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DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
OCTOBER 24, 2007

(2007-SC-0517-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001142-MR

GREEN'S MOTORCYCLE
SALVAGE, INC.; ORVILLE GREEN;
AND CATHERINE GREEN

APPELLANTS

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 05-CI-00480

CANEYVILLE VOLUNTEER FIRE
DEPARTMENT; CITY OF CANEYVILLE;
AND ANTHONY CLARK

APPELLEES

OPINION REVERSING AND REMANDING

** ** * ** * **

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BUCKINGHAM, SENIOR JUDGE: Orville Green, Catherine Green, and Green's Motorcycle Salvage, Inc., appeal from an order of the Grayson Circuit Court dismissing their negligence lawsuit against the City of Caneyville, Caneyville Volunteer Fire Department (CVFD), and CVFD Fire Chief Anthony Clark pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f). The circuit court determined that the defendants were immune from the lawsuit pursuant to the doctrine of sovereign immunity as purportedly conferred upon fire departments and firefighters by Kentucky Revised Statute (KRS) 75.070.

Based upon the holdings in *Happy v. Erwin*, 330 S.W.2d 412 (Ky. 1959), and *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1965), and our conclusion that CVFD is not an arm of either Grayson County or central state government, we conclude that KRS 75.070 is unconstitutional insofar as it purports to confer sovereign immunity upon the City of Caneyville, CVFD, and/or Fire Chief Clark. However, we further conclude that firefighters do have qualified official immunity as described in *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky.App. 1992). Because it is unclear from the pleadings whether Clark is entitled to official immunity under the circumstances of this case, and because the City and CVFD's liability is dependent upon Clark's liability, we reverse the circuit court's award of judgment upon the pleadings as to all defendants and remand for further proceedings in the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Greens are the owners and operators of a motorcycle salvage business, Green's Motorcycle Salvage, located in Millwood, Kentucky. On December 3, 2003, the salvage business building caught fire. CVFD responded to the call and attempted, unsuccessfully, to extinguish the fire. Most of the building's contents, including motorcycles, parts, and equipment, were destroyed.

The Greens had insured their building and certain items of personal property against fire loss, and those claims were settled with their insurance carrier. The remainder of the destroyed property was not insured against loss or damage.

On December 2, 2005, the appellants filed a civil complaint in the Grayson Circuit Court, naming the appellees as defendants. The complaint alleged that the fire department “by its negligent acts and omissions and the negligent acts and omissions of its Chief, Anthony Clark, failed to expeditiously extinguish the fire, which resulted in an increased loss of real property and personal property owned and possessed by the Plaintiffs.” The complaint identified CVFD as “an agency of the City of Caneyville” and, thus, a municipal fire department.

The complaint also challenged the constitutionality of KRS 75.070 and KRS 95.830(2).² KRS 95.830(2) purports to confer absolute immunity upon cities and their employees for negligent conduct committed in the course of firefighting activities.

² The appellants further challenged the constitutionality of KRS 75.020. That statute, however, does not appear to have relevance to the issues presented in the appellants' complaint, and it is not discussed in the briefs. Nor did the circuit court address the statute in its decision. We do not further address the constitutionality of KRS 75.020.

KRS 75.070 purports to confer absolute immunity upon fire departments and fire fighters for such negligent conduct.³

On December 29, 2005, the defendants filed a motion seeking dismissal of the claim pursuant to CR 12.02(f) for failure to state a claim upon which relief can be granted. The motion alleged that the defendants were immune from the claims alleged by the plaintiffs pursuant to KRS 75.070.

On May 11, 2006, the circuit court issued an order granting the defendants' motion to dismiss.⁴ The court determined that the defendants had immunity from the claims presented by the plaintiffs pursuant to KRS 75.070 on the basis that the statute conferred the appellees with sovereign immunity. The court also determined that KRS 75.070 is constitutional. This appeal followed.

