RENDERED: June 22, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001740-MR

THERESE HOUGHTON AND
MARK HOUGHTON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 97-CI-000614

CITY OF LOUISVILLE — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Therese and Mark Houghton (Appellants) appeal a summary judgment in favor of the City of Louisville (Appellee) in an action to recover for injuries the Houghtons sustained due to the allegedly negligent maintenance of a stop sign, and an Order of the Jefferson Circuit Court denying their Motion to Reconsider. For the reasons set forth below, we reverse and remand.

On July 26, 1996, an automobile collision occurred at the intersection of Rosedale and Roanoke Avenues in Louisville, involving the Appellant and another individual not named in this

appeal. Appellant's automobile collided with the second automobile after Appellant failed to stop at a stop sign at the intersection. Appellants contend that this collision occurred because foliage beneath the sign and branches from a tree in the yard adjacent to the intersection had obscured the stop sign.

Appellants filed this lawsuit against the Appellee, City of Louisville, and another Defendant, Jennifer Post (Post), on January 31, 1997. Post was the owner of the property upon which the tree allegedly obstructing the stop sign was situated. Appellants' complaint is premised upon Appellee having had a duty to maintain the stop sign, including the duty to remove obstructions from its visibility, and having failed in that regard. Appellee filed a motion for summary judgment after answers were filed by Appellee and Post. The Jefferson Circuit Court sustained Appellee's motion on July 24, 1997, concluding that Appellee's actions were discretionary in nature, and therefore entitled to immunity under KRS 65.2003.

Motions to reconsider filed by both Appellants and Post were rejected by the Circuit Court on October 21, 1997. Appellants' first appeal was dismissed by this Court as interlocutory. Once again, Appellants and Post jointly requested that the Jefferson Circuit Court reconsider its summary judgment in favor of the Appellee. This request was rejected by the Jefferson Circuit Court on July 11, 2000. Subsequently, all claims were resolved between Appellants and Post. This appeal followed.

Standard of Review

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hosp. v. Rose, Ky., 683 S.W.2d 255 (1985). However, "a party opposing a properly supported summary judgment motion cannot defeat the motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992), citing Steelvest, 807 S.W.2d at 480. The circuit 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, 807 S.W.2d at 480, citing Dossett v. New York Mining & Mfg. Co., Ky., 451 S.W.2d 843 (1970). "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Id. at 480.

This Court has said that the standard of review on appeal of a summary judgment is "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, Ky. App., 916 S.W.2d 779, 781 (1996) (citations omitted). "There is no requirement that the appellate court defer to the trial court since factual findings are not at issue." Scifres, 916 S.W.2d at 781.

According to Kentucky Rule of Civil Procedure (CR) 56.03, summary judgment is appropriate "if the pleadings,

depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." To prevail on a motion for summary judgment, the City of Louisville must demonstrate that "it would be impossible for [the Houghtons] to produce evidence at trial warranting a judgment in [their] favor." Steelvest, 907 S.W.2d at 480; CR 56.03.

Municipal Immunity

In 1985, the Kentucky Supreme Court addressed the judicially created doctrine of municipal immunity in Gas Service Co., Inc. v. City of London, Ky., 687 S.W.2d 144 (1985). That Court expressed frustration with the "legal morass" that had generated around the doctrine. Gas Service, 687 S.W.2d at 146. In an earlier case, Haney v. City of Lexington, Ky., 386 S.W.2d 738 (1964), the Court had supposedly "abrogated the rule of sovereign immunity for a municipal corporation," making liability the rule. City of Lexington v. Yank, Ky., 431 S.W.2d 892, 893 (1968). However, subsequent decisions had whittled away at the Haney holding. See City of Louisville v. Louisville Seed Co., Ky., 433 S.W.2d 638 (1968); Hempel v. Lexington-Fayette Urban Cty. Gov't, Ky. App., 641 S.W.2d 51 (1982); Carmichael v. Lexington-Fayette Urban Cty. Gov't, Ky. App., 608 S.W.2d 66 (1980).

