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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001297-MR

LESLIE CLAY CAREY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 99-CI-00619

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT;
RAY SABATINI, INDIVIDUALLY, AND IN HIS
OFFICIAL CAPACITY AS FAYETTE COUNTY JAILER;
AND ROBERT RAMSEY, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS DIRECTOR OF THE
DEPARTMENT OF GENERAL SERVICES — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: BARBER, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Leslie Clay Carey has appealed from an order of dismissal of the Fayette Circuit Court entered on June 3, 1999, which dismissed his negligence action against Lexington-Fayette Urban County Government (LFUCG) and two individuals, Ray Sabatini and Robert Ramsey, based on the doctrine of sovereign immunity. Having concluded that LFUCG was entitled to have its motion to

dismiss granted, we affirm in part. However, we hold that dismissal as to Sabatini and Ramsey was premature and we must reverse and remand in part.

Carey was an inmate at the Fayette County Detention Center and he was assigned work through the community service work program.[1] On March 14, 1998, while Carey was working at the Fayette County Juvenile Detention Center, he fell and severely injured his leg. As a result of the fall, Carey underwent a number of medical procedures including surgeries and he ultimately lost his leg. The Detention Center is an agency of the defendant, LFUCG. Carey's medical bills relating to his injury were paid by LFUCG during the time he was incarcerated. After Carey was released from jail, LFUCG refused to pay for his medical treatment.

Subsequently, on February 19, 1999, Carey filed a complaint against LFUCG, Ray Sabatini, individually and in his official capacity as Fayette County Jailer and Robert Ramsey, individually and in his capacity as Director of the Department of General Services. In his complaint, Carey alleged a cause of action for common law negligence by stating that his injuries resulted from the negligence, carelessness, or recklessness of the appellees due to their failure "to maintain, repair and otherwise provide a safe place for [him] to work." More specifically, the complaint alleged that while Carey was "returning to the kitchen from the dumpster where he had

[1]Kentucky Revised Statutes (KRS) 441.125.

deposited rubbish, [he] was caused to fall [sic] due to the grounds' unsafe, dangerous, and poorly maintained condition about which [sic] Defendants knew or in the exercise of ordinary care should have known." On March 29, 1999, the appellees filed a motion to dismiss based on the doctrine of sovereign immunity. On May 14, 1999, the Fayette Circuit Court heard oral arguments on the motion, which was granted by an order entered on June 3, 1999. This appeal followed.

While the parties have failed to discuss the procedural basis for the order of dismissal or our standard of review, we believe a discussion of these issues is necessary for an understanding of this case. Since the appellees filed their motion to dismiss prior to filing an answer to the complaint, the motion can only be viewed as a motion to dismiss for failure to state a claim upon which relief can be granted under Kentucky Rules of Civil Procedure (CR) 12.02 (f). Our standard of review is as follows:

> For the purpose of testing the sufficiency of the complaint the pleading must not be construed against the pleader and the allegations must be accepted as true. "[The] court should not dismiss unless it appears the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim." Ewell v. Central City, Ky., 340 S.W.2d 479 (1960); Heuer v. Loop, 198 F.Supp. 546 (1961) D.C.Ind. Since the adoption of the civil rules liberality and simplicity in pleadings is the style in Kentucky. Johnson v. Coleman, Ky., 288 S.W.2d 348 (1956). Only a concise statement of facts is required (CR 8.01) because the "complaint need only give fair notice of a cause of action and the relief sought." Security Trust Co. v.

Dabney, Ky., 372 S.W.2d 401 (1963); 6 Kentucky Practice, Clay, 128.[2]

Carey's first claim of error is that he had some type of employee status with LFUCG and as such he was entitled to minimum protections and a forum for recovery on his claim against the appellees. Carey makes the convoluted argument that the Legislature by enacting the Board of Claims Act at KRS 44.070(1),[3] somehow provided "a partial waiver of sovereign immunity." The only case that Carey cites in support this argument is Department of Education v. Blevins.[4] Carey's reliance on Blevins and KRS 44.070(1) is totally misplaced. Blevins involved three separate actions that were filed in the Board of Claims against the Kentucky Department of Education. Carey fails to explain how the valid actions in the Board of Claims in Blevins against a state agency has anything to do with his civil action filed in circuit court. This argument has no merit.

