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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001610-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 15-CI-00134

ROBERT J. WATSON;
LA-Z-BOY LOGISTICS, INC.; AND
JEFFREY M. WILLIAMS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet ("Cabinet"), appeals the denial of its motion to dismiss due to its alleged immunity to suit pursuant to sovereign immunity. Following a factual recitation, we address the immunity issue before us.

FACTS

Robert Watson filed a Complaint in McCreary Circuit Court alleging damages stemming from a traffic incident. The Complaint alleges that on August 25, 2014, Jeffrey Williams, who was at the time working for La-Z-Boy Logistics Inc., pulled his vehicle into the path of the automobile driven by Watson, causing damages to Watson's vehicle and injuries to Watson's person. Watson also claims the Cabinet is liable for the damages and injuries because they allegedly failed to maintain the traffic light at the intersection where the traffic incident occurred.

The Cabinet filed a motion to dismiss the Complaint, alleging it was entitled to sovereign immunity. Following briefing and a hearing, the trial court issued an order summarily denying the motion. The Cabinet now appeals.

INTERLOCUTORY APPEAL

Though this appeal is interlocutory, the parties agree that the appeal is properly before us pursuant to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009). *Prater* permits a party to appeal the denial of a substantial claim of absolute immunity even in the absence of a final judgment. Thus, we will review the merits of the Cabinet's sovereign immunity claim.

ANALYSIS

The issue before us is whether the Cabinet is entitled to immunity from Watson's suit in the McCreary Circuit Court pursuant to the sovereign immunity doctrine. Appellee Watson argues that the Cabinet is not protected by sovereign immunity. Appellees Williams and La-Z-Boy Logistics, Inc. join with Watson's claim, and, alternatively claim that if the Cabinet is entitled to dismissal based on immunity that Williams and La-Z-Boy Logistics, receive an apportionment instruction at trial. We address these issues in turn.

Concerning whether the Cabinet is immune from suit, it is the judiciary's function to determine whether an entity is entitled to protection under sovereign immunity. *Withers v. University of Kentucky*, 939 S.W.2d 340, 342 (Ky. 1997). The test for whether an entity is immune from suit is twofold. "First, the courts must look to the origin of the public entity, specifically: 'was [the entity in question] created by the state or a county [which are entitled to immunity], or a city [which is not entitled to immunity] . . . .' The second and 'more important' inquiry is whether the entity exercises a 'function integral to state government.'" *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855, 859 (Ky. 2015) (citations omitted). *See also Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (". . . 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.") (Footnote and citation omitted).

Here, the Cabinet is a creation of the Commonwealth, which itself is entitled to immunity, thus it passes the first prong of the test. Under the second

prong, the Cabinet performs an integral state government function when it maintains the public roadways and traffic signals. Thus, it is entitled to immunity. *Cf. Commonwealth, Transp. Cabinet, Dept. of Highways v. Sexton*, 256 S.W.3d 29, 32 (Ky. 2008).

Once it is determined that a party is entitled to sovereign immunity, whether and how that party may be sued is controlled by the legislature. Section 231 of the Kentucky Constitution provides that only "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." In relation to negligence claims against the Transportation Cabinet for ministerial acts, the General Assembly has provided this means through the Board of Claims.

Kentucky Revised Statutes (KRS) 44.072 provides that sovereign immunity is waived in negligence claims for ministerial acts so long as those claims are brought before the Board of Claims. "It is the intention of the General Assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus or agencies . . . as herein provided." *Id*. KRS 44.073(2) provides that the Board of Claims has "primary and exclusive jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth [and] any of its cabinets . . . ."[1] As

[1] That statute was abrogated on other grounds by *Yanero*, *supra*. Furthermore, though the parties argue whether maintaining the traffic light was a ministerial or discretionary function, we do not decide that issue as it is not a factor in the test for whether a state agency is cloaked in sovereign immunity. *See Yanero*, 65 S.W.3d at 525-28 (analyzing whether the Jefferson County Board of Education is entitled to sovereign immunity). The ministerial/discretionary test is utilized when analyzing agencies that are not political subdivisions of the state, or when analyzing actions of

Watson's claim against the Cabinet is that it negligently failed to perform a ministerial act, the allegation, if it is to be raised at all, must be brought before the Board of Claims. The Cabinet's sovereign immunity is not otherwise waived to bring it before the circuit court.

