RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000290-MR

ALBERT E. CARSON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA SUMME, JUDGE
ACTION NO. 98-CI-01284-MR

CITY OF COVINGTON; KENTON COUNTY; BOONE COUNTY; NORTHERN KENTUCKY AREA PLANNING COMMISSION; KENTON COUNTY & MUNICIPAL PLANNING AND ZONING COMMISSION; CITY OF FORT MITCHELL; CITY OF FT. WRIGHT; CITY OF EDGEWOOD; CITY OF ERLANGER; CITY OF ELSMERE; CITY OF LAKESIDE PARK; CITY OF WALTON; CITY OF INDEPENDENCE; CITY OF FLORENCE; CITY OF CRESTVIEW HILLS; AND CITY OF TAYLOR MILL — APPELLEES

and

NO. 1999-CA-000398-MR

CITY OF CRESTVIEW HILLS, KENTUCKY; CITY OF FLORENCE, KENTUCKY; CITY OF TAYLOR MILL, KENTUCKY — CROSS-APPELLANTS

V.

CROSS APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA SUMME, JUDGE
ACTION NO. 98-CI-01284

ALBERT E. CARSON, INDIVIDUALLY;
ALBERT E. CARSON, AS REPRESENTATIVE
OF A CLASS OF PERSONS WHO ARE PROPERTY
OWNERS OR RESIDENTS WITHIN THE BANKLICK
CREEK WATERSHED — CROSS-APPELLEES

and — NO. 1999-CA-000415-MR

BOONE COUNTY; KENTON COUNTY; KENTON
COUNTY & MUNICIPAL PLANNING AND
ZONING COMMISSION; AND NORTHERN
KENTUCKY AREA PLANNING COMMISSION — CROSS-APPELLANTS

V. CROSS APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA SUMME, JUDGE
ACTION NO. 98-CI-01284

ALBERT E. CARSON, INDIVIDUALLY;
AND ALBERT E. CARSON, REPRESENTATIVE
OF A CLASS OF PERSONS WHO ARE PROPERTY
OWNERS OR RESIDENTS WITHIN THE BANKLICK
CREEK WATERSHED; CITY OF COVINGTON;
CITY OF FORT MITCHELL; CITY OF FT. WRIGHT;
CITY OF EDGEWOOD; CITY OF ERLANGER; CITY
OF ELSMERE; CITY OF LAKESIDE PARK; CITY
OF WALTON; CITY OF INDEPENDENCE; CITY
OF FLORENCE; CITY OF CRESTVIEW HILLS;
AND CITY OF TAYLOR MILL — CROSS-APPELLEES

and — NO. 1999-CA-000451-MR

CITY OF INDEPENDENCE, KENTUCKY — CROSS-APPELLANT

V. CROSS APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA SUMME, JUDGE
ACTION NO. 98-CI-01284

ALBERT E. CARSON, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF PERSONS WHO ARE PROPERTY OWNERS OR RESIDENTS WITHIN THE BANKLICK CREEK WATERSHED; CITY OF FT. MITCHELL; CITY OF FT. WRIGHT; CITY OF EDGEWOOD; CITY OF ERLANGER; CITY OF ELSMERE; CITY OF LAKESIDE PARK; CITY OF WALTON; KENTON COUNTY; KENTON COUNTY MUNICIPAL PLANNING & ZONING COMMISSION; NORTHERN KENTUCKY AREA PLANNING COMMISSION; BOONE COUNTY; CITY OF COVINGTON; CITY OF FLORENCE; CITY OF CRESTVIEW HILLS; AND CITY OF TAYLOR MILL — CROSS APPELLEES

and — NO. 1999-CA-000452-MR

CITY OF EDGEWOOD; CITY OF ELSMERE; CITY OF ERLANGER; CITY OF FT. MITCHELL; CITY OF FT. WRIGHT; CITY OF LAKESIDE PARK; AND CITY OF WALTON, KENTUCKY — CROSS APPELLANTS

