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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000676-MR

SILAS FARMER AND
LORENE FARMER — APPELLANTS

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 11-CI-00721

JOE GRIESHOP AND
COUNTY OF HARLAN, KENTUCKY — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Silas Farmer and Lorene Farmer appeal from an order of the Harlan Circuit Court dismissing their complaint for failure to state a claim pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. The circuit court ruled that Harlan County is entitled to sovereign immunity and Harlan County Judge

Executive, Joe Grieshop, was sued only in his official capacity and, therefore, entitled to the same immunity. Although we agree that Harlan County and Grieshop are entitled to sovereign immunity regarding any tort claims against them, we hold that the complaint sufficiently states a claim for reverse condemnation against Harlan County not barred by sovereign immunity.

Because the circuit court dismissed the action based on Harlan County's and Grieshop's motion to dismiss pursuant to CR 12.02 for failure to state a claim upon which relief can be granted, our focus is on the complaint. For purposes of the motion, the facts as pleaded in the complaint are admitted. *Huie v. Jones*, 362 S.W.2d 287, 288 (Ky. 1962). A court should not grant a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to CR 12.02 "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." *Pari-Mutuel Clerks' Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

In *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989), the Court recognized this Commonwealth's approach when considering a motion to dismiss under CR 12.02:

> Long ago, in 1953, we abandoned the old rules of common law pleadings and adopted modern Rules of Civil Procedure. We no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law. *See* Vol. 6 *Kentucky Practice, supra,* at p. 144. Whereas the old common law demur searched the pleadings for a reason to dismiss, now a Motion to

Dismiss is directed at the substance of the pleading.

As in *Smith*, "this case involves an issue of pleadings, not proof." *Id*. Because we are concerned only with whether the complaint states a cause of action and not liability, our decision necessarily depends on the allegations made in the complaint. *Id*.

The complaint's caption designates "Joe Grieshop and County of Harlan, Kentucky," as defendants without further language indicating whether Grieshop was named in his individual or official capacity. However, in the body it is stated that Harlan County is a governmental entity and, at all relevant times, Grieshop was the County Judge Executive of Harlan County. It also states that Harlan County, by and through its employees and/or agents, was working "at the sole and direct control and direction" of Grieshop "in his capacity as County Judge Executive of Harlan County, Kentucky."

The complaint states that the Farmers own certain real property in Harlan County and that Harlan County, at Grieshop's direction, committed "multiple acts of trespass upon the property of the [Farmers], without the consent or agreement thereto by the [Farmers]." Specifically, it is alleged that a drainage pipe placed on their property by Harlan County "resulted in an unreasonable change in the natural flow of surface water" off and onto their property causing the fair market value of their property to be substantially diminished. The complaint further alleges that Harlan County and Grieshop acted with "intent, malice, oppression, and/or gross disregard for the [Farmers] rights."

The complaint requests damages against "the defendants," jointly and severally. In addition to compensation for the "substantial diminution of the fair market value of the property," damages are sought for the Farmers' "loss of the quiet use and enjoyment" of the property and "physical and emotional pain and suffering intentionally inflicted."

Harlan County and Grieshop assert that the complaint does not state a claim upon which relief can be granted because they are entitled to sovereign immunity. First, we recite the general law regarding immunity.

"Kentucky counties are cloaked with sovereign immunity. This immunity flows from the Commonwealth's inherent immunity by virtue of a Kentucky county's status as an arm or political subdivision of the Commonwealth." *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004) (citation omitted).

Moreover, a county government cannot be held liable for the tortious actions of its officials and employees acting in an official capacity. *Estate of Clark ex rel. Mitchell v. Daviess County,* 105 S.W.3d 841, 844 (Ky.App. 2003). In *Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer Dist*., 805 S.W.2d 133, 139 (Ky. 1991), the Court emphasized that the immunity afforded applies to intentional and unintentional torts. "A wrong is a wrong, whether intentionally or negligently committed, but unless our Constitution is changed the sovereign state cannot be held liable in a court of law for either intentional or unintentional torts committed by its agents." *Id*.

