue of the doctrine of *respondeat superior*. They sought compensatory as well as punitive damages.

The parties engaged in discovery, and on November 24, 1998, the City of London filed a motion for summary judgment, asserting that it had statutory immunity against this type of action pursuant to KRS 62.2003 – as well as long-standing case law. Shell also filed a motion for summary judgment on February

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<sup>2</sup>Rainbow Estates, Inc., is a corporation owned by the Pasqualinis. It was in the name of this corporation that the Pasqualinis were building the apartment buildings.

1, 1999. In an order entered September 1, 1999, the court granted summary judgment in favor of the City of London. The court agreed that the under the plain language of KRS 65.2003, the City of London could not be held liable for the Pasqualinis' claim. On September 8, 1999, the court also granted summary judgment in favor of Shell.

The Pasqualinis argue on appeal that the court erred in granting summary judgment in favor of the City of London and Shell. They contend that there are material issues of fact as to whether they had indeed violated a city ordinance and that, therefore, summary judgment was improper. We disagree.

In general, municipal corporations are shielded by immunity from tort liability in very limited circumstances. Gas Service Co., Inc. v. City of London, Ky., 687 S.W.2d 144, 148 (1985). Municipal immunity is restricted to situations in which the municipality is performing a judicial or legislative function or a quasi-judicial or quasi-legislative function. Id. KRS 65.2003, enacted in 1988, codifies the case law as to municipal tort liability and provides:

Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:

- (1) Any claim by an employee of the local government which is covered by the Kentucky workers' compensation law;
- (2) Any claim in connection with the assessment or collection of taxes;
- (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in

the local government, which shall include by example, but not be limited to:

(a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;

(b) The failure to enforce any law;

(c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order or similar authorization;

(d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or

(e) Failure to make an inspection.

Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

(Emphasis added). The Pasqualinis' claim clearly falls within KRS 65.2003(3)(c), and the City of London is immune from suit as a matter of law for any claim arising out of the issuance or revocation of a building permit.

We now turn our attention to the issue of whether summary judgment was appropriate as to the Pasqualinis' claim against Shell personally.

In Kentucky, personal liability for a public officer's or public employee's negligent performance of duties depends in part on whether the powers in question were ministerial or discretionary in nature. *Thompson v. Huecker*, Ky. App., 559 S.W.2d 488 (1977). The general rule of thumb in Kentucky, as stated in *Thompson, id.* at 495, is that a public officer or employee "may be personally liable for negligence or bad faith in performing *ministerial* duties" (emphasis in original), but is not subject to tort

liability in certain circumstances for actions taken in the performance of discretionary duties.

Ashby v. City of Louisville, Ky. App., 841 S.W.2d 184, 188 (1992). In Upchurch v. Clinton County, Ky., 330 S.W.2d 428, 430 (1959), the Supreme Court adopted the following distinction between a ministerial duty and a discretionary duty:

The essentials of a ministerial as contrasted with a discretionary act are thus set forth in 43 Am.Jur., Public Officers, sec. 258, p. 75: 'An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature. Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaption of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. However, an act is not necessarily taken out of the class styled 'ministerial' because the officer performing it is vested with a discretion respecting the means or method to be employed.'

Shell testified in his deposition that his job as building inspector involved many different duties. He was responsible for taking and investigating applications for permits – as well as for interpreting and enforcing the zoning ordinances. Shell's duties as building inspector thus involved both discretionary and ministerial duties. However, the essence of the Pasqualinis' claim relates to Shell's duty in interpreting and applying zoning ordinances. The performance of this duty

"necessarily require[d] the exercise of reason in the adaption of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." We agree with the trial court that Shell was performing a discretionary duty and that he was entitled to immunity as a matter of law. The court did not err in granting summary judgment in favor of Shell.

Based upon the foregoing reasons, we affirm the judgments of the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Stephen W. Cessna  
London, KY

BRIEF FOR APPELLEE SHELL:

John M. Bush  
Courtney R. Howell  
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BRIEF FOR APPELLEE CITY OF  
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Dave Whalin  
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