V. — CROSS APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA SUMME, JUDGE
ACTION NO. 98-CI-01284

ALBERT E. CARSON, INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF PERSONS WHO ARE PROPERTY OWNERS OR RESIDENTS WITHIN THE BANKLICK CREEK WATERSHED; CITY OF COVINGTON; CITY OF INDEPENDENCE; COUNTY OF KENTON, KENTUCKY; NORTHERN KENTUCKY AREA PLANNING COMMISSION; KENTON COUNTY MUNICIPAL PLANNING AND ZONING COMMISSION; COUNTY OF BOONE, KENTUCKY; CITY OF CRESTVIEW HILLS; CITY OF FLORENCE; CITY OF TAYLOR MILL — CROSS APPELLEES

and — NO. 1999-CA-000466-MR

CITY OF COVINGTON — CROSS APPELLANT

V. — CROSS APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA SUMME, JUDGE

ACTION NO. 98-CI-01284

ALBERT E. CARSON, INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF PERSONS WHO ARE PROPERTY OWNERS OR RESIDENTS WITHIN THE BANKLICK CREEK WATERSHED; CITY OF WALTON; CITY OF FT. MITCHELL; CITY OF FT. WRIGHT; CITY OF EDGEWOOD; CITY OF ERLANGER; CITY OF ELSMERE; CITY OF LAKESIDE PARK; CITY OF INDEPENDENCE; COUNTY OF KENTON; COUNTY OF BOONE; NORTHERN KENTUCKY AREA PLANNING COMMISSION; KENTON COUNTY MUNICIPAL PLANNING AND ZONING COMMISSION; CITY OF CRESTVIEW HILLS; CITY OF FLORENCE; AND CITY OF CITY OF TAYLOR MILL — CROSS APPELLEES

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

BEFORE: BARBER, JOHNSON AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Albert Carson (Carson) seeks reversal of the Kenton Circuit Court's order dismissing his claim under CR 12.02(f) for failure to state a claim upon which relief can be granted. Carson, who resides within the Banklick Creek Watershed, filed a complaint against various governmental entities, cities, counties and planning commissions, alleging negligent approval of development plans without adequate provision for storm water controls. Carson also alleged that storm run off flooded his property and constituted a taking.

The various parties have cross appealed as follows: City of Ft. Wright, City of Edgewood, City of Walton, City of Ft. Mitchell, City of Erlanger, City of Elsmere and City of Lakeside Park, Northern Kentucky Area Planning Commission and Kenton County and Municipal Planning and Zoning Commission, Boone County

and Kenton County, the City of Independence, as well as the Cities of Crestview Hills, Florence and Taylor Mill contend that the trial court erred in concluding that the complaint was timely filed. The City of Walton, Boone County and the City of Florence also contend that the trial court should have dismissed the complaint against it for improper venue. Boone County and Kenton County contend that the trial court erred in failing to address whether or not they were entitled to immunity under KRS 65.200, et seq. The City of Covington did not file a cross appeal.

The trial court's order provides a thorough summary of the facts, procedural events and issues of law involved:

> This matter is before the Court pursuant to the Defendants' CR 12.02(a), (c) and (f) motion to dismiss....
>
> Plaintiff. . . has filed suit against the Defendants, claiming negligence in approving development, which significantly altered the natural flow of storm water and subsequently damaged their real property and the value thereof. Defendants, Boone County, the City of Florence and the City of Walton argue that Kenton Circuit Court is an improper venue for this action. All Defendants further argue that the suit is barred by KRS Chapter 100, KRS 65.200, et. seq. and for failing to state a claim constituting a taking. Alleging the above, the Defendants seek to have this action dismissed.
>
> Boone County, the City of Walton and the City of Florence have raised the issue of improper venue as the basis for a motion to dismiss under CR 12.02. The court must determine whether Kenton County is the proper court to hear a case against a county and cities not located within it's [sic] borders . . .
>
> . . .
>
> [T]he Court believes that KRS 452.400 is the proper authority to apply in this situation. Although the case claims negligence on behalf

of all the defendants, the injury that is alleged is damage to the property.