Likewise, a county judge executive and fiscal court members in their official capacities are entitled to absolute immunity from tort actions. "Any action against fiscal court members in their official capacities is essentially an action against the county which is barred by sovereign immunity." *Estate of Clark, ex. rel. Mitchell*, 105 S.W.3d at 844. However, "when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Although immune for the good faith performance of a discretionary act, a public officer or employee is "afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.,* one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id*.

The circuit court ruled Harlan County enjoys sovereign immunity and because Grieshop was sued only in his official capacity, he likewise enjoys the same immunity. In part, we agree with the circuit court.

To the extent the complaint alleges tort actions, Harlan County is absolutely immune: As a county, it is shielded by sovereign immunity from tort actions. Whether Grieshop is entitled to the same immunity depends on whether he was sued in his individual capacity or only in his official capacity.

In *Calvert Investments, Inc.,* 805 S.W.2d at 139, the Court held that a claim against a public employee or official in his or her individual capacity must be made

with specificity. The Court was persuaded that the complaint failed to state a separate cause of action for personal liability against any particular individual. It specifically pointed out the complaint's failure to "specify individual capacity in the heading, the lack of specificity in the body, and the failure to seek judgment against such individuals in the concluding demand[.]" *Id*.

In a subsequent decision, the Court distinguished *Calvert* and held that although the complaint did not expressly state whether the action was against McCollum, a state actor, in his individual or official capacity, when read as a whole, it sufficiently alleged individual liability. *McCollum v. Garrett*, 880 S.W.2d 530, 533 (Ky. 1994). The Court emphasized the allegations as stated in the complaint:

> While disclosure of McCollum's official position in the caption and in paragraph 2 creates a measure of uncertainty, the complaint otherwise states a straightforward claim against McCollum based upon his individual actions. Nowhere is there any allegation that Henderson County or its fiscal court is liable for damages.

Id.

After review of the complaint in the present case, we are persuaded that *Calvert* is indistinguishable. Its caption does not designate whether Grieshop is named in his individual or official capacity and, consistently throughout, Grieshop is alleged to at all times acted "in his capacity as county judge executive of Harlan County, Kentucky." In the claim for relief, damages are sought against the "defendants," jointly and severally, without reference to Grieshop individually. In

summary, the complaint consists only of allegations that Grieshop acted improperly in his capacity as county judge executive. We conclude that the circuit court did not err when it ruled that all claims regarding Grieshop were made against him in his official capacity and, therefore, properly dismissed the complaint against him.

Although we have determined that as a matter of law Harlan County is immune from any tort action alleged against it, our inquiry does not end. The complaint alleges that Harlan County, through its agents and employees, entered upon the Farmers' property without their consent and constructed a drainage ditch causing unreasonable natural surface water off and onto their property resulting in a substantial decrease in the fair market value of their property. Although couched in terms of trespass, the allegations sufficiently state a claim for reverse condemnation.

Reverse condemnation is "the term applied to a suit 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, Natural Resources & Environmental Protection Cabinet v. Stearns Coal and Lumber Co.,* 678 S.W.2d 378, 381 (Ky.1984).[1] The origin of the cause of action is found in our Constitution as explained in *Kentucky State Park Comm'n v. Wilder*, 260 Ky. 190, 84 S.W.2d 38, 39 (1935):

[1] Courts have used the terms inverse condemnation and reverse condemnation interchangeably.

> [I]n the absence of specific legislative consent, suits which involved the taking of property for public use, or trespass amounting to a taking, have been sustained upon the idea that the state had surrendered its immunity or authorized the suit by express constitutional or statutory provisions.
>
> Section 13 of the Constitution declares that no "man's property [shall] be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." This declaration of an "inherent and inalienable" right has been a part of all four Constitutions of Kentucky, and there is no exception in favor of the state or its subdivisions.
>
> Section 242 of the Constitution requires that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall pay or secure the payment of just compensation before the taking thereof. This allows compensation for injury or destruction of property unattended by an actual taking. Both sections prohibit the actual taking of property without payment. They have been construed and strictly applied in a number of cases.

(Citations omitted). Under these constitutional provisions, "an appropriate action will lie against the commonwealth as well as against corporations or individuals for damages growing out of the taking, injuring, or destroying of private property for public purposes." *Lehman v. Williams*, 301 Ky. 729, 731, 193 S.W.2d 161, 163 (1946).