Carey's claims against LFUCG were dismissed based upon the doctrine of sovereign immunity as provided for in § 231 of the Kentucky Constitution.[5] Kentucky courts have ruled in many

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[2]Pike v. George, Ky., 434 S.W.2d 626, 627 (1968).

[3]The Act states in KRS 44.070(1) that this waiver is "to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its departments, bureaus, or agencies, or any of its officers, agents or employees. . . ."

[4]Ky., 707 S.W.2d 782 (1986).

[5]"The General Assembly may, by law, direct in what manner (continued...)

cases that the doctrine of sovereign immunity is applicable to a county.[6] In Hemple, this Court stated that an urban-county government retains the immunities of county government, and that "the City of Lexington ceased to exist on the day on which urban county government became effective and that Fayette County remained as a geographical subdivision governed by a new creature, urban county government."[7]

A county's immunity from liability is absolute unless waived by the Legislature. While the Legislature has waived the defense of sovereign immunity for the Commonwealth to a limited extent by enacting the Board of Claims Act, a county is not covered by that act. In Ginter v. Montgomery County,[8] the former Court of Appeals stated that "our Board of Claims statute does not completely abrogate the doctrine of immunity even as to the state government, and as to local governments it does not purport to waive any immunity."[9]

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[5](...continued)
and in what courts suits may be brought against the Commonwealth."

[6]Moores v. Fayette County, Ky., 418 S.W.2d 412 (1967); Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967); Carr v. Jefferson County, 275 Ky. 685, 122 S.W.2d 482 (1938); Hemple v. Lexington-Fayette Urban County Government, Ky.App., 641 S.W.2d 51 (1982).

[7]Hemple, supra at 52 (citing Jacobs v. Lexington-Fayette Urban County Government, Ky., 560 S.W.2d 10, 12 (1978)).

[8]Ky., 327 S.W.2d 98, 100 (1959).

[9]See also Board of Education of Rockcastle County v. Kirby, Ky., 926 S.W.2d 455, 456 (1996); Cullinan, supra at 410; and Gnau v. Louisville & Jefferson County Metropolitan Sewer District,
(continued...)

Thus, we must determine whether the Legislature, by enacting some other statute, has waived LFUCG's defense of sovereign immunity. KRS 65.150(1) permits a county to purchase liability insurance, and LFUCG did purchase liability insurance and did establish a self-insurance fund. Carey, relying on Dunlap v. University of Kentucky Student Health Services Clinic,[10] asks this Court to revisit the recent Kentucky Supreme Court decisions that have held the purchase of liability insurance is not an implied waiver of immunity.

In Withers v. University of Kentucky,[11] the Court attempted to clarify the application of the doctrine of sovereign immunity. Justice Lambert stated: "For decades, this Court has struggled with whether various governmental entities are entitled to the protection of sovereign immunity, and of those which are, whether statutes or conduct of the immune entity amount to an express or implied waiver."[12]

Withers had filed a wrongful death action against the University of Kentucky for the alleged medical negligence of a doctor-in-training at the university hospital. The complaint was dismissed on the grounds of sovereign immunity. The Supreme Court noted that our Legislature by enacting KRS 44.072 and

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[9](...continued)
Ky., 346 S.W.2d 754, 755 (1961).

[10]Ky., 716 S.W.2d 219 (1986).

[11]Ky., 939 S.W.2d 340 (1997).

[12]Id. at 342.

44.073(2) and (14) intended to preserve sovereign immunity as a defense.[13] The Supreme Court held that the University of Kentucky was protected by sovereign immunity and that by enacting the University of Kentucky Medical Center Malpractice Act, KRS 164.939, et seq., the Legislature had not waived sovereign immunity. The Supreme Court stated: "If immunity exists, it is not lost or diminished or affected in any manner by the purchase of liability insurance or the establishment of an indemnity fund, whether directed or authorized by statute or merely undertaken without authorization, notwithstanding that such may have been an unnecessary expenditure of funds."[14]

The Supreme Court further stated:

> [I]n an effort to avoid the morass we have heretofore been in, we will observe a rule similar to the one found in Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662, 678 (1974), as follows: "We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464-65, 53 L.Ed. 742 (1909)."[15]

In Franklin County, Ky. v. Malone,[16] the Court held that "[p]articipation in a self-insurance fund pursuant to an

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[13]We also note the Legislature's intent to preserve sovereign immunity for counties by its enactment of KRS 65.2001(2) and 67A.060.

