

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000145-MR

MARY KIRKPATRICK AND
BILL KIRKPATRICK

APPELLANTS

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 12-CI-00367

CITY OF HUSTONVILLE;
HUSTONVILLE FIRE DEPARTMENT;
AND HUSTONVILLE WATER
DEPARTMENT

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Mary and Bill Kirkpatrick appeal from a Lincoln Circuit Court order dated December 26, 2013, dismissing their complaint against the City of Hustonville, the Hustonville Fire Department, and the Hustonville Water

Department (Hustonville Parties). At issue is whether Hustonville Parties are entitled to relief from liability under Kentucky Revised Statutes (KRS) 75.070 or KRS 65.2003 for the Kirkpatrick's' claims that they negligently constructed and maintained the city's water lines and fire hydrants.

Mary Kirkpatrick owns commercial property in Hustonville which she leased to her son, Bill, who operated an auto body shop on the premises. On September 17, 2011, the body shop and its contents were destroyed by a fire. The Kirkpatrick's brought a negligence action against Hustonville Parties, seeking to recover damages for the property and income losses. The complaint alleged that there was an insufficient flow of water to put out the fire from the lines and hydrants servicing the location of the body shop, and that this insufficient flow of water was the result of Hustonville Parties' negligent construction, installation, maintenance, servicing, testing and/or operation of the water lines and hydrants.

Hustonville Parties sought to dismiss the action, arguing that the water and fire departments were agencies of the city, and not legal entities capable of being sued. They further argued that Hustonville Parties were entitled to governmental immunity pursuant to KRS 75.070 and were also exempt from liability pursuant to the Claims Against Local Governments Act, KRS 65.200 -65.2006. Finally, Hustonville Parties argued that the Kirkpatrick's had failed to state a claim for negligence because Hustonville Parties owed no duty to the Kirkpatrick's, but only to the public at large. The motion to dismiss was granted by

the trial court on the basis of the reasons set forth by the defendants and this appeal followed.

As a preliminary matter, we note that the Kirkpatricks expressly conceded in their response to the motion to dismiss that Hustonville Water Department is an agency of the City of Hustonville and should be dismissed as a separate party. This part of the judgment is therefore affirmed.

We set forth our standard of review of the remaining claims:

A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (internal citations and quotation marks omitted).

Governmental immunity is defined as “the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency.” *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). A state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function. *Gas Service Co., Inc. v. City of London*, 687 S.W.2d 144 (Ky. 1985). Municipalities, such as

the City of Hustonville, however, are not immune from liability for ordinary torts and the governmental/proprietary distinction has been “abolished in the context of municipal immunity.” *Yanero*, 65 S.W.3d at 520.

On appeal, the Kirkpatricks argue that KRS 75.070 does not provide a statutory basis for relieving the Hustonville Parties of liability. Hustonville Parties contend that this argument cannot be addressed because the Kirkpatricks failed to list it on their prehearing statement. Under Kentucky Rules of Civil Procedure (CR) 76.03(8), a “party shall be limited on appeal to issues in the prehearing statement[.]” “[A]lthough a party defending a trial court’s judgment need not raise an issue in a prehearing statement for the Court of Appeals to affirm on those grounds, the party appealing a trial court’s judgment is limited to those issues identified by the prehearing statement.” *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 212 (Ky. 2012) (citations omitted). The Court of Appeals does retain the authority to reverse a trial court’s judgment on an unpreserved issue if it finds palpable error. *Id.* The trial court adopted the reasoning of the motion to dismiss, which argued in part that Hustonville Parties are entitled to governmental immunity under KRS 75.070. In our view, this overly-expansive reading of the statute does constitute palpable error.

The purpose of KRS 75.070 is to extend governmental immunity to municipal fire departments, fire protection district fire departments, and volunteer fire departments. It states:

(1) A municipal fire department, fire protection district fire department, and volunteer fire department and the personnel of each, answering any fire alarms, performing fire prevention services, or other duly authorized emergency services inside and outside of the corporate limits of its municipality, fire protection district, or area normally served by a volunteer fire department, shall be considered an agent of the Commonwealth of Kentucky, and acting solely and alone in a governmental capacity, and such municipality, fire protection district, or area normally served by a volunteer fire department, shall not be liable in damages for any omission or act of commission or negligence while answering an alarm, performing fire prevention services, or other duly authorized emergency services.

(2) No municipal fire department, fire protection district fire department or volunteer fire department answering any fire alarms, performing fire prevention services or volunteer fire department services inside the corporate limits of the district shall be liable in damages for any omission or act of commission or negligence while answering or returning from any fire or reported fire, or doing or performing any fire prevention work under and by virtue of this chapter and said fire departments shall be considered agents of the Commonwealth of Kentucky, and acting solely and alone in a governmental capacity.

KRS 75.070.

Because fire departments are deemed agents of the Commonwealth and are consequently immune from suit in tort, the Supreme Court of Kentucky has held that there can be no attendant municipality liability for the fire department's firefighting actions. *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009). Consequently, the City of Hustonville is immune from liability, to the extent of its fire department's

immunity. However, the Kirkpatrick's' complaint has raised claims, such as alleged negligence in the construction and installation of the water lines and fire hydrants, which concern matters that appear to exceed the scope of immunity provided to the fire department. Thus, the circuit court made an error of law in granting the City's motion to dismiss on the basis of KRS 75.070 providing complete governmental immunity to the City. Immunity for the City under this statute is limited as set forth above.

