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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002006-MR

DEBORAH RUSSELL — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 07-CI-01487

CITY OF OWENSBORO — APPELLEE

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

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Deborah Russell appeals from an order of the Daviess Circuit Court granting summary judgment in favor of the City of Owensboro. We affirm.

On October 2, 2006, Russell was walking on a sidewalk in Owensboro when she allegedly tripped due to a two-inch break in the sidewalk that caused her to fall and sustain injuries to her head, left side of her face, left elbow

and right knee. Russell filed this action against the City alleging negligence. The City filed an answer which included the affirmative defense that Russell's action was barred by the Claims Against Local Governments Act (CALGA), Kentucky Revised Statutes (KRS) 65.200 et seq. Following discovery, the trial court entered summary judgment in favor of the City based on the CALGA. This appeal followed.

The basis for Russell's claim is the City's "Sidewalk Policy and Construction and Maintenance Plan" (Sidewalk Plan) and its allegedly negligent actions pursuant to the Sidewalk Plan. Under the Sidewalk Plan, the City established twelve sidewalk districts using the already existing Neighborhood Alliance Boundaries ("NABs"). According to City Engineer Joe Scheffers, the Sidewalk Plan is necessary because the City lacks the physical and financial ability to repair the many miles of sidewalks within the City. Under the Sidewalk Plan, each summer sidewalks are inspected for defects and repair and replacement prioritized. A committee then recommends district prioritization for sidewalk repairs to the City Manager. Work is completed in the highest NAB before resources are allocated to the next highest prioritized NAB.

When presented with the City's motion for summary judgment, the trial court found Russell's claims were barred by the CALGA. It reasoned:

> Ms. Russell's action hinges on the City's Sidewalk Policy/Plan, and it therefore must fail. The Sidewalk Policy/Plan is a pure example of discretionary action by the City. The Sidewalk Policy/Plan is a guideline to assist the City management in the determination of its sidewalk

> maintenance objectives. It does not constitute an order from the City Manager directing heads of particular departments to perform certain ministerial functions. It was designed to influence decisions and actions of the City with respect to its sidewalks so that their installation and maintenance will proceed in an orderly fashion within its fiscal constraints.

Our 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "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.*, 807 S.W.2d 476, 480 (Ky. 1991).

Cities have been held to have a duty to maintain their sidewalks in a reasonably safe condition for travel. *City of Louisville v. Haugh*, 157 Ky. 643, 163 S.W. 1101 (1914); *City of Covington v. Bollwinkle*, 121 S.W. 664, 666 (Ky.App. 1909). However, in this post-CALGA case, the question is not one of duty; rather, it is whether through the enactment of the CALGA, the General Assembly sought to relieve cities from liability where, as here, the City enacted a Sidewalk Plan

prioritizing sidewalk repairs in order to allocate existing resources. We have not been cited to any case in this Commonwealth applying the CALGA to similar facts and, therefore, begin our discussion with a background of its enactment.[1]

Unlike sovereign immunity which is found in our Constitution, there is no constitutional basis for municipal immunity and "it is hard to determine how this doctrine became imbedded in the law of our Commonwealth." *Haney v. City of Lexington*, 386 S.W.2d 738, 739 (Ky. 1965). Prior to the CALGA, equally difficult to determine was the scope of immunity afforded cities.[2] In an attempt to resolve the uncertainty, in *Haney*, the Court pronounced a bright-line rule, which it believed would resolve the judicial discourse regarding municipal immunity:

> We now recede from prior decisions which hold municipal corporations immune from liability for ordinary torts. We wish to make it plain, however, that this opinion does not impose liability on the municipality in the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions.

Id. at 742. However, following *Haney*, the doctrine of municipal immunity quickly began to again descend into judicial obscurity causing our Supreme Court to issue its opinion in *Gas Service Co., Inc. v. City of London*, 687 S.W.2d 144 (Ky. 1985).

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[1] We note *Schilling v. Schoenle*, 782 S.W.2d 630 (Ky. 1990), involved a city's liability for injuries caused by its failure to maintain a sidewalk in a reasonably safe condition. Although decided after the enactment of the CALGA, the injury occurred prior to its enactment and the CALGA was not discussed.