[14]Id. at 346.

[15]Id.

[16]Ky., 957 S.W.2d 195, 203 (1997).

inter-local cooperation act does not give rise to an implied waiver of sovereign immunity." The Court, in discussing Withers, stated, "the majority of the Supreme Court determined that a clear legislative intent to preserve the defense of sovereign immunity unless expressly waived was announced by the General Assembly and that the legislature abrogated the decision of Dunlap."[17]

Essentially, Carey is asking this Court to do something it does not have the authority to do: to overturn these recent Supreme Court decisions based on public policy.[18] In a dissenting opinion in Withers, Justice Wintersheimer stated: "Immunity is a barren legal concept that is generally used as a shield for those who have committed some wrong so as to prevent their legal liability. Accountability and responsibility are far better standards to be applied in our advanced civilized society."[19] While this Court is inclined to agree with the reasoning of Justice Wintersheimer, this Court is not the proper place to revisit Withers and Malone. Any changes in this law must come from the Legislature or the Supreme Court.

Thus, since LFUCG's sovereign immunity was not expressly waived when the Legislature permitted it to purchase liability insurance or to establish a self-insurance fund, the dismissal of the complaint against it was proper. While as a

[17]Id.

[18]Kentucky Rules of the Supreme Court 1.030(8)(a).

[19]Withers, supra at 348.

matter of public policy, it is unjust for an injured party not to have a remedy against a county for a county's negligence, our Supreme Court has held that any remedy must be expressly granted by the Legislature.

The trial court also ruled that Carey's claims against Ray Sabatini and Robert Ramsey were barred by the doctrine of sovereign immunity. In Malone the Court was faced with the issue of whether a jailer could be held personally liable for a suicide that took place while the decedent was in the custody of the jailer. The Court stated:

> Public officials are responsible only for their own misfeasance and negligence and are not responsible for the negligence of those who are employed by them. Moores v. Fayette County, Ky., 418 S.W.2d 412 (1967). In order to have negligence or fault attributed to a public official, there must be proof of personal wrongdoing.[20]

Carey alleged in his complaint that Sabatini and Ramsey were negligent by exercising exclusive control over him and by negligently maintaining the Detention Center's grounds for which they were solely responsible in an unsafe and dangerous condition and that such negligence was the proximate cause of his injury and caused him to suffer substantial damages. This is a classic allegation of common law negligence; and Sabatini's and Ramsey's reliance upon immunity as an absolute defense is premature. There are still many factual matters to be considered.

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[20]Malone, supra at 199-200.

It was premature of the trial court to dismiss Carey's claims against Sabatini and Ramsey in their official capacity because they have not even raised as a defense that the negligent acts allegedly committed by them were being performed as a discretionary function. The defense of official immunity was discussed by our Supreme Court in Malone:

> The doctrine of official immunity protects public officials from liability in certain instances when exercising a discretionary function. In such circumstances, a public official is entitled to absolute immunity from liability as long as the official acts are within the general scope of their authority [citations omitted].
>
> The essence of a discretionary power is that the person or persons exercising it may choose which of several courses will be followed. The power to exercise an honest discretion necessarily includes the power to make an honest mistake of judgment [citations omitted].[21]
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> In Upchurch v. Clinton County, Ky., 330 S.W.2d 428[, 430] (1959), the former Court of Appeals stated:
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> > Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation 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 of 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.

[21]Id. at 201.

Our Supreme Court stated in Malone, "[t]he enactment of rules prescribing proper treatment of prisoners necessarily involves discretionary policy determinations and consequently such an act is clearly a discretionary function. . ."[22]; but at this time Sabatini and Ramsey have produced no evidence as to the discretionary nature of their actions.

