

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001094-MR

DELORIS GEISLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 16-CI-000329

KENTUCKY COMMUNITY AND TECHNICAL
COLLEGE SYSTEM

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Deloris Geisler (“Appellant”) appeals from an Opinion and Order Granting Motion to Dismiss rendered in Jefferson Circuit Court. She argues that the circuit court erred in dismissing her Complaint upon concluding that the Kentucky Community and Technical College System (“Appellee”) has

governmental immunity from tort claims. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

The facts are not in dispute. Appellant fell and was seriously injured on January 22, 2015, while descending the steps of a building owned by Appellee. On January 21, 2016, Appellant filed the instant personal injury action against Appellee in Jefferson Circuit Court. Appellee responded with a Motion to Dismiss based on governmental immunity, and various responsive and reply pleadings followed.

Oral arguments on the Motion were conducted on May 16, 2016. Thereafter, the circuit court rendered an Opinion and Order granting the Motion to Dismiss. In support of the Opinion and Order, the court cited various opinions, including the unpublished opinion in *Robinson v. Kentucky Cmty. & Tech. Coll. Sys.*, 2014-CA-000659-MR, 2015 WL 5656312 (Ky. App. Sept. 25, 2015), for the proposition that Appellee was a state agency engaged in a governmental function of educating the public, and was therefore entitled to governmental immunity from suit. The court dismissed Appellant's Complaint with prejudice and this appeal followed.

Appellant now argues that the Jefferson Circuit Court committed reversible error in dismissing her Complaint based upon the determination that Appellee was entitled to governmental immunity. Specifically, Appellant contends that both the unpublished opinion cited by Appellee in support of its Motion to Dismiss and the unpublished opinion referenced by the circuit court should be

disregarded by this Court because there are published Kentucky appellate opinions setting forth the applicable rules to determine if Appellee is entitled to governmental immunity. After directing our attention to Kentucky Rules of Civil Procedure (CR) 76.28(4), which provides that unpublished appellate opinions may be cited only if there is no published opinion that would adequately address the issue before the court, Appellant argues that Appellee improperly cited an unpublished Opinion in both its Motion to Dismiss and in its Reply. Because of this failure, Appellant argues that this Court should disregard the cited opinion and follow published opinions of this Court and the Kentucky Supreme Court in determining if Appellee is properly entitled to governmental immunity.

Additionally,

Appellant argues that while the circuit court did not expressly rely on Appellee's unpublished opinion, the circuit court did improperly rely on a different unpublished opinion of this Court as an authority for determining that Appellee is a state agency engaged in the governmental function of educating the public and is therefore entitled to governmental immunity from suit. The focus of Appellant's argument is that the circuit court improperly relied on one or more unpublished opinions in disposing of the Motion before it rather than properly relying on published opinions to reach the opposite result.

In considering the Motion before it, the Jefferson Circuit Court first cited *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010), for the proposition that in the context of official immunity, dispositive motions play an important role in

determining whether the defendant is immune not just from liability, but from the suit itself. The circuit court then relied on *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009), for the distinction between pure sovereign immunity for the Commonwealth and counties, versus lower governmental and quasi-governmental entities where the reach of sovereign immunity becomes more complicated. The court went on to determine that the analysis of immunity for subordinate state agencies like Appellee hinges on whether the entity is performing a governmental function as opposed to a proprietary one. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2002).

Appellant argued below that Appellee is engaged in a proprietary function versus a governmental one. The circuit court resolved this issue by quoting Kentucky Revised Statute (KRS) 164.580(2), which states that the Kentucky Legislature created the Appellee to provide “students and employers in all regions of the Commonwealth with accessible education and training to support the lifelong learning needs of Kentucky citizens[.]” Finally, the court quoted the unpublished opinion in *Robinson, supra*, which leads to the issue now before us. *Robinson* held that “KCTCS is a state agency engaged in a governmental function . . . entitled to governmental immunity.” *Id.* at 1.

Appellant argues that the Jefferson Circuit Court’s citation of *Robinson* was erroneous, as published case law exists upon which the court could have properly adjudicated Appellee’s Motion. Appellant would have the circuit court consider the Motion under the 2009 published opinion in *Comair, supra*,

based on two factors: 1) “the origins of the entity” and 2) “the nature of the function [the entity] carries out[.]” *Comair*, 295 S.W.3d at 99. In Appellant’s view, and based on *Comair*, an entity like Appellee has governmental immunity only when it originates from a “parent” with governmental immunity, and it carries out a function integral to state government. Appellee argues that when *Comair* is properly applied to the facts before us, the circuit court was bound to conclude that Appellee is not vested with governmental immunity. The parties agree that the *Comair* test was later applied in *Transit Auth. of River City v. Bibelhauser*, 432 S.W.3d 171 (Ky. App. 2013).

The issue before us may be properly distilled into two questions. First, did the Jefferson Circuit Court properly apply *Comair* and its progeny to conclude that Appellee met the two-prong test and is entitled to governmental immunity? And second, did the court’s citation to *Robinson* run afoul of the Civil Rules and supporting case law? We must answer the first question in the affirmative. Appellant acknowledges that the first prong of the *Comair* test is satisfied, i.e., that Appellee is an entity created by the General Assembly. That is to say, Appellee originated from a “parent” with governmental immunity. The second prong is whether Appellee performs a “function integral to state government.” *Transit Auth. of River City*, 432 S.W.3d at 174. The Jefferson Circuit Court answered this question in the affirmative, and properly so. The community college system “is indisputably a state agency and imbued with governmental immunity under Kentucky law. . . . [It] enjoys state funding and is

subject to legislative directive.” *Ashland Cmty. & Tech. Coll. v. Steele*, No. 2013-CA-000812-MR, 2014 WL 1155790 (Ky. App. March 21, 2014).

We cannot conclude that the Jefferson Circuit Court’s citation to *Robinson, supra*, is misplaced or otherwise runs afoul of CR 76.28(4)(c). The circuit court considered the facts before it in light of the seminal holding in *Comair*, it applied the *Comair* analysis, and it noted *Comair*’s holding that entities entitled to governmental immunity “include, but are not limited to, police, *public education*, corrections, tax collection, and public highways.” *Comair*, 295 S.W.3d at 99 (emphasis added). After concluding that Appellee was a public education entity entitled to immunity, the circuit court bolstered its finding by pointing to the unpublished *Robinson* opinion which expressly held that “[Appellee] KCTCS is a state agency engaged in a government function . . . entitled to governmental immunity. . . .” *Robinson, supra*. The circuit court’s citation to *Robinson* was wholly proper as Appellant has cited to no published opinion expressly addressing KCTCS’s entitlement to immunity. Because the circuit court properly grounded its finding on the published opinions in *Comair*, *Yanero*, and *Haney, supra*, and then pointed to *Robinson* for its specific holding that KCTCS is a state agency engaged in a governmental function entitled to immunity, we have no basis for concluding that the court’s analysis ran afoul of CR 76.28(4)(c). We find no error.

For the foregoing reasons, we AFFIRM the Opinion and Order Granting Motion to Dismiss rendered by the Jefferson Circuit Court.

LAMBERT, J., JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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