We find the case of *Hammers v. Plunk*, 374 S.W.3d 324 (Ky. App. 2011), instructive in the present case. In that consolidated appeal, where separate traffic incidents resulted in damages and led to lawsuits, the parties first filed petitions to the Kentucky Board of Claims naming the Department of Transportation and the Department of Highways as parties. During those actions before the Board of Claims, the names of individuals who worked for the Department of Highways and Department of Transportation were identified as responsible for the maintenance of the roadways where the accidents occurred. Once those names were identified, the parties then filed respective actions in circuit courts where the traffic incidents occurred, naming as defendants the individuals who were responsible for the roadway maintenance. While discussing the parties' claims, a panel of this Court noted:

> The present actions were properly brought within the circuit court because they were brought against individual employees of the Department in their individual capacities and our courts have previously held that "repair" or maintenance of the state's highways is a ministerial act. *Estate of Clark v. Daviess County*, 105 S.W.3d 841, 846 (Ky. App. 2003). In contrast, the

officers and employees of the state. *Id*. at 528-531 (analyzing whether the athletic director, coaches, and the Kentucky High School Athletic Association are entitled to qualified official immunity). As the Transportation Cabinet is a state agency, we only need to analyze whether it performs an integral state function.

> appellants' claims against the Department were properly brought before the Board of Claims as our Supreme Court has previously held that county governments are protected by governmental immunity for wrongful death actions arising out of claims of negligence with respect to maintenance of the State's roadways.

Plunk, 374 S.W.3d at 330-31 (footnote and citation omitted).

Likewise, in the present case, the action against the Cabinet claiming negligence for failing to perform a ministerial function should be brought before the Board of Claims. Indeed, Watson has filed claims against the Cabinet in both the Board of Claims and the McCreary Circuit Court. Both cannot be maintained, as the circuit court cannot permit a cause of action to proceed against an agency that is cloaked in sovereign immunity, and the Board of Claims does not obtain jurisdiction over "non-immune agencies, officers and employees[,]" *Yanero v. Davis*, 65 S.W.3d at 525. The Complaint filed in the McCreary Circuit Court should be dismissed inasmuch as the Cabinet is immune from suit under the doctrine of sovereign immunity. Accordingly, we find the trial court erred by denying the Cabinet's motion to dismiss on grounds of sovereign immunity. We reverse and remand for an order dismissing the Cabinet.

Having determined the Cabinet should have been dismissed due to the doctrine of sovereign immunity, we now turn to the alternative claim that Appellees Williams and La-Z-Boy Logistics, Inc., be "entitled to an apportionment instruction" against the Cabinet should the case proceed to trial. (Appellee's Brf. at 4). To support their request, Appellees Williams and La-Z-Boy principally rely

on unpublished opinions and orders in two Federal District Court cases: *Hayes v. MTD Products, Inc.*, No. 3:05cv-781-H, 2007 WL 437687 (Feb. 5, 2007); and *Reinert v. Randall*, 06-18-DLB, 2006 U.S.Dist. LEXIS 68026 (Sept. 21, 2006).

In *Reinert*, a motor vehicle accident occurred on a snowy day, and the Commonwealth of Kentucky's Transportation Cabinet was alleged to have been partially negligent for failing to properly plow the parkway. Randall filed a motion for leave to file a third-party complaint against the Commonwealth pursuant to Federal Rules of Civil Procedure (Fed. R. Civ. P.)14(a). Though all parties agreed the Commonwealth was entitled to sovereign immunity, and recovery, if any, could only be had in the Board of Claims, Randall desired to add the Cabinet so he could receive an apportionment instruction against the Commonwealth, should the case proceed to a jury.

The magistrate judge initially noted that leave to file a third-party complaint under Fed. R. Civ. P. 14 "is generally not subject to denial on grounds of futility. In other words, leave to file a third-party complaint should be permitted for purposes of apportionment even where the defendant is subject to immediate dismissal based upon a clear affirmative defense." Though the Commonwealth was entitled to immunity from suit in the district court, the futility of naming it as a third-party defendant did not preclude granting the Fed. R. Civ. P. 14 motion.

Instead, the analysis of whether to grant the Fed. R. Civ. P. 14 motion turned on whether a limited waiver of sovereign immunity could permit the Commonwealth to be a third-party defendant for purposes of apportionment. The

magistrate judge ultimately found that because the Transportation Cabinet's sovereign immunity was partially waived through the Board of Claims Act, it was potentially liable for damages before the Board of Claims and could be added as a third-party defendant for apportionment purposes only.

