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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001724-MR

SHANNON C. (PENN) CASTLE;
DARRYN JEFFRIES — APPELLANTS

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NOS. 95-CI-00146; 95-CI-00147

ANDERSON COUNTY FISCAL COURT,
AND/OR THEIR SUCCESSORS, IN
THEIR OFFICIAL CAPACITIES AS MAGISTRATES
AND MEMBERS OF THE ANDERSON FISCAL COURT;
ANDERSON COUNTY KENTUCKY; AND THOMAS D. COTTON
IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE/
EXECUTIVE AND AS A MEMBER OF THE ANDERSON
FISCAL COURT

APPELLEES

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

BEFORE: BUCKINGHAM, HUDDLESTON, and JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Shannon C. Penn (now Castle) and Darryn Jeffries appeal from an order and judgment of the Anderson Circuit Court granting summary judgment in a lawsuit stemming from an automobile accident. The appellants contend that the appellees were negligent for failing to maintain a safe roadway at the accident site. The trial court granted summary judgment

in favor of the appellees on the basis that each of the appellees was immune from lawsuit under the doctrine of sovereign immunity. We affirm.

On August 20, 1994, Brian Riddle was driving a 1989 Pontiac Grand Am on Ashby Road in rural Anderson County. Chastity Price was riding in the front passenger seat, and Castle and Jeffries were riding in the back seat. At approximately 8:20 p.m., Riddle ran off the right-hand side of the road, and the car struck a tree stump. As a result of the accident, Castle broke her back and tore her colon, causing her to be hospitalized for several weeks and requiring her to have three major surgeries. Jeffries was thrown forward upon impact, suffering serious injuries to his face and teeth.

On August 18, 1995, Jeffries and Ella Penn, individually and as parent and guardian of Shannon C. Penn,[1] filed separate complaints, which were later consolidated, in the Anderson Circuit Court. Named as defendants were Anderson County Fiscal Court and/or their successors in their official capacities as magistrates and members of the Anderson County Fiscal Court; Anderson County, Kentucky; and Thomas D. Cotton in his official capacity as county judge-executive and as a member of the Anderson County Fiscal Court.

The complaints alleged, among other things, that the defendants were negligent in that they failed to design, maintain, or keep Ashby Road and the adjacent county right-of-way

[1] Having attained the age of majority, by order entered February 12, 2001, Shannon was substituted as a plaintiff in her own right.

at, and approaching, the accident site in a reasonably safe condition for travel. The complaints also alleged that the defendants failed to provide proper safeguards and to give adequate warning of dangerous conditions and failed to remedy, warn, or guard against potential dangers in the highway and its shoulders. Furthermore, the complaints alleged that to the extent the defendants might be entitled to invoke the defense of sovereign immunity, the defense had been waived by the county's purchase of liability insurance. Following discovery, the defendants moved for summary judgment, arguing that the plaintiff's claims were barred by the doctrine of sovereign immunity and that Anderson County's participation in a county insurance fund did not waive the defense of sovereign immunity.

On May 23, 2001, the trial court entered an order and judgment granting the defendants' motion for summary judgment on grounds of sovereign immunity. Subsequently, the plaintiffs filed a motion to alter, amend, or vacate, and a motion to amend their consolidated complaint to add James E. Doss, the Anderson County road supervisor, as a defendant. On July 12, 2001, the trial court entered an order and amended judgment again granting summary judgment to the defendants and denying the motion to add the road supervisor as a defendant. This appeal followed.

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. CR[2] 56.03. "The record must be viewed 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, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). "Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Id., citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]" Steelvest at 482.

First, the appellants contend that sovereign immunity does not apply to this case because the purchase of commercial insurance by the county estops it from asserting sovereign immunity. We disagree.