As noted, a municipality is generally liable for its own torts and for certain torts committed by its employees. KRS 65.2005. There are exceptions to a city's general liability, as set forth in KRS 65.2003, which the Kirkpatrick's argue are not applicable to this case. KRS 65.2003 reads as follows:

Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:

- (1) Any claim by an employee of the local government which is covered by the Kentucky workers' compensation law;
- (2) Any claim in connection with the assessment or collection of taxes;
- (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.

KRS 65.2003.

The Kirkpatrick's allege that Hustonville Parties "failed, and/or refused, and/or negligently constructed, installed, maintained, serviced, tested and/or operated the water lines and hydrants servicing the area[.]" Complaint at paragraph 5. The issue is thus whether any of these claims arise from City of Hustonville's exercise of its judicial, quasi-judicial, legislative or quasi-legislative authority as set forth in KRS 65.2003.

The circuit court referenced *Siding Sales, Incorporated v. Warren County Water District*, 984 S.W.2d 490 (Ky. App. 1998), as a basis for granting the City immunity. The circuit court's order granting the motion to dismiss also references KRS 65.200 but does not analyze the application of *Siding Sales*, 984 S.W.2d 490 or KRS 65.2003 to the facts of this case. In *Siding Sales*, a commercial building was destroyed by a fire set by an arsonist. The city issued a

permit for a replacement building, conditioned upon the water district providing an increased water supply to protect the new structure. The city ultimately assumed part of the cost of the project, which involved enlarging the water line servicing the property and extending the system to a new connection point. During this period, the city refused to issue an occupancy permit for the new replacement building.

The landowners and a commercial tenant filed suit, alleging that the city and water district had not maintained sufficient water pressure in the lines to assist the firefighters in saving the original building, in violation of the city's fire protection safety standards. Because this claim was essentially that the city had failed to enforce the local regulatory law which established these standards, the Court held that the city was exempt from liability under KRS 65.2003(3)(b), due to "[t]he failure to enforce any law[.]" *Siding Sales*, 984 S.W.2d at 492 (quoting KRS 65.2003(3)(b)). Similarly, the city's refusal to issue an occupancy permit for the new building, pending expansion of the water lines, was deemed to be regulatory action falling under KRS 65.2003(3)(b) and also discretionary action falling under KRS 65.2003(3)(c). *Siding Sales*, 984 S.W.2d 490.

Additionally, in *Siding Sales*, 984 S.W.2d 490, the claims against the water district were that it had negligently (1) placed its stamp on the subdivision plat creating appellants' lot; (2) failed to provide sufficient water to assist firefighters; and, (3) failed to make capital improvements to its system in a timely manner, delaying the commercial tenant's ability to resume normal operation.

The Court found the district to be exempt from liability for these alleged acts of negligence for the same reasons as the city. It further stated:

[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, 984 S.W.2d at 493-94.

The Court in *Siding Sales*, 984 S.W.2d 490, also expressed concern about imposing liability on the city when it 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.” *Id.* at 493 (quoting *Gas Serv. Co., Inc. v. City of London*, 687 S.W.2d at 149 (1985)).

In the limited record before this Court on appeal, it is impossible for this Court to determine from the complaint whether any or all of the Kirkpatricks' allegations implicate the city's exercise of its regulatory functions, or whether they are straightforward negligence claims for which no immunity exists. A municipality is shielded in those cases in which it is performing a regulatory function “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 Serv.*, 687 S.W.2d at 149. We therefore believe it is necessary to remand this case back to the circuit court for further discovery to determine the specific basis of the Kirkpatricks’ claims, and whether they have any factual basis or legal support under applicable negligence standards or look to the City’s regulatory function for which said acts would be immune from liability under KRS 65.2003.

Finally, we address the city’s contention that it does not owe a duty to individuals, but only to the public at large, and that the Kirkpatricks had consequently failed to state a claim for negligence. This argument has been rejected by the Supreme Court in holding that municipal immunity for ordinary torts has been abrogated:

The decisions as to whether a given activity is an ultimate function of government, or is not an ultimate function of government, and as to when a negligent act should be considered to impact citizens singly and when collectively, have not been rationally explained, and cannot be.

The concept of liability for negligence expresses a universal duty owed by all to all. The duty to exercise ordinary care commensurate with the circumstances is a standard of conduct that does not turn on and off depending on who is negligent. With a municipal corporation as with all other legal entities, the question is not whether such a duty exists, but whether it has been violated and what are the consequences.

Constitutionally, statutorily, or by court decisions, on occasion we excuse the nonperformance of this duty, but no purpose is served by denying its existence.

Gas Serv. Co., Inc., 687 S.W.2d at 148.

The order of the Lincoln Circuit Court granting Hustonville Parties' motion to dismiss is reversed, except insofar as Hustonville Water Department and Hustonville Fire Department are dismissed as a parties. The case is remanded to the circuit court for further proceedings consistent with this opinion.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

KRAMER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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