RENDERED: AUGUST 9, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000757-MR

ANGELA JOHNSON; WILLIAM JOHNSON;
DYLAN BOOTS, AIDAN JOHNSON, ALYSSA
JOHNSON AND WILLIAM JOHNSON, MINOR
CHILDREN, BY AND THROUGH THEIR NEXT
FRIEND, ANGELA JOHNSON APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 12-CI-01479

STEVEN DIVINE, INDIVIDUALLY, AND AS
AGENT OF THE NORTHERN KENTUCKY
INDEPENDENT HEALTH DEPARTMENT;
NORTHERN KENTUCKY INDEPENDENT
HEALTH DEPARTMENT; DANIEL MEISER;
AND TERRY MEISER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND SPALDING, JUDGES.

ACREE, JUDGE: Appellants, Angela and William Johnson, in their individual capacities and on behalf of their five minor children, appeal the June 26, 2014, December 15, 2016, and February 3, 2017, orders of the Campbell Circuit Court granting summary judgment to Appellees, Northern Kentucky Independent Health Department (NKIHD) and Steven Divine as an agent of that department, and denying their motions to add a fourth amended complaint. The Johnsons asserted a tort claim for which the circuit court could find no cause of action. We affirm.

FACTS AND PROCEDURE

William and Angela Johnson purchased property at 14381 Hissem Road in Campbell County in June 2007. The property contained an in-ground septic system. This system is at the center of the controversy in this case.

In addition to a residence, the property included a barn where the Johnsons kept their horses and dogs. The barn was also a frequent play area for their children. Over the next year, the children and the animals started to exhibit a variety of health problems. Three of the Johnsons' animals died, and the children experienced both cognitive and physical debilitation.[1]

[1] There were seizures and sudden death for the animals (two german shepherd puppies and a horse), which turned out to be lung cancer. The six-year-old daughter lost her ability to do simple math and was diagnosed with cognitive regression after she began writing right to left. The two-year-old son developed a severe upper respiratory infection as well as a stumbling gait and tremors in his extremities.

In 2010, Angela began to investigate her family's health problems. In January, she contacted the NKIHD. On January 28, 2010, Steve Divine, Director of Environmental Health and Safety at NKIHD, and two other NKIHD officials visited the Hissem Road property to investigate.

On February 25, 2010, Angela telephoned NKIHD and requested the inspection file related to her property. Divine allegedly faxed the report in its entirety at that time. Upon a second request in March 2010, Divine provided Angela a second copy of the inspection file. A few months later, in July 2010, the Johnsons vacated the Hissem Road property never to return. The next year, the Johnsons filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code.

On October 23, 2012, Angela appeared at the NKIHD office and requested another copy of the inspection file for the Hissem Road property. According to Angela, the inspection file that she obtained on this date contained additional information relevant to this action. Specifically, Johnson pointed to a seven-page document dated April 13, 1994, which indicated that Divine initiated an inspection of the sewage system on the property but did not fully complete it. (R. at 1582). In the file was a note written by Divine dated August 14, 1993, which stated:

> Dosing tank and supply line to lateral e-box [sic] from dosing tank was installed and covered without inspection.

> According to installer a 500 gal. dosing tank was used. House currently occupied. No one home at time of visit. Left card and message to call. Installer to submit paperwork but has not yet for motor (pump) code # [sic] etc. . . .

(R. at 1583). Additionally, the file indicated that in 1996, the sewage system underwent one or more repairs without a permit and that the system did not comply with state regulations.

On November 28, 2012, the Johnsons filed a complaint and jury demand naming as defendants Steffen Builders, LLC, Daniel and Terry Meiser, and John Doe.[2] Months later, on May 21, 2013, the Johnsons amended the initial complaint to name NKIHD and Divine as defendants, asserting against the new defendants claims of negligence in inspection of an on-site sewage system.

On July 19, 2013, NKIHD and Divine filed motions for summary judgment as to all claims against them. On June 26, 2014, the trial court granted summary judgment to NKIHD and Divine finding neither defendant owed a duty to the Johnsons and that, pursuant to *Bolden v. Covington*, 803 S.W.2d 577 (Ky. 1991), no cause of action for the alleged tortious conduct existed.

On October 21, 2016, the Johnsons filed a motion to again amend their complaint to assert a cause of action for Kentucky Open Records Act

---

[2] John Doe was denoted as the "other persons responsible for the design and installation of the septic system on the Defendant's Property, whose identity the Plaintiffs expect to learn through discovery." (R. at 2).

