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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000683-MR

DEAN WOOD; THELMA CORNELIUS;
PATRICIA GREEN; SANDY WOOD
JOHNSON; ANN PERKIN; DOROTHY
WOOD; JOHN CHESTER WOOD; AND
LORELLA WOOD, ADMINISTRATRIX OF THE
ESTATE OF HAROLD WOOD

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-00353

COMMONWEALTH OF KENTUCKY,
ADMINISTRATIVE OFFICE OF THE
COURTS FOR CHARLES E. KING,
FORMER MASTER COMMISSIONER OF THE
MCCREARY CIRCUIT COURT, AND
HONORABLE JERRY WINCHESTER,
JUDGE OF THE MCCREARY CIRCUIT COURT; AND
THE KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF, SENIOR JUDGE:¹

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KNOPF, SENIOR JUDGE: This is an appeal from an order of the Franklin Circuit Court affirming the dismissal of appellants' action against the Administrative Office of the Courts (AOC) by the Kentucky Board of Claims. Because it is clear that neither McCreary Circuit Judge Jerry Winchester nor his master commissioner Charles E. King can be considered employees of AOC, the judgment of Franklin Circuit Court must be affirmed.

The facts are not in dispute. In 1987, Judge Winchester appointed King to serve as master commissioner for a four-year period ending May 11, 1991. Despite the fact that KRS 31A.010(3) specifically limits a master commissioner's term to four years unless reappointed, it appears that King continued to serve as the *de facto* master commissioner until 2003 without reappointment or renewal of the \$25,000 bond acquired in May 1987.

On August 19, 2002, the McCreary Circuit Court ordered King to sell four tracts of land formerly owned by John and Zola Wood. The property was sold for \$234,600 and payment was completed on October 22, 2002. By order of January 2, 2003, the circuit court ordered King to distribute the proceeds of the sale to appellants but he failed to follow the court's directive and distribution did not occur. On January 21, 2003, King was again ordered to distribute the sale proceeds, but the funds were never distributed to appellants.

King eventually pled guilty and was sentenced in May 2005 for one hundred and thirty-two counts of theft by failure to make required disposition of property

valued over \$300. The Supreme Court of Kentucky thereafter permanently disbarred King from the practice of law on the basis of the following misconduct :

While acting as Master Commissioner for McCreary Circuit Court, King misappropriated the proceeds from numerous separate sales by transferring funds from the Master Commissioner's account to his own personal account instead of to the rightful beneficiaries. The aggregate value of the misappropriated funds exceeded \$300,000.

King v. Kentucky Bar Ass'n, 162 S.W.3d 462 (Ky. 2005). The Supreme Court also ordered that King would not be permitted to apply for reinstatement of his license to practice law.

Prior to the resolution of the criminal charges, on August 11, 2003, appellants filed claims for damages in the Kentucky Board of Claims against AOC, King, and Judge Winchester. Respondents moved for summary judgment alleging that AOC was entitled to sovereign immunity and that appellants failed to state a claim upon which the Board of Claims could grant relief. The Board dismissed appellants' claims by order dated January 27, 2004.

On appeal to the Franklin Circuit Court, appellants argued that Judge Winchester was negligent in his ministerial duties to reappoint King as master commissioner and to require him to post bond in a sufficient amount. Although the Franklin Circuit Court cited judicial immunity as its basis for upholding the dismissal of appellants' claims, we are convinced that dismissal was required for the more fundamental reason that neither Judge Winchester nor King can be considered employees of AOC.

The Board of Claims was created for the purpose of providing a means of redress for damages occasioned by negligence on the part of the Commonwealth:

By statute, the Commonwealth's immunity from liability for injury occasioned by its negligence has been waived to a limited extent. KRS 44.070 vests authority in the Board of Claims to 'investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of **negligence on the part of the Commonwealth, any of its departments or agencies, or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth or any of its departments or agencies; * * * [.]'**

Gnau v. Louisville and Jefferson County Metropolitan Sewer Dist., 346 S.W.2d 754, 754 (Ky.1961), emphasis added. The Supreme Court of Kentucky recently reiterated the import of the Board of Claims legislation in *Stratton v. Commonwealth*, 182 S.W.3d 516, 519 (Ky. 2006):

Governmental immunity is a doctrine of law created by section 231 of the Constitution of Kentucky. As an agency operating under the direction and control of the central state government, the Cabinet for Families and Children is entitled to the protections of governmental immunity unless that immunity has been explicitly waived. The Board of Claims Act offers a **limited waiver of governmental immunity** with regard to negligence claims filed with the Board. The waiver extends only to negligence claims involving the performance of ministerial acts. KRS 44.073(2). A "ministerial" act is one in which **the agency** has no discretion; non-ministerial, or discretionary, acts cannot be a basis for recovery under the Board of Claims Act. [Citation omitted, emphasis added.]

The Supreme Court also made clear in *Horn by Horn v. Commonwealth*, 916 S.W.2d 173, 175 (Ky. 1995), that this legislation encompasses AOC:

As the AOC is part of the judicial department, it follows that the AOC falls within the reach of KRS 44.070(1) and the Board of Claims.

