RENDERED: July 16, 2004, 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001162-MR

STANLEY MADDEN
and BARBARA MADDEN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD, JUDGE
CIVIL ACTION NO. 00-CI-008182

CITY OF LOUISVILLE and
LOUISVILLE & JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT — APPELLEES

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

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, and TAYLOR, Judges.

MINTON, Judge: Stanley Madden and Barbara Madden (the Maddens) appeal from that portion of an opinion and order of the Jefferson Circuit Court entered May 8, 2003, which granted the motions for summary judgment of the City of Louisville

(Louisville) and the Louisville & Jefferson County Metropolitan Sewer District (MSD).[1]

The Maddens live adjacent to Iroquois Park and Golf Course (Iroquois Park), which is owned by Louisville. They allege that since January 3, 2000, their basement has flooded on numerous occasions after a rainfall. The Maddens attribute the flooding to rainwater draining from Iroquois Park and assert that both Louisville and MSD are liable for this flooding. The Maddens asserted the following claims[2] against Louisville: 1) negligent trespass due to its construction or grading of Iroquois Park which diverted rain water from the park onto the Maddens' property; 2) negligent trespass[3] due to its failure to properly maintain its drainage ditches and drainage areas in and around Iroquois Park; and 3) negligent failure to "reasonably

---

[1] The May 8, 2003, opinion and order also denied the Maddens' motion to file a third amended complaint, but they have not appealed that decision. The second amended complaint incorporated by reference all allegations contained in the original complaint and first amended complaint. Any references to the Maddens' complaint shall be to the second amended complaint unless otherwise indicated.

[2] These claims against Louisville and MSD are not numbered or even named as in the complaint. We have chosen to disregard the terminology used by the parties where it does not best describe the actual cause of action. *See*, *e.g.*, note 3, *infra*.

[3] What we have designated as two claims of negligent trespass, the Maddens designated as two claims of negligence and a third claim of trespass. We have chosen the former terminology because it more accurately describes the alleged tortious conduct. For a detailed analysis of the tort of negligent trespass in Kentucky, *see* Mercer v. Rockwell Int'l Corp. 24 F. Supp. 2d 738 (W.D. Ky. 1998).

maintain all the property within its control in order that it does not cause damage to or interfere with the property of its residents."[4] The Maddens asserted the following claims against MSD: 1) negligent trespass due to its failure to properly maintain drainage ditches and drainage areas in and around Iroquois Park; 2) negligent trespass due to its "failure to resolve the drainage problems"[5] on the Maddens' property by "designing drainage ditches or other means to properly drain the natural flow of water"[6] from Iroquois Park; and 3) breach of contract for violating provisions concerning remedying park drainage in an agreement between MSD and the Louisville and Jefferson County Parks Department to which the Maddens claim to be third-party beneficiaries.

Louisville and MSD separately filed motions for summary judgment. Both Louisville and MSD asserted governmental immunity under Kentucky Revised Statutes (KRS) 65.2003 of the Claims Against Local Governments Act (CALGA) as a basis for summary judgment.[7]

---

[4] Maddens' Orig. Compl. ¶ 17. The Court questions whether this is a cognizable cause of action independent of the negligent trespass claims but declines to rule on this issue since it was not well-developed in the record.

[5] Maddens' Second Am. Compl. ¶ 7.

[6] *Id*. at ¶ 10.

[7] Kentucky Revised Statutes (KRS) 65.200-65.2006.

A hearing was conducted on both motions for summary judgment on April 17, 2003. In its May 8, 2003, opinion and order, the circuit court granted the motions for summary judgment of both Louisville and MSD. The sole basis given for the summary judgments in the opinion and order is that both Louisville and MSD are protected from liability for their alleged actions by municipal or local governmental immunity under KRS 65.2003. The Maddens filed a timely notice of appeal. They also notified the Attorney General (AG) that they intended to challenge the constitutionality of certain provisions of CALGA on appeal. The AG subsequently filed a notice of intention not to intervene.