(KORA) violations and fraudulent concealment of records. On December 15, 2016, the trial court denied the Johnsons' motion and expounded upon its analysis from *Bolden*. On February 3, 2017, after the Johnsons again renewed their motion to amend the complaint by adding a bad faith claim against Divine pursuant to the Kentucky Open Records Act, the trial court again denied their motion. The trial court restated its previous denial to amend, and its grant of summary judgment, and refused to hear the KORA claim because Campbell Circuit Court did not have particular-case jurisdiction concerning the documents in question.

On March 30, 2017, the trial court granted the Johnsons' motion to certify its orders from June 26, 2014, December 15, 2016, and February 3, 2017, as final and appealable pursuant to CR[3] 54.02. The Johnsons filed a notice of appeal on May 3, 2017.

STANDARD OF REVIEW

The standard of review, on appeal, when a trial court grants a motion for 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); CR 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only

---

[3] Kentucky Rules of Civil Procedure.

if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001), *citing Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). "Impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436, *quoting Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436 (quoting *Steelvest*, 807 S.W.2d at 482). Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Scifres*, 916 S.W.2d at 781.

ANALYSIS

We begin by noting that, contrary to the position taken by the Johnsons, this is not an interlocutory appeal. The trial court entered an order pursuant to CR 54.02(1) making its orders entered June 26, 2014, December 15,

2016, and February 3, 2017, final and appealable. Because we affirm the trial court's ruling that there is no liability, immunity is irrelevant.

From these three orders we see that there are two findings that require analysis: (1) NKIHD and Divine owed no duty to the Johnsons because there is no basis for finding tort liability and (2) the Campbell Circuit Court lacked particular case jurisdiction over the Johnsons' Kentucky Open Records Act claim.

1.) Establishment of Duty for NKIHD and Divine

The Johnsons focus on the immunity question. But immunity arises as an issue only to preclude a duty alleged to have been breached by a government actor. The trial court concluded no such duty existed and that makes immunity arguments moot.

The trial court, in its June 26, 2014 order, first held that the Johnsons' claim could not survive because they could identify no duty owed them by a government actor. That ruling has survived, having never been successfully refuted by the Johnsons. The trial court reiterated this ruling in every subsequent order. We have reviewed that ruling and agree with the trial court.

The trial court's analysis from its June 26, 2014, order granting summary judgment stated:

> The underlying basis of the plaintiff's claims and causes of action is that NKIHD and Divine were negligent in inspecting the on-site septic system on the Hissem property. These negligent acts and omissions are alleged

> to be in violation of Kentucky Revised Statutes and Kentucky Administrative Regulations. In *Bolden v. City of Covington*, the Kentucky Supreme Court ruled that functions relating to an "inspection" are regulatory and quasi-judicial in nature and therefore not actionable. Similarly, in *Washington v. City of Winchester*, the Kentucky Court of Appeals followed the same reasoning in ruling that a tort based on an improper inspection and enforcement of code provisions is not a theory for liability. While the agencies sued in *Bolden* and *Washington* had the authority to condemn a building due to a failure to correct any code violations, the courts still held that agencies had no liability for failure to do so. Given the status of Kentucky law, this Court finds that NKIHD and Divine did not owe a duty to the plaintiffs. While an inspection was not fully completed in this case and it is questionable whether NKIHD and Divine had the authority to order the Meisers to uncover the septic tank or vacate the premises, this Court finds that any failure to complete the inspection or order the Meisers to uncover the septic tank or vacate the premises cannot be the basis of liability under Kentucky law. Therefore, NKIHD and Divine's Motion for Summary Judgment is granted.

(R. at 839) (internal citations omitted).

In its December 15, 2016, order, the trial court reiterated and elaborated upon its understanding of *Bolden*, stating:

> [T]he Court does not believe that its June 26, 2014, Order was in error, and Plaintiffs have pointed to no authority that would indicate otherwise. The Court's prior Order was premised on the Supreme Court of Kentucky's decision in *Bolden v. City of Euclid*.
>
> . . . .

> > . . . The trial court's decision that the City must respond in tort in this situation was in error, not because the City enjoys immunity from tort liability, but because the incompetent performance of decision-making activity of this nature by a government agency is not the subject of tort liability.
>
> In short, *Bolden* held that the City of Covington was immune not because of any governmental immunity, but because its alleged negligence was not the subject of tort liability.

(R. at 1755) (internal emphasis omitted) (internal citation omitted).

To recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached its duty; and (3) the breach proximately caused the plaintiff's damages. *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211–12 (Ky. App. 2007). Whether the defendant owed a duty is a question of law for the court to decide. *Id.*; *see also Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 88 (Ky. 2003). When a public official is involved, Kentucky courts use the "relationship doctrine" to determine whether a duty is owed. *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 393 (Ky. 2001).