It does not follow, however, that the Board was the proper forum to pursue appellants' claims against the circuit judge and his master commissioner for the simple reason that neither the judge nor the master commissioner can be considered employees of AOC.

A circuit judge is an elected constitutional officer whose compensation is fixed by the General Assembly. Ky. Const. §§ 117, 120. Similarly, a master commissioner acts at the direction of and accounts to the circuit judge. KRS 31A.010 provides that the master commissioner shall be appointed by and serve at the pleasure of the circuit judge and that his term “shall automatically terminate following the death, resignation, or permanent replacement of the Circuit Judge who appointed him.” KRS 31A.010(3). The master commissioner is compensated “by fees as provided by rule of the Supreme Court.” KRS 31A.010(4). The Court in *Shamburger v. Commonwealth*, 240 S.W.2d 636, 638 (Ky.1951), observed that the circuit court commissioner “is not an officer, although he is referred to as an officer of the court, but is an attache or assistant of the chancery court.” In view of these statutorily mandated conditions of employment, we are convinced that, like the circuit judge, a master commissioner cannot be construed to be employed by AOC and thus the Board of Claims is not the proper forum to redress the negligence of either of them. It is also important to note that the limited waiver of **sovereign immunity** set out in KRS 44.070 is a concept entirely distinct from that of **judicial immunity**. And because of that critical distinction, the Board lacks authority to

waive judicial immunity, reinforcing the impropriety of lodging claims against the judge and master commissioner with that body.

That is not to say that appellants are without a remedy. Although the trial court found that “absolute and judicial immunity applies” to the claims against Judge Winchester and King, that conclusion is clearly erroneous with regard to the criminal acts of King as they were not undertaken within the scope of his duties as commissioner. Consider an analogous situation addressed in *McCollum v. Garrett*, 880 S.W.2d 530, 534 (Ky. 1994), where our Supreme Court concluded that immunity was unavailable to a prosecutor acting outside the scope of his authority:

The court correctly recognized that a public prosecutor must have immunity **when he is acting within the scope of his authority** for without it, the prosecutorial function would suffer. Nevertheless, the court examined the applicable constitutional and statutory provisions and concluded that as the prosecutor had no lawful authority to sign the name of a judge to an arrest warrant, he was outside the scope of his authority and without immunity. Throughout the *Dugger* opinion, one encounters the concept of “scope of prosecutorial duties,” or words to that effect, as defining the availability of prosecutorial immunity. The opinion is clear that **so long as a prosecutor acts within the scope of the duties imposed by law, quasi-judicial immunity is available, but otherwise it is not.** [Footnote omitted, emphasis added.]

We are convinced that this rationale applies with equal force to King, who has admitted his criminal conduct with regard to appellants' property. Acting outside the scope of his duties as commissioner, King would not be entitled to the cloak of immunity in a civil suit.

Because the Board of Claims was not the proper forum in which to lodge the appellants' claims, the judgment of the Franklin Circuit Court is affirmed.

ABRAMSON AND STUMBO, JUDGES, CONCUR.

KNOPF, SENIOR JUDGE, CONCURS BY SEPARATE OPINION.

KNOPF, SENIOR JUDGE, CONCURRING: I fully concur in the majority opinion, but write separately to address the question of judicial immunity concerning the omissions of Judge Winchester. While an important matter, it is not essential to the majority holding. However, I am of the opinion that because the Franklin Circuit Court found that judicial immunity applied to Judge Winchester's failure to properly reappoint and supervise his master commissioner King by requiring an appropriate bond--the availability of judicial immunity in regard to those actions should be addressed.

In *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 545, 98 L.Ed.2d 98 (1988), the United States Supreme Court drew a clear distinction between judicial or discretionary acts and ministerial acts for purposes of invoking judicial immunity:

In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts-**like many others involved in supervising court employees and overseeing the efficient operation of a court**-may have been quite important in providing the necessary conditions of a sound adjudicative system. **The decisions at issue, however, were not themselves judicial or adjudicative.** As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. **Such decisions, like personnel decisions made by judges, are**

often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.
[Emphasis added.]

It is certainly arguable that the failure to reappoint the master commissioner and to require the posting of an appropriate bond might fall within that criterion as distinguished from the purely judicial functions involved in *Vaughn v. Webb*, 911 S.W.2d 273 (Ky.App. 1995). In *Vaughn*, this Court discussed the availability of judicial immunity to the acts of a judge undertaken **in the course of a particular case**:

Judge Ray was acting within his jurisdiction when he entered the order of February 5, 1990, approving the periodic settlement filed by the guardian. His act was a judicial act, not an administrative act, and the plaintiff's claim is barred by the doctrine of judicial immunity.

911 S.W.2d at 277. Comparing the clearly judicial acts in *Webb* with the failure to properly supervise the reappointment and bonding of a master commissioner, it is clear to me that a legitimate argument could be made that the latter acts are not judicial or adjudicative, but rather fall within the *Forrester* rationale of “overseeing the efficient operation of a court.” The omissions in question here did not involve particular litigants or litigation, but were matters related to the staffing of a statutorily created assistant to the circuit judge. Legal ramifications notwithstanding, our circuit judges must be ever-vigilant to avoid the problems generated by such omissions.

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