On appeal, the Maddens assert that the circuit court erred by holding that Louisville and MSD were protected by local governmental immunity under KRS 65.2003. They assert that MSD is not a "local government" within the meaning of CALGA and, thus, not protected by the statutory immunity provisions of the act. Also, the Maddens claim that the alleged actions of Louisville and MSD at issue are all ministerial duties, which are exempted from local governmental immunity under KRS 65.2003. The Maddens also assert that CALGA's statutory local governmental immunity, as applied to MSD, violates the jural rights provisions of Sections 14, 54, and 241 of the Kentucky Constitution, which restrict the power of the legislature to

abrogate or limit common law rights which predate the adoption of the Kentucky Constitution. The Maddens do not appear to deny that some form of municipality or local governmental immunity existed prior to the adoption of the Kentucky Constitution. However, they assert that the act unconstitutionally increased the scope of the immunity if it is applied to entities like MSD which are not municipalities. They also allege that the act is unconstitutional because it defines discretionary duties in an overly broad way to include what the Maddens contend previously would have been considered ministerial duties.

As outlined in CR 56.03, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 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."[8] Because factual findings are not at issue, we do need to defer to the trial court.[9]

---

[8] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[9] *Id*.

CONSTITUTIONALITY OF CALGA

The summary judgment for Louisville and MSD was based on the circuit court's determination that the entities were not liable for the alleged conduct because of local governmental immunity under CALGA, the act which the Maddens assert is unconstitutional. First we must consider whether the trial court ruled on the constitutionality of the act. Counsel for the Maddens first mentioned the issue orally in the April 17, 2003, hearing on the motions for summary judgment, admitting that the issue had not been raised in any written motion or pleading, including the memoranda regarding the motions for summary judgment. Neither the Maddens nor anyone else notified the AG that the constitutionality of CALGA was being called into question until after summary judgment was entered.

KRS 418.075 states, in relevant part: "In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard ...."[10] Similarly, Kentucky Rules of Civil Procedure (CR) 24.03 states as follows: "When the constitutionality of an

[10] As a procedural statute, the relevant version of KRS 418.075 is the one in effect when this issue of CALGA's constitutionality first arose before the circuit court, between the April 17, 2003, hearing and May 8, 2003, when the order and opinion was entered. The statute was subsequently amended, effective June 1, 2003, but the quoted language did not change when the statute was amended.

act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney-General [sic]."

While making no mention of CR 24.03, the Maddens assert that they were not required to notify the AG at the trial court level because the previously-cited provision of KRS 418.075 only applies in declaratory actions. They rely on the fact that it is contained within the Declaratory Relief Act.[11] They point out that their complaint did not seek declaratory relief; the constitutionality of CALGA only arose after Louisville and MSD asserted local governmental immunity under the act as defenses in their respective motions for summary judgment. However, the Kentucky Supreme Court has rejected the Maddens' interpretation of the duty to notify the AG under KRS 418.075, stating as follows:

> The language of [KRS 418.075] and [CR 24.03] evinces a strong public policy in favor of notification to the Attorney General whenever the constitutionality of a statute is placed in issue despite the location of KRS 418.075 in the Kentucky Declaratory Judgments Act and the appearance of CR 24.03 in our rule relating to intervention.[12]

---

[11] KRS 418.005-418.090.

[12] Maney v. Mary Chiles Hosp., Ky., 785 S.W.2d 480, 485 (1990).

Therefore, it is clear that the Maddens had a duty to notify the AG before summary judgment was entered, regardless of the nature of their civil suit.

In the alternative, the Maddens assert that if they were required to notify the AG before summary judgment was entered, then the circuit court had a duty to refrain from the entry of judgment until such notice was given. They rely upon language in Maney which states, "[u]nless the record shows that the requirements of KRS 418.075 have been observed, any judgment rendered which decides the constitutionality of a statute shall be void."[13] However, the instant case is distinguishable from Maney in that the circuit court in the instant case did not rule on the constitutionality of a statute. In fact, this is not a case where the constitutionality of a statute or act was even before the circuit court, as it was never properly raised in a written motion or pleading. What was before the circuit court was an oral argument for it to declare CALGA unconstitutional.[14] It has often been noted that courts speak through their written orders and opinions.[15] This raises the question of how to

---

[13] *Id.* at 482.