In its most recent order of February 3, 2017, the trial court stated: "The Court's previous Orders granted summary judgment to Divine and NKIHD on the basis that Divine's failure to inspect the subject property in the early 1990s

was not the proper subject of tort liability. *Plaintiffs accept this result*, but argue that Divine committed tortious conduct in 2010-2012 by willfully failing to produce public records upon request." (R. at 1891) (emphasis added).

In their final argument, the Johnsons assert that NKIHD is a municipal corporation with the power to sue and to be sued and therefore unable to obtain immunity through the Claims Against Local Governments Act (CALGA), KRS[4] 65.2001. The trial court entertained the Johnsons' argument as to lack of immunity for NKIHD and Divine under CALGA in its December 15, 2016, order but we are unsure of the court's reasoning for doing so given its previous, superseding holding of no liability.

In that order the trial court stated: "Defendants, Divine and NKIHD continue to be immune from liability for any alleged negligence related to their inspection and permitting of the subject property in this action." (R. at 1758). In context, we understand this language – "continue to be immune" – to mean that the defendants continue to be unsusceptible to the claim because they owed the Johnsons no duty. The court was merely responding with language, in kind, to a motion couched in immunity concepts. The trial court correctly noted that *Bolden*, the basis for the June 26, 2014, order granting summary judgment, made no mention of CALGA even though that statute was enacted at the time it was

[4] Kentucky Revised Statutes.

published. Here, as in *Bolden*, because the trial court made a finding that neither NKIHD nor Divine had a duty to the Johnsons for the cause of action asserted in its June 26, 2014, order, any finding by the trial court as to immunity was unnecessary as immunity does not come into play absent viable allegations of duty, breach, causation, and damages.

The Johnsons fail to offer a legal argument that could defeat the trial court's legal conclusion that the defendants owed the Johnsons no duty. We know of no authority that impacts *Bolden* or that distinguishes the facts of this case from those in that case. Therefore, we conclude the trial court's legal conclusion that there was no duty is not clearly erroneous. We therefore affirm the trial court's ruling in this regard.

2.) Particular-case jurisdiction over the Kentucky Open Records Act claim

The Johnsons also assert that Divine fraudulently concealed evidence of his failure to inspect the Hissem Road septic system and that the duty to disclose his failed inspection was ministerial. NKIHD and Divine argue that this portion of the Johnsons' brief should be stricken because it contains arguments in support of unasserted and irrelevant claims related to the Open Records Act.

We recognize that CR 76.12 allows that "[a] brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12." CR 76.12(8)(a). When a party fails to comply with the briefing requirements of CR

76.12, this Court has multiple options. It may ignore the deficiency and review the issue raised, strike the brief or refuse to consider an issue, or review the issue for manifest injustice only. *Elwell v. Stone,* 799 S.W.2d 46, 48 (Ky. App. 1990). We elect to review this case notwithstanding procedural flaws.

The trial court dispensed with this claim on the basis that it did not have particular-case jurisdiction of this Open Records Claim. On its face, the claim would appear to be properly brought in Kenton Circuit Court only.

In its February 3, 2017, order the trial court found:

> With regard to any claims related to Divine's alleged failure to produce documents in 2010, the recent case of *Taylor v. Maxson* is controlling. There, the Court of Appeals held "that the General Assembly intended suits based on violations of the Open Records Act . . . to be brought against the state agencies themselves and not against the individuals employed by those agencies." As a result, Divine is not liable for any alleged Open Records Act violation; only NKIHD could be. However, the evidence produced with regard to these issues indicates that this Court lacks jurisdiction to hear that claim. K.R.S. § 61.882 provides that "[t]he Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained shall have jurisdiction to enforce" the Open Records Act. Here, Defendants have presented evidence that NKIHD's principal place of business and the location of its records are in Kenton County. Plaintiffs have requested time to verify whether this is true, but have conceded that if it is true, then this Court would lack jurisdiction over those claims. . . . In the interest of judicial economy, the Court will proceed to DENY Plaintiffs [sic] Leave to Amend their Complaint to include an Open Records Act

> violation, but will reconsider this order if presented with evidence demonstrating that Campbell County is the proper venue for their Open Records claim.

(R. at 1892) (citations omitted).

Here, the primary issue is whether the trial court has particular-case jurisdiction over the Johnsons' Kentucky Open Records Act claim. The Johnsons' arguments do not address this issue directly. Our examination of the briefs and record for an indirect argument has been unavailing. The Johnsons could not compel the Campbell Circuit Court to hear a case in which it lacked particular-case jurisdiction and the defendants did not waive it. We affirm the February 3, 2016, order dismissing the Johnsons' Open Records Act claim on the basis of its lack of particular-case jurisdiction.

CONCLUSION

For the foregoing reasons, we affirm the June 26, 2014, December 15, 2016, and February 3, 2017, orders of the Campbell Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Laura E. Landenwich
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Thomas R. Nienaber
Florence, Kentucky