STANDARD OF REVIEW

We begin our discussion by setting forth our standard of review. The circuit court should not grant a motion for dismissal under CR 12.02(f) :

unless 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. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

³ The plaintiffs notified the Attorney General of the constitutional challenge pursuant to CR 24.03; however, the Attorney General has declined to participate in the proceedings.

⁴ The order was entered by the circuit court clerk on May 15, 2006.

James v. Wilson, 95 S.W.3d 875, 883-884 (Ky.App. 2002) (internal quotation omitted).

Because determining whether a complaint should be dismissed under this rule is a matter of law, our review is de novo. *Id.*; *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (questions of law are reviewed de novo on appeal).

KRS 95.830(2)

In their complaint the appellants challenged the constitutionality of KRS 95.830(2). In granting judgment upon the pleadings, the circuit court did not rely upon KRS 95.830(2). Further, the statute was not addressed as a principal issue upon appeal. However, the background of this statute is important to our review of KRS 75.070, and we accordingly begin with a discussion of KRS 95.830(2).

In 1959, the former Court of Appeals in *Happy v. Erwin* addressed an earlier and similar version of KRS 95.830(2), which purported to confer absolute immunity upon municipalities and their firefighters for damages caused in connection with the use of a firefighting apparatus outside the city.⁵ The former version of the statute stated as follows:

Neither the city nor its officers or employees shall be liable in any manner on account of the use of the [firefighting] apparatus at any point outside of the corporate limits of the city. The [firefighting] apparatus shall be deemed to be employed in the exercise of a governmental function of the city.

⁵ The decision noted that whether the firefighting was done inside or outside of the city was irrelevant to constitutionality issues, and we adopt that view in our discussions of both KRS 95.830 and KRS 75.070.

The *Happy* case held that KRS 95.830(2) was unconstitutional insofar as the statute granted absolute immunity to municipal firefighters in their personal capacity.⁶ The court concluded that the statute violated Sections 14⁷ and 54⁸ of the Kentucky Constitution and that it would violate Section 241⁹ if death were involved. Quoting *Ludwig v. Johnson*, 243 Ky. 533, 534, 49 S.W.2d 347, 351 (1932), the *Happy* decision stated, “[i]t was the manifest purpose of the framers of that instrument (the Constitution) to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for his injury.” *Happy* at 414.

At the time *Happy* was rendered, municipalities had sovereign immunity. Thus, the essential holding of *Happy* is that under the Kentucky Constitution, even if their employer has sovereign immunity, firefighters may not be conferred with immunity

⁶ The decision did not address official capacity liability; however, because municipalities had sovereign immunity at the time *Happy* was rendered, it appears that a municipal firefighter would have been protected by sovereign immunity to the extent he was sued in his official capacity.

⁷ Section 14 provides as follows: “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

⁸ Section 54 provides as follows: “The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.”

⁹ Section 241 provides as follows: “Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.”

in their personal capacity for negligent conduct committed during their firefighting duties.

The present version of KRS 95.830(2) states as follows:

The city shall not be liable in any manner on account of the use of the apparatus at any point outside of the corporate limits of the city. The apparatus shall be deemed to be employed in the exercise of a governmental function of the city.

This version of the statute is identical to the former version of KRS 95.830(2) except that it limits the immunity granted to cities only. However, it is now well settled that municipal corporations, such as the City of Caneyville, are not protected by immunity from ordinary tort liability under the doctrine of sovereign immunity except in situations involving “the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions.” *Haney v. City of Lexington*, 386 S.W.2d 738, 742 (Ky. 1965). *See also Gas Service Co., Inc. v. City of London*, 687 S.W.2d 144 (Ky. 1985); *Bolden v. City of Covington*, 803 S.W.2d 577 (Ky. 1991); and KRS 65.2003. Firefighting does not involve “the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions.” As such, although the issue is not squarely before us, we believe the present version of the statute is unconstitutional to the extent that it attempts to confer sovereign immunity to municipalities and, by extension, to municipal firefighters.

