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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001603-MR

WILLIAM PIRTLE — APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
NO. 2001-SC-00691-DR

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 94-CI-01306

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, STEPHEN A.
GAHAFER, AND CHARLES MASSARONE — APPELLEES

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

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

KNOPF, JUDGE: William Pirtle appeals from a June 5, 2000, opinion and order by the Fayette Circuit Court dismissing his complaint for damages against the Lexington-Fayette Urban County Government (LFUCG) and two of the urban county=s police officers, Charles Mazzarone and Stephen Gahafer. On August 5, 1993, Officer Mazzarone arrested Pirtle, handcuffed him, and placed him in the back of a police transport vehicle. Officer Gahafer then

drove Pirtle to the Fayette County Detention Center. Pirtle alleges that he fell during the ride, when Officer Gahafer made a sharp turn, and that he suffered a serious injury. His complaint accuses both the government and the officers of negligence in failing to provide him with safe transportation. Ruling that all three defendants enjoy sovereign immunity, the trial court dismissed the complaint in its entirety.

Pirtle appealed to this Court and contended that the general assembly had waived the urban county=s immunity and that the doctrine of sovereign immunity did not apply to the individual officers. By an opinion rendered July 27, 2001, this Court affirmed the trial court=s dismissal of Pirtle=s complaint. We agreed with the trial court that under Franklin County v. Malone,[1] all of the defendants were immune from suit. Shortly after the rendition of our opinion, our Supreme Court issued Yanero v. Davis,[2] in which it overruled a significant portion of Malone. By order entered February 21, 2002, the Supreme Court vacated this Court=s July 27, 2001, opinion and remanded the case to us for reconsideration in light of Yanero. We agree with Pirtle that Yanero makes a difference. Although nothing in Yanero alters our earlier ruling with respect to the urban-county=s immunity, the official-immunity doctrine reasserted in Yanero affords the individual officers a more circumscribed

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

[2]Ky., 65 S.W.3d 510 (2001).

immunity than did Malone. We are obliged accordingly, to affirm in part, reverse in part, and remand for additional proceedings.

With respect to LFUCG, Pirtle acknowledges the well established rule in Kentucky that counties and urban counties share the state=s sovereign immunity.[3] He maintains, however, that the General Assembly waived the counties= immunity in 1988 by enacting the Claims Against Local Governments Act.[4] That act includes county governments within the definition of Alocal government.@[5] And, with certain exceptions,[6] it contemplates wrongful death, personal injury, and property damage actions against Aany local government@ where the injury was caused by, among other things, A[a]ny act or omission of any employee, while acting within the scope of his employment or duties.@[7] Pirtle contends that his complaint against LFUCG meets this description and thus was authorized by the act.

The short answer to Pirtle=s contention is that our Supreme Court has rejected it. In Franklin County v. Malone, the Court responded to a similar contention by stating,

> The Claims against Local Government Act, KRS 65.200 et seq., offers no relief for the Burns Estate in this case. The specific

[3]Franklin County v. Malone, *supra;* Hempel v. Lexington-Fayette Urban County Government, Ky. App., 641 S.W.2d 51 (1982).

[4]KRS 65.200 *et seq.*

[5]KRS 65.200(3).

[6]KRS 65.2003.

[7]KRS 65.2001(1).

> language of KRS 65.2001(2) provides "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."[8]

Yanero affirmed this portion of Malone. The trial court did not err, therefore, by dismissing Pirtle=s complaint against LFUCG as barred by the urban-county=s sovereign immunity.

Pirtle next contends that the trial court misapplied the sovereign-immunity doctrine with respect to his complaint against the individual police officers. Public officials and employees sued as individuals, he maintains, have typically been thought outside the scope of sovereign immunity.[9] They have enjoyed instead a qualified immunity for job-related acts that require the exercise of a significant degree of discretion or policy making. Immunity has not shielded their tortiously performed ministerial acts.[10]

As the trial court noted, however, Malone extended the notion of sovereign immunity to include the authorized acts of

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[8]957 S.W.2d at 203.

[9]University of Louisville v. O'Bannon, Ky., 770 S.W.2d 215 (1989); Happy v. Erwin, Ky., 330 S.W.2d 412 (1960).

[10]Speck v. Bowling, Ky. App., 892 S.W.2d 309 (1995); Ashby v. City of Louisville, Ky. App., 841 S.W.2d 184 (1992). *See* Dobbs, *The Law of Torts,* p. 735 (2001):

> More generally, officers and employees are said to enjoy qualified immunity for discretionary acts, but not for ministerial acts. The discretionary immunity is qualified or conditional because it is usually lost if the officer is guilty of bad faith, malice, corruption, wanton misconduct or the like. (Footnotes and citations omitted).

individual government employees whenever those acts fulfilled Athe traditional role of government,@ regardless of whether those acts were discretionary or ministerial. Under this portion of Malone, officers Mazzarone and Gahafer were immune from Pirtle=s suit. It was this aspect of Malone that the Supreme Court overruled in Yanero. There the Court reasserted the doctrine of qualified official immunity and made clear that government employees are generally not shielded from suits alleging the negligent performance of ministerial duties. In this case, the trial court found that placing Pirtle into the transport vehicle and driving him to the detention center were ministerial functions. Under Yanero and the rule of qualified immunity just stated, the officers should thus have been deemed subject to Pirtle=s suit.

Against this result the urban county contends that Pirtle=s complaint against the individual officers was in form and essential fact a complaint against the urban county. This contention has no merit. It has been apparent to all concerned from the beginning of this case that Pirtle was proceeding against the officers in their individual capacities. It is also apparent that Pirtle=s complaint against the officers is based on their alleged breach of the duty of reasonable care, not a duty implicating the urban-county=s authority.

The urban county also contends that the officers were in fact engaged in discretionary functions and should be accorded

official immunity even under Yanero. However, because the urban county did not cross-appeal from the trial court=s contrary finding that the officers= acts were ministerial, this issue was not preserved for our review.[11] Instead, the trial court will need to reconsider it as though from the beginning. We may note, however, that non-emergency driving in the course of governmental duties is generally deemed ministerial.[12] We realize that, because this issue was litigated and not appealed, arguably the trial court=s initial ruling should be deemed the law of the case.[13] In light of the added significance Yanero gives the issue, however, and because there are possibly material distinctions between the roles of the two officers, we are persuaded that there is a risk of injustice if we foreclose reconsideration of the officers= official immunity on remand. Reconsideration, furthermore, will not unduly burden either Pirtle or the trial court.

Accordingly, we affirm the June 5, 2000, order of the Fayette Circuit Court to the extent that it dismisses Pirtle=s suit against the Lexington-Fayette Urban County Government. We reverse the order dismissing Pirtle=s suit against officers Mazzarone and Gahafer. And we remand for reconsideration of the

[11]Smith v. Wal-Mart Stores, Ky., 6 S.W.3d 829 (1999); Fryar v. Stovall, Ky., 504 S.W.2d 701 (1973).

[12]Speck v. Bowling, *supra;* Chamberlain v. Mathis, 729 P.2d 905 (Ariz. 1986); Sintros v. LaValle, 406 So.2d 483 (Fla. App. 1981).

[13]Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980); Nowak v. Joseph, 283 Ky. 735, 142 S.W.2d 970 (1940).

officers: official immunity, as defined in Yanero, and for additional proceedings if either officer is found subject to suit.

ALL CONCUR.

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