In *Hayes*, a district court judge ruled on a similar issue as *Reinert*. There, Hayes was crushed to death in a lawn tractor accident, and the Kentucky Department of Highways was alleged to have been partially at fault by not maintaining the grass where the accident occurred. MTD Products, Inc., the manufacturer of the lawn tractor, sought to file a third-party complaint against the Department of Highways. The district court judge found that the Department of Highways could be added as a third-party defendant, reasoning as follows:

> Kentucky statutory law requires that jury apportionment among joint tortfeasors shall be conducted in all tort cases unless all parties agree otherwise. K.R.S. § 411.182(1). However, as interpreted by Kentucky courts, this statute only allows persons who are or who *have been* parties to the litigation to be named in the jury instruction. *Jones v. Stern*, 168 S.W.3d 419, 423 (Ky. App. 2005) (citing *Baker v. Webb*, 883 S.W.2d 898, 900 (Ky. App. 1994)). The jury is not allowed to apportion damages among persons or entities that have never been parties. *Id*. Therefore, a necessary predicate for MTD Products requesting an apportionment instruction at trial is that the Highway Department to become a party in this litigation, if only temporarily.
>
> The Highway Department is a department of the Commonwealth of Kentucky and thus can be held liable only under the provisions of the Kentucky Board of Claims Act, meaning that the Highway Department could not be held liable in this Court. *See* K.R.S. § 44.070 *et seq*. Plaintiff asserts that the Highway Department cannot

> be joined based on Kentucky case law. However, this case presents a nearly identical factual scenario to the underlying case in *Grimes v. Mazda North American Operations*, 355 F.3d 566 (6th Cir. 2004). In *Grimes*, plaintiff filed suit against Mazda for negligent design in an action stemming from plaintiff's automobile accident. *Id*. at 568. Plaintiff also filed an action against the Highway Department in a Board of Claims action "for failure to warn about an existing road hazard and thereby causing or contributing to the accident." *Id*. at 571. Upon learning of the Board of Claims action, Mazda in turn impleaded the Highway Department, because "[u]nder Kentucky law, only by bringing a third-party claim against the Department could defendants seek contribution from it for any damages awarded to plaintiff." *Id*. Judge Russell of the Western District of Kentucky acknowledged in his order the rule discussed *supra*: that for an apportionment instruction to be issued, "a claim must be made against the alleged wrongdoer, even if there is no legal right to recover from that wrongdoer." *Id*. at 572 (paraphrasing Judge Russell). "[T]he practice is to bring the alleged wrongdoer into the case by a third-party complaint only to then have it dismissed. This sets up a possible apportionment instruction.'" *Id*. (quoting D. Ct. Order, dated Mar. 8, 2000).

Hayes, 2007 WL 437687 at *1.

The district court judge then acknowledged that the Kentucky Supreme Court reached opposite conclusions in two cases: *Jefferson County Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001), and *Lexington-Fayette Urban County Gov't v. Smolcic*, 142 S.W.3d 128 (Ky. 2004). It found both cases distinguishable. In *Kaplan*, all of the defendants were both absolutely immune from suit and could not be held liable under the Board of Claims Act. Thus, dismissing the third-party complaint was appropriate as no

relief could be had of any of the defendants either in circuit court or before the Board of Claims. *Hayes*, 2007 WL 437687 at *2.

In *Smolcic*, the district court noted, the defendant, Lexington-Fayette Urban County Government, was also absolutely immune from suit. There, the Kentucky Supreme Court held that policy concerns dictate against allowing apportionment against a defendant who is absolutely immune from suit. Though financial liability would not attach, the defendant would still be subject to process, discovery, depositions, and testimony at trial. *Smolcic*, 142 S.W.3d at 135-36. "In other words, possessing absolute immunity from suit is incompatible with being 'a party to the action' in any sense and construing the statute otherwise would result in a partial abrogation of the absolute immunity defense." *Id*. at 136.

Because *Smolcic* and *Kaplan* both concerned parties who were absolutely immune from suit, the district court judge in *Hayes* reasoned:

> Defendant's claim in this case is different. The Highway Department is not absolutely immune from suit because the Kentucky Legislature has partially abrogated the state's immunity via the Board of Claims Act. The policy reasons discussed by the *Smolcic* court for immunity do not apply, because the Highway Department is at least potentially liable for its actions (or inaction, as the case may be) in this case. Although whether an apportionment instruction is ultimately issued will depend upon questions of law and fact presented later in this case, granting Defendant's motion at this time is a necessary procedural step under Kentucky law to even allow *consideration* of an apportionment instruction later in this case.

Hayes, 2007 WL 437687 at *2 (emphasis in original). The district court judge ultimately permitted the Highway Department to be added as a third-party defendant, but cautioned the parties that the Department was immune to suit and, "in the next few days the Court will enter an order dismissing the claims against the Highway Department without prejudice." *Id*.

We find these nonbinding, unpublished Federal District Court opinions inapplicable to the instant case. First, they concern only whether to grant a motion to add a third-party defendant. That is not the issue before us, nor was it the issue before the trial court below. Here, the Cabinet was a named party in Watson's Complaint. The Cabinet moved to dismiss the Complaint on grounds of sovereign immunity. Thus, the Cabinet is already a named party, and the issue before us is whether the trial court erred by denying the motion to dismiss the Complaint on sovereign immunity grounds.

