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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001468-MR

BRIAN MORRIS, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS JAILER OF PIKE COUNTY; JUSTIN MAYNARD, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS PERSONNEL DIRECTOR OF THE PIKE COUNTY FISCAL COURT; WILLIAM M. DESKINS, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS JUDGE EXECUTIVE OF PIKE COUNTY FISCAL COURT; JEFF ANDERSON, MAGISTRATE DISTRICT 1, CHARLIE COMPTON, MAGISTRATE DISTRICT 2, LEO MURPHY, MAGISTRATE DISTRICT 3, KENNETH ROBINSON, MAGISTRATE DISTRICT 4, HILMAN DOTSON, MAGISTRATE DISTRICT 5, BOBBY VARNEY, MAGISTRATE DISTRICT 6, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITY AS MAGISTRATES OF PIKE COUNTY FISCAL COURT; AND PIKE COUNTY FISCAL COURT — APPELLANTS

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE JAMES W. CRAFT II, JUDGE
ACTION NO. 18-CI-00620

COLLENE CHANEY — APPELLEE

AND — NO. 2018-CA-001652-MR

COLLENE CHANEY — CROSS-APPELLANT

v. CROSS-APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JAMES W. CRAFT II, JUDGE
ACTION NO. 18-CI-00620

R&K DRUG TESTING CO., LLC;
BRIAN MORRIS, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS JAILER OF PIKE COUNTY;
JUSTIN MAYNARD, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS PERSONNEL DIRECTOR OF THE PIKE COUNTY FISCAL COURT; WILLIAM M. DESKINS, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS JUDGE EXECUTIVE OF PIKE COUNTY FISCAL COURT;
JEFF ANDERSON, MAGISTRATE DISTRICT 1,
CHARLIE COMPTON, MAGISTRATE DISTRICT 2,
LEO MURPHY, MAGISTRATE DISTRICT 3,
KENNETH ROBINSON, MAGISTRATE DISTRICT 4,
HILMAN DOTSON, MAGISTRATE DISTRICT 5,
BOBBY VARNEY, MAGISTRATE DISTRICT 6,
INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITY AS MAGISTRATES OF PIKE COUNTY FISCAL COURT;
AND PIKE COUNTY FISCAL COURT CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

JONES, JUDGE: The Pike County Fiscal Court; Pike County Jailer Brian Morris; Pike County Fiscal Court Personnel Director Justin Maynard; Pike County Judge Executive William M. Deskins; and Pike County Magistrates Jeff Anderson, Charlie Compton, Leo Murphy, Kenneth Robinson, Hilman Dotson, and Bobby

Varney (collectively referred to herein as the "Pike County Appellants") appeal from the Pike Circuit Court's order denying their motion to dismiss the claims filed against them by Appellee, Collene Chaney. The Appellee, Collene Chaney, cross-appeals the trial court's order dismissing her claims against R&K Drug Testing Co., LLC ("R&K Drug Testing"). After having reviewed the record in conjunction with all applicable legal authority, we hold the trial court erred in failing to dismiss Chaney's claims against the Pike County Fiscal Court as well as her official capacity claims against the other Pike County Appellants as those claims are barred by sovereign immunity.[1] We cannot review the Pike County Appellants' other arguments or Chaney's cross-appeal because the underlying order, which did not dispose of all the claims and parties, lacks finality language.

I. BACKGROUND

Collene Chaney filed the underlying action on May 17, 2018, in Pike County Circuit Court asserting claims of political retaliation by R&K Drug Testing Co., LLC; the Pike County Fiscal Court; and various Pike County employees and officials. In her complaint, Chaney alleged that, due to her outspoken support of a

[1] The Pike County Appellants' motion to dismiss sought dismissal of Chaney's claims against the Pike County Fiscal Court as well as her official capacity claims against the other defendants on the basis of sovereign immunity. The motion did not address Chaney's individual capacity claims. Our review is confined accordingly. Nothing in this opinion should be read as expressing an opinion on the validity of the individual capacity claims, and on remand the Pike County Appellants are free to move for dismissal or summary judgment of the individual capacity claims based on qualified governmental immunity.

candidate other than the then-current Jailer Brian Morris, she was subjected to unfair drug and alcohol testing procedures and her position as a Pike County Fiscal Court employee was threatened.