[14] *Cf*. Brashars v. Com., Ky., 25 S.W.3d 58, 64-65 (2000) (criminal defendants made oral motions at final sentencing to declare Kentucky's Sex Offender Registration Act unconstitutional).

[15] Midland Guardian Acceptance Corporation v. Britt, Ky., 439 S.W.2d 313, 314 (1968).

interpret the circuit court's silence in its order and opinion regarding the Maddens' argument to declare CALGA unconstitutional. American Jurisprudence 2d states as follows:

> As a general rule, a judgment disposes of all issues presented by the pleadings unless a contrary intention appears from the face of the judgment. A judgment which grants part of the relief but omits reference to other relief put in issue by the pleadings will ordinarily be construed to settle all issues by implication. Where a judgment is silent with regard to the disposition of a matter, it is presumed that the claim is denied.[16]

In this instance, where the circuit court applied provisions of CALGA without addressing its constitutionality, it necessarily implicitly denied the Maddens' oral motion to declare the act unconstitutional. In a similar situation, in which the moving parties made eleventh-hour oral motions to have an act declared unconstitutional, without ever raising the issue in any written motion or pleading and without notifying the AG pursuant to KRS 418.075 and CR 24.03, the Kentucky Supreme Court upheld the trial court's summarily overruling of the oral motions.[17] The Supreme Court stated that "the appellants' failure to notify the Attorney General of their constitutional challenges alone provided the trial court with a sufficient basis to overrule the motions and affirm the trial court's

[16] 46 Am.Jur.2d Judgments § 94 (1994).

[17] Brashars, 25 S.W.3d at 64-66.

ruling."[18] Likewise, we find that the circuit court had a sufficient basis to deny the Maddens' oral motion, and we hold that its implicit denial was proper.

LOCAL GOVERNMENTAL IMMUNITY UNDER CALGA

The circuit court found that Louisville and MSD were both protected by local governmental immunity pursuant to KRS 65.2003 of CALGA for the claims made against them by the Maddens. The Kentucky Supreme Court has declared that the legislative intent of CALGA was "to specify what damages could be obtained against local governments that are subject to common law judgments and what obligation a local government has to provide a defense for and pay judgments rendered against its employees for the tortious performance of their ministerial duties."[19] KRS 65.2001 restricts the scope of CALGA to "action[s] in tort"[20] brought "against any local government" due to a "defect or hazardous condition" existing on public property or "an act or omission of any employee."[21] "Local government" is defined for purposes of the Act as "any city incorporated under the law of this Commonwealth, the offices and agencies thereof,

---

18 *Id.* at 66.

19 Schwindel v. Meade County, Ky., 113 S.W.3d 159, 163 (2003).

20 "Action in tort" is defined in KRS 65.200(1).

21 Schwindel, 113 S.W.3d at 164, KRS 65.2001.

any county government or fiscal court, any special district or taxing district created or controlled by a local government."[22] CALGA also sets forth certain claims against local governments which are disallowed.[23] The relevant portion states as follows:

> a local government shall not be liable for injuries or losses resulting from:
>
> ....
>
> (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:
>
> (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

[22] KRS 65.200(3).

[23] *See* KRS 65.2003.

> from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Reading CALGA as a whole, there are three factors which must be shown for the local governmental immunity available under KRS 65.2003 to apply: (1) the cause of action must be an action in tort, as defined by KRS 65.200(2); (2) the entity seeking immunity must be a local government, as defined by KRS 65.200(3); and (3) the otherwise tortious actions must arise out of the exercise of discretionary duties rather than ministerial duties.[24] In order to determine whether the circuit court correctly found local governmental immunity under KRS 65.2003 for Louisville and MSD on every claim against them, we must analyze both appellees separately and each cause of action separately.