In Gas Service, the Supreme Court overruled contrary case law and reiterated its support for the Haney holding, stating:

> In Haney we hold that municipal corporations are no longer "immune from liability for ordinary torts." 386 S.W.2d at 742. We then designate a narrowly defined exception to liability:
>
> "We wish to make it plain, however, that this opinion does not impose liability on the municipality in the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions." Id.

Gas Service, 687 S.W.2d at 147.

The Gas Service Court then proceeded to apply Haney to the facts before it, and ruled that the City of London was not entitled to immunity. Gas Service Company was seeking indemnity for damages incurred in a gas explosion. The city had installed a system of sewer lines in close proximity to existing gas lines. Testimony adduced during discovery revealed that a public works employee made a faulty repair to the sewer line, which caused a hole in the adjacent gas line. The trial court and the Court of Appeals had afforded immunity to the city, but the Supreme Court reversed. The maintenance of a sewer line, the Court ruled, was not a quasi-legislative or quasi-judicial function of the city government; instead, it was a ministerial function not immune from liability under Haney. Gas Service, 687 S.W.2d at 149. In Gas Service, the city itself was charged with having caused the injury, not with having "failed to prevent it by proper exercise of regulatory functions which have elements appearing quasi-judicial and quasi-legislative in nature." Id.

In Zanella v. City of Grand Rivers, 687 F. Supp. 1105 (W.D. Ky. 1988), a Federal diversity case, the Court applied the Gas Service and Haney cases to a case with facts strikingly

similar to those at issue here. Subsequent to an automobile collision, one driver brought suit against the city to recover for the city's allegedly negligent failure to maintain a stop sign or other traffic warning device at the intersection where the accident had occurred. The stop sign, which had earlier been posted at the intersection, was missing at the time of the accident. The intersection was a "blind-type intersection." Zanella, 687 F. Supp. at 1107. Without stopping at the intersection, the plaintiff proceeded onto the highway and was struck by another vehicle.

The Zanella Court observed that, with respect to the construction and maintenance of streets within a city's limits, "municipalities must exercise ordinary care and reasonable diligence to keep the streets and sidewalks therein in a reasonably safe condition for travel, and if they should negligently fail to do so they are liable for consequent injuries to a traveler thereon." Id., at 1108, citing Wyatt v. City of Henderson, 222 Ky. 292, 300 S.W. 921 (1927). The Zanella Court reasoned that, while the rule is inapplicable to a city's decision to erect or not erect a stop sign at a particular intersection, once that decision is made, the erection and maintenance of that sign must be done in a reasonable manner. 687 F. Supp. at 1108. The difference lies in the distinction between the legislative decision to build, and the ministerial duty to maintain, the sign. Zanella, 687 F.Supp. at 1108.

Subsequently, also in 1988, the General Assembly codified the Gas Service interpretation of the Haney rule in KRS 65.2001 to 65.2006. KRS 65.2001(2) provides:

> Except as otherwise specifically provided in KRS 65.2002 to 65.2006, all enacted and case-made law, substantive or procedural, concerning actions in tort against local governments shall continue in force. No provision of KRS 65.2002 to 65.2006 shall in any way be construed to expand the existing common law concerning municipal tort liability as of July 15, 1988, nor eliminate or abrogate the defense of governmental immunity for county governments.

As examples of the types of judicial, quasi-judicial, legislative, and quasi-legislative discretion for which municipal immunity had been retained, the General Assembly provided a non-exhaustive list in KRS 65.2003(3), including "(b) The failure to enforce any law," ... "(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," and "(e) Failure to make an inspection." KRS 65.2003(3) further provides that, "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."

This Court had an opportunity to apply the provisions of KRS 65.2003 in City of Frankfort v. Byrns, Ky. App., 817 S.W.2d 462 (1991). The City of Frankfort had decided to enlarge the capacity of an existing storm drainage system. As a result of the improvements made to the system's capacity, the drainage ditch in the Westgate Subdivision overflowed its banks after

rainfall. The property owners alleged negligence on the part of the city in the installation, design, and maintenance of the drainage system serving the subdivision and claimed that, because of the flooding, they were unable to use that portion of their lands, constituting an unjust taking under provisions of the Kentucky and United States Constitutions.