[2] A discussion of early cases regarding municipal immunity can be found in *Haney*, 386 S.W.2d at 740-742.

The Court began with its expression of discontent with the post-*Haney* state of the law:

> In short, with certain narrow exceptions stated in the opinion, *Haney* separates municipal immunity from sovereign immunity and seeks to abolish it. But subsequent decisions have so circumscribed its language that we have regressed beyond its starting point. In *Haney,* and in *City of Louisville v. Chapman,* Ky., 413 S.W.2d 74 (1967), which followed close on the heels of *Haney,* we regarded municipal immunity as a judicially created monstrosity which should be judicially destroyed. Fifteen years later we find that this monstrosity is … alive and well[.]

Id. at 147. Again, the Court reiterated municipal immunity was abolished with the narrow exception for "the exercise of legislative or judicial or quasi-judicial or quasi-legislative functions." *Id*. (quoting *Haney*, 386 S.W.2d at 742).

Following *Haney* and perhaps so the Supreme Court's decision would not again become enmeshed in the ebb and flow of judicial opinion regarding municipal immunity, in 1988, the General Assembly enacted the CALGA. KRS 65.2001 provides:

> (1) Every action in tort against any local government in this Commonwealth for death, personal injury or property damages proximately caused by:
>
> > (a) Any defect or hazardous condition in public lands, buildings or other public property, including personalty;
> >
> > (b) Any act or omission of any employee, while acting within the scope of his employment or duties; or

> (c) Any act or omission of a person other than an employee for which the local government is or may be liable
>
> shall be subject to the provisions of KRS 65.2002 to 65.2006.
>
> (2) 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.

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." *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003). However, the legislature chose not to completely abolish municipal immunity.

> KRS 65.2003 states in part:
>
> Notwithstanding KRS 65.2001, 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 from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Four years after the CALGA's enactment, in *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky.App. 1992), this Court considered the meaning of KRS 65.2003(3). *Ashby* involved the duty of law enforcement officers to protect a victim of domestic violence when dispatched to render assistance. It was alleged Louisville police officers failed to execute a mandatory arrest warrant on the victim's killer and otherwise failed to protect her. The question before the Court was whether the City of Louisville was immune from tort liability under KRS 65.2003(3) because it was involved in the "exercise of judicial, quasi-judicial, legislative or quasi-legislative functions[.]" *Id.* at 186. Although the facts render its holding of little persuasive value in deciding the present case, the Court's observation regarding the statute's construction is instructive. It pointed out KRS

65.2003 does not include situations outside the exercise of "judicial, quasi-judicial, legislative or quasi-legislative functions." *Id*. at 187.

Under facts analogous to the present, in *Siding Sales, Inc. v. Warren County Water District*, 984 S.W.2d 490, 493-494 (Ky.App. 1998), this Court held the CALGA precluded liability against the Water District for its alleged failure to expand a water line project. The quasi-legislative nature of the Water District's actions performed within its "discretion in determining how to best use its limited resources to upgrade the water supply" was decisive. *Id*. at 494. Likewise, in this case, Russell essentially challenges the City's policy making decisions in determining how to use its limited resources to maintain its existing sidewalks.

The City's Sidewalk Plan requires the City to conduct an annual inventory of its sidewalks and prioritize each sidewalk for repairs and replacement. Because of the lack of funds and resources, the plan does not require immediate repair of all sidewalks. Its policy determinations pursuant to the Sidewalk Plan regarding the allocation of resources have "some resemblance (as in function, effect, or status)" to a legislative act and, therefore, are properly considered quasi-legislative within the meaning of KRS 65.2003. *City of London*, 687 S.W.2d at 149. This fact situation falls squarely within KRS 65.2003(3)(d) and (e), which state a local government shall not be liable for injuries resulting for any claim arising from "[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" or the "[f]ailure to make an inspection." Based on the clear statutory language, the

City cannot be liable for its decision regarding how to allocate its resources for sidewalk repairs or its failure to inspect existing sidewalks.

