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Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000389-MR
AND
NO. 2002-CA-000666-MR

VIRGIL GRIFFITH and
TAMMY GRIFFITH — APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 97-CI-00173

MIKE FLYNN;[1] CITY OF
GEORGETOWN; DON HAWKINS
and SCOTT COUNTY — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART and REMANDING

** ** ** ** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER and HUDDLESTON,[2] JUDGES.

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[1] The notice of appeal filed by appellants lists the spelling as Flynn; however, we note that the correct spelling is Flinn and for purposes of this appeal the spelling will be Flinn.

[2] Judge Huddleston concurred in this opinion prior to his retirement effective June 15, 2003.

EMBERTON, CHIEF JUDGE. Virgil and Tammy Griffith contracted with Larry Riddell and Otis West for remodeling work on their residence located in Sadieville, Kentucky. The Griffiths filed claims against Riddell and West, individually and as a business partnership, Riddell's Construction, as well as against Scott County and the City of Georgetown alleging that the Georgetown/Scott County Office of Building Inspection issued Certificates of Completion and Occupancy despite the existence of code defects. Don Hawkins, a Georgetown/Scott County electrical inspector, and Mike Flinn, a Georgetown/Scott County building inspector, were also sued in their individual capacities for alleged negligence and bad faith. The claims against Riddell, West, and Riddell's Construction were arbitrated and judgment was awarded in the Griffiths' favor. The issues raised concern the liability of the city, county, and the individual liability of Hawkins and Flinn.

Municipal immunity is governed by the landmark case of Haney v. City of Lexington,[3] where the court abolished municipal immunity for ordinary torts but retained the doctrine for acts classified as legislative, judicial, quasi-legislative, or quasi-judicial.[4] Unlike municipal immunity, sovereign immunity,

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[3] Ky., 386 S.W.2d 738 (1964).

[4] Id. at 742.

applicable to counties, has its roots in the Constitution thereby providing counties immunity from liability except as otherwise provided by the legislature.[5]

In 1988, the legislature enacted the "Claims Against Local Governments Act," applicable to both counties and cities.[6] KRS[7] 65.2003 provides in its entirety:

> Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:
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> (1) Any claim by an employee of the local government which is covered by the Kentucky workers' compensation law;
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> (2) Any claim in connection with the assessment or collection of taxes;
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> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

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[5] Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195 (1997) (overruled on other grounds Yanero v. Davis, Ky., 65 S.W.3d 510 (2001)).

[6] A county enjoys absolute immunity unless otherwise waived by the legislature. A municipality, however, has limited immunity and the Act, in reaction to Haney, consequently addresses many of the issues arising from the abolition of municipal tort immunity. However, since that Act is applicable to both counties and municipalities, we discuss them in unity.

[7] Kentucky Revised Statutes.

> (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;
>
> (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; or
>
> (e) Failure to make an inspection.
>
> 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 65.2003(3)(c), without qualification, provides that a local government shall not be liable for the issuance of a permit or certificate. The Griffiths contend, however, that the issuance of the building permit was a ministerial duty performed by Hawkins and Flinn, thus, the concluding paragraph of the statute imposes liability on the county and city. If this court accepts such proposition, KRS 65.2003(3)(c) is essentially nullified.

It was not the intent of the drafters of the Claims Against Local Governments Act to abrogate or expand the immunity

afforded to local governments by either the constitution or the common law. KRS 65.2001(2) expressly states:

> 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.

After a review of the common law developed in cases involving the failure of a local government to enforce safety and building codes, we conclude that KRS 65.2003(3)(c) is a codification of that law.

The Griffiths allege that the issuance of the certificates caused them to pay the contractors despite the existence of construction defects. It is not alleged, nor could it be under the facts, that the county or city actually caused the defects in the construction.[8] Such distinction renders this case inapposite to those where the local government has taken affirmative action resulting in injury. The failure to enforce government regulations or laws having quasi-judicial and quasi-legislative elements has consistently been held non-tortious.

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[8] See Gas Service Co., Inc. v. City of London, Ky., 687 S.W.2d 144 (1985).

Although preceding the enactment of the Claims Against Local Government Act, Grogan v. Commonwealth,[9] established the legal precedent regarding the liability of local governments for failure to enforce its own regulation. The Grogan case evolved from the tragic Beverly Hills Supper Club fire and involved an action against the City of Southgate. The charge, as phrased by the court, was that the city, in not enforcing its fire and building code laws, "did not enforce a law or laws designed for the safety of the public and that its taxpayers must therefore bear a loss occasioned by someone else's failure to comply with the law."[10] The court made two pertinent points.

Initially it rejected the assumption that tort liability for local governments is that applicable to private individuals. Although the latter can assume a duty to use reasonable care, by the enactment of public safety laws, the government does not undertake such duty. As stated by the court, "it attempts only to compel others to do it, and as one of the means of enforcing that purpose it may direct its officers and employees to perform an inspection function."[11] The court continued emphasizing that underlying all tort liability

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[9] Ky., 577 S.W.2d 4 (1979).

[10] Id. at 5.

[11] Id.

is the concept of duty. Absent some relationship to the individual, otherwise imposing a duty, in the context of building and fire codes, the duty is only to the public generally.

