

RENDERED: DECEMBER 21, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000087-MR

NATHAN LEASE AND
MELISSA LEASE

APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
ACTION NO. 11-CI-01864

CITY OF VINE GROVE;
MELVIN ATCHER, in his
official capacity; JAMES
MICHAEL JONES; MIKE
JONES BUILT HOMES LLC;
JIMMY HARDESTY AND
HARDESTY BUILT HOMES LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

KRAMER, JUDGE: Nathan and Melissa Lease appeal from an order of the Hardin Circuit Court, which granted summary judgment in favor of the City of Vine Grove and Melvin Atcher. The circuit court determined Vine Grove and Atcher were immune from liability and dismissed the Leases' claims against them accordingly. After careful review of the record and applicable law, we affirm.

This appeal arises from the Leases' purchase of a newly constructed home in Hardin County. After they moved into the home, the Leases encountered several problems with the home and filed a complaint in circuit court against several parties and asserted numerous causes of action.¹ Relevant to this appeal, the Leases asserted claims against Vine Grove and Atcher for alleged violations of the construction code under KRS² 198B and for negligence. Atcher serves as the official building inspector for Vine Grove.

The crux of the Leases' claims against Vine Grove and Atcher is stated in their brief as follows: "It is the Lease's [sic] position that Building Code violations existed and that . . . Vine Grove, through Atcher, should have discovered them pursuant to their mandate under KRS 198B and their own ordinances."

Shortly into discovery, Atcher moved for summary judgment seeking dismissal of

¹ The claims against all other defendants/appellees were resolved by trial verdict, default judgment, or settlement. The summary judgment granted to Vine Grove and Atcher, in his official capacity, is the sole subject of this appeal.

² Kentucky Revised Statute.

the claims against him in his individual capacity. In his motion, he cited to section 103.12 of the 2007 Kentucky Building Code, which insulates city building inspectors from personal liability so long as the inspector acts in good faith and without malice. The Leases did not oppose this motion, and the circuit court granted summary judgment to Atcher in his individual capacity in August 2012.³

Thereafter, Vine Grove and Atcher, in his *official* capacity, moved for summary judgment. In their motion, they cited Kentucky's Claims Against Local Government Act (CALGA), codified as KRS 65.200 *et seq.*, for the proposition that CALGA creates qualified immunity from liability to cities and their employees when they perform discretionary acts. The Leases opposed this motion. However, the circuit court ultimately concluded that "[i]nspection decisions were discretionary acts" and granted summary judgment in December 2013.

Eventually, the circuit court entered an order making the summary judgment final and appealable. The Leases timely filed the above-captioned appeal. Additional facts will be discussed as they become relevant.

Kentucky Rule of Civil Procedure (CR) 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists, and the

³ Initially, the Leases appealed from the order dismissing their claims against Atcher in his individual capacity in Appeal No. 2017-CA-00965-MR. That claim effectively alleged that Atcher maliciously performed the inspection, therefore, he should not be immune from liability in his individual capacity. However, they voluntarily acquiesced to the dismissal of that appeal. Accordingly, that appeal was dismissed by a separate order.

moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings; accordingly, we review under a *de novo* standard. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

On appeal, the Leases argue that Atcher’s acts were ministerial, not discretionary. Therefore, neither Atcher nor Vine City should be immune from liability under CALGA.

CALGA states that a municipality, such as Vine Grove, is generally liable for torts committed by its employees while acting within the scope of their duties. KRS 65.2001(1)(b). However, CALGA sets forth certain claims against local governments which are *disallowed* in KRS 65.2003. The relevant portion of that statute 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 from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

KRS 65.2003(3). Boiled down, if Atcher's acts as Vine City's inspector were judicial, quasi-judicial, or otherwise discretionary, he and Vine City are immune from liability. On the other hand, if those acts as inspector were ministerial, CALGA's immunity from liability does not apply.

The Kentucky Supreme Court has found "quasi-judicial" in the context of immunity to mean, "[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.” *Bolden v. City of Covington*, 803 S.W.2d 577, 581 (Ky. 1991) (quoting *Quasi-Judicial*, BLACK’S LAW DICTIONARY (6th ed. 1990)). As indicated above, CALGA also provides common examples of quasi-judicial acts in KRS 65.2003(3)(a)-(e). Especially relevant to this appeal is subsection (c) which involves the quasi-judicial act of issuing, revoking, or failing to issue permits, licenses, certificates, or similar authorizations.

In the instant appeal, the Leases argue that Atcher missed several code violations. And while the Leases allude to several violations, they only specifically name one that existed concerning the home’s wooden deck and its lack of attachment to the main structure. It is the Leases’ view that Vine City’s adoption of the Kentucky Building Code was discretionary, however, Atcher’s enforcement of the provisions of the State Building Code is ministerial. Therefore, Vine City and Atcher are not immune from liability. We disagree.

This Court recognizes that, “[i]n reality, few acts are ever purely discretionary or purely ministerial.” *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). For this reason, the discretionary versus ministerial analysis is inherently difficult. However, when analyzing this oft recurring dichotomy through the lens of CALGA, the General Assembly has provided some guidance in KRS

65.2003(3)(c). The discretionary acts referred to in that subsection revolve around the issuance of permits, certificates, or other similar authorizations. Here, Atcher inspected the Leases' home multiple times. While he may have performed some ministerial duties in the course of his inspection, he also investigated facts, weighed evidence, and drew conclusions. Stemming from his conclusions, he signed two official documents related to the Leases' home. The first was a building permit. The second was a certificate of occupancy. Any purported ministerial duty was intrinsically related to the issuance of the building permit and certificate of occupancy. Therefore, Atcher's acts in inspecting the home qualify as quasi-judicial discretionary acts within the meaning KRS 65.2003(3); and the circuit court did not err in determining Vine City and Atcher were immune from liability for any negligence stemming from those acts.

In light of the foregoing, the order of the Hardin Circuit Court is
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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