Our conclusion is consistent with other jurisdictions with similar local government tort claims acts that have considered a municipality's failure to maintain a sidewalk or road. In *City of Terre Haute v. Pairsh*, 883 N.E.2d 1203 (Ind. App. 2008), the Indiana Appellate Court analyzed facts indistinguishable from those in this case. The court noted the City's Transportation Infrastructure Manager was empowered to inspect and rate sidewalks "to determine whether they [were] a priority for reconstruction or repair." *Id.* at 1207. Because of the modern-day financial burden on growing cities to maintain miles of sidewalks, the Court applied a planning-operational test to determine whether the City was exempt from liability:

> [I]f the decision of the governmental entity was a 'planning' activity, that is a function involving the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices, then the decision is discretionary and immune under I.C. § 34-13-3-3(7). Government decisions about policy formation which involve assessment of competing priorities, a weighing of budgetary considerations or the allocation of scarce resources are also planning activities. On the other hand, if the function is "operational," for example decisions regarding only the execution or implementation of already formulated policy, the function is not discretionary under the statute and no immunity attaches.

Id. at 1206-1207 (quoting *Voit v. Allen County*, 634 N.E.2d 767, 769-770 (Ind. Ct. App. 1994)). The *Pairsh* Court concluded the manager's duties involved "the

exercise of official judgment and discretion, the weighing of alternatives, an assessment of competing priorities, the weighing of budgetary considerations, and the allocation of scarce resources" and the City was immune. *Id*. at 1208.

Similarly, an Illinois Court determined the City was not liable to the plaintiff for injuries sustained in a motorcycle accident caused by a pothole in the road. In *Wrobel v. City of Chicago,* 318 Ill. App. 3d 390, 395, 252 Ill. Dec. 151, 156, 742 N.E.2d 401, 406 (2000), the Court concluded the City's discretion to make public policy determinations, inherently a legislative function, was pivotal:

> The decisions of the (city's) workers in this regard can also fairly be characterized as policy determinations. When confronted with a particular stretch of roadway, the workers must necessarily be concerned with the efficiency in which they prepare any potholes for repair. Specifically, the workers must allocate their time and resources among the various potholes that will be repaired, and they must ensure that not too much time is dedicated to pothole preparation. The more time and resources the workers devote to preparing potholes for a patch, the less time and resources they have available to repair the other potholes existing throughout their daily grid.

We conclude the City's Sidewalk Plan falls squarely within the quasi-legislative authority of the City and its decision regarding which sidewalks to repair was made in its discretion when allocating the City's resources. Consequently, we hold it is exempt from liability under the CALGA.

Finally, we briefly address Russell's contention the CALGA 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

that predate the adoption of the Kentucky Constitution in 1891. *Ludwig v. Johnson*, 243 Ky. 533, 49 S.W.2d 347 (1932). The City maintains this issue is not properly before this Court based on controlling precedent of our Supreme Court that, pursuant to KRS 418.075, notice be given to the Attorney General prior to the entry of final judgment in all cases whenever a constitutional challenge is made to a statute. *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). Russell did not notify the Attorney General of her constitutional challenge until after summary judgment was entered. Although she presented the issue in a motion filed pursuant to CR 59.05, "a party cannot invoke CR 59.05 to raise arguments and introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005).

We conclude the trial court properly rejected Russell's argument. Even if properly presented, Russell's argument appears to have little merit. Municipal immunity existed at least in some form, as early as 1852, *Prather v. City of Lexington*, 52 Ky. 559, 560 (1852), and contrary to Russell's assertion, the General Assembly merely codified the law regarding municipal immunity. Russell's eleventh-hour argument that the jural rights doctrine precludes the legislature from exempting a city from liability for the exercise of its "judicial, quasi-judicial, legislative or quasi-legislative authority" is without merit.

Based on the foregoing, the summary judgment of the Daviess Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

DIXON, JUDGE, DISSENTING: Respectfully, I must dissent. Although the City had the discretion to develop a policy to allocate its limited resources, the implementation of such plan is a purely ministerial function for which immunity does not apply.

