

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-1810-MR

ANGELA GAETA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 17-CI-003972

LOUISVILLE METRO POLICE
DEPARTMENT AND LOUISVILLE
JEFFERSON COUNTY METRO
GOVERNMENT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, McNEILL, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Angela Gaeta (formerly Jane Doe II)¹ has appealed from the November 26, 2019, order of the Jefferson Circuit Court dismissing her claims

¹ The notice of appeal incorrectly refers to Gaeta as Jane Doe VI.

against Louisville Jefferson County Metro Government (“Louisville Metro”) and Louisville Metro Police Department (“LMPD”) (collectively, “Metro”) on the basis of sovereign immunity.² We affirm.

The underlying action is one of several filed by different women³ seeking damages against Metro as well as former LMPD officer Pablo Cano, individually and in his official capacity, as a result of allegations that Cano had sexually abused or raped them while in a position of authority. In her complaint, filed on July 31, 2017, Gaeta alleged that she had been the victim of rape and sexual abuse by Cano in December 2016, while he was employed by Metro and was carrying his LMPD badge and gun. By his engaging in rape and sexual misconduct, she alleged that Cano had committed the intentional torts of assault and battery, as well as the intentional infliction of emotional distress. Gaeta alleged that Cano was liable under Kentucky Revised Statutes (KRS) 413.2485 and 510.040(1)(a), as was Metro, as Cano was its employee. She alleged that Metro had a duty to properly supervise its employees to prevent rape and sexual abuse by officers and to charge them with crimes, and that the offenses resulted from Metro’s failure to employ qualified people for positions of authority, to properly

² This panel is also considering the appeals in *Jane Doe V v. Louisville Metro Police Department and Louisville Jefferson County Metro Government*, Appeal No. 2019-CA-0210-MR, and *Jane Doe v. Louisville/Jefferson County Metro Government*, Appeal No. 2020-CA-0060-MR.

³ The other plaintiffs are still referred to as “Jane Doe” along with a Roman numeral denoting the order of the filing of the separate lawsuits.

train and supervise their conduct, and to promulgate appropriate operating policies and procedures to protect citizens. Accordingly, Gaeta alleged liability on Metro's part for the negligent hiring, training, and supervision of Cano. She sought compensatory and punitive damages from Cano and Metro.

Gaeta filed an amended complaint in late August 2017. In this pleading, she sought to clarify that she had named the Metro defendants to determine whether Cano was entitled to indemnification pursuant to the Claims Against Local Governments Act, KRS 65.200, *et seq.* (CALGA), for any settlement or judgment she might obtain.

Shortly after the original complaint was filed, Metro moved to be dismissed from the action for failure to state a claim pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), on the basis of sovereign immunity for Louisville Metro and because LMPD was not an entity capable of being sued. Metro renewed its motion to dismiss in October 2018. In response, Gaeta argued that because she had sought a declaration of rights pursuant to KRS 418.040 as to whether Metro had a statutory obligation to indemnify Cano in the event of a settlement or judgment, sovereign immunity did not bar her claim against Metro. She cited to *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 838-40 (Ky. 2013), in support of this argument. In reply, Metro argued that Gaeta had not sought a declaratory judgment in her complaint and that, therefore, this issue was

not properly before the court. In August 2019, Metro filed a motion to dismiss Gaeta's amended complaint, incorporating by reference the arguments in its previously filed renewed motion to dismiss and supplemental memorandum.

The court held a hearing on Metro's motion to dismiss in November 2019, during which Metro argued that it had not waived immunity for Gaeta's tort claims and that it was not a necessary party to determine whether Cano would be entitled to indemnification for purposes of this case. Therefore, dismissal was appropriate. Gaeta suggested that the motion be tabled to wait for resolution of the other cases that were on appeal on the same issue. In an order entered November 26, 2019, the circuit court granted Metro's motion to dismiss,⁴ finding that Metro was protected by the doctrine of sovereign immunity and dismissing Gaeta's liability claims against Metro. This appeal now follows.⁵

On appeal, Gaeta asserts that the circuit court should not have dismissed Metro from the suit based upon her arguments that CALGA constituted a waiver of sovereign immunity in such cases. She states that the circuit court

⁴ The circuit court's order stated that it granted summary judgment to Metro. However, Metro was seeking a dismissal pursuant to CR 12.02(f).

⁵ By order entered June 17, 2021, this Court dismissed Cano as a party and ordered that Gaeta's appeal was limited to issues relating to the government's immunity claim. Prior to his dismissal, Cano filed an appellee brief, to which Gaeta responded. As Cano is no longer a party to the appeal, we shall disregard his brief and Gaeta's reply brief filed in response. Gaeta also filed a separate reply brief to Metro's appellee brief, which we have reviewed. In addition, we note that Cano filed several dispositive motions in the underlying circuit court case. As the issues before us do not relate to those motions, we shall not mention them in this Opinion.

failed to address CALGA and did not provide any reasoning that CALGA did not apply. Metro argues that whether CALGA has any bearing in this case is not the issue. Rather, the issue is whether the circuit court properly held that sovereign immunity applied to Gaeta's direct liability claims against Metro and dismissed the governmental defendants from the lawsuit.

