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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001259-MR
AND
NO. 2004-CA-001261-MR

CITY OF SHEPHERDSVILLE — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 99-CI-00881 & 01-CI-00826

NICHOLS FIRE PROTECTION DISTRICT;
SOUTHEAST BULLITT FIRE PROTECTION DISTRICT;
ZONETON FIRE PROTECTION DISTRICT; AND
MT. WASHINGTON FIRE PROTECTION DISTRICT — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER AND McANULTY, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BARBER, JUDGE: Appellant, City of Shepherdsville, appeals a ruling of the Bullitt Circuit Court on annexation of unincorporated areas. We believe that the law supports the lower court rulings only if the City is properly found not to

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

have a “regular fire department” as defined by law. The summary judgment is vacated and remanded for an evidentiary hearing.

All Appellees argue before this Court that Appellant, City of Shepherdsville, has failed to preserve its arguments for review and fails to cite to any portion of the record alleged to contain errors subject to review, thereby barring review by this Court. An appellant must direct this court specifically to the record where errors occurred below. Elwell v. Stone, 799 S.W.2d 46, 47 (Ky.App. 1990); CR 76.12(4)(c)(iv) and (v). Upon review of the briefs before us, we note that the brief filed by some of the Appellees has the same flaws complained of. Several of the briefs fail to fully comply with CR 76.12. Despite this fact, the briefs contain appendices and references to the lower court’s ruling sufficient to permit review. The parties are cautioned, however, that in the future failure to follow the guidelines of CR 76.12 may result in dismissal of the appeal.

The underlying action was filed in 2001. Before the circuit court the Appellee Fire Departments argued that they provided fire protection services to areas within their various fire protection districts. The Appellees argued that the City was unable to provide that protection as it did not have a regular fire department. The City had a fire department without permanent paid personnel on hand at all times to respond to fire emergencies. The Appellee Fire Protection Districts sought

return of revenue obtained by the City through taxation. This revenue was to pay for fire protection. The Appellees also sought a determination that they were entitled to continue to tax residents within their fire protection district.

The City admitted in response to a Request for Admissions that it had only a volunteer fire department. The city also admitted that it did not tax residents specifically for fire protection. The City claimed that "Shepherdsville provides this municipal service [fire protection] as part of the general services supported by the General Revenue Fund." The City argued that provision of fire protection was a permissible act by a city. Barber v. Commissioner of Revenue, 674 S.W.2d 18 (Ky.App. 1984). The Appellee Fire Protection Districts contended that because the City did not have a regular fire department it could not lawfully sever property from an existing fire protection district through annexation. Appellees provided opinions entered on this question in separate opinions by the Office of Attorney General. See: OAG 69-373, OAG 73-662. These opinions support the Fire Districts' assertions.

The Bullitt Circuit Court entered a Summary Judgment ruling that as the City of Shepherdsville had only a volunteer fire department rather than a regular fire department, it could not claim to be properly serving the fire protection needs of the annexed properties. The City of Shepherdsville asserts that

the circuit court's ruling prevents it from providing fire protection to all citizens and property within its municipal boundaries. The City has a municipal fire department supported by City taxes, funds from state government, and volunteers. The City annexed some surrounding areas in accordance with KRS 81A.420. The areas annexed had previously been provided fire protection by the Appellees, various local fire departments.

The City also claimed that taxpayers in the annexed areas pay City taxes for fire protection, but are not provided such protection by the City fire department. Instead, those individuals are provided fire protection by the local fire department. The City contends that those individuals are therefore paying double taxes for their fire protection. After investigation by the Kentucky Department of Revenue, the Bullitt County Property Valuation Administrator restored the annexed areas to the respective fire district tax rolls pending outcome of the underlying action.

The City argues that the language of KRS 81A.450 does not support the court's ruling. KRS 81A.450 provides, in pertinent part:

> Whenever any unincorporated territory is annexed by a City, the annexing City shall be liable for any indebtedness that is attached to . . . the territory by reason of the same being then or previously a part of any taxing districts and the annexing City shall assume the liability, so that after

> annexation the burden of taxation shall be uniform throughout the City.

The trial court ruled that the situation in the present case was governed by KRS 75.020(3) which holds that:

> Any city that maintains a regular fire department and has either by incorporation or annexation caused property to be stricken from a fire protection district or a volunteer fire protection district, shall assume the liability of such taxes as may be necessary to pay the proportionate share of the indebtedness incurred while such territory was part of said district.

The trial court found that the City did not maintain a regular fire department, as defined by KRS 95.010(3)(b), which defines a regular fire department as:

> . . . one having a fixed headquarters where firefighting apparatus and equipment are maintained and where firefighters are in constant and uninterrupted attendance to receive and answer fire alarms.

The City did not have a fire department meeting that definition at the time the action was filed. For that reason, and because the City had not adopted civil services for its fire department personnel, the circuit court ruled that the City was "not legally authorized to strike property from the [fire protection] districts and that the districts are entitled and legally obligated to provide fire protection for all property within the annexed area contained within their boundaries." In its partial summary judgment the court held that the fire protection

districts were entitled to tax revenue from property within the boundaries of their fire protection areas “even when those areas may also lie within the Defendant City.”