Municipal corporations are immune from tort liability in only very limited circumstances involving "the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions." *Ashby v. City of Louisville*, 841 S.W.2d 184, 186 (Ky.App. 1992) (Citation omitted). As the majority points out, the landmark case on municipal liability in Kentucky is *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964), wherein our then-highest Court abolished municipal immunity for ordinary torts, reasoning that "the doctrine runs counter to a basic concept underlying the law of torts, that is, that liability follows negligence." *Id.* at 739 (citation omitted). However, the *Haney* Court retained municipal immunity for acts that could be classified as "the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions." *Id.* at 742. In 1988, these judicially recognized principles of municipal tort liability were codified with the General Assembly's enactment of CALGA, KRS 65.200 et seq.

Although the terms "quasi-judicial" and "quasi-legislative" have never been statutorily defined, the Kentucky Supreme Court in *Gas Service Co., Inc. v. City of London*, 687 S.W.2d 144, 149 (Ky. 1985), explained:

> The question is what activities are excluded from the liability in tort imposed on municipal corporations in *Haney* by the exception made for "the exercise of ... quasi-legislative or quasi-judicial functions."? "Quasi," when used as an adjective, is defined in Webster's Third New International Dictionary (unabr. ed. 1971), as "having some resemblance (as in function, effect, or status) to a given thing."
>
> Our research has failed to produce cases where this terminology is used in the precise context with which we are presently concerned. But *Grogan v. Commonwealth*, the Beverly Hills nightclub fire and *Com., Dept. of Banking & Securities v. Brown*, the building and loan association collapse, are cases where the "government takes upon itself a regulatory function," *Brown, supra* at 498, which is different from any performed by private persons or in private industry, and where, if it were held liable for failing to perform that function, it would be a new kind of tort liability. We deem the limitation expressed in *Haney* by the terms "quasi-judicial and quasi-legislative functions" as directed at the type of regulatory activity represented by *Com., Dept. of Banking & Securities v. Brown* and *Grogan v. Commonwealth*. In these cases the government was not charged with having caused the injury, but only with having failed to prevent it by proper exercise of regulatory functions which have elements appearing quasi-judicial and quasi-legislative in nature.

In *Bolden v. City of Covington,* 803 S.W.2d 577, 581(Ky. 1991*)*, the Court again attempted to further define "the area of activity" covered by these frequently cited terms of art:

> We can find no better definitions than those in *Black's Law Dictionary*, Sixth Edition (1990), p. 1245:
>
> "Quasi–Judicial—A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and

> draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature."
>
> "Quasi–Judicial Power—The power of an administrative agency to adjudicate the rights of persons before it."
>
> "Quasi–Legislative Power—The power of an administrative agency to engage in rule-making."

Based upon the above definitions, the *Bolden* Court determined that the City of Covington was immune from municipal liability for any claims arising out of its municipal housing inspections, because such regulatory activity involved an exercise of judgment or discretion that was quasi-judicial in nature. *Id.* *But see* *Ashby*, 841 S.W.2d at 188. ("Although police officers certainly investigate facts, their duties do not include regulatory functions such as those involved in *Bolden, supra*, including the holding of hearings, the weighing of evidence, or the exercise of judicial discretion and adjudication of parties' rights.")

There can be no question that municipalities with fixed budgets struggle to balance competing priorities and allocate limited resources appropriately. Nevertheless, I am simply not persuaded that the City's actions under its sidewalk plan fall within the judicially recognized exceptions to municipal liability set forth in KRS 65.2003. Although the City is vested with the discretion to assess and prioritize sidewalk repair given a limited amount of resources, such does not include regulatory functions "such as the holding of hearings, the weighing of evidence, or the exercise of judicial discretion and adjudication of parties' rights." *Ashby*, 841 S.W.2d at 188. Furthermore, there is

no question that the City, in implementing its sidewalk policy, is not " 'tak[ing] upon itself a regulatory function,' . . . which is different from any performed by private persons or in private industry, and where, if it were held liable for failing to perform that function, it would be a new kind of tort liability." *Gas Service Co., Inc.,* 687 S.W.2d at 149 (citation omitted). Rather, the City's failure to perform its function is nothing more than the traditional and firmly rooted tort of failure to maintain.