Our standard of review of an order granting a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to CR 12.02(f) is set forth in *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005):

A motion to dismiss should only be granted if “it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling on the motion, the allegations in “the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true.” *Gall v. Scroggy*, 725 S.W.2d 867, 868 (Ky. App. 1987). In making this decision, the trial court is not required to make any factual findings. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Therefore, “the question is purely a matter of law.” *Id.* Accordingly, the trial court’s decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

With this standard in mind, we shall review the order on appeal.

It is well-settled in Kentucky that “[a] county government is cloaked with sovereign immunity. Nor can a county, absent a legislative waiver of

immunity, be held vicariously liable in a judicial court for the ministerial acts of its agents, servants, and employees.” *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003) (citations omitted). Here, there is no question that Louisville Metro is a county government and that LMPD is one of its agencies. Therefore, both are entitled to immunity as to Gaeta’s direct liability claims against them. *See Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky 2009).

Gaeta spends the majority of her brief discussing CALGA and argues that the Act constitutes a waiver of immunity in this instance. We disagree.

KRS 65.2001(1) provides:

Every action in tort against any local government in this Commonwealth for death, personal injury or property damages proximately caused by:

- (a) Any defect or hazardous condition in public lands, buildings or other public property, including personalty;
- (b) Any act or omission of any employee, while acting within the scope of his employment or duties; or
- (c) Any act or omission of a person other than an employee for which the local government is or may be liable

shall be subject to the provisions of KRS 65.2002 to 65.2006.

As set forth in KRS 65.2005, CALGA mandates that a local government must provide a defense for an employee in a tort action and pay any judgment or settlement that results if certain requirements are met:

- (1) A local government shall provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which it has been given notice pursuant to subsection (2) of this section. The local government shall pay any judgment based thereon or any compromise or settlement of the action except as provided in subsection (3) of this section and except that a local government's responsibility under this section to indemnify an employee shall be subject to the limitations contained in KRS 65.2002.
- (2) Upon receiving service of a summons and complaint in any action in tort brought against him, an employee shall, within ten (10) days of receipt of service, give written notice of such action in tort to the executive authority of the local government.
- (3) A local government may refuse to pay a judgment or settlement in any action against an employee, or if a local government pays any claim or judgment against any employee pursuant to subsection (1) of this section, it may recover from such employee the amount of such payment and the costs to defend if:
 - (a) The employee acted or failed to act because of fraud, malice, or corruption;
 - (b) The action was outside the actual or apparent scope of his employment;
 - (c) The employee willfully failed or refused to assist the defense of the cause of action,

including the failure to give notice to the executive authority of the local government pursuant to subsection (2) of this section;

- (d) The employee compromised or settled the claim without the approval of the governing body of the local government; or
- (e) The employee obtained private counsel without the consent of the local government, in which case, the local government may also refuse to pay any legal fees incurred by the employee.

The Supreme Court addressed CALGA in *Richardson v. Louisville/Jefferson County Metro Government*, 260 S.W.3d 777, 781 (Ky. 2008), explaining:

CALGA was enacted in part to shield public employees from the personal expense incurred in the defense of tort claims. The protections afforded by CALGA allow public employees to diligently and faithfully serve the Commonwealth without worrying about the financial burdens and other adverse consequences of civil litigation, which may stem from their civil service.

(Citations omitted.)

In *Schwindel, supra*, the Supreme Court of Kentucky addressed – and rejected – an argument that CALGA constituted a waiver of immunity in the context of a vicarious liability claim against a county. It analyzed the statutory language in KRS 65.2001(2), which states:

Except as otherwise specifically provided in KRS 65.2002 to 65.2006, all enacted and case-made law, substantive or procedural, concerning actions in tort against local governments shall continue in force. No

provision of KRS 65.2002 to 65.2006 shall in any way be construed to expand the existing common law concerning municipal tort liability as of July 15, 1988, nor eliminate or abrogate the defense of governmental immunity for county governments.

The *Schwindel* Court addressed the intent of the General Assembly in enacting CALGA, holding:

[T]he legislative intent was not to waive any immunity enjoyed by any local government but to specify what damages could be obtained against local governments that are subject to common law judgments and what obligation a local government has to provide a defense for and pay judgments rendered against its employees for the tortious performance of their ministerial duties.

113 S.W.3d at 163. The Court explained this holding, stating:

Nothing in [KRS 65.2005] purports to waive a county government's immunity from suit or from a judgment against itself premised upon vicarious liability. However, it does require a county government, subject to the limitations contained in KRS 65.2002 and the exceptions enumerated in KRS 65.2005(3), to provide a defense for and pay any judgment rendered against a county employee for damages arising out of the performance of a ministerial act. In this case, the original complaint did not seek a judgment against any county employee but only sought to hold the county vicariously liable for the negligence of its unnamed agents, servants, or employees. Thus, KRS 65.2005 has no application to the damages sought in the original complaint. And even if Meade County could have been required to pay a judgment rendered against its employees, no judgment could be entered against the county, itself[.]

Id. at 167-68.

We agree with Metro that whether CALGA requires it to indemnify Cano for any damages Gaeta may be awarded has nothing to do with whether it is entitled to immunity for Gaeta's direct liability claims, nor does it prevent dismissal in this instance. The circuit court did not commit any error in holding that the doctrine of sovereign immunity applies to Metro in this case or in dismissing Gaeta's direct liability claims against it.

For the foregoing reasons, the order of the Jefferson Circuit Court dismissing Gaeta's claims against Louisville Metro Police Department and Louisville Jefferson County Metro Government is affirmed.

ALL CONCUR.

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