Furthermore, there is case law which supports venue as to the moving defendants. Lehman v. Williams, [Ky., 193 S.W.2d 161, 163 (1946)] involves similar facts. . . . The plaintiff . . . sued agents/officers of the state for wrongful diversion of water which caused damage to their real property. The court found venue to be proper in the county where the real estate was located in an action for injuries to real estate. In another case, an agency of the state was sued for adopting a redistricting statute which allegedly caused injuries to the plaintiff. Fischer v. St. Bd. of Elections, 847 S.W.2d 718 (1993).

In light of the above case law and KRS 452.400, the Court believes that Kenton County is the proper venue for these claims against Boone County, the City of Florence, and the City of Walton. Plaintiffs allege that injuries have occurred to their real property due to the action of the named defendants, and therefore, the county where those injuries occurred is a proper venue to hear the case.

All defendants further contend that this lawsuit is barred by the time limitation for such actions provided for by KRS 100.347. This section requires an appeal to the circuit court of a final action of a planning commission or legislative body to be brought within 30 days of that action. Plaintiffs rely on KRS 413.120 which provides for a five year statute of limitations from the time the cause of action accrues in an action for trespass to real property. The Court finds the five-year statute of limitations to be the applicable time constraint. The plaintiffs are not appealing the final action of the local governments and the planning and zoning commissions, they are seeking reparations for the alleged damage caused by the continuous invasion of water. Because this lawsuit is based on the alleged water damage, the five year statute of limitations is applicable and begins to toll from the inception of the trespass, and the motion to dismiss is overruled.

Defendants, individually named cities, further move this Court pursuant to CR 12.02(f) to dismiss the action for failure to state a claim for which relief can be

granted. The complaint alleges that the acts and omissions of the defendants constitute negligence, careless and reckless behavior and further constitute a wanton disregard for the lives and property of the plaintiffs. Defendants rely on the principle of sovereign immunity to suggest that a municipality may not be sued in tort without expressly waiving said immunity.

Kentucky court's [sic] first began to limit the immunity that had been afforded municipalities in Haney v. City of Lexington, Ky., 386 S.W.2d 738. In Haney, the court moved away from [the] proposition that municipal corporations were immune from liability for ordinary torts. They did not, however, go so far as to impose liability on the municipality in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. Id., at 742.

After Haney, the immunity of local governments was codified by statute. KRS 65.2003 disallows claims against a local government for injuries or losses resulting from:

> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or other 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; ... (emphasis added).

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. KRS 65.200(3)

includes "any city incorporated under the law of this Commonwealth" in it's [sic] definition of local government.[1] KRS [65.]2001(1) states that every action in tort for property damage caused by an act of any employee while acting within the scope of his employment is subject to KRS 65.2003. "Actions in tort" includes any claim for money damages." KRS [65.]200(1).

Plaintiff's cause of action is based on allegations of defendants' negligence when, while acting within the scope of their employment, they permitted, allowed and approved the development plans without providing an adequate storm water control plan.

Since the enactment of KRS 65.2003, the courts have addressed when the city is protected with the shield of immunity and when it is not. Bolden v. City of Covington, is an example of a [sic] action of a local government found to be a discretionary function, immune from liability. The City Housing Code assigned the director of housing development and city inspectors the duty to find violations and to decide whether to repair or placard buildings in violation. Those duties were deemed to be quasi-judicial and were within the immunity enjoyed by a local government.

In City of Frankfort v. Byrns, 817 S.W.2d 462 (Ky. App., 1991), plaintiffs sued the city claiming their property had been damaged due to the city's negligence in designing and building a storm water system. The court found that the city's liability depended on a determination of whether the city was acting within it's [sic] discretionary authority or in a simple ministerial role. The court found the decision to design and construct the water drainage system in question was an exercise of discretionary function, but the subsequent actions in designing and building said system were ministerial.