The final point made by the court, and one which it found based on common logic and precedent, is that sound public policy dictates that "a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all."[12]

In 1991, after the enactment of the Claims Against Local Governments Act, the court was again confronted with the liability of a city for failure to enforce fire and safety codes. In Bolden v. City of Covington,[13] the court reiterated the view that a government is not liable for acts that are regulatory and quasi-judicial in nature and tort liability does not extend to cases where the government undertakes a regulatory function. "[I]t is not a tort for government to govern."[14]

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[12] Id. at 6.

[13] Ky., 803 S.W.2d 577 (1991).

[14] Id. at 580 (citing Restatement (Second) Torts, § 895B, Comment e, Conduct Not Tortious.

The city's housing code was regulatory and quasi-judicial in nature. Legal liability for its violations ultimately rests with the owner or person in control of the building and the role of the government is only to find violations and decide what needs to be done to comply with the code. The city was not shielded from liability by immunity but because "the incompetent performance of decision-making activity of this nature by a governmental agency is not the subject of tort liability."[15]

Addressing the application of the Claims Against Local Governments Act, the court in Siding Sales, Inc. v. Warren County Water Dist.,[16] held that the city was immune from liability for the failure to enforce local fire safety standards and refusal to issue an occupancy permit. These were regulatory functions and constituted discretionary acts for which there is no liability under the Act. The language in Grogan and Bolden was again affirmed.

The Griffiths contend that despite precedent, the court in Collins v. Commonwealth, Natural Resources and Environmental Protection Cabinet,[17] held that a duty to a

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[15] Id. at 581.

[16] Ky. App., 984 S.W.2d 490 (1998).

[17] Ky., 10 S.W.3d 122 (1999).

specific individual was created by the enactment of mining laws and that the Cabinet's failure to discover violations and the negligent issuance of a mining permit was actionable after a child drowned in a culvert located on mining premises. Grogan and its progeny were not discussed in Collins; however, despite Justice Cooper's strong dissent, the court rejected the Cabinet's contention that the negligent enforcement of mining regulations does not constitute actionable negligence. Instead, the court held that the duties of the Cabinet were ministerial, and under the 1986 amendment to the Board of Claims Act, the Commonwealth can be liable for the negligent performance of regulatory functions running to the public as a whole.

We are not concerned in this case with an interpretation of the Board of Claims Act and therefore find that Grogan and its progeny are applicable and remain sound law. Additionally, there is a distinction between mining and building inspections. The requirements for mine premises are specific and require no discretion. Building codes, however, require the inspectors to use their judgment whether there is compliance and what, if any, remedial measures are required. We are not persuaded that Collins overrules this precedent.

In conclusion we summarize what we have previously stated. The liability of a local government for its failure to enforce laws or regulations enacted for the public safety has

been consistently denied by the courts and now by the Claims Against Local Governments Act for three distinct reasons. Under the doctrine of immunity, the decision as to whether a structure meets the code standards is a discretionary function requiring the expertise and the decision-making authority of the government, its officers and employees. Second, there is recognition that, as a matter of public policy, governments should not be fearful of liability for the failure to govern. Through the enactment of safety laws, governments are not then insurers of compliance by private individuals. Finally, absent a special relationship between a government and a private individual, there is simply no duty to any specific citizen by virtue of building codes. The duty to protect is owed to the public and not to a particular individual or class of individuals.

The application of official immunity to Hawkins and Flinn depends upon whether their acts were discretionary or ministerial.

> "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed.[18]

[18] Yanero v. Davis, Ky., 65 S.W.3d 510, 521 (2001).

A government employee, however, is not shielded from liability for discretionary acts performed in bad faith.

To avoid redundancy, we reiterate simply that the acts performed by Hawkins and Flinn were discretionary in that they were called upon to use their expertise to make judgments regarding compliance with the codes. Additionally, we conclude that merely by reason of performing an inspection, there is no special relationship between the inspector and the individual creating a duty to reasonably perform the inspection.[19] The purpose of Hawkins's and Flinn's inspections was to determine whether there was compliance with the regulations and laws enacted to protect the public generally, not to assure that the Griffiths' contractor fulfilled its duty. This view is consistent with that expressed in Grogan. If the building codes create no duty owed by the local governments to individuals, certainly the inspector's duty is likewise only to the general public.

The trial court did not address an allegation raised in the Griffiths' complaint concerning the good faith of Hawkins and Flinn in conducting their inspections. Although at this point only mere allegations, the Griffiths allege that there was a bribe or other bad faith conduct between the inspectors and

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[19] Ashby v. City of Louisville, Ky. App., 841 S.W.2d 184 (1992).

the contractors. If true, neither would be entitled to official immunity and both Hawkins and Flinn had a common duty not to intentionally engage in behavior injurious to the Griffiths.[20] It is unclear whether the Griffiths can develop evidence to support these allegations; we cannot say, however, as a matter of law, that liability is precluded. On this issue alone, we remand this case to the trial court.

The judgment of the Scott Circuit Court is affirmed except that it is remanded for the taking of proof on the sole issue of bad faith of Hawkins and Flinn.

ALL CONCUR.

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[20] Yanero, supra, at 523.

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