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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000941-MR

KATE CARUCCI APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, JUDGE
ACTION NO. 16-CI-00476

NORTHERN KENTUCKY WATER DISTRICT APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT,[1] AND MAZE, JUDGES.

MAZE, JUDGE: The issue in this appeal is whether our opinion in *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340 (Ky. App. 2011), which held that water districts are entitled to governmental immunity, is still valid law in light of

[1] Judge Debra Hembree Lambert concurred in this opinion prior to her accepting election to the Kentucky Supreme Court effective January 7, 2019.

the Kentucky Supreme Court's opinion in *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855 (Ky. 2015), which held that sanitation districts providing similar services are not entitled to governmental immunity. After careful review, we hold *Byrd* cannot be reconciled with *Coppage*. We therefore reverse the Campbell Circuit Court's order granting summary judgment in favor of Appellee, Northern Kentucky Water District (NKWD).

I. Background and Procedural History

NKWD is a special district created pursuant to KRS[2] Chapter 74, in accordance with procedures set forth in KRS 65.805-830, to provide clean water for personal consumption, recreation, agriculture, and commercial use. A brief discussion about how a water district, such as NKWD, is created is necessary for resolving this appeal. First, no less than five resident freeholders of the geographical region sought to be served with water facilities by the proposed district must submit an application to the Public Service Commission of Kentucky for the authority to petition the appropriate county judge/executive for the establishment of a water district. KRS 74.012(1). If the Public Service Commission approves of the application, KRS 74.010 provides that a fiscal court may create a water district in accordance with the procedures for creating any special district. Accordingly, a fiscal court may hold a hearing after a certain

[2] Kentucky Revised Statutes.

number of persons residing in the district sign a petition and present it to the appropriate fiscal court. KRS 65.810(1). After the public hearing, the fiscal court shall provide written findings of fact approving or disapproving of the formation of the water district. KRS 65.810(6). The water district shall thereafter be managed by a board of commissioners selected by the appropriate county judge/executive. KRS 74.020(1). We now turn to the facts pertinent to this appeal.

Appellant, Kate Carucci, was injured after tripping over an unsecured water meter cover owned by NKWD. She then sued NKWD for negligence. NKWD subsequently moved for summary judgment, arguing it was cloaked in governmental immunity under *Byrd*. Carucci responded that the Kentucky Supreme Court implicitly overruled *Byrd* in *Coppage*. In a written opinion and order, the trial court expressed skepticism that *Byrd* could be reconciled with *Coppage*. However, it concluded it was bound to apply existing precedent and granted NKWD's motion for summary judgment. This appeal follows.

II. Standard of Review

Summary judgment is proper only when "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 Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Whether an entity is entitled to governmental immunity is a question of law; therefore, our review is *de novo*. *Louisville Arena*

Authority, Inc. v. RAM Engineering & Const., Inc., 415 S.W.3d 671, 677 (Ky. App. 2013).

III. Analysis

Under the doctrine of sovereign immunity, the Commonwealth, its counties, and urban county governments are absolutely immune from suit unless the state has given its consent or otherwise waived its immunity. *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004). Cities are not immune from suit. *Haney v. City of Lexington*, 386 S.W.2d 738, 742 (Ky. 1964).

Governmental immunity, derived from sovereign immunity, is the public policy that limits tort liability on a governmental agency. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). The basic policy is that "courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy." *Id.* "Thus, 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." *Id.*

Although the law of immunity is relatively simple in the abstract, its application "has vexed the courts of the Commonwealth for decades." *Coppage*, 459 S.W.3d at 859. Determining when governmental immunity applies has become increasingly complex "as the government has developed numerous quasi-governmental agencies, independently contracted for services with other businesses performing proprietary work, and expanded into fields outside what was probably the original intent of our founders." *Jacobi v. Holbert*, 553 S.W.3d 246, 254 (Ky. 2018). These "quasi-governmental" or public entities are created by the government but are privately managed. In *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), the Kentucky Supreme Court created the basic framework for determining when a quasi-governmental or public entity is protected by governmental immunity.

In *Comair*, the Supreme Court noted that despite the uncertainty regarding the reach of sovereign immunity, the distinction between the immunity afforded to counties and cities was undisputed. *Id.* at 94. Thus, it was "useful" in any immunity analysis to look at the "parent" of the entity seeking immunity, that is, whether it created by a clearly immune entity, like a county, or one that is not, like a city. *Id.* at 99. However, the "more important" focus is whether the entity exercises a "function integral to state government." *Id.* The Court defined functions integral to state government as those "common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways." *Id.* Thus, the Court concluded an airport board was entitled to governmental immunity because it was created by the Fayette County government and exercised an integral governmental function by providing air transportation infrastructure for the state. *Id.* at 100.