The City further argues that this constitutes a double tax upon the city’s residents. The City further contends that since the State Fire Marshall and the State Fire Commission have issued the City’s fire department a certification number, then it must be a fire department. It must be noted, however, that the City admitted in discovery that it did not have a regular fire department, as defined by statute.

Following the trial court’s entry of judgment against it, the City claimed to have hired two firefighters to staff the fire department. It then requested a new ruling from the circuit court finding that it now met the definition of a “regular fire department.” Appellees objected, saying that two employees could not possibly fully staff a fire department on a continual basis as required by the law, and that the City still did not have a “regular fire department.” The circuit court agreed, and ruled that as of September 12, 2003, the City still did not have a regular fire department. Summary judgment was entered on May 21, 2004. On appeal the City contends that it did establish a regular fire department in 2003, and that at that point, it was entitled to include the annexed property on its tax rolls.

Appellees, Zoneton Fire Protection District and Mt. Washington Fire Protection District, assert that the fire protection districts have standing to contest the illegal annexation practices of the City. Fire protection districts have a judicially cognizable interest in the property within their respective districts. Pewee Valley Fire Protection District v. South Oldham Fire Protection District, 570 S.W.2d 290 (Ky.App. 1978). The Appellees contend that the property was illegally removed from the Fire District's tax rolls at the City's request. The Appellees argue that only a city with a regular fire department may alter or reduce a fire protection district territory, and claim that the City of Shepardsville does not have the required regular fire department.

KRS 75.040(1) permits a fire protection district to "levy a tax upon the property in the district, including that property within cities in a fire protection district or a volunteer fire department district. . . ." The limits on fire protection district boundaries exist only where the city claiming the right to include the property on its tax rolls "maintains a 'regular fire department' and which city has paid its proportionate share of the indebtedness incurred while such territory was part of the district." Appellees contend that the trial court properly found that the City does not have a "regular fire department." The Appellees argue that the lower

court ruled appropriately in finding that the Fire Districts had the duty to provide fire protection to the annexed areas, and the right to tax the residents for those services.

No evidentiary hearing was held regarding the City's claim that, as of May, 2003, it had met the statutory definition of a "regular fire department" by hiring an employee and providing a fixed address for the fire station. This created an issue of material fact not capable of determination on summary judgment. Summary judgment is not proper where material facts are in dispute. Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave, 751 S.W.2d 36 (Ky.App. 1988). For this reason, the summary judgment must be reversed.

The trial court ruled that the City does not have a regular fire department, as defined by law. That ruling appears to be based on the City's earlier Response to Admissions. If the City is found not to have a regular fire department, the City cannot deny the Fire Districts the right to provide fire protection and to tax for that protection. The statutory language provides limitations in annexation and taxation for cities who do not meet the statutory requirements for having a "regular fire department." If the City does have such a department, however, it may have a right to provide fire services to areas which have been annexed.

The law provides that summary judgment is to be cautiously applied. Steelvest, Inc. v. Scansteel Service Ctr., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Id., at 484. This Court has held that:

> On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03; Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

Moore v. Mack Trucks, Inc., 40 S.W.3d 888, 889 (Ky.App. 2001). The summary judgment is vacated and the case is remanded for evidentiary hearing on the status of the City of Shepherdsville's Fire Department.

Appellees, Nichols Fire Protection District and Southeast Bullitt Fire Protection District, asserted on appeal that the City is without standing to sue. The Fire Protection Districts do not show that this issue was raised before the trial court. This court notes that the City was a party defendant below, and that for this reason, the facts support the City's standing to defend the claims against it both before the trial court, and on appeal. Standing is established on a case

by case basis. Fourroux v. City of Shepherdsville, 148 S.W.3d 303, 307 (Ky.App. 2004).

Appellees argue that the City has admitted that it was not harmed by the circuit court's rulings and that for this reason the City cannot claim to have standing. The City asserted that citizens and taxpayers were harmed, but made no attempt to include those individuals as parties to the action. "Standing" is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1413 (7th ed. 1999). In order to have standing, the complainant must show that it has some injury distinct from that of the general public. Deters v. Kenton County Public Library, 168 S.W.3d 62, 63 (Ky.App. 2005). The City, as a provider of services to the public and as the entity conducting the challenged annexation and taxation, has standing to defend the claims against it. We decline to hold that the City lacked standing.

Based on the foregoing, the judgment of the lower court is vacated and remanded for proceedings consistent with this opinion.

McANULTY, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING. I respectfully dissent. In the fire districts' summary judgment motion, it referred to the City's answer to a request for admission wherein the City admitted it did not have a regular fire department. In response to the motion, the City made only general statements that it now had a regular fire department. It did not file a counter-affidavit or other document to support its response. I conclude that its general unsupported statements in its response are insufficient to create an issue of fact in the face of its prior admission. See Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914, 916 (Ky. 1955).

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEES, ZONETON FIRE PROTECTION DISTRICT AND MT. WASHINGTON FIRE PROTECTION DISTRICT:

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BRIEF AND ORAL ARGUMENT FOR NICHOLS FIRE PROTECTION DISTRICT AND SOUTHEAST BULLITT FIRE PROTECTION DISTRICT:

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