Second, the cases both indicate that the Commonwealth agency would be dismissed shortly after being added as third-party defendants. The dismissal scenario is precisely what this appeal concerns – whether to dismiss the Cabinet, which is an already named party to the action. Notably, there was no disagreement in *Hayes* or *Reinert* concerning the fact that the Commonwealth agency was immune from suit and the claims against it should be dismissed. We likewise find the Cabinet is immune from suit and should have the claims against it dismissed.

Third, the district court cases erroneously interpret KRS 411.182,[2] the apportionment statute, as permitting apportionment against all current and former parties to the litigation. The Kentucky Supreme Court has held that once a party is dismissed from the lawsuit, the party is no longer subject to apportionment under the statute. In *Kaplan*, the Court first held that certain parties who had been added as third-party defendants should be dismissed due to absolute immunity from suit.

[2] KRS 411.182 provides:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
>
> > (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> >
> > (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
>
> (2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> (3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
>
> (4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

It next faced the ancillary question of whether these former parties to the litigation fell under the purview of KRS 411.182. 65 S.W.3d at 922. Answering the question in the negative, the Court determined that the right to apportionment under KRS 411.182 is limited to "parties and other persons who fall within the scope of the statute." *Id*. "When the statute states that the trier-of-fact shall consider the conduct of 'each party at fault,' such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large." *Id*. (Quoting *Baker v. Webb*, 883 S.W.2d 898, 900 (Ky. App. 1994)).

The dissenting opinion elaborated on the majority's holding. "The implicit premise behind the majority's holding is that, after the trial court entered summary judgment in favor of [the third-party defendants], each ceased to be a third-party defendant for the purposes of apportionment under KRS 411.182." *Id.* at 928. The dissent also noted that Kentucky jurisprudence previously permitted "third-party complaint practice [to] allow[] apportionment even after a third-party complaint is dismissed[.]" *Id*. at 929. Thus, *Kaplan* holds that once third-party complaints are dismissed, apportionment is not permitted.

Kaplan's holding is further strengthened by the Court's holding in *Smolcic*. There, the Court was asked to overturn or distinguish *Kaplan* and permit apportionment against parties that were dismissed due to sovereign immunity. 142 S.W.3d at 134. The Court declined to overturn or distinguish *Kaplan*, instead choosing to expand on the policy reasons surrounding "the necessary inference that

a person or entity entitled to absolute immunity is not a 'party to the action'" under the apportionment statute. *Smolcic* at 135.

The Court noted that when one is cloaked in immunity from suit, it is free from the cost, inconvenience, distractions, and burdens of trial. *Id*. "Allowing apportionment against a possessor of immunity from suit defeats the above policy concerns." *Id*. Possessing sovereign immunity "is incompatible with being 'a party to the action' in any sense and construing the statute otherwise would result in a partial abrogation of the absolute immunity defense." *Id*. at 136.

The Court made no distinction between absolute immunity and a partial waiver of absolute immunity, and we can find no justifiable reason for a distinction. In fact, the policy reasons announced in *Smolcic* remain valid even for acts by agencies that the General Assembly has partially waived the sovereign immunity defense. The waiver and the means for suit therefrom remains the General Assembly's prerogative. It has chosen to permit recompense for damages for negligence in ministerial acts solely through the Board of Claims. To permit this limited waiver of sovereign immunity to open the Cabinet up to third-party apportionment in cases outside of the Board of Claims would violate the same policy concerns in *Smolcic*. The Cabinet would then incur the cost, inconvenience, distractions, and burdens of trial in cases in which it is not even financially liable, only to then also incur the cost, inconvenience, distractions, and burdens of a hearing before the Board of Claims.

The Cabinet's litigation would double in every claim of negligence that is brought both before a circuit court and the Board of Claims. Accordingly, *Smolcic* and *Kaplan* control this issue. The Cabinet should not be subject to apportionment in the instant case as it is being dismissed on sovereign immunity grounds. Any issues regarding an apportionment jury instruction should be raised on direct appeal of any judgment issued in the case, not in the instant interlocutory appeal regarding sovereign immunity. *See, e.g., Owens Corning Fiberglas Corp. v. Parrish,* 58 S.W.3d 467, 471 (Ky. 2001); *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005).

CONCLUSION

The Cabinet's motion to dismiss should have been granted because the Cabinet is immune from suit pursuant to sovereign immunity. As the Cabinet is immune from suit, it is no longer a party to the action and is thus not within the purview of KRS 411.182 pursuant to *Kaplan* and *Smolcic*. Finally, we decline to address whether Appellees Williams or La-Z-Boy Logistics, Inc., are entitled to an apportionment instruction should the case proceed to a jury trial.

The trial court's order denying the Cabinet's motion to dismiss pursuant to sovereign immunity is reversed and remanded for entry of an order dismissing the Cabinet.

NICKELL, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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