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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000187-MR

ANTHONY NOEL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 17-CI-02505

TREVOR WELCH, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY
AS EMPLOYEE, SERVANT, AND/OR
AGENT OF LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT
AND/OR LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT
DIVISION OF POLICE; LEXINGTON-
FAYETTE URBAN COUNTY GOVERNMENT;
LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT, DIVISION OF POLICE; and
LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT, DIVISION OF FLEET SERVICE

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Anthony Noel challenges an order entered by the Fayette Circuit Court on November 27, 2017. Citing sovereign immunity, that order dismissed from a personal injury suit Lexington-Fayette Urban County Government (“LFUCG”), Lexington-Fayette Urban County Government Division of Police, Lexington-Fayette Urban County Government Division of Fleet Service, and Officer Trevor Welch in his official capacity (collectively “LFUCG Defendants”). The action continues against Officer Welch in his individual capacity. After consideration of the briefs, law and record, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On November 23, 2016, Noel was riding a bicycle against traffic on Winchester Road in Lexington, Kentucky. Officer Welch—in uniform and acting in the scope of duty—turned his LFUCG-owned police car in front of Noel. As a result, Noel collided with the driver-side door of Officer Welch’s cruiser, fell and sustained physical injuries. On July 11, 2017, alleging Officer Welch acted with negligence, Noel filed suit against Welch in both his individual and official capacities, and against all other LFUCG Defendants. Noel demanded no-fault Personal Injury Protection (“PIP”) benefits, compensatory and punitive damages.

On July 31, 2017, citing *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128 (Ky. 2004), LFUCG Defendants moved

for dismissal from the suit arguing Noel had failed to state a claim and asserting the cloak of sovereign immunity as protection from civil judgments and the costs and burdens of defending such actions. One day later, LFUCG Defendants answered the complaint, again urging dismissal, with prejudice, of all claims. Welch, in his individual capacity, did not join the motion to dismiss. Instead he filed a separate answer to the complaint.

Noel opposed dismissal, calling sovereign immunity “archaic,” “outdated and arbitrary.” He claimed LFUCG’s purchase of automobile liability insurance—as permitted by KRS¹ 67.180—waived sovereign immunity up to policy limits. *Ginter v. Montgomery County*, 327 S.W.2d 98, 100 (Ky. 1959).

In its reply supporting the motion to dismiss, LFUCG Defendants asserted entitlement as an urban-county government entitlement to sovereign immunity unless such authorization “expressly repealed or amended.” KRS 67A.060(2). Additionally, they maintained LFUCG is self-insured and Noel’s claim was outside the grasp of KRS 67.180(2) which at most allows suit to be filed against a government to “measure the liability of the insurance carrier to the injured party.” KRS 67.180(2). LFUCG Defendants specifically argued:

LFUCG has not purchased an automobile liability policy of insurance, and therefore has not waived its immunity [under KRS 67.180].

¹ Kentucky Revised Statutes.

...

LFUCG has not purchased private motor vehicle liability insurance for motor vehicles owned by the city or for any compensation to its employees for purposes of worker's [sic] compensation as contemplated under the limited waiver of KRS 67.180. Any claims of management or investigation service investigating claims under its self-insurance retention fund does not constitute a policy of liability insurance. *Phillips v. Lexington-Fayette Urban County Government*, 331 S.W.3d 629, 632 (Ky. App. 2010). Only if such a motor vehicle policy of insurance had been purchased with a third-party insurance carrier would the waiver [sic] alleged by [Noel] fall within the language of KRS 67.180. The case law cited by [Noel] in his Response addresses county governments having purchased motor vehicle insurance policies for county-owned motor vehicles, and even those could never be enforced against the county government—only the insurer. *See Monroe County v. Rouse*, 274 S.W.2d 477 (Ky. 1954); *see also Ginter v. Montgomery County*, 327 S.W.2d 98 (Ky. 1959). *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001) and *Grayson County Bd. of Education v. Casey*, 157 S.W.3d 201 (Ky. 2005) merely identify that KRS 67.180 contains an express but limited waiver of sovereign immunity for suits against counties having purchased insurance coverage for motor vehicle accidents and workers' compensation claims.

Filed with LFUCG Defendant's reply was an affidavit executed by M. Keith Horn,

LFUCG's managing attorney, stating:

2. [LFUCG] is a self-insured entity with a self-insured retention fund² and does not depend on a third-party

² With a self-insured retention fund, also called a retained limit policy, the policyholder agrees to bear a specified amount of risk—and pay the amount of any loss up to that specified amount—

insurer for basic claims needs, such as workers' compensation or motor vehicle coverage.

3. [LFUCG] has been self-insured prior to and during November 2016.

4. All the underlying departments of [LFUCG] are currently part of the same self-insured entity and therefore were self-insured prior to and during November 2016.

