

RENDERED: JANUARY 6, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001933-MR

MERCER COUNTY FISCAL COURT
AND BILLY HUMPHREY

APPELLANTS

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 08-CI-00168

KAREN DEAN; KENNETH DEAN;
AND MICHAEL E. SCULL

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: Mercer County Fiscal Court and Billy Humphrey, Road

Supervisor of the Mercer County Road Department, appeal from the denial of their

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

motion for summary judgment against the Appellees Karen Dean and Kenneth Dean and from the dismissal of their third-party complaint against the Appellee Michael Scull. On appeal, Mercer County and Billy Humphrey argue that they should have been granted summary judgment against the Deans on the basis of immunity and that their complaint against Scull should not have been dismissed because they are entitled to indemnity.

On August 12, 2006, the Deans were riding on a motorcycle down Warwick Road in Mercer County, Kentucky. As they approached the intersection of Warwick Road and Mundy's Landing Road, their motorcycle collided with a pick-up truck driven by Scull and the Deans were seriously injured. The facts are contested as to whether Scull veered into the Deans' lane, whether the Deans failed to stop at the stop sign, whether the Deans veered into Scull's lane, or whether both Scull and the Deans failed to keep to the right as they passed one another. An accident reconstructionist for Scull's insurer issued a report noting that the stop sign was placed on the opposite side of the intersection instead of the right-hand side of the roadway and that the intersection lacked pavement markings.

After the accident, the Deans reached a settlement agreement with Scull and his insurer, reserving all possible claims against other negligent parties. The settlement stated that the Deans agreed to indemnify and hold Scull harmless from any and all future claims relating to the crash.

Following the settlement of their claims against Scull, the Deans sued Mercer County and Billy Humphrey (in his official capacity) in the Mercer Circuit

Court. The complaint alleged that Mercer County and Billy Humphrey were negligent in the location and placement of the stop sign and/or in failing to provide pavement markings at the intersection of Warwick and Mundy's Landing.

Thereafter, Mercer County and Billy Humphrey filed a third-party complaint against Scull seeking indemnity and/or contribution. The trial court dismissed the third-party complaint against Scull upon Scull's motion.

Mercer County and Billy Humphrey then filed a motion to alter, amend or vacate, and the trial court entered a new order which again dismissed Scull as a party under the terms of the release.

Mercer County and Billy Humphrey also filed a motion for summary judgment on the grounds that the claims against them were precluded by immunity. The trial court denied the motion for summary judgment on October 1, 2009.

Mercer County and Billy Humphrey now appeal from both of these orders. On appeal, Mercer County and Billy Humphrey argue that they are entitled to the protection of sovereign immunity, governmental immunity, and official immunity in regards to the placement of the stop sign and absent pavement markings. In the alternative, Mercer County and Billy Humphrey allege there is no evidence that the location of the stop sign and lack of pavement markings caused the wreck. Mercer County also appeals from the dismissal of its third-party complaint seeking indemnification from Scull.

Upon review, we find that summary judgment was improperly denied to Mercer County and Billy Humphrey because they are immune from suit. This

Court has jurisdiction to consider the present appeal because the appellate courts of Kentucky have jurisdiction to consider appeals from interlocutory orders denying motions for dismissal or summary judgment where such motions are premised on the movant's claim of absolute immunity. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). This is because "immunity entitles its possessor to be free 'from the burdens of defending the action, not merely . . . from liability.'" *Id.*, quoting *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). As we hold that the present action must be dismissed on immunity grounds, we decline to address the remaining issues raised on appeal as moot.

"[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." *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (footnote omitted). The erection and maintenance of the State's road signs is a governmental function. *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841 (Ky. App. 2003).

Indeed, this Court has previously held that county governments are protected by governmental immunity against claims of negligence with respect to the erection or maintenance of signs on the State's roadways. *Estate of Clark*, 105 S.W.3d at 844. Thus, Mercer County is entitled to summary judgment on the basis of governmental immunity.

We now turn to the question of whether Billy Humphrey, sued in his official capacity as the Mercer County Road Supervisor, is also entitled to immunity. The analysis is different when it is a state employee that is being sued

instead of a county or state agency. If an employee is sued in his or her official capacity, then he or she enjoys official immunity so long as the acts in question were performed in the exercise of his or her governmental function. *Yanero*, 65 S.W.3d at 521; *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011). However, if the employee is sued individually, rather than in their official capacity, then he or she only enjoys qualified official immunity if the act in question was discretionary in nature, was taken in good faith, and was within the scope of their employment.² *Id.*

In the present case, Billy Humphrey enjoys official immunity. Indeed, when an officer or employee of a governmental agency is sued in his or her representative capacity, their “actions are afforded the same immunity, . . . to which the agency, itself, would be entitled[.]” *Yanero*, 65 S.W.3d at 522. Thus, as Mercer County is entitled to the protection of governmental immunity, so is Billy Humphrey in his official capacity as the county road supervisor. Because he was not sued individually, we need not even address the issue of whether the location and placement of a stop sign is a discretionary act. *Id.*

As both Mercer County and Billy Humphrey are cloaked with immunity, the circuit court is not the proper forum for the action.³ Rather, the proper forum for any claims the Deans may have against Mercer County and Billy

² In contrast, an employee is not immune from suit for the negligent performance of a ministerial act.

³ Nevertheless, we do not find fault with the Deans’ choice of filing in the circuit court. As the Kentucky Supreme Court recently acknowledged in *Nelson County Bd. of Educ.*, 337 S.W.3d at 622, “the soundest course [when in doubt] is to commence the action in circuit court[.]” and let the courts decide whether jurisdiction lies with the courts or the Board of Claims.

Humphrey is the Board of Claims. *Nelson County Bd. of Educ.*, 337 S.W.3d at 621. Thus, the Deans are not left without remedy. As was recently acknowledged in *Nelson County Bd. of Educ.*, the savings statute will operate to allow the timely filing of their claims within the Board of Claims after the dismissal of the present action by the circuit court. *Id.* at 624; KRS 413.270.

Hence, we reverse and remand to the trial court with instructions for the court to dismiss the action with prejudice. As we are reversing for a dismissal of the action with prejudice, we need not address the issues raised on appeal by Mercer County regarding causation and the dismissal of the third-party complaint against Scull.

It is so ordered.

ALL CONCUR.

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