KRS 75.070

The circuit court determined that KRS 75.070 is constitutional and confers sovereign immunity upon all of the defendants. We next consider whether KRS 75.070

is constitutional insofar as it purports to confer sovereign immunity to the City of Caneyville, CVFD, and/or Fire Chief Clark. KRS 75.070 provides as follows:

(1) A municipal fire department, fire protection district fire department, and volunteer fire department and the personnel of each, answering any fire alarms, performing fire prevention services, or other duly authorized emergency services inside and outside of the corporate limits of its municipality, fire protection district, or area normally served by a volunteer fire department, shall be considered an agent of the Commonwealth of Kentucky, and acting solely and alone in a governmental capacity, and such municipality, fire protection district, or area normally served by a volunteer fire department, shall not be liable in damages for any omission or act of commission or negligence while answering an alarm, performing fire prevention services, or other duly authorized emergency services.

(2) No municipal fire department, fire protection district fire department or volunteer fire department answering any fire alarms, performing fire prevention services or volunteer fire department services inside the corporate limits of the district shall be liable in damages for any omission or act of commission or negligence while answering or returning from any fire or reported fire, or doing or performing any fire prevention work under and by virtue of this chapter and said fire departments shall be considered agents of the Commonwealth of Kentucky, and acting solely and alone in a governmental capacity.

We construe KRS 75.070, first enacted in 1964, as attempting to, in effect, restore the protections held unconstitutional in the *Happy* decision: absolute immunity to fire departments and firefighters for damages caused by negligent conduct committed in the course of firefighting duties. However,

the General Assembly has no power to extend sovereign immunity beyond the limits of the area constitutionally protected by § 231. When it attempts to do so, it is in

violation of the rights preserved to our citizens under §§ 14, 54 and 241.

Kentucky Center for the Arts Corp. v. Berns, 801 S.W.2d 327, 329 (Ky. 1990). “Where sovereign immunity exists by reason of the constitution, the General Assembly may extend or limit waiver as it sees fit, but where no constitutionally protected sovereign immunity exists the General Assembly cannot by statute create it.” *Id.*

As it has been previously determined by the court in *Happy v. Erwin* that the legislature may not confer municipal firefighters with absolute immunity under the pretext of sovereign immunity, to the extent that KRS 75.070 attempts to confer such immunity to firefighters, it is unconstitutional. Moreover, to the extent that the statute attempts to confer sovereign immunity to municipal fire departments, it is likewise unconstitutional. *Haney, supra.*

Lastly, we conclude that to the extent that KRS 75.070 purports to confer sovereign immunity to fire departments in general, it is unconstitutional. “The doctrine of sovereign immunity . . . shields, inter alia, counties . . . and all 'departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure.’” *Department of Corrections v. Furr*, 23 S.W.3d 615, 617 (Ky. 2000) (footnotes omitted). The statutory methods for creating fire departments are contained, generally, in KRS Chapter 75. Upon our review of the various methods of creating fire departments in Kentucky, we can ascertain no method which provides that a fire department may be established as part of a cabinet, department, agency, or division of central state government or of a county government.

As such, to the extent that KRS 75.070 purports to confer fire departments in general with sovereign immunity, it is unconstitutional.

In summary, the circuit court erred in holding that the City of Caneyville, CVFD, and Fire Chief Clark have sovereign immunity under KRS 75.070. To the extent KRS 75.070 purports to confer them with such, it is unconstitutional.¹⁰

DISMISSAL OF COMPLAINT AGAINST FIRE CHIEF ANTHONY CLARK

With the foregoing in mind, we next consider the circuit court's award of judgment to the three defendants. As previously noted, we construe the complaint as having named CVFD and the City liable under the doctrine of respondeat superior, and, accordingly, as alleging that any negligence assignable to them is dependent upon a finding of negligence against Clark. For that reason, we address the judgment awarded to Clark first.

