

SUPREME COURT OF KENTUCKY  
2007-SC-000517-DG

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SUPREME COURT

CANEYVILLE VOLUNTEER FIRE DEPARTMENT,  
CITY OF CANEYVILLE, and  
ANTHONY CLARK

APPELLANTS

V.

ON APPEAL FROM  
THE KENTUCKY COURT OF APPEALS  
No. 2006-CA-001142-MR

GREEN'S MOTORCYCLE SALVAGE, INC.  
ORVILLE GREEN, and  
CATHERINE GREEN

APPELLEES


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**APPELLANTS' BRIEF**

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KERRICK, STIVERS, COYLE & VAN ZANT, P.L.C.  
P. O. Box 844, 2819 Ring Road, Suite 200  
Elizabethtown, Kentucky 42702-0844  
(270) 737-9088  
(270) 769-2905 -- FAX

BY: \_\_\_\_\_

  
Greg N. Stivers  
Jason B. Bell  
Scott D. Laufenberg  
*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

This is to certify that the original and ten (10) copies of this Appellants' Brief were delivered to **Susan Stokley Clary**, Clerk of the Supreme Court, New Capitol Bldg., 700 Capitol Avenue, Frankfort, KY 40601-3488, via U.S. Postal Service Registered Mail on this 21st day of December, 2007. True and accurate copies of the original were served via First Class U.S. Mail on this the same day to the following: **Samuel P. Givens, Jr.**, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; **Alton L. Cannon**, P.O. Box 427, Leitchfield, KY ; **Michael Alvey**, Caneyville City Attorney, 62 Public Square, Grayson County Courthouse, Leitchfield, KY 42754, **Judge Robert A. Miller**, Grayson Circuit Court, Division II, Grayson County Courthouse, P. O. Box 245, Brandenburg, KY 40108; and **Elois Downs**, Grayson Circuit Court Clerk, Judicial Building, 125 E. White Oak Street, Leitchfield, KY 42754.

  
\_\_\_\_\_  
Attorney for Appellants

## INTRODUCTION

This appeal arises out of the order of the Grayson Circuit Court dismissing all claims against Appellants City of Caneyville, Caneyville Volunteer Fire Department, and Anthony Clark pursuant to CR 12.02 and KRS 75.070 and denying a request to declare KRS 75.070, 75.020, and 95.830(2) unconstitutional. On appeal, the Court of Appeals declared KRS 75.070 and 95.830(2) unconstitutional.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants City of Caneyville, Caneyville Volunteer Fire Department, and Anthony Clark believe that oral argument would assist the Court in addressing the issues of first impression presented in this case.

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## STATEMENT OF THE CASE

The Caneyville Volunteer Fire Department (“CVFD”) is a volunteer fire department providing fire protection services to the community of Caneyville in Grayson County and the surrounding area. See TR. 2. Anthony Clark is the Fire Chief of the CVFD.<sup>1</sup> See id. The City of Caneyville is city of the 6th class. See id.

The Appellees operated a motorcycle salvage business located outside of the City of Caneyville that sustained significant damage due to a fire on December 3, 2003. See id. Upon being notified of the fire, the CVFD responded to and extinguished the fire. See id.

From the allegations in the Complaint, the Appellees either had not procured insurance coverage for the contents of their business or the coverage was insufficient to cover their loss. See id. at 3. On December 2, 2005, the Appellees filed this action alleging the Appellants were negligent in failing to “expeditiously extinguish the fire” upon arrival at the scene. Id. at 2. Appellees further allege that they suffered additional or more severe property damage due to this alleged negligence. See id. at 3. In addition, the Appellees sought a declaration that KRS 75.020, 75.070, and 95.830(2) were unconstitutional. See id. The allegations of the Complaint exclusively related to events in connection with the fire response and the efforts to extinguish the fire. See id.

The City, CVFD, and Chief Clark moved to dismiss the claim pursuant to CR 12.02 relying upon KRS 75.070. See id. at 29. On May 15, 2006, in a thorough and well-reasoned opinion, the Grayson Circuit Court dismissed the action, with prejudice. See id. at 72-81.

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<sup>1</sup> While Chief Clark is named in both his official and individual capacities, the Greens did not allege any specific acts of negligence by him in his individual capacity.

On June 29, 2007, the Court of Appeals reversed the order of the Grayson Circuit Court and declared that KRS 75.070 and 95.830(2) were unconstitutional. See Green's Motorcycle Salvage, Inc. v. Caneyville Volunteer Fire Dep't, No. 2006-CA-001142, slip op. at 10, 13 (Ky. App. June 29, 2007). In its opinion, the Court of Appeals relied upon the decisions of Kentucky's highest court in Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959), and Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964), in concluding that KRS 95.830(2) was unconstitutional. See Green's Motorcycle Salvage, slip op. at 5-7. In addressing the constitutionality of KRS 75.070, the Court of Appeals also concluded that the statute was unconstitutional based upon Haney. See id. at 9-10. With respect to Chief Clark, the court held that he had qualified official immunity based upon Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. App. 1992). See Green's Motorcycle Salvage, slip op. at 11.

On July 27, 2007, the Appellants moved for discretionary review. On October 24, 2007, this Court granted the Appellants' motion.

