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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001748-MR

SANITATION DISTRICT NO. 1 — APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 10-CI-01935

AARON AND ANITA ARNSPERGER — APPELLEES

AND NO. 2012-CA-000486-MR

AARON AND ANITA ARNSPERGER — APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 10-CI-01935

DEBRA BECKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Sanitation District No. 1 brings this interlocutory appeal from the August 29, 2011 order of the Kenton Circuit Court denying its motion for summary judgment based upon sovereign immunity. We affirm.

Sanitation District No. 1 currently operates in the Kentucky counties of Boone, Campbell and Kenton. At issue in this appeal is its operation of the Dry Creek Wastewater Treatment Plant located on Amsterdam Road in Villa Hills, Kentucky. The plant, opened in 1979, treats industrial, commercial and residential wastewater. Eleven years later, in 1990, a residential area known as Brookville Court was developed off Amsterdam Road within two miles of the treatment facility. Thirty years after the plant opened, Aaron Arnsperger and his wife, Anita Arnsperger, purchased a home in Brookville Court in October of 2009 and began occupying it in late December.

Shortly after purchasing the home, the Arnspergers began noticing strong chemical odors. Unaware of the plant's existence and close proximity to their new home, they began making inquiries of neighbors. When they learned the likely source of the odors was the treatment plant, the Arnspergers requested and received records from Sanitation District No. 1 related to previous complaints about odors. They discovered Debra Becker—their immediate predecessor in title—was one of the persons who had registered a complaint with Sanitation District No. 1.

On June 16, 2010, the Arnspergers filed suit against Becker and Sanitation District No. 1 seeking damages and injunctive relief. They presented claims for fraudulent concealment and representation, negligence, and unjust enrichment against Becker and for fraud, negligence and nuisance against Sanitation District No. 1. On September 8, 2010, the trial court dismissed the fraud and negligence claims against Sanitation District No. 1 upon finding it was immune from liability pursuant to the guidance set forth in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). However, the nuisance claim was permitted to continue.

Following completion of further discovery, Sanitation District No. 1 moved for summary judgment on the nuisance claim arguing it was entitled to sovereign immunity from liability on nuisance claims under *Comair*. Without mentioning *Comair*, the trial court denied the motion upon finding:

> it is not necessary to determine the immunity of defendant Sanitation District in reviewing this claim, as even with agencies cloaked with immunity there has long been an exception for nuisance liability. *Clayton v. City of Henderson*, 103 Ky. 228, 20 Ky.L.Rptr. 87, 44 S.W. 667 (1898). The nuisance exception is grounded in the belief that a nuisance involving an invasion of private property resembles an unconstitutional taking, and that creating a dangerous situation goes beyond mere negligence.

This interlocutory appeal followed.[1]

[1] The Supreme Court of Kentucky has held an immediate right to appeal exists from an interlocutory order denying an entity sovereign or governmental immunity. *Breathitt Co. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

On appeal, Sanitation District No. 1 contends the trial court erred in concluding it was not entitled to sovereign immunity and thereafter refusing to grant it summary judgment. For the following reasons, we believe Sanitation District No. 1 is protected by the cloak of sovereign immunity but was not entitled to summary judgment dismissing the Arnsperger's claim of nuisance.

In this Commonwealth, the law of immunity is often thought of as a quagmire defying both common sense and reasonable explanation. Our Courts have repeatedly struggled to set forth with clarity and finality the legal principles of immunity. Invariably, new legal principles of immunity are announced with the same vigor and insight of the old principles.

In 2009, our Supreme Court announced a new legal principle of immunity in *Comair*. Therein, the Supreme Court was faced with the question of whether the Lexington-Fayette Urban County Airport Corporation, its Board, and members of its Board (collectively referred to as Airport Corporation) were entitled to immunity. The Supreme Court initially held the state and counties enjoy sovereign immunity, but cities, as municipal corporations, enjoy no immunity for negligent acts committed "outside the legislative and judicial realms." *Id*. at 95. Most importantly, the Supreme Court recognized other entities exist that are neither a city, state, nor county but are "in-between entities." *Id*. at 95. Oftentimes, it is unclear whether these "in-between entities" are more similar to state or county agencies and entitled to immunity, or more similar to municipal corporations and, therefore, enjoy no immunity. *Id*. at 95. To answer this

question, the Supreme Court fashioned a new two-part analysis. Under the new calculus, to determine an entity's immunity status, a court first considers the origin of the entity and then considers whether the entity carries out an integral state function. *Id*.

As to the origin of the entity, the Supreme Court explained:

> This inquiry can be as simple as looking at the "parent" of the entity in question, i.e., was it created by the state or a county, or a city? This amounts to recognizing that an entity's immunity status depends to some extent on the immunity status of the parent entity. *E.g.*, *Autry* [*v. Western Kentucky University*, 219 S.W.3d 713, 719 (Ky. 2007)] (noting that an entity "derives its immunity status through" the parent entity).

Comair, 295 S.W.3d at 99. As to the entity's function, the Supreme Court stated the analysis is focused upon whether the entity performs a function integral to government. The Supreme Court particularly noted:

> The focus, however, is on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways.

Id.

Ultimately, the Supreme Court held the Airport Corporation was entitled to sovereign immunity. In so holding, the Supreme Court concluded the Lexington-Fayette Urban County Government (LFUCG) was the "parent" of the

Airport Corporation and the Airport Corporation constituted an "arm" of the LFUCG.[2] *Id*. Then, the Supreme Court determined the Airport Corporation's function was to provide a "vital transportation infrastructure for . . . the Commonwealth, which is an integral function of state government." *Id*. at 102. Consequently, the Supreme Court held the Airport Corporation was an "arm" of the LFUCG and was, likewise, imbued with sovereign immunity as "a direct administrative subdivision of the state[.]" *Id*. at 99.