Chaney was first hired by the Pike County Fiscal Court as an executive secretary in 2007. She was transferred to the Road Department as office manager in 2009 and currently remains employed at the Pike County Fiscal Court. At the time she was first hired, Chaney received and signed a copy of the Pike County Fiscal Court Policy on a drug free workplace. By signing the policy, Chaney agreed to submit to random drug and alcohol testing as part of her employment.

At some unspecified point in time, Chaney was subjected to a random drug screening test. Although the drug and alcohol policy allowed for random testing, Chaney claims that, prior to her own testing, random drug testing had not been used at her workplace for over four years. According to Chaney, she and her husband openly supported a political opponent of Jailer Morris. Chaney alleges after her support of Jailer Morris's opponent became known, Jailer Morris and Justin Maynard, the Pike County Fiscal Court Personnel Director, discussed the need to drug test county employees, including Chaney. Pike County Judge

Executive William M. Deskins approved Jailer Morris and Personnel Director Maynard's request to begin drug testing county employees.[2]

Chaney was then subjected to a drug screening test. The test was performed by R&K Drug Testing. Chaney believes she was tested as punishment for her support of Jailer Morris's opponent. The results of the drug screen are not part of the record before us. However, the parties agree that no formal action was taken against Chaney as a result of her drug test. She was not disciplined, demoted, or otherwise reprimanded in any way. She remains employed by the Pike County Fiscal Court. Despite this, Chaney claims that her employment was threatened by "unfair drug testing procedures." To this end, Chaney alleges that the various Pike County officials acted in concert with R&K Drug Testing to engage in acts of wrongdoing in hopes of silencing Chaney's support of Jailer Morris's opponent and to punish her by threatening her livelihood.

On June 28, 2018, the Pike County Appellants filed a motion to dismiss arguing that they were immune from suit and that Chaney's complaint failed as a matter of law to establish a cognizable political retaliation claim for which the court could grant relief under any set of facts. Furthermore, according to the Pike County Appellants, Chaney failed to offer any evidence that she was

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[2] It is not clear from the record whether other employees in addition to Chaney were also drug tested during the relevant time period.

subjected to an adverse employment action or deprived of some employment benefit because of her drug test. R&K Drug Testing filed a separate motion to dismiss asserting that Chaney had failed to allege any cognizable claims against it.

Chaney filed a single response to both motions to dismiss. She argued that the Pike County Appellants were not entitled to blanket immunity by way of sovereign or governmental immunity and requested time to engage in discovery to substantiate her claims and overcome their claims of immunity. She further maintained that she had presented the trial court with a claim upon which relief could be granted, because the "unfair drug-testing policy" and subsequent testing constituted an adverse employment action against her.

After entertaining arguments, the trial court granted R&K Drug Testing's motion to dismiss and dismissed Chaney's claims against the testing company "with prejudice." The trial court overruled the Pike County Appellants' motion to dismiss without explanation.

The Pike County Appellants immediately appealed the denial of their motion to dismiss. Chaney filed a cross-appeal as related to the trial court's order granting R&K Drug Testing's motion to dismiss.

II. ANALYSIS

A. The Pike County Appellants: Appeal No. 2018-CA-001468-MR

Before examining the substance of the Pike County Appellants' various assignments of error, we must clarify the scope of our review. In addition to their assignments of error concerning the trial court's failure to grant relief on their claims of sovereign/governmental immunity with respect to the Pike County Fiscal Court and Chaney's official capacity claims, the Pike County Appellants also raise arguments concerning their entitlement to immunity in their individual capacities, as well as the trial court's failure to grant them relief on their arguments that Chaney's complaint failed to state any cognizable claims against them as a matter of law.

This Court has jurisdiction of interlocutory appeals concerning denial of a defense of immunity. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). In this instance, the trial court did not deny the Pike County Appellants' claim for qualified immunity on Chaney's individual capacity claims because the Pike County Appellants did not raise this issue before the trial court when they moved for dismissal. The Pike County Appellants' motion to dismiss was limited to whether they were entitled to immunity with respect to Chaney's official capacity claims against the county officials/employees and her claim against the Pike County Fiscal Court. They did not make any arguments to the

trial court regarding Chaney's individual capacity claims. Appellants may not ordinarily raise new arguments for the first time on appeal. *Commonwealth v. Jones*, 217 S.W.3d 190, 199 (Ky. 2006). While the Pike County Appellants are free to bring this issue before the trial court's attention on remand, we cannot review the individual capacity claims at this juncture.