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[1]Local government is defined in KRS 65.200(3) as "any city incorporated under the law of this Commonwealth, the offices and agencies thereof, any county government or fiscal court, any special district or special taxing district created or controlled by a local government."

> In an earlier case, the approval of subdivision plats was deemed a ministerial act, not immune from liability for any injuries caused by such act. Snyder v. Owensboro, Ky., 528 S.W.2d 663 (1975). The court found that when approving plans, the planning board was limited to determining whether the plan were within compliance with regulations, and therefore, the approval was not within their discretion but was merely ministerial.
>
> Having determined that the discretionary acts of a city are within the immunity afforded the city and ministerial acts [are] outside of that immunity, the Court must now decide whether or not the zoning and planning scheme approved by the individual cities, allegedly causing the damage to plaintiffs' property, are discretionary or ministerial. Chapter 100 of KRS is very specific on regulations that cities must follow when adopting Comprehensive Plans (KRS 100.187),[2] Zoning Regulations (KRS 100.203) and Subdivision Regulations (KRS 100.281). Following the logic of Byrns, the decision to develop both commercially and residentially was discretionary, but the approval of the submitted plans was ministerial. Because the approval of such land use schemes is regulated by statutory guidelines, the permission, allowance and approval of such development plans may be outside the discretion of the local governments and a ministerial function outside the protection of immunity provided by KRS 65.200.
>
> However, to follow the logic in Byrns to this conclusion would hold the city responsible for each and every ministerial act which arises as a consequence of the over-all discretionary act which is in fact protected. The complaint has not alleged that, . . .these acts as a whole, and not argued individually, would lead us back to the overriding principle of immunity . . . that complete immunity in circumstances where

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[2]KRS 100.187(5) provides: The comprehensive plan **may include** any additional elements such as, without being limited to, community renewal, housing, **flood control**, pollution, conservation, natural resources, regional impact, historic preservation, and other **programs which in the judgment of the planning commission** will further serve the purposes of the comprehensive plan. (emphasis added).

a similar private entity would be required to pay is unacceptable in a civilized society. There are no similar private entities. The cities approval not only meets the test of immunity set forth in KRS 65.2003, this activity of approval, without alleging any specific acts of negligence which caused the water damage, relates back to the discretionary activities that are protected.

Defendants, Boone and Kenton Counties also contend that they are afforded immunity from tort liability. In Franklin County v. Malone, 957 S.W.2d 198 (Ky. 1998), the court recognizes the contention that a county has the same sovereign immunity as does the state. The Court further found that absent waiver, a county is immune from tort liability.

At no time do plaintiffs point to any evidence of waiver on behalf of either Boone or Kenton County. Nor do the plaintiffs argue that the decision in Malone does not apply to the present case. In their response to Defendants' motion they only suggest that more time for discovery might reveal an express waiver requited by the Malone decision.

A motion to dismiss the complaint for failure to state a claim should not be granted unless it appears the pleading party would not be entitled to relief under any set of facts which could. Pari-Mutuel Clerks' Local 541 v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977).

The court accepts the argument of Defendants that if there is any situation that satisfies Malone, this is such a situation. The action taken by the defendant(s), ". . . when viewed as a whole, the entity is carrying out a function integral . . ." government function.

Using the same reasoning, the Northern Kentucky Area Planning Commission (NKAPC) and the Kenton County and Municipal Planning and Zoning Commission (KCMP&ZC) are also immune from tort liability on the basis of sovereign immunity. The NKAPC is a special taxing district created pursuant to KRS 147.610 through KRS 147.705 and the creation of the KCMP&ZC is provided for by KRS 100.133. These enabling statutes recognize that both operate as agents of the cities and counties which utilize their services. As agents of the government entities, KRS 65.200(3) gives

> them the same immunity that is afforded the counties and the municipalities. Therefore, the motion to dismiss is granted in their favor as well.
>
> Defendants further allege that the complaint fails to state a claim which constitutes a taking. Having already determined that the complaint of the plaintiffs should be dismissed, the Court does not find it necessary to address the defendants' claim.
>
> It is THEREFORE ORDERED AND ADJUDGED that the Defendants' CR 12.02(f) motion to dismiss is GRANTED. This is a final and appealable order.