CLAIMS AGAINST THE CITY OF LOUISVILLE

The three claims against Louisville are two claims of negligent trespass, based on different theories of negligence, and a claim of negligent failure to maintain its property so as not to harm others' property. To the extent that this novel, latter claim exists in Kentucky law, it would be a tort. Negligent trespass is also a tort. Therefore, each of these

[24] *See* KRS 65.2003(3) (giving a nonexclusive list of possible discretionary duties).

claims is potentially within the scope of the local governmental immunity provisions of CALGA.

The Maddens do not dispute that, as an incorporated city, Louisville is a local government within the meaning of the act. The question then arises whether the duties at issue were ministerial or discretionary. One of the negligent trespass claims alleges that the grading of Iroquois Park and the construction of the surrounding drainage ditches and areas were negligently performed, which diverted park rainwater toward the Maddens' property. The other negligent trespass claim and the failure to maintain property claim are both based on the allegation that Louisville failed to properly maintain Iroquois Park and the surrounding drainage ditches and areas, preventing rainwater from flowing away from the Maddens' property as intended. The circuit court concluded that the grading of the park and the construction of the drainage ditches, as well as the maintenance of the drainage ditches, were all discretionary duties. We disagree. In Mason v. City of Mt. Sterling,[25] the Kentucky Supreme Court stated as follows:

> this Court has long held that a municipality's decision to establish or open a sewer system is a legislative function

[25] Ky., 122 S.W.3d 500 (2003). We note that the circuit court did not have the benefit of this decision since it was not rendered until October 23, 2003, several months after summary judgment was already entered in this case. Moreover, a subsequent motion for rehearing filed in Mason was denied on January 22, 2004.

> entitled to immunity protection. However, once a municipality establishes or opens a sewer, it has a ministerial duty to non-negligently construct, maintain, and repair the sewer system.[26]

Notably, the court in Mason was referring to a storm sewer system designed to handle rainwater, much like the drainage ditches in the instant case. Therefore, the maintenance and construction of the drainage ditches are ministerial duties. Likewise, while the decision whether to establish Iroquois Park and Golf Course would be discretionary, their actual construction, grading, and maintenance involve purely ministerial duties. All three claims against Louisville are based on negligence in performing ministerial duties. KRS 65.2003(3) states that nothing in the statute's provisions on governmental immunity "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." We find that, as a matter of law, Louisville is not entitled to statutory local governmental immunity under CALGA for any of the three causes of action raised against it. Accordingly, the circuit court erred in granting summary judgment against Louisville on the basis of local governmental immunity under KRS 65.2003.

[26] *Id.* at 504 (citations omitted).

CLAIMS AGAINST LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT

The three claims alleged against MSD include two claims of negligent trespass and one claim of breach of contract. As noted earlier, negligent trespass is an action in tort, within the scope of CALGA. However, the breach of contract claim is not a tort. As such, it is not within the scope of CALGA, and the local governmental immunity provisions under the act are inapplicable. The circuit court erred in granting summary judgment to MSD on the breach of contract claim on the basis of statutory local governmental immunity under CALGA.

On the threshold issue of whether MSD is a local government within the meaning of CALGA, the circuit court found that it was, finding it to be a "special district ... created or controlled by a local government."[27] The Court further relied upon KRS 65.005(1)(a) which defined a "[s]pecial district" as follows:

> any agency, authority, or political sub-division of the state which exercises less than statewide jurisdiction and which is organized for the purpose of performing governmental or other prescribed functions within limited boundaries. It includes all political subdivisions of the state except a city, a county, or a school district.

[27] KRS 65.200(3).

Based on these statutory definitions, the circuit court found MSD to be a local government within the meaning of CALGA. This ruling is consistent with Siding Sales, Inc. v. Warren County Water District.[28] However, on April 24, 2003, one week after the hearing on summary judgment in this case, the Kentucky Supreme Court rendered an opinion in Phelps v. Louisville Water Company,[29] holding that the Louisville Water Company (LWC) is not a local government within the meaning of CALGA. This ruling was made, notwithstanding the fact that the City of Louisville holds legal title to all of LWC's physical property and owns all stock of LWC, holding it in the city's sinking fund.[30] Also, the Board of Waterworks of LWC was then comprised of members appointed by either the mayor of Louisville or the Jefferson County judge/executive.[31] The Court considered a number of factors in ruling that LWC was not a local government, including the following: the Board of Waterworks, not the city, exercised

