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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000819-MR

SANITATION DISTRICT NO. 1

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 10-CI-02847

MCCORD PLAINTIFFS

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: KELLER, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Sanitation District No. 1 brings this interlocutory appeal from February 3, 2011, and April 12, 2011, orders denying Sanitation District No. 1's motion to dismiss based upon sovereign immunity. We affirm in part, reverse in part, and remand.

Sanitation District No. 1 currently operates in the Kentucky counties of Boone, Campbell, and Kenton. Appellees are a group of homeowners who received sanitation services from Sanitation District No. 1. On two occasions, raw sewage from sanitary and storm sewers overflowed and invaded appellees' homes causing damage.

Consequently, appellees filed a complaint against, *inter alios*, Sanitation District No. 1 alleging negligence, nuisance, trespass, and inverse condemnation. Thereupon, Sanitation District No. 1 filed a motion to dismiss based upon the doctrine of sovereign or governmental immunity. By orders dated February 3, 2011, and April 12, 2011, the circuit court denied the motion to dismiss and reasoned:

[Sanitation District No. 1] is just that type of in-between entity which the Comair court test addresses. [Sanitation District No. 1] has different parent entities from which flow the different functions it has now taken under its authority. The ministerial functions of exercising reasonable care in the maintenance and repair of a sewer system such as are involved in the case currently before the court and in numerous cases, going back a century in Kentucky case law as set forth in the prior order of the court, have held not to be entitled to immunity.

This interlocutory appeal follows.¹

Sanitation District No. 1 contends that the circuit court erred by concluding that it was not entitled to sovereign or governmental immunity. For the following reasons, we believe that Sanitation District No. 1 is protected by the cloak of

¹ Our Supreme Court held that an immediate right to appeal exists from an interlocutory order denying an entity sovereign or governmental immunity. *Breathitt Co. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

sovereign immunity but only is entitled to summary judgment dismissing appellees' claim of negligence.

In its order denying Sanitation District No. 1's motion to dismiss, the circuit court specifically stated that it "reviewed the pleadings of the parties . . . and the entire record of this case." As matters outside the pleading were admittedly considered by the circuit court, our review proceeds under the summary judgment standard. *See Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958). Thereunder, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Our review proceeds accordingly.

In this Commonwealth, the law of immunity is often thought of as a quagmire defying both common sense and reasonable explanation. Our Courts have repeatedly struggled to set forth with clarity and finality the legal principles of immunity. Invariably, new legal principles of immunity are announced with the same vigor and insight of the old principles.

In 2009, our Supreme Court announced a new legal principle of immunity in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corporation*, 295 S.W.3d 91 (Ky. 2009). Therein, the Supreme Court was faced with the question of whether the Lexington-Fayette Urban County Airport Corporation, its Board, and members of the Board (collectively referred to as Airport Corporation) were entitled to immunity. The Supreme Court initially held that the state and counties

enjoy sovereign immunity but that cities, as municipal corporations, enjoy no immunity for negligent acts committed “outside the legislative and judicial realms.” *Id.* at 95. Most importantly, the Supreme Court recognized that other entities exist that are neither a city, state, nor county but are “in-between entities.” *Id.* at 95. Oftentimes, it is unclear whether these “in-between entities” are more similar to agencies of the state or of the county and entitled to immunity or are more similar to municipal corporations and enjoy no immunity. *Id.* at 95. To answer this question, the Supreme Court fashioned a new two-part analysis. Thereunder, the Court initially considered the origin of the entity and then considered whether the entity carries out an integral state function to ultimately determine the entity’s immune status. *Id.*

As to the origin of the entity, the Supreme Court explained:

This inquiry can be as simple as looking at the “parent” of the entity in question, i.e., was it created by the state or a county, or a city? This amounts to recognizing that an entity's immunity status depends to some extent on the immunity status of the parent entity. *E.g.*, [Autry, 219 S.W.3d at 719](#) (noting that an entity “derives its immunity status through” the parent entity).

Comair, 295 S.W.3d at 99. And, as to the entity’s function, the Supreme Court stated that the analysis is focused upon whether the entity performs a function integral to government. The Supreme Court particularly noted:

The focus, however, is on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties). Such concerns include, but are not limited to, police, public

education, corrections, tax collection, and public highways.

Comair, 295 S.W.3d at 99.

Ultimately, the Supreme Court held that the Airport Corporation was entitled to sovereign immunity. In so holding, the Supreme Court concluded that the Lexington-Fayette Urban County Government (Urban County Government) was the “parent” of the Airport Corporation and that the Airport Corporation constituted an “arm” of the Urban County Government.² *Id.* at 99. Then, the Supreme Court determined that the Airport Corporation’s function was to provide a “vital transportation infrastructure for . . . the Commonwealth, which is an integral function of state government.” *Id.* at 102. Consequently, the Supreme Court held that the Airport Corporation was an “arm” of the Urban County Government and was, likewise, imbued with sovereign immunity as “a direct administrative subdivision of the state[.]” *Id.* at 99.

To summarize, under the two-part analysis announced in *Comair*, a court must initially consider the origin (or parent) of the entity and then consider the functions carried out by the entity. *Id.* If the entity’s parent is immune and if the entity carries out functions integral to state government, the entity is imbued with either governmental or sovereign immunity. *Id.* However, if either is absent, the entity enjoys no immunity. *Id.* We undertake this two-part analysis to discern the immune status of Sanitation District No. 1.