Noel responded, maintaining LFUCG was misleading the trial court and could not be self-insured because it has a third-party insurance carrier for motor vehicle claims as evidenced by the policy declarations sheet. Noel's counsel had acquired a copy of LFUCG's 2011-2012 insurance policy through its representation of another client, leading it to vigorously argue LFUCG's purchase of substantially similar insurance coverage for motor vehicle collisions in effect at the time of the 2016 collision waived sovereign immunity up to policy limits.

Ultimately, and only after being ordered to do so by the trial court, LFUCG provided a complete copy of its insurance policy with American Alternative Insurance Corporation (AAIC) in effect at the time Noel collided with Officer Welch's cruiser. The lengthy policy covers a wide range of scenarios—far more than vehicles. The endorsements and declarations pages specifically mention

before the insurer's responsibility to pay for any loss is triggered. The benefit of such a policy is usually payment of a reduced premium. (Footnote added).

“Automobile Liability Coverage.” There is also a four-page section titled “Automobile Liability Coverage Part.”

While the motion to dismiss was pending, Noel initiated a vigorous motion practice, serving interrogatories, requesting production of documents, and scheduling a deposition of Officer Welch for purposes of discovery and any other permitted purpose, all of which LFUCG Defendants resisted in light of the sovereign immunity claim. LFUCG Defendants argued it would be unfair to subject Officer Welch to a deposition prior to determining whether he was entitled to assert immunity in his official capacity. Citing CR³ 26.03, LFUCG Defendants moved for a protective order restricting discovery until the motion to dismiss was resolved, seeking to avoid the unfair and unnecessary burdens of discovery. LFUCG Defendants also noted discovery requests had been served on Noel early on, but no response had been received. By agreed order, Officer Welch, in his individual capacity, was to be deposed on October 4, 2017. According to a document filed by LFUCG Defendants, Officer Welch was eventually deposed for seven hours.

³ Kentucky Rules of Civil Procedure.

Noel maintains he “tailored”⁴ his discovery requests to obtain only information needed to determine whether LFUCG had waived sovereign immunity by purchasing third-party liability insurance for motor vehicle claims. An order entered on October 10, 2017, granted the protective order sought by LFUCG Defendants, and set the motion to dismiss to be heard after the filing of supplemental briefs.

In an order entered November 27, 2017, the trial court wrote:

Defendants [LFUCG], [LFUCG] Division of Police, [LFUCG] Division of Fleet Service, and Officer Trevor Welch in his Official Capacity . . . are entitled to sovereign immunity in this matter. The existence of a Retained Limits Policy in addition to LFUCG’s self-insured policy does not constitute an express waiver of the LFUCG Defendants’ sovereign immunity defense under KRS 67.180. Therefore, the LFUCG Defendants are immune from suit and are entitled to dismissal of all claims asserted against them in this action with prejudice.

Noel moved to alter, amend or vacate the order dismissing LFUCG Defendants.

On January 3, 2018, the trial court entered a succinct order denying the motion.

This appeal, from both the order dismissing LFUCG Defendants from suit⁵ and the order denying Noel’s CR 59.05 motion, followed.

⁴ Noel states he has not requested information and documents from the 1970’s (inception of LFUCG)-forward, but rather only from January 1, 2006-forward.

⁵ In the wake of entry of this order, Noel filed more than 600 pages of settlement documents and insurance policies unrelated to this action. The trial court struck the items, but placed them under seal and left them in the record.

LEGAL ANALYSIS

LFUCG Defendants formally sought dismissal from suit. However, the trial court's consideration of evidence outside the pleadings converted the motion to dismiss into a summary judgment motion. *Chen v. Lowe*, 521 S.W.3d 587, 591 (Ky. App. 2017). As a result, our inquiry on appeal is whether any genuine issues of material fact exist to prevent LFUCG Defendants from being awarded judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. Stated differently, we consider whether Noel could “prevail under any circumstances.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). We conclude he could not.

Whether LFUCG Defendants were properly dismissed from suit due to sovereign immunity is a question of law we review *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003). Sovereign immunity “precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517-18 (Ky. 2001) (citing Restatement (Second) of the Law of Torts § 895B (1) (A.L.I.1979)); 72 Am.Jur.2d, *States, Territories, and Dependencies*, § 99 (1974). “[T]he granting of waiver is a matter exclusively legislative.” *Withers v. University of Kentucky*, 939 S.W.2d 340, 344 (Ky. 1997). The General Assembly may waive immunity via

statute, but such waiver must be “by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.” *Id.* at 346; *see also Department of Corrections v. Furr*, 23 S.W.3d 615 (Ky. 2000).