Furthermore, to the extent Carey's complaint has alleged the individual liability of Sabatini and Ramsey based on allegations of their personal negligence, they are not immune from liability. In Gould v. O'Bannon,[23] our Supreme Court held that official immunity does not bar a claim for personal negligence:

> Individual state employees are accountable for their actions and torts. The state is also vicariously liable in the Board of Claims. The Court is not unmindful that in many situations, the practical economic realities effectively insulate the individual employee from suit, but that may not be the case in regard to medical employees. Nonetheless individuals must be accountable for their conduct.
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> There is a distinction between discretionary and ministerial functions of state employees. Discretionary acts will not result in liability when negligently performed. The administration of medical care is a ministerial function by employees, including doctors. Compliance with the applicable standard of care does not involve discretionary governmental function. State officers have frequently been held responsible for their ministerial conduct.

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[22]Malone, supra.

[23]Ky., 770 S.W.2d 220, 221-22 (1989).

> See Whitt v. Reed, Ky., 239 S.W.2d 489 (1951); 43 Am.Jr. Public Officers § 279.
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> The three physicians in the university hospital have no special protection by means of sovereign immunity. Happy v. Erwin, Ky., 330 S.W.2d 412 (1959) provides that a statute which purports to extend sovereign immunity to the personal liability of its employees violates Sections 14, 54 and 241 of the Kentucky Constitution. Our Constitution specifically prohibits the abolition or dimunition of legal remedies for personal injuries. Carney v. Moody, Ky., 646 S.W.2d 40 (1982). The legislature may not abolish an existing common law right or action for personal injury. Saylor v. Hall, Ky., 497 S.W.2d 218 (1973).
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> It is the manifest purpose of the Kentucky Constitution to preserve and perpetuate the common law right of any citizen injured by the negligent acts of another to sue or recover damages for such injuries. Saylor, supra.

Subsequently, in Board of Trustees of University of Kentucky v. Hayse,[24] the Supreme Court further stated:

> Dean Stephenson was sued for his personal wrongdoing, direct responsibility for violating Hayse's constitutionally protected rights. The fact that this wrongdoing occurred while serving in his official capacity does not entitle him to the defense of sovereign immunity. Our recent decision in Gould v. O'Bannon, Ky., 770 S.W.2d 220 (1989), finality June 8, 1989, and our decision of long-standing in Happy v. Erwin, Ky., 330 S.W.2d 412 (1959), lay this matter to rest.

Therefore, even though it may later be determined that Sabatini and Ramsey are immune from liability in their official capacity due to the discretionary nature of their actions, the

[24]Ky., 782 S.W.2d 609, 615 (1989).

doctrine of official immunity does not bar a claim based on their alleged personal negligence.

We believe our holding is supported by the majority of jurisdictions. In Montanick v. McMillin,[25] the Supreme Court of Iowa stated:

> A public official may be guilty of negligence in the performance of official duties for which his official character gives him no immunity. Public service should not be a shield to protect a public servant from the consequences of his personal misconduct.

Iowa's high court went on to explain the soundness of this principle with case law from several different jurisdictions:

> The New Jersey court in the case of Florio v. Mayor and Aldermen of Jersey City, 101 N.J.L. 535, 129 A. 470, at page 471, 40 A. L. R. 1353, at page 1356, said:
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> > But it would be a travesty upon both law and justice to hold, that, because of the gravity and importance of the duties cast upon him, he has become clothed with the privilege, while in the act of performing such duties, to thrust aside all ordinary prudence in driving along the public streets to the great hazard of life and limb of men, women, and children of all classes and conditions, who may be upon the public highway. He must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed a wrong to the injury of another. The servant of the municipality is required to perform his duty in a proper and careful manner, and when he negligently fails to do so, and in

[25]225 Iowa 442, 280 N.W. 608, 615 (1938).