In the course of discovery, it was disclosed that Anderson County participates in a trust, the Kentucky All Lines Fund, sponsored by the Kentucky Association of Counties. In Franklin County v. Malone, Ky., 957 S.W.2d 195 (1997) (overruled in part by Yanero v. Davis, Ky., 65 S.W.3d 510, 523 (2001), and Board of Claims v. Harris, Ky., 59 S.W.3d 896 (2001)), a case brought against Franklin County, a state trooper, and various county officials as a result of a post-arrest suicide in a Franklin County jail restroom, the Kentucky Supreme Court concluded that Franklin County's participation in the Kentucky

[2] Kentucky Rules of Civil Procedure.

All Lines Fund did not constitute a waiver of sovereign immunity. The court stated:

> Franklin County does not have what is generally considered to be commercial insurance. The county participates in a trust, the Kentucky All Lines Fund, sponsored by the Kentucky Association of Counties. Counties have associated to self-insure pursuant to KRS 65.150(3) under the authority of KRS 65.210 et seq., the Inter-local Cooperation Act. There is clearly a difference between a fund of money contributed to by local governments and held in trust for the indemnification of the participating members, officers and employees from the purchase of commercial liability insurance coverage. It could be argued that when a local government pays a premium to a commercial insurance company, that public funds have been expended. It may be appropriate to exempt commercial insurance companies from the protection of sovereign immunity and require such companies to pay a proper claim. However, in a self-insurance group, the funds have not been expended until a claim is made and such funds could be used to reduce contributions or make refunds in the following years. In regard to commercial insurance, any loss sustained is the loss of the insurance carrier. We agree with the Supreme Court of Maine which distinguished participation in state-sponsored self-insurance funds from the purchase of commercial insurance and determined that the participation in a self-insurance fund did not constitute a waiver of sovereign immunity. Maynard v. Com'r of Corrections, 681 A.2d 19 (Me. 1996).

Malone, 957 S.W.2d at 204.

The appellants contend that Malone is distinguishable from the present case because their discovery disclosed that, in fact, there is a commercial insurance aspect to the All Lines Fund. Specifically, the appellants cite the deposition of Joseph R. Greathouse, the Director of Insurance Programs for the Kentucky Association of Counties. Greathouse explained that, in

practice, the All Lines Fund pays the first $250,000.00 of any insured claim out of the self-insurance fund, but that for claims above that amount, Kentucky Reinsurance Trust pays 30 percent and Lloyds of London pays 70 percent.

The appellants argue that since it has now been brought to light that there is a commercial insurance aspect to the All Lines Trust, the statement in Malone that "[i]t may be appropriate to exempt commercial insurance companies from the protection of sovereign immunity and require such companies to pay a proper claim" should be interpreted so as to construe Anderson County's participation in the fund as a waiver of sovereign immunity. However, this court is bound by and must follow precedents established by opinions of the Kentucky Supreme Court. SCR[3] 1.030(8)(a); Smith v. Vilvarajah, Ky. App., 57 S.W.3d 839, 841 (2000). In light of the Kentucky Supreme Court's explicit holding in Malone that a county's participation in the All Lines Fund does not constitute a waiver of sovereign immunity, we are constrained to reject the appellants' argument that Anderson County's participation in the fund constituted such a waiver.

Further, even if we were able to accept the appellants' argument, it appears that under their theory, at best, sovereign immunity would be waived only for that portion of a judgment in excess of $250,000.00. The circuit court record does not disclose with specificity the damages sought by each appellant; however, it appears unlikely that, after apportionment of fault

[3] Rules of the Supreme Court.

to the driver, the claim of either appellant against the appellees exceeds the $250,000.00 threshold. Assuming so, it appears that any potential waiver would not benefit the appellants in any event.

Next, the appellants contend that sovereign immunity does not apply to the case at bar because the appellees were not performing discretionary acts but, rather, were failing to perform mandatory statutory acts. We disagree.