The majority cites to the decision in *Siding Sales, Inc. v. Warren County Water District*, 984 S.W.2d 490 (Ky.App. 1998), as having facts analogous to the case herein. I disagree. In *Siding Sales, Inc.*, the landowners and commercial tenant filed an action against the City of Bowling Green and the Warren County Water District, alleging, in part, negligence arising from an inadequate water supply to assist firefighters in their efforts to save Siding Sales' building on the property as well as challenging the water district's subsequent efforts to upgrade the water system. The trial court granted summary judgment in favor of the city and water district on immunity grounds. On appeal, this Court devoted the majority of the immunity discussion on the City's liability, concluding that the City's failure to enforce local fire protection standards, issuance of a building permit with knowledge that the property did not meet standards, and denial of an occupancy permit during the district's expansion project were akin to regulatory activities for which immunity is granted under CALGA. *See Bolden*, 803 S.W.2d 577. The brief reference to the water district's liability is as follows:

> [A]s concerns the water line expansion project, undertaken after destruction of appellants' original building, appellants do not allege negligence in the actual construction of the project, nor do they allege the project failed to increase the water supply to an adequate level. Essentially, they challenge the Water District's exercise of discretion in determining how to best use its limited resources to upgrade the water supply. However, under KRS 65.2003(3)(d), we believe the Water District is exempt from liability in the face of such allegations.

Siding Sales, Inc., 984 S.W.2d at 493-94. Notably, there was no claim that the water district negligently constructed or failed to maintain the new water system, only that it was negligent in its determination of how best to "enlarge[] the water line servicing the property and extend[] the Water District's system to a new connection point . . . ." *Id.* at 491. Contrary to the Majority's assertion, the *Sidings Sales* decision is neither analogous nor applicable to the matter herein. The City's implementation of an existing plan to maintain sidewalks is in no manner similar to Warren Water District's creation and construction of an upgraded water system. *See Mason v. City of Mt. Sterling*, 122 S.W.3d 500, 504 (Ky. 2003) ("[O]nce a municipality establishes or opens a sewer, it has a ministerial duty to non-negligently construct, maintain, and repair the sewer system.").

The majority also cites to several opinions from other jurisdictions wherein immunity was afforded if the municipality had a policy that required the exercise of judgment and discretion in the allocation of resources to prioritize specific repairs. However, our Supreme Court in *Ashby* chose not to give effect to

the language "or others, exercise of judgment or discretion vested in the local government . . ." contained in KRS 65.2003(3), if the act could not be characterized as "judicial, quasi-judicial, legislative or quasi-legislative authority." 841 S.W.2d at 847. While the City's creation of its policy could arguably be legislative or quasi-legislative in nature, the implementation of such policy is a purely ministerial function.

Notwithstanding my opinion herein, I do believe that what falls within the types of discretionary activities for which immunity is afforded is becoming more unclear. And as a municipality's monies become more limited, it will no doubt be forced to prioritize and allocate resources to do what were once ministerial functions. Nevertheless, the flaw in the majority's opinion is the assumption that all municipalities will act with the purest of intentions. Unfortunately, I believe the more likely result of today's opinion is that municipalities across Kentucky will implement policies such as the one herein, and liability for the failure to maintain a sidewalk will cease to exist. Such could not have been the intent of the Legislature in enacting CALGA.

The task of the judiciary, and perhaps the legislature, will be to further clarify how these policies fit within the framework of CALGA. Nevertheless, I believe that this Court is constrained by *Ashby* to conclude that, based upon the law as it currently stands in Kentucky, the City of Owensboro's sidewalk plan does not fall within the type of quasi-judicial or quasi-legislative activities protected under CALGA. As such, summary judgment herein was improper.

BRIEFS FOR APPELLANT:

Christopher L. Rhoads
P. Marcum Willis
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Patrick D. Pace
Stephen C. Pace
Owensboro, Kentucky