In addition to the immunity claims, the Pike County Appellants argue that the trial court also erred when it did not dismiss Chaney's entire suit for failure to state any cognizable claims upon which relief could be granted to her as a matter of law. We cannot review these arguments. "[A]n appellate court reviewing an interlocutory appeal of a trial court's determination of a defendant's immunity from suit is limited to the specific issue of whether immunity was properly denied, nothing more." *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018).

Therefore, the sole issue before us is whether the trial court erred when it denied the Pike County Appellants' claim the Pike County Fiscal Court and the employees as named in their official capacities were immune from suit. We review this issue *de novo*, as the question "of whether a defendant is entitled to the defense of sovereign or governmental immunity is a question of law." *University of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017) (citations omitted).

Sovereign immunity originates "from the common law of England and was embraced by our courts at an early stage in our nation's history. It is an inherent attribute of a sovereign state that 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 (Ky. 2001) (citations omitted). Policy dictates that issues of sovereign immunity are immediately appealable in order to avoid potentially futile litigation against the government. Our Supreme Court has provided:

> The rationale for absolute immunity for the performance of legislative, judicial and prosecutorial functions is not to protect those individuals from liability for their own unjustifiable conduct, but to protect their offices against the deterrent effect of a threat of suit alleging improper motives where there has been no more than a mistake or a disagreement on the part of the complaining party with the decision made.

Id. at 518 (citation omitted). The Court further explained: "[S]uch an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action." *Prater*, 292 S.W.3d at 886.

Under Section 231 of the Kentucky Constitution, "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth[,]" thus allowing the General Assembly to waive the Commonwealth's immunity at will. *Benningfield v. Fields*, 584 S.W.3d

731, 736 (Ky. 2019). Thus, the Kentucky Constitution recognizes the state's sovereign immunity from tort actions and establishes that only the General Assembly may waive immunity from suit. KY. CONST. § 231. However, our Supreme Court has explicitly provided that such waiver will only be found "where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Withers v. Univ. of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974)). "The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." *Yanero*, 65 S.W.3d at 518 (citations omitted).

It is longstanding Kentucky law that counties are political subdivisions of the state authorized by the Constitution and are thereby clothed with immunity from tort liability. *Cullinan v. Jefferson Co.*, 418 S.W.2d 407, 408 (Ky. 1967), *overruled on other grounds by Yanero*, 65 S.W.3d 510; KY. CONST. §§ 63, 144. The Supreme Court held in *Franklin County v. Malone*, 957 S.W.2d 195 (Ky. 1997), *overruled on other grounds by Commonwealth v. Harris*, 59 S.W.3d 896 (Ky. 2001), and *Yanero*, 65 S.W.3d 510, that "a county . . . is an arm of state government protected by the same sovereign immunity as the state." Therefore, it

follows that the county is also immune from liability in the absence of any waiver. *Id*. at 204.

Kentucky law clearly establishes that Pike County Fiscal Court, as a county entity, is entitled to sovereign immunity as an arm of the state. *Benningfield*, 584 S.W.3d at 737. Chaney has not alleged any explicit or implicit waiver of the Pike County Fiscal Court's immunity. Her complaint before the trial court is devoid of any constitutional or 42 U.S.C.[3] §1983 claims and failed to raise any claims that might give rise to implicit waiver of immunity. We therefore hold that the trial court was incorrect in denying the Pike County Fiscal Court's motion to dismiss.

Governmental immunity is "a policy-derived offshoot of sovereign immunity" protecting government agencies and entities from tort liability. *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 801 (Ky. 2009); *Taylor v. Maxson*, 483 S.W.3d 852, 855 (Ky. App. 2016). Under the doctrine of government immunity, "a state agency [or entity] is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Yanero*, 65 S.W.3d at 519 (footnote and citation omitted). A suit against a governmental official in his or her "official capacity is the equivalent of a suit against the governmental entity." *Matthews v.*

[3] United States Code.

Jones, 35 F.3d 1046, 1049 (6th Cir. 1994) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68, 109 S.Ct. 2304, 2310-11, 105 L.Ed.2d 45 (1989)). Our Supreme Court further clarified in *Yanero*: "[W]hen an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled[.]" *Yanero*, 65 S.W.3d at 522. Furthermore, our Court has previously held that "[a]ny action against fiscal Court members in their official capacities is essentially an action against the county" that is generally barred by immunity. *Edmonson County v. French*, 394 S.W.3d 410, 414 (Ky. App. 2013) (citations omitted).