While relevant in lawsuits against public officials sued in their individual capacities, in the present case the distinction between discretionary acts and ministerial acts[4] is not relevant. The complaints initiating this lawsuit unambiguously indicate that the members of the fiscal court and the county judge-executive are being sued in their official capacities. "Any action against fiscal court members in their official capacities is essentially an action against the county which is barred by sovereign immunity." Malone at 201, citing Ky. Const. § 231 and Littlejohn v. Rose, 768 F.2d 765 (6th Cir. 1985). "The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." Yanero v. Davis, Ky., 65 S.W.3d 510, 518 (2001)(citing Alden v. Maine, 527 U.S. 706, 756, 119 S.Ct. 2240, 2267, 144 L.Ed.2d 636 (1999); 72 Am.Jur.2d, States, Territories and Dependencies § 104 (1974); Tate v.

[4] Consistent with standardized terminology, we construe the appellants' use of the term "mandatory statutory acts" as referring to "ministerial acts."

Salmon, 79 Ky. 540, 543 (1881); and Divine v. Harvie, 23 Ky. (7 T.B. Mon.) 439, 441 (1828)).

The distinction regarding discretionary functions and ministerial functions applies only if a government official is sued in his individual capacity. See Yanero at 522. In such cases the official receives only qualified official immunity and is afforded no immunity from tort liability for the negligent performance of a ministerial act, i.e., an act that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. Id. Because the fiscal court members and the county judge-executive were sued only in their official capacities, and not their individual capacities, absolute immunity applies, not qualified official immunity. Because they have absolute immunity, summary judgment in favor of the members of the fiscal court and the county judge-executive was proper.

Next, the appellants contend that the application of sovereign immunity violates the appellants' jural rights. The "jural rights" doctrine operates to preserve rights of action that existed prior to the adoption of the present state constitution in 1891. See Gilbert v. Barkes, Ky., 987 S.W.2d 772, 776 (1999). However, the doctrine of sovereign immunity preexisted our 1891 constitution, and the application of the doctrine to bar lawsuit against the appellees does not abrogate or abolish any right of action which existed prior to 1891. See Wood v. Board of Education of Danville, Ky., 412 S.W.2d 877, 879

(1967). Inasmuch as the doctrine of sovereign immunity would have applied in these circumstances prior to 1891, we conclude that the jural rights doctrine does not provide a remedy for the appellants. See Clevinger v. Board of Educ. of Pike County, Ky., 789 S.W.2d 5, 11 (1990); Poole Truck Line, Inc. v. Commonwealth, Transportation Cabinet, Ky. App., 892 S.W.2d 611, 614-15 (1995).

Next, the appellants contend that the application of sovereign immunity is an unfair and antiquated concept which should be abandoned. The Kentucky Supreme Court has repeatedly upheld the doctrine of sovereign immunity, including the general rule that a county has the same sovereign immunity as the state. Malone at 203; see also Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967); Moores v. Fayette County, Ky. 418 S.W.2d 412 (1967); Calvert Investments, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, Ky., 805 S.W.2d 133 (1991); and Yanero, supra. In view of the Kentucky Supreme Court's long-standing and consistent affirmation, approval, and acceptance of sovereign immunity, we are without the authority to abolish the doctrine as "unfair and antiquated." SCR 1.030(8)(a).

Next, the appellants contend that allowing other injured parties a legal remedy before the Kentucky Board of Claims while preventing such relief to the appellants violates their equal protection and due process rights. Specifically, the appellants contend that by allowing the victims of accidents occurring on state roads to bring an action before the Board of Claims while denying the right to victims of accidents occurring on county roads, the latter group is discriminated against.

Less than a year ago, in Board of Claims v. Harris, Ky., 59 S.W.2d 896 (2001), the Kentucky Supreme Court explicitly held that the Board of Claims does not have jurisdiction over claims against counties, county agencies, officers, or employees. While Harris did not specifically address equal protection and due process issues, nevertheless, the appellants seek to have us overrule Harris, albeit on alternative grounds. We are without authority to do this. SCR 1.030(8)(a).

In any event, the equal protection and due process claims asserted by the appellants concern socioeconomic issues, and the legislatures's decision to grant a forum for state-road accident victims while denying the same right to county-road accident victims need only be supported by a rational basis. Unless a classification requires some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause of the U.S. Constitution requires only that the classification be analyzed under the rational basis test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); Commonwealth v. Howard, Ky., 969 S.W.2d 700, 702-703 (1998).