> the performance of his duty negligently injures another, his official cloak cannot properly be permitted to shield him against answering for his wrongful act to him who has suffered injury thereby.
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> The Connecticut court in Voltz v. Orange Volunteer Fire Association, Inc., 118 Conn. 307, 172 A. 220, 222, said:
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> > This claim involves a misconception of the doctrine of governmental immunity, which does not extend to the protection of the employee of the municipality from the consequences of his own negligence. The driver of a fire truck is liable to one injured by his negligent driving, though the municipality employing him is exempt from liability.
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> [T]he Court of Appeals of the City of New York had occasion to consider this question in Ottmann v. Incorporated Village, 275 N.Y. 270, 9 N.E.2d 862, 863, 864, where it was held:
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> > Sound public policy requires that one injured by the negligent act of another engaged in a public service should be permitted to recover the damages suffered as a result of such misconduct. Public service should not be a shield to protect a public servant from the result of his personal misconduct. . . . We believe the law to be that a servant, agent or officer of a municipality is required to do his work in a reasonably careful manner and that if he fails to do so and another is injured because of his negligence he is personally responsible, the same as any other person who has by his misconduct caused injury.

We agree with these courts and hold that Sabatini and Ramsey can be held liable for their alleged personal negligence in carrying

out their official duties.

The dissent in the case sub judice relies upon Malone, supra for the position that a county employee performing a ministerial activity which is inherently within the traditional role of government is entitled to official immunity.[26] The problem with this application is twofold. First, Malone cites no authority for the statement that "[a]s long as the police officer acts within the scope of the authority of office, the actions are those of the government and the officer is entitled to the same immunity and the only recourse available to claimants is through the Board of Claims."[27] Second, Malone does not overrule the long line of cases which denied official immunity to a government employee who was allegedly negligent in performing a ministerial duty.[28]

By dismissing the complaint for failure to state a claim, the trial court failed to accept Carey's allegations as true, failed to assume that Carey could prove a state a facts to

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[26]Here are a few examples of this incorrect application of Malone: (1) Inmate is seriously injured after following jailer's negligent instructions to perform extremely hazardous work involving the removal of toxic chemicals from a storage room even though jailer knew the inmate was untrained and improperly equipped to perform this work; (2) Bystander is seriously injured when a member of the court's clerical staff negligently causes a box of court files to fall from a third floor courthouse balcony; or (3) Children leaving school are killed when a county employee negligently operates a dump truck and crashes into the school bus in a school zone.

[27]Malone, supra at 202.

[28]See Hayes, supra; Gould, supra; Happy, supra; and Whitt, supra.

support his claim of negligence, and failed to provide Carey with a liberal application of his simple and concise complaint.[29] Accordingly, we must reverse the order of dismissal as to Sabatini and Ramsey, individually and in their official capacity, and remand this matter for further proceedings.

For these reasons, this Court affirms the order of the Fayette Circuit Court which dismissed the complaint against LFUCG, but we reverse the dismissal as to Sabatini and Ramsey and remand for further proceedings consistent with this Opinion.

BARBER, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree with the majority that the LFUCG is protected by sovereign immunity, I also believe the two jail employees were covered by official immunity. In Malone, 957 S.W.2d 195, the Supreme Court considered whether or not employees of agencies entitled to sovereign immunity are also protected by official immunity. It appears that the Malone Court distinguishes between official immunity for state employees and county employees because the Court employed a different analysis as to the liability of county employees from that of the state employee (trooper). When dealing with county employees, the Court left open the possibility of individual liability with its analysis of

[29]Pike, supra at 627.

discretionary v. ministerial functions. An official performing discretionary functions automatically enjoys official immunity. However, where county employees are performing ministerial activities, we must ask if those activities are inherently within the traditional role of government. If so, official immunity applies. If not, the employees have no official immunity, although he or she may have a defense to an allegation of wrongdoing.[30]

The complaint alleges negligence, carelessness or recklessness while performing their duties of maintaining the jail. Maintaining the jail is a traditional role of government, of the jailer and his/her deputies, and employees. Therefore, official immunity should apply and bar the action. I would affirm the Fayette Circuit Court.

BRIEF FOR APPELLANT:

Stephen D. Milner
Lexington, KY

BRIEF FOR APPELLEE:

Tracy W. Jones
Edward W. Gardner
Lexington, KY

[30]The Supreme Court is currently considering what they said in Malone in at least three pending cases: Michael Yanero, et al. v. Allen Davis, et al., 1999-SC-871; Kentucky High School Athletic Association v. Michael Yanero, et al., 2000-SC-347; and Turner, et al. v. Newport, et al., 2000-SC-957.