Nearly two years later, this Court held in *Byrd*, 352 S.W.3d at 343, that water districts are entitled to governmental immunity. *Byrd* did not cite *Comair* and did not examine the water district's parent entity. Instead, it defined the water district as a "political subdivision" of the county and therefore a "Kentucky governmental agency." *Id.* *Byrd* further held that water districts performed a governmental function by providing "clean water for personal consumption, recreation, and agricultural and commercial use, thereby providing for the health, safety, and welfare of Kentucky citizens." *Id.* at 344. Although *Byrd* would seem to make resolution of this case simple, Carucci argues it was implicitly overruled by *Coppage*. We agree.

In *Coppage*, the Kentucky Supreme Court was tasked with determining whether a sanitation district that provided sewer disposal and storm drainage utility services in Boone, Kenton, and Campbell counties was protected by governmental immunity. First, the Court looked at the sanitation district's parent entity. It concluded the sanitation district was not created by an immune entity because KRS 220.040 provides that sanitation districts are established after a petition is signed by either a certain percentage of affected landowners or by the governing body of any municipality lying within the district. *Id.* at 861. Although the petition had to be approved by a county health board, the Court reasoned that "Simply put, no county can impose a sanitation district upon its citizens under KRS Chapter 220 (or its predecessor), and none of the counties involved in this litigation 'created' SD1 [the sanitation district]." *Id.*

The *Coppage* Court further held that the water district's services of sewage disposal, stream pollution prevention, and regulation of stream flow were not integral to state government. *Id.* at 863. The Court reached this holding even though it acknowledged the sanitation district's services were "critically important within the counties it serves[.]" *Id.* at 864. The Court also rejected the sanitation district's argument that its services were governmental because they promoted the Commonwealth's policy of maintaining a clean water supply. *Id.* The Court held the sanitation district played no special role that distinguished it from metropolitan sewer districts, which have traditionally been denied governmental immunity. *Id.*

Carucci argues the statutory prerequisite for creation of a water district, presentation of a signed petition, is fatal to NKWD's immunity status. Specifically, she contends that this features ensures NKWD is not created by an immune entity because "no county can impose a [water] district upon its citizens[.]" *Coppage*, 459 S.W.3d at 861. NKWD counters that the need for a petition is not relevant to its immunity status because a water district's existence depends on approval by a fiscal court, the legislative body of an immune entity. NKWD contends that this feature distinguishes it from the sanitation district in *Coppage*, which was created by municipalities. Ultimately, we conclude an analysis of NKWD's parent entity is unnecessary in this case because NKWD has not demonstrated that it performs a function integral to state government. Simply put, its services cannot be distinguished in any meaningful way from the sanitation district in *Coppage.*

NKWD has not provided this Court with any basis to conclude the providing of "clean water for personal consumption, recreation, agriculture and commercial use" is less proprietary than the sewage disposal and storm drainage services provided by sanitation districts. NKWD's own enabling statutes recognizes that its services can be, and are, provided by the private sector. KRS 74.012(3) states that the Public Service Commission should approve of an application of a water district only if it finds "that the geographical area sought to be served by such proposed water district . . . cannot be feasibly served by any existing water supplier, *whether publicly or privately owned*[.]"

Moreover, the services NKWD alleges that it provides all involve the private consumption and use of water. This is significant. As one commentator explained,

> [W]hen a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage to the property of others to the same extent and upon the same basis as a privately owned water company would be. Stated somewhat differently, the distribution of water to its inhabitants for their domestic and commercial uses is a proprietary function.

78 Am. Jur. 2d Waterworks and Water Companies § 8 (footnotes omitted). NKWD's own affidavit to the trial court admits that the water meter that Carucci tripped over was installed to measure a consumer's personal consumption for billing purposes. Even if some services provided by NKWD could be considered governmental, its actions relevant to this appeal were not integral to state government. *See Kentucky River Foothills Development Council, Inc. v. Phirman*, 504 S.W.3d 11, 17 (Ky. 2016) (holding that even if a community action agency's services related to poverty elimination could be considered governmental, it was not cloaked with immunity for alleged negligence while managing a substance abuse recovery program). Accordingly, we hold that governmental immunity does not protect NKWD's from the claims in Carucci's complaint.

We acknowledge that *Byrd* has not been explicitly overruled by the

Kentucky Supreme Court.[3] We are also mindful that immunity determinations require a case-by-case analysis. *Comair*, 295 S.W.3d at 99. Still, a case-by-case approach must not be an arbitrary approach. After carefully reviewing *Comair* and *Coppage*, we simply cannot find any sound basis in law or logic for denying governmental immunity to sanitation districts but granting it to water districts.

IV. Conclusion

The order of the Campbell Circuit Court granting summary judgment in favor of Northern Kentucky Water District is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Robert Poole Covington, Kentucky	Timothy Walker Lexington, Kentucky

[3] The Kentucky Supreme Court did not review *Byrd*. It became final at the Court of Appeals without a motion for discretionary being filed. Since *Coppage* became final in 2015, neither this Court nor the Kentucky Supreme Court has been called on to review a case dealing with a water district's immunity under the binding effect of *Coppage*.