[28] Ky.App., 984 S.W.2d 490 (1998) (holding the Warren County Water District to be a local government within the meaning of CALGA). The Warren County Water District was created by the Warren County Fiscal Court, pursuant to KRS Chapter 74. *Id*. at 493. In contrast, MSD was established pursuant to KRS Chapter 76. Rash v. Louisville & Jefferson County Metro. Sewer Dist., Ky., 217 S.W.2d 232, 236 (1949).

[29] Ky., 103 S.W.3d 46 (2003).

[30] *Id*. at 49.

[31] *Id*. at 51.

day-to-day control over LWC;[32] LWC operated as a private, for-profit corporation from its establishment by the General Assembly in 1854 until Louisville purchased all of its shares of stock;[33] Louisville did not exercise its option to purchase the entire franchise of LWC and its assets but only LWC's stock;[34] the act creating the Board of Waterworks to govern the LWC did not change the status of LWC in relation to the city or alter its corporate identity in any way;[35] LWC may enter into contracts or sue and be sued but only in its own name;[36] Louisville exercised no control over LWC's fiscal matters;[37] and any losses occurred by LWC are not imputed to Louisville and its taxpayers.[38]

Because Phelps was rendered after the parties submitted their memoranda on the motions for summary judgment and after the hearing on the motion, the parties did not have the opportunity to consider and address the Kentucky Supreme Court's decision in Phelps. For this reason, they did not

---

[32] *Id*.

[33] *Id*. at 49.

[34] *Id*. at 50-51.

[35] *Id*. at 50.

[36] *Id*. at 50-51.

[37] *Id*. at 51.

[38] *Id*.

address many of the factors which that court found relevant in determining that LWC is not a local government under CALGA. The circuit court also did not address these factors or the ramifications of the Phelps case in its order and decision.[39] Therefore, we vacate the circuit court's decision that MSD is a local agency within the meaning of CALGA and remand for reconsideration in light of Phelps v. Louisville Water Company.[40]

Of the two remaining claims against MSD which might be covered by local governmental immunity, the first claim is for failure to properly maintain its drainage ditches and drainage areas. As noted above, maintaining drainage ditches is a ministerial duty. Therefore, local governmental immunity is not available for MSD under KRS 65.2003 for this claim. The circuit erred in granting summary judgment on this claim based on this inapplicable statutory immunity.

The second claim against MSD is for negligent trespass due to its alleged "failure to resolve the drainage problems" on the Maddens' property by "designing drainage ditches or other means to properly drain the natural flow of water" from Iroquois Park. The Maddens disagree with the choices that MSD has made

[39] We note that the Maddens filed notice of the Phelps case with the circuit court on April 29, 2003. However, given that this was only six business days before the circuit court entered its opinion and order, it is not clear whether the circuit court was, in fact, actually made aware of this decision.

[40] 103 S.W.3d 46.

in allocating its resources. They think that alleviating the flooding of their residences should be a higher priority for MSD than other projects. However, "[t]he exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources"[41] is listed as an example of the type of discretionary act for which a local government is immune from tort liability under CALGA. Therefore, the circuit court properly granted summary judgment on this claim on the basis of statutory local governmental immunity under KRS 65.2003.

For the reasons stated above, we affirm the trial court's refusal to declare CALGA unconstitutional, we reverse the summary judgments, in part, vacate, in part, and remand the case to the circuit court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Charles W. Miller
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE CITY OF LOUISVILLE:

Gregory Scott Gowen
Carrie Pearson Hall
JEFFERSON COUNTY ATTORNEY'S OFFICE
Louisville, Kentucky

[41] KRS 65.2003(3)(d).

BRIEF AND ORAL ARGUMENT FOR APPELLEE LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT:

Laurence Zielke
Ilam E. Smith
PEDLEY, ZIELKE, GORDINIER & PENCE
Louisville, Kentucky