Citing Gas Service, this Court determined that the actions of the city were ministerial in nature and, therefore, were not immune from liability. Byrns, 817 S.W.2d at 464. "Once the City of Frankfort made a decision to design and construct the system in question, a decision which was within its discretionary capacity, its subsequent actions in designing and building the system were ministerial." Id. Citing Justice Wintersheimer's concurring opinion in Gas Service, this Court defined discretionary acts as those bearing upon the formulation of policy, and ministerial acts as those relating to the execution or implementation of that policy. Id. at 465.

In the case sub judice, Appellee has argued, and the circuit court agreed, that the provisions of KRS 65.2003(3)(d) and (e) establish that municipal immunity applies to the City of Louisville's action, or rather inaction, of not adequately maintaining a stop sign. We do not agree. Paragraph (d) provides immunity for actions where "the local government determines whether and how to utilize or apply existing resources." The trial court read that paragraph broadly, to include not only the city's decision of how to utilize it maintenance resources to fix the stop sign, but also the decision

whether to use its maintenance resources at all. Such a broad interpretation of KRS 65.2003(3)(d) would exempt virtually every decision by a city government from liability, because virtually every decision of a local government can, in some attenuated fashion, be construed as bearing upon the allocation of scarce financial resources. Accordingly, we reject this view. Having made the policy decision to control traffic at an intersection through use of a stop sign, the city simply cannot fail to maintain that sign or place it in such a location that it will be ineffective. The maintenance methods of the city do not relate to the "formulation" of the city's traffic control policy; they are methods for ensuring the effective execution and implementation of that policy.

Similarly, there is no support for Appellee's contention that KRS 65.2003(3)(e), which shields a municipal corporation from liability for failure to make an inspection, applies to this case. According to KRS 65.2001(2), KRS 65.2003 must be read in harmony with the existing case law on municipal immunity, and "shall [not] in any way be construed to expand the existing common law concerning municipal tort liability." As is obvious from the face of the statute, KRS 65.2001 to 65.2006 must be interpreted as a codification of the then-existing common law, not as an abrogation of it. Gas Service and Zanella are part and parcel of that common law, so it is therefore appropriate to evaluate Appellee's claim of immunity under the standards established in those cases, and to interpret the provisions of KRS 65.2003 in conformity therewith.

Paragraph (e) is one of five items in the non-exhaustive list of "quasi-legislative" and "quasi-judicial" functions specifically immune from tort liability under KRS 65.2003. The "inspection" referred to in that paragraph, being "quasi-judicial" in type, is of the sort whereby an agent of the municipality seeks to ascertain and evaluate the conformity of a private person's conduct with an appropriate standard established by city ordinance or other law. Examples of this type of "inspection" are housing and building inspections, where a landlord or contractor is held to a specific standard of care by a landlord-tenant ordinance, a building code, or other health and safety regulations promulgated under the city's police power.

The "inspection" contemplated by Appellee and the Circuit Court in this case is not quasi-judicial in type. "Quasi-judicial" connotes an ability to adjudicate individual claims and individual rights, neither of which bear upon a city government's inspection of its own property. The facts of this case, therefore, do not fall within the provision of KRS 65.2003(3)(e).

What remains after Appellee's claims to immunity are defeated is tort liability, as announced in the Gas Service, Zanella, and Byrns cases. Each of these cases imposed liability upon a municipal government for negligent maintenance of its own property, and remain the rule in this Commonwealth even after the enactment of KRS 65.2001 to 65.2006.

Because municipal tort immunity was the only ground upon which the Circuit Court granted summary judgment, we go no

further than to address that sole issue. Further, we express no opinion as to the likelihood of Appellant's success on the merits at trial. But, because genuine issues exist as to the visibility of the stop sign, the existence of an obstruction occasioned by the growth of a tree and weeds, and the possibility of a breach of duty to maintain the stop sign by Appellee, we cannot say that it would be impossible for Appellant to prevail at trial. Because of the absence of municipal tort immunity under the facts presented in this case, summary judgment was not proper. We, therefore, reverse the summary judgment entered by the Jefferson Circuit Court and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

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