To summarize, under the two-part analysis announced in *Comair*, a court must initially consider the origin (or parent) of the entity and then consider the functions the entity performs. *Id*. If the entity's parent is immune and if the entity carries out functions integral to state government, the entity is imbued with either governmental or sovereign immunity. *Id*. However, if either a qualifying parent or function is absent, the entity enjoys no immunity. *Id*. We undertake this two-part analysis to discern the immunity status of Sanitation District No. 1.

A sanitation district is a creature of legislative fiat, and its genesis can be found specifically in KRS[3] Chapter 220. Under KRS 220.030, a sanitation district's stated functions are to prevent pollution of streams, regulate flow of streams for sanitary purposes, to provide for collection or disposal of sewage, and

[2] It has been established that a merged urban-county government enjoys the sovereign immunity of the county as the city ceases to exist upon merger. *Phillips v. Lexington-Fayette Urban County Gov.'t*, 331 S.W.3d 629 (Ky. App. 2010).

[3] Kentucky Revised Statutes.

to provide for management of onsite sewage disposal facilities. Upon creation of a sanitation district, KRS 220.110(1) provides such sanitation district shall be considered "a political subdivision . . . with power to sue and be sued, contract and be contracted with, incur liabilities and obligations . . . ." Under its statutory scheme, a sanitation district may include numerous cities or counties. The district is governed by a Board, and the Board members are appointed by the county judge, subject to approval of the fiscal court of each county within the sanitation district's geographical confines. KRS 220.140; KRS 220.170. Also, the fiscal court of each county has specific powers to approve/disapprove land acquisitions, construction of capital improvements, service charges or user fees, and the proposed budget. KRS 220.035. The Board of a sanitation district also possesses the power of condemnation and is endowed with authority to promulgate regulations related to design, construction, and use of sewers. KRS 220.310; KRS 220.320.

Applying *Comair*'s two-part analysis to the facts of this case, Sanitation District No. 1's "parents" are the counties within its geographical confines—Boone, Campbell, and Kenton Counties. *See Comair*, 295 S.W.3d 91. Clearly, the General Assembly intentionally placed powers of appointment of Board members and powers of approval of certain actions by the Board specifically within the counties' control. By so doing, it is evident Sanitation District No. 1 qualifies as an "arm" of the counties within its geographical boundaries. *See id*.

As to the functions of Sanitation District No. 1, it is clear this entity performs functions integral to state government. Providing and maintaining sewer facilities are functions of state concern and a necessary governmental function. Integral state functions are generally those that "are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (*e.g.,* by counties)." *Comair*, 295 S.W.3d at 99. As explained in *Comair*, to determine integral state functions, it must be recognized that the county may carry out integral functions of state government, and by extension, an arm of a county also may carry out integral state functions. *Comair*. In the present case, Sanitation District No. 1, as an arm of Boone, Campbell, and Kenton Counties, carries out integral functions of state government.[4]

We are buttressed in our opinion by the recent Supreme Court decision in *Wilson v. City of Central City*, 372 S.W.3d 863 (Ky. 2012). Therein, the Supreme Court commented upon its past opinion in *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852 (Ky. 2008). In so doing, the *Wilson* Court stated Consolidated Infrastructure Management Authority provided clean water, sanitation, and a functioning sewer system and recognized these functions addressed "state level governmental concerns that are common to all of the citizens of this state[.]" *Wilson*, 372 S.W.3d at 870, n.11 (quoting *Comair*, 295 S.W.3d at 99). As in *Wilson*, we, likewise, recognize that

[4] We also note that another panel of this Court recently held a "water district is a state agency engaged in a governmental function." *South Woodford Water District v. Byrd*, 352 S.W.3d 340, 344 (Ky. App. 2011).

providing and maintaining a sewer system by Sanitation District No. 1 constitutes state level concerns common to all Kentucky citizens. *See Wilson*, 372 S.W.3d 863. Hence, it is clear Sanitation District No. 1 performs integral state functions. Accordingly, under the two-part analysis announced in *Comair*, we hold Sanitation District No. 1 is an entity cloaked with sovereign immunity. *See Comair*, 295 S.W.3d 91.

Since Sanitation District No. 1 is protected by sovereign immunity, the Arnsperger's claims of fraud and negligence are barred—as the trial court correctly determined early in the proceedings below. However, it is well-established sovereign immunity is no bar to inverse or reverse condemnation.[5] It matters not whether the claim is based on theories of trespass or nuisance, government action constituting a "taking" of real property creates liability for just compensation. *Commonwealth, Dept. of Highways v. Cochrane*, 397 S.W.2d 155 (Ky. 1965); *Lehman v. Williams*, 301 Ky. 729, 193 S.W.2d 161 (1946); *Holloway Constr. Co. v. Smith*, 683 S.W.2d 248 (Ky. 1984); *Ky. Bell Corp. v. Commonwealth*, 295 Ky. 21, 172 S.W.2d 661 (1943). *See also, Clayton, supra*. Thus, the Arnsperger's claim of nuisance seeking to recover for an unconstitutional taking of private property without just compensation is not barred by sovereign immunity, even when invoked by an entity cloaked with immunity.

[5] Inverse condemnation is an action instituted "against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used." *Commonwealth, Natural Resources & Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984).

In sum, although Sanitation District No. 1 is generally an entity entitled to the cloak of sovereign immunity, such immunity is not universal and does not extend to the nuisance claim presented in the matter *sub judice*. The trial court was correct to deny Sanitation District No. 1's motion for summary judgment.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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