“Counties, which predate the existence of the state and are considered direct political subdivisions of it, enjoy the same immunity as the state itself.” *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). While technically an “urban county government,” “LFUCG is entitled to sovereign immunity[.]” *Smolcic*, 142 S.W.3d at 132.

KRS 67.180(1) gives 119 Kentucky counties—all but Jefferson County which contains a city of the first class—discretion to purchase “policies of insurance of all kinds deemed advisable, covering vehicles operated by the county[.]” Purchasing such insurance is discretionary; it is not required. *Id.* The statute reads in its entirety:

(1) The fiscal court of each county, except a county containing a city of the first class may, in its discretion, for the protection of the public and its employees, appropriate county funds to purchase policies of insurance of all kinds deemed advisable, covering vehicles operated by the county, and compensation insurance covering employees of the county receiving injuries arising out of and in the course of employment.

(2) Suits instituted on such policies may be maintained against the county only for the purpose of obtaining a judgment which when final shall measure the liability of

the insurance carrier to the injured party for whose benefit the insurance policy was issued, but not to be enforced or collectible against the county or fiscal court or the members thereof.

Noel argues LFUCG's purchase of an "automobile liability" policy covering motor vehicle collisions waived its sovereign immunity up to policy limits. Close inspection of LFUCG's retained limits policy from AAIC, however, confirms it is not the type of coverage contemplated by KRS 67.180(1). It is instead a liability policy in name only which merely indemnifies LFUCG for "damages [LFUCG] becomes legally obligated to pay" Although titled "AUTOMOBILE LIABILITY COVERAGE PART," the "DEFENSE AND INDEMNIFICATION" portion of the policy absolves AAIC of any and all responsibility for defending claims against LFUCG. Covering legal costs and payouts for which the insured is ultimately found to be legally liable is part and parcel of a traditional "automobile liability policy." LFUCG's policy does not do so. Its terms are as follows:

1. [AAIC has] no duty to defend a Claim against an Insured seeking damages for Bodily Injury or Property Damage.
2. [AAIC has] no obligation to pay or indemnify an Insured for any amount under this Coverage Part if an Insured's obligation to pay Ultimate Net Loss is within or equal to the Retained Limit.

3. [LFUCG has] the duty to defend any Claim to which this insurance applies and shall be responsible for the Ultimate Net Loss up to the Retained Limit.
4. When the Ultimate Net Loss exceeds the Retained Limit, for which you become legally obligated to pay because of an Accident, you will be entitled to Indemnification from us under this Coverage Part. You shall apply for indemnification as soon as practicable after the Ultimate Net Loss has been determined to exceed the Retained Limit. We will promptly indemnify you in excess of the Retained Limit subject to the Excess Limit of Insurance for this Coverage Part shown on the Declarations.
5. Your legal obligation to pay the Ultimate Net Loss must be evidenced either by a judgment against you after the actual trial, or by an arbitration award entered as a judgment, or by a written settlement executed by you and the claimant.
6. You must obtain our prior written approval before offering or agreeing to pay an amount, which is in excess of the Retained Limit in order to settle any Claim under this Coverage Part.

LFUCG has established a self-insured retention fund, creation of which does not waive sovereign immunity. *Withers*, 939 S.W.2d at 345. The “Insurer” of that Fund is LFUCG’s Division of Risk Management, and the “Assured” is LFUCG. The Fund provides “100%” of “comprehensive automobile liability.” The Fund declares it is responsible for the cost of any defense “unless defense of Sovereign Immunity is not applicable.” The Fund covers alleged acts of employee negligence without exposing the public coffers to depletion. LFUCG’s purchase of the

retained limits policy from AAIC—a surplus or excess lines policy—is limited to indemnification, specifically excluding any duty to defend. Hence, the trial court correctly found:

existence of a Retained Limits Policy in addition to LFUCG’s self-insured policy does not constitute an express waiver of the LFUCG Defendants’ sovereign immunity defense under KRS 67.180.

LFUCG Defendants accurately stated the posture of this case in its brief:

[Noel] can seek redress for his complaints only in a suit against Officer Trevor Welch in his individual capacity. Despite this, [Noel] can still pursue the benefit of measuring liability against the insurance Officer Welch depends on, which is the LFUCG self-insured retention policy (and if that is exhausted, the retained-limit policy), without violating the long-standing concepts of sovereign immunity by involving LFUCG in the underlying lawsuit.

In light of the foregoing analysis, we affirm the trial court’s dismissal of LFUCG Defendants from Noel’s personal injury action. Furthermore, we discern no merit in Noel’s attack on the trial court’s denial of his motion to alter, amend or vacate the order of dismissal. Finally, Noel has raised various evidentiary issues which are rendered moot by our resolution. Thus, the order of dismissal, converted into a motion for summary judgment by the trial court’s consideration of matters outside the pleadings, is AFFIRMED.

ALL CONCUR.

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