² It has been established that a merged urban-county government enjoys the sovereign immunity of the county as the city ceases to exist upon merger. *Phillips v. Lexington-Fayette Urban County Gov. ’t*, 331 S.W.3d 629 (Ky. App. 2010).

A sanitation district is a creature of legislative fiat, and its genesis can be found specifically in Kentucky Revised Statutes (KRS) Chapter 220. Under KRS 220.030, a sanitation district's stated functions are to prevent pollution of streams, regulate the flow of streams for sanitary purpose, to provide for the collection or disposal of sewage and to provide for the management of onsite sewage disposal facilities. Upon the creation of a sanitation district, KRS 220.110(1) provides that such sanitation district shall be considered "a political subdivision . . . with power to sue and be sued, contract and be contracted with, incur liabilities and obligations" Under its statutory scheme, a sanitation district may include numerous cities or counties. The district is governed by a Board, and the Board members are appointed by the county judge subject to approval of the fiscal court of each county within the sanitation district's geographical confines. KRS 220.140; KRS 220.170. Also, the fiscal court of each county has specific powers to approve/disapprove land acquisitions, construction of capital improvements, service charges or user fees, and the proposed budget. KRS 220.035. The Board of a sanitation district also possesses the powers of condemnation and is endowed with authority to promulgate regulations related to the design, construction, and use of sewers. KRS 220.310; KRS 220.320.

Applying *Comair's* two-part analysis to the facts of this case, we think that Sanitation District No. 1's "parents" are the counties within its geographical confines – Boone, Campbell, and Kenton counties. *See Comair*, 295 S.W.3d 91. Clearly, the General Assembly intentionally placed powers of appointment of

Board members and powers of approval of certain actions by the Board specifically within the counties' control. By so doing, we are of the opinion that Sanitation District No. 1 qualifies as an "arm" of the counties within its geographical boundaries. *See Comair*, 295 S.W.3d 91.

As to the functions of Sanitation District No. 1, it is clear that Sanitation District No. 1 performs functions integral to state government. Providing and maintaining sewer facilities are functions of state concern and a necessary governmental function. Integral state functions are generally those that "are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties)." *Comair*, 295 S.W.3d at 99. As explained in *Comair*, to determine integral state functions, it must be recognized that the county may carry out integral functions of state government, and by extension, an arm of a county also may carry out integral state functions. *Comair*, 295 S.W.3d 91. Hence, we are of the opinion that Sanitation District No. 1, as an arm of Boone, Campbell, and Kenton counties, carries out integral functions of the state government.³

We are buttressed in our opinion by the recent Supreme Court decision in *Wilson v. City of Central City*, 372 S.W.3d 863 (Ky. 2012). Therein, the Supreme Court commented upon its past opinion in *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852 (Ky. 2008). In so doing, the

³ We also note that another panel of this Court recently held that a "water district is a state agency engaged in a governmental function." *South Woodford Water District v. Byrd*, 352 S.W.3d 340, 344 (Ky. App. 2011).

Wilson Court stated that Consolidated Infrastructure Management Authority provided clean water, sanitation, and a functioning sewer system and recognized that these functions addressed “state level governmental concerns that are common to all of the citizens of this state[.]” *Wilson*, 372 S.W.3d at 870 n.11 (quoting *Comair*, 295 S.W.3d at 99). As in *Wilson*, we, likewise, recognize that the providing and maintaining of a sewer system by Sanitation District No. 1 constitutes state level concerns that are common to all Kentucky citizens. See *Wilson*, 372 S.W.3d 863. Again, it is clear that Sanitation District No. 1 performs integral state functions. Accordingly, under the two-part analysis announced in *Comair*, we hold that Sanitation District No. 1 is an entity cloaked with sovereign immunity and that the circuit court erred by deciding otherwise. See *Comair*, 295 S.W.3d 91.

As Sanitation District No. 1 is protected by sovereign immunity, we are of the opinion that appellees’ claim of negligence is barred. However, it is well-established that sovereign immunity is no bar to a claim of inverse or reverse condemnation.⁴ And, it matters not whether the claim is based on the theories of trespass or nuisance, government action constituting a “taking” of real property creates liability for just compensation. *Commonwealth, Dept. of Highways v. Cochrane*, 397 S.W.2d 155 (Ky. 1965); *Lehman v. Williams*, 301 Ky. 729, 193

⁴ Inverse condemnation is an action instituted “against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used.” *Commonwealth, Nat. Res. & Envtl. Prot. Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984).

S.W.2d 161 (1946). *Holloway Constr. Co. v. Smith*, 683 S.W.2d 248 (Ky. 1984); *Ky. Bell Corp. v. Commonwealth*, 295 Ky. 21, 172 S.W.2d 661 (1943). Thus, appellees' claim of inverse condemnation is not barred by sovereign immunity; likewise, appellees' claims of nuisance and trespass seeking to recover for an unconstitutional taking of private property without just compensation is similarly not barred by sovereign immunity.⁵

In sum, Sanitation District No. 1 is entitled to summary judgment dismissing appellees' claim of negligence based upon sovereign immunity. Sanitation District No. 1 is not entitled to summary judgment upon appellees' claims of inverse condemnation, nuisance, and trespass.

For the foregoing reasons, the orders of the Kenton Circuit Court are affirmed in part, reversed in part, and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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⁵ While the claims of inverse condemnation, trespass, and nuisance are not barred by sovereign immunity, appellees may only recover damages upon a single claim if successful; double recovery is not permissible.