We have already established that the Pike County Fiscal Court is entitled to immunity from suit. Under *Yanero* and *Edmonson*, it follows that the Pike County Appellants are also immune, in their official capacities. Accordingly, the trial court erred when it refused to dismiss Chaney's official capacity claims.

B. Chaney's Cross-Appeal: Appeal No. 2018-CA-001652-MR

Chaney contends in her cross-appeal that the trial court erroneously granted R&K Drug Testing's motion to dismiss for failure to state a claim and appeals its dismissal from her case.[4] However, we cannot address the substance of

[4] In her appeal, Chaney includes an affidavit containing "more specific information pertaining to the relationship between the owners and/or employees of R&K [sic] and the Pike County defendants . . . and the conspiracy between [them]," which further discusses the familial

Chaney's cross-appeal, as we only have the authority to review cases that fall within our jurisdiction.

"It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined." *Wilson v, Russell*, 162 S.W.3d 911, 913 (Ky. 2005). We are required to "raise the issue of want of jurisdiction if the order appealed from lacks finality" regardless of whether any party to this appeal has raised this question. *Huff v. Wood-Mosaic Corp.*, 454 S.W.2d 705, 706 (Ky. 1970) (citation omitted); *Francis v. Crounse Corp.*, 98 S.W.3d 62, 64 (Ky. App. 2002).

With very limited exceptions, none of which is applicable here, this Court has jurisdiction to review only final judgments. "A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR 54.01. CR 54.02 provides, in part:

> (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are

relationships between the parties and the conspiracy between R&K and the Pike County defendants. Cross-Appellant's Br. at 3-4. In our review, we will not consider this affidavit, as instructed by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(vii), which clearly provides that "materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." We will not consider evidence the trial court had no opportunity to examine. *Kindred Nursing Centers Ltd. Partnership v. Leffew*, 398 S.W.3d 463, 468 (Ky. App. 2013).

> involved, *the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay*. The judgment shall recite such determination and shall recite that the judgment is final. *In the absence of such recital, any order or other form of decision*, however designated, *which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action* as to any of the claims or parties, and *the order or other form of decision is interlocutory* and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
>
> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

CR 54.02 (emphasis added).

Thus, a threshold requirement for reviewing a dismissal is that it must be rendered in a final, appealable order. If an order adjudicates less than all the claims in an action, it is "merely interlocutory, unless the order recites that there is no just reason for delay and that the order is final as to the particular claim . . . ." *Vance v. King*, 322 S.W.2d 485, 487 (Ky. 1959) (citations omitted).

This action is one in which there are multiple parties, and so the provisions of CR 54.02 are applicable. The trial court's October 1, 2018 order states as follows: "IT IS HEREBY ORDERED that the Defendant, R&K Drug Testing Co., LLC's Motion to Dismiss is GRANTED. Plaintiff's action against

Defendant, R& K [sic] Drug Testing Co., LLC is hereby DISMISSED with prejudice." The order does not contain the "magic language" of CR 54.02 as it lacked any recitation that the judgment was final or that there was no just reason for delay in its entry. *See Francis*, 98 S.W.3d at 64; *Vance*, 322 S.W.2d at 487 (holding that an order cannot be considered final if there is no recitation in the order that it is final or that there is no just reason for delay). As such, we cannot review the dismissal of Chaney's claims against R&K Drug Testing at this time.

III. CONCLUSION

For the reasons set forth above, we REVERSE the trial court's order insomuch as it denied immunity to the Pike County Fiscal Court and to Brian Morris, Jailer of Pike County; Justin Maynard, Personnel Director of the Pike County Fiscal Court; William Deskins, Judge Executive of the Pike County Fiscal Court; and Jeff Anderson, Charlie Compton, Leo Murphy, Kenneth Robinson, Hilman Dotson, and Bobby Varney, Magistrates of the Pike County Fiscal Court, in their official capacities. We decline to rule on the remaining issues as they are not properly before us at this time, and therefore REMAND the remaining claims to the trial court for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANTS/CROSS-APPELLEES:

Jonathan C. Shaw
Pikeville, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT COLLENE CHANEY:

Glenn M. Hammond
J. Casey Smith
Pikeville Kentucky

BRIEF FOR CROSS-APPELLEE R&K DRUG TESTING CO., LLC:

Donald L. Jones
Paintsville, Kentucky