The groundwork for our review of the judgment in Clark's favor has been laid by our previous discussion. As previously noted, under the holding in *Happy v. Erwin*, KRS 75.070 is unconstitutional insofar as it purports to exempt Clark from personal liability for negligence committed in connection with his firefighting duties. Also, as previously discussed, Clark does not have sovereign immunity derived from the City of Caneyville or CVFD. *Haney, supra; Furr, supra*. Accordingly, the circuit court erred in dismissing the appellants' claims against Clark under the premise that he is protected from liability under either theory.

¹⁰ Based upon the authorities cited herein, we further determine that to the extent that KRS 75.070 purports to confer any fire department established under KRS Chapter 75, or any firefighter in general, with sovereign immunity, it is unconstitutional.

Nevertheless, pursuant to the allegations contained in the complaint, Clark is an employee of CVFD which, in turn, is “an agency of the City of Caneyville.” As such, Clark is a municipal firefighter. In *Ashby v. City of Louisville*, 841 S.W.2d 184, 188 (Ky.App. 1992), this court held that municipal policemen were entitled to qualified official immunity pursuant to the Restatement (Second) of Torts § 895D(3) as adopted in *Thompson v. Huecker*, 559 S.W.2d 488 (Ky.App. 1977). We discern no reason why such official immunity should not likewise extend to municipal firefighters such as Fire Chief Clark. As such, we hold that municipal firefighters do have such immunity.¹¹ The principle is summarized in *Ashby* as follows:

In Kentucky, personal liability for a public officer's or public employee's negligent performance of duties depends in part on whether the powers or duties in question were ministerial or discretionary in nature. *Thompson v. Huecker*, Ky.App., 559 S.W.2d 488 (1977). The general rule of thumb in Kentucky, as stated in *Thompson*, *id.* at 495, is that a public officer or employee “may be personally liable for negligence or bad faith in performing *ministerial* duties” (emphasis in original), but is not subject to tort liability in certain circumstances for actions taken in the performance of discretionary duties.

Id. at 188. *See also Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) (comprehensively discussing the distinction between ministerial and discretionary duties).

The pleadings are not sufficiently specific for a determination of whether the negligence alleged in this case is based upon discretionary duties, for which Clark

¹¹ The Claims Against Local Governments Act, KRS 65.200 et. seq. defines, along with municipalities, special districts or special taxing districts as local governments. *See* KRS 65.200(3). As such, we discern no reason why firefighters for fire departments established as special district or special taxing district fire departments - which would appear to encompass all nonmunicipal fire departments - would not likewise be entitled to qualified official immunity.

would have immunity, or upon ministerial duties, for which he would not. As such, the circuit court erred in granting Clark judgment for failure to state a claim upon which relief can be granted.

DISMISSAL OF CITY OF CANYEVILLE

As previously discussed, the City has no independent immunity under the doctrine of sovereign immunity from the negligence alleged in this lawsuit.

The appellants' complaint does not specify the basis for naming the City as a defendant in this lawsuit; however, we construe its inclusion as a party as being premised upon the doctrine of respondeat superior. It is a fundamental rule under that doctrine that if the employee has no liability upon a claim, the employer likewise is without liability. *See Patterson v. Blair*, 172 S.W.3d 361, 364 (Ky. 2005). Hence, any liability attributable to the City will turn upon the liability of its employee Fire Chief Clark. As further proceedings are required to ascertain the liability of Clark, the circuit court erred by dismissing the appellants' claim against the City of Caneyville.

DISMISSAL OF CVFD

The appellants' complaint not being specific on the point, as with the City, we construe the negligence liability of the CVFD as being premised upon the doctrine of respondeat superior. For the same reasons just discussed in our review of the circuit court's dismissal of the plaintiffs claims against the City, the circuit court erred by granting CVFD judgment for failure to state a claim upon which relief can be granted.

As with the City, CVFD's exposure to liability will turn upon the liability of Fire Chief Clark.

CONCLUSION

For the foregoing reasons, the judgment of the Grayson Circuit Court is reversed, and the case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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