We agree with the trial court's conclusion that the complaint fails to state a claim upon which relief can be granted. We recently addressed a very similar issue in Siding Sales v. Warren Co. Water District, Ky. App., 984 S.W.2d 490 (1998). There, a building was destroyed by fire. The property owners and lessee sued the City of Bowling Green and the water district alleging that pressure in the water lines was insufficient to assist firefighters in fighting the blaze. They also alleged a takings claim. The trial court entered summary judgment in favor of the City and the water district under KRS 65.2003, and found that no taking had occurred.

On appeal, the property owners and lessee contended that the City had negligently: 1) failed to enforce local fire protection standards during the process of plat approval; 2) issued a building permit allowing construction of the original building with knowledge that the lot did not comply with local fire protection safety standards.

Siding Sales held that the City and the water district were exempt from liability under KRS 65.2003(3)(b), for "the

failure to enforce any law." This Court interpreted the allegations that the City caused appellants' injury as "more properly . . . charges that the City failed to prevent their injury by providing insufficient water to fight a fire. . . . Such a distinction is significant in this case, ..." (emphasis added). Id. at 492. A city is not held to the same standard as a professional organization hired to do a job. Nor can a city be held liable for its omission to do everything that could or should have been done to protect life and property. [citation omitted]. Id. at 493. Tort liability does not extend to cases where the government performs a regulatory function different from that performed by private persons or industry, and where failure to perform the function would result in a new kind of tort liability. [citation omitted]. Id.

In the case *sub judice*, the pleadings alleged that (1) appellees "permitted, allowed and approved" numerous plans for the Banklick Creek watershed without providing for an adequate storm water control plan; and (2) appellees' failure to provide for appropriate storm water control and retention have resulted in increased storm water runoff which has damaged the appellant. The complaint defines the term, "storm water control plan," as "regulations or zoning ordinance, the purpose of which is to control, regulate or provide precautionary measures for the flow of storm water diverted, increased or otherwise altered from or in its natural course by construction." In essence, the activity the appellant complains of is a failure to regulate. Such activity cannot constitute a cause of action against any of the

appellees under KRS 65.200(3). In light of our holding, we need not address the remaining issues raised by appellees cross appeals.

Appellant also contends that the trial court erred in not addressing its taking claim. Appellant claims that the storm water control plans for the developments have destroyed the value of his property "by negative implication", that replacing ground and trees with structure and pavement turned his property into a water retention basin. Appellant characterizes "the issue *sub judice* . . . [as] whether the legislative bodies' approval of development plans for subdivisions which diverted surface storm water onto the appellant's property, thus converting appellant's land into temporary water retention, for the public at large, constitutes a taking."

> A taking is generally defined as the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment. Private property shall not be taken without just compensation. [citation omitted] . . . Inverse condemnation is the term applied to a suite 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. The United States Supreme Court . . . has identified several factors which are relevant to ascertaining whether an act amounts to a taking. Such elements are (1) the economic impact of the law on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the "character" of the governmental action, that is whether the action is a physical invasion versus a public program adjusting the benefits and burdens of economic life to promote the common good, (4) what uses the regulation permits, (5) that the inclusion of the protected property was

> not arbitrary or unreasonable, and (6) that judicial review of the agency decision was available.

Commonwealth v. Sterns Coal & Lumber, Ky., 678 S.W.2d 378, 381 (1984).

In the case *sub judice*, the complaint alleges a failure to act — that appellees did not provide an adequate plan for adequate storm control water. The complaint alleges that private development, rather than any governmental activity, altered the natural flow of storm water resulting in an invasion of storm water on appellant's property. Considering the factors set forth in Sterns, supra, we cannot agree that a taking occurred.

Therefore, the order of the Kenton Circuit court is affirmed.

SCHRODER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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