Our General Assembly, under the Equal Protection Clause, has great latitude to enact legislation that may appear to affect similarly situated people differently. Clements v. Fashing, 457 U.S. 957, 963, 102 S.Ct. 2836, 2843, 73 L.Ed.2d. 508 (1982). Legislative distinctions between persons, under traditional equal protection analysis, need only bear a rational

relationship to a legitimate state end. Id.; Chapman v. Eastern Coal Corp., Ky., 519 S.W.2d 390, 393 (1975). "Under this test, statutorily created classifications will be held invalid when these classifications are totally unrelated to the state's purpose in their enactment, and when there is no other conceivable purpose for continued viability." Chapman v. Gorman, Ky., 839 S.W.2d 232, 239-240 (1992). Furthermore, "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.'" FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 113, S.Ct. 2096, 2102, 124 L.Ed.2d 211, 222 (1993), quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351, 358 (1973).

We are persuaded that the General Assembly's decision to exclude counties from actions before the Board of Claims - including claims involving accident victims on county roads - is rationally related to the legitimate state purpose of exercising fiscal restraint and control over the state budget by imposing constraints and limits on the expenditure of taxpayer funds in the settlement of Board of Claims actions.[5]

Finally, the appellants contend that the trial court erred by failing to allow them to amend their complaint to name James E. Doss, the Anderson County road supervisor, as a defendant in the case.

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[5] Further, we note that other injured persons situated such as these appellants are not without a remedy in all cases. Where appropriate, actions may be brought against county officials in their individual capacities. Yanaro, supra.

On May 31, 2001, the appellants filed a motion to amend their complaint in light of Ezell v. Christian County, Kentucky, 245 F.3d 853 (6th Cir. 2001). Ezell held that under Kentucky law, the administrator of the estate of a motorist who was killed in an automobile accident could maintain a private right of action against a county road engineer who allegedly failed to comply with his statutory duty to maintain county bridges and roads in a safe condition. The trial court subsequently denied the motion to amend.

CR 15.01 provides that a party may amend a pleading once as a matter of right before a responsive pleading is served or within a certain time frame; "[o]therwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Relevant factors for consideration of leave to amend under CR 15.01 include timeliness, excuse for delay, and prejudice to the opposite party. Lawrence v. Marks, Ky., 355 S.W.2d 162, 164 (1961). The granting or denial of an opportunity to amend is within the discretion of the trial court and should not be disturbed unless abuse of discretion is clearly shown. Johnston v. Staples, Ky., 408 S.W.2d 206, 207 (1966).

We are persuaded that the trial court did not abuse its discretion in denying the appellants' motion to amend. The original complaints were filed on August 18, 1995. The appellants filed their motion for summary judgment August 18, 1999. The initial order granting summary judgment was entered on May 23, 2001. The motion to amend was filed on July 5, 2001.

Based upon this time line, the motion to amend was filed almost six years after the initial complaint and after the initial order granting summary judgment had been entered.[6] A lengthy passage of time before filing a motion to amend is a significant factor to be weighed in whether to grant a motion to amend. See Floyd v. Humana of Virginia, Inc., Ky. App., 787 S.W.2d 267, 269 (1989). In light of the untimeliness of the motion to amend, we cannot say that the trial court abused its discretion in denying it.

For the foregoing reasons, the judgment of the Anderson Circuit Court granting summary judgment to the appellees is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT DARRYN JEFFRIES:

Roy C. Gray
Frankfort, Kentucy

BRIEF FOR APPELLANT SHANNON C. (PENN) CASTLE:

David L. Holmes
Frankfort Kentucky

BRIEF FOR APPELLEE:

Shelby C. Kinkead, Jr.
Kinkead & Stilz, PLLC
Lexington, Kentucky

[6] The appellants' motion to alter, amend, or vacate the original order was limited to errors in the caption of the order.