In *Bader v. Jefferson County*, 274 Ky. 486, 119 S.W.2d 870, 871 (1938), the Court recognized our Courts have "held many times" that sections 13 and 242 are not limited to instances where there has been an actual taking in the sense of reducing the property to possession. "[I]f there was a physical invasion of the

property or actual damage thereto, such as by causing subsidence through the weakening or destruction of lateral support, or the diversion of water, or flooding of property, the owner must be compensated." *Id*.

We conclude that the Farmers' complaint sufficiently states a claim against Harlan County to the extent it alleges reverse condemnation. However, their damages are limited to the difference, if any, in the fair market value of the property just before and just after the work performed on their property by Harlan County. *City of Louisville v. Caron*, 28 Ky.L.Rptr. 844, 90 S.W. 604, 605 (1906). "The measure of damages is the same as in condemnation cases. Separate recovery of punitive damages is prohibited." *Witbeck v. Big Rivers Rural Electric Co-op Corp.,* 412 S.W.2d 265, 269 (Ky.App. 1967) (*overruled on other grounds* in *Commonwealth, Dept. of Highways v. Stephens Estate,* 502 S.W.2d 71, 73 (Ky.1973)).

Based on the forgoing, the order of the Harlan Circuit Court is affirmed to the extent it dismisses all claims against Grieshop and all tort claims against Harlan County. However, to the extent that the order dismisses the reverse condemnation action against Harlan County, it is reversed and the case remanded to proceed on that claim.

CAPERTON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I fully agree with the majority opinion that the Farmers' claim for monetary damages arising out of the alleged trespass by Harlan County is barred by the doctrine of sovereign immunity. Likewise, I agree with the majority that the Farmers have only named the judge-executive and the fiscal court members in their official capacities and consequently they are entitled to official immunity. Finally, I also agree with the majority that Harlan County would not be immune from suit in a reverse condemnation action to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government.

However, I disagree with the majority that the Farmers have actually pleaded a claim for reverse condemnation in this case. In *Keck v. Hafley*, 237 S.W.2d 527 (Ky. 1951), the former Court of Appeals recognized that a property owner must choose one of two remedies when the action of the Commonwealth causes damage to real property. The property owner must either bring a reverse condemnation action or seek injunctive relief to enjoin the trespass. *Id.* at 529-530. In the former case, the property owner may recover monetary damages representing the loss of fair market value of the property; while in the latter case, the courts have jurisdiction to grant injunctive relief, even though sovereign immunity may bar an award of monetary damages. *Id.* However, the property owner is not entitled to pursue both remedies. *Id.*

In the current case, the Farmers sought monetary damages under a tort theory of trespass. The majority concludes that the factual allegations in the complaint are sufficient to state a valid cause of action for reverse condemnation. While factual allegations should be construed liberally in the light most favorable to the plaintiff, I am hesitant to reverse the trial court on an issue which was never raised before the trial court. The Farmers have never suggested that their claim might be viable under a theory of reverse-condemnation either before the trial court or in this appeal. I do not believe that this Court should attempt to practice their case for them.

On the other hand, the Farmers' complaint specifically requested that the trial court enjoin Harlan County "temporarily and permanently, from conducting the activities referred to hereinabove which have resulted in the … unreasonable change in the natural flow of surface water onto the Plaintiffs' property as set forth above; …" and "to correct the changes [Harlan County has] made upon their property which have resulted in an unreasonable change in the natural flow of surface water onto the Plaintiffs' property as set forth above…" The Farmers have stated a sufficient claim for injunctive relief under the rule set out in *Keck v. Hafley*, *supra*.

Indeed, it should be noted that the doctrine of sovereign immunity only applies to claims seeking monetary damages against a state agency. *See Clevinger v. Board of Education of Pike County*, 789 S.W.2d 5, 9 (Ky. 1990). The doctrine does not bar claims for injunctive or declaratory relief. Under the

circumstances presented in this case, the Farmers have elected to pursue their remedy to enjoin further trespass on their property by the actions of Harlan County. Consequently, I would support remand to the circuit court only on this issue.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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