## ARGUMENT

### I. IT IS WITHIN THE AUTHORITY OF THE GENERAL ASSEMBLY TO CONFER IMMUNITY UPON FIRE DEPARTMENTS.

There is no factual dispute between the parties to this appeal. Rather, this appeal involves purely legal issues, which this Court reviews de novo. See Newell Enters., Inc. v. Bowling, 158 S.W.3d 750, 754 (Ky. 2005).

“When considering the constitutionality of a statute, this Court draws all fair and reasonable inferences in favor of the statute’s validity. ‘The violation of the Constitution must be complete and unmistakable in order to find the law unconstitutional.’” Posey v. Commonwealth, 185 S.W.3d 170, 175 (Ky.), cert. denied, 127 S. Ct. 85 (2006) (quoting Kentucky Indus. Util. Customers, Inc. v. Kentucky Utils. Co., 983 S.W.2d 493, 499 (Ky. 1998)). See also Keith v. Hopple Plastics, 178 S.W.3d 463, 466 (Ky. 2005) (citations omitted) (“Legislative acts are presumed to be valid; therefore, the burden is on one attacking a statute to show the negative.”). “[I]f there are two ways to reasonably construe a statute, one upholding the validity and the other rendering it unconstitutional, [courts] ‘must adopt the construction which sustains the constitutionality of the statute.’”<sup>2</sup> Flynt v. Commonwealth, 105 S.W.3d 415, 423 (Ky. 2003) (internal quotation marks omitted) (citations omitted). Applying these principles in this case, KRS 75.070 and 95.830(2) are constitutional, and this Court should affirm the dismissal of this action by the Grayson Circuit Court.

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<sup>2</sup> In addressing the issues raised in this case, the Court should limit its inquiry to the relevant provisions and not the entire statutes. In accordance with KRS 446.090, the Court should only sever any unconstitutional provisions and should leave any remaining provisions in force.

A. The Court should abandon the jural rights doctrine.

In its decision, the Court of Appeals concluded that the KRS 75.070 and 95.830(2) were unconstitutional based upon the jural rights doctrine due to the decisions in Happy and Haney. Collectively, Sections 14, 54, and 241 of the Kentucky Constitution—which was ratified in 1891—form the basis of the “jural rights doctrine” or what is often referred to as the “open courts” provisions. See, e.g., McCollum v. Sisters of Charity of Nazareth Health Corp., 799 S.W.2d 15, 17 (Ky. 1990) (citing Fannin v. Williams, 655 S.W.2d 480, 481 (Ky. 1983)) (“We hold that the five-year cap provided in . . . the statute violates the open courts provisions of the Kentucky Constitution, as judicially construed . . .”). As this Court explained in Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991):

In drafting our constitutional protections in §§ 14, 54, and 241, our founding fathers were protecting the jural rights of the individual citizens of Kentucky against the power of the government to abridge such rights, speaking to their rights as they would be commonly understood by those citizens in any year, not just in 1891.

Id. at 816. Specifically, Kentucky’s highest court has held that the jural rights doctrine protects the “right to sue for personal injury or death caused by negligence or other wrongful acts . . . .” Id. The case of Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932), is recognized as the first time in which Kentucky’s highest court applied the doctrine, and the Court has continued to apply it numerous times. See, e.g., Perkins, 808 S.W.2d at 817 (declaring a statute of repose unconstitutional); Williams v. Wilson, 972 S.W.2d 260, 269 (Ky. 1998) (declaring the definition of malice in the punitive damages statute in violation of the jural rights doctrine and, thus, unconstitutional).

A closer review of the genesis of the jural rights doctrine calls into question its historical and jurisprudential foundation. In his 1992 law review article, Professor Thomas

Lewis outlines his extensive research and analysis of the jural rights doctrine and the misconceptions upon which it is based. See Thomas P. Lewis, Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth, 80 Ky. L.J. 953 (1992) (attached as Tab D). See also Williams, 972 S.W.2d at 272-76 (Cooper, J., dissenting) (discussing Professor Lewis's law review article and the history of the jural rights doctrine in Kentucky).

To understand the jural rights doctrine requires an examination of the relevant individual sections of the Kentucky Constitution. Section 14 provides that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Ky. Const. § 14. This section can be traced back to Kentucky's first constitution enacted in 1792 and ultimately has its roots in English and Kentucky common law and the Magna Carta. See Lewis, supra, at 964. As Professor Lewis noted:

The source and nature of Section 14 are unmistakable. It is a guarantee of process in the application of the law of the law—due process of law. It is not, nor could it be sensibly be, a delegation of final authority to the courts to declare substantive law through the law of remedies.

Lewis, supra, at 966.

Section 54 provides that "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." Ky. Const. § 54. From a review of the debates of the 1890 Constitutional Convention, Section 54 reflects the distrust delegates had for the General Assembly and the influence exercised over it by "corporations, especially [] railroad corporations . . ." Id. at 968. That section was intended to preclude the General Assembly from imposing any cap on the amount of damages recovered, which should be determined by a jury. See Lewis, supra, at

968 (quoting 3 Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend, or Change the Constitution of the State of Kentucky 3793).

Section 241 appears for the first time in the present Constitution. See id. at 970. It provides:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

Ky. Const. § 241. Based upon his review of the debates of 1890 Constitutional Convention, Professor Lewis explained that “[t]he extremely narrow focus of section 241 is apparent. Neither its language nor its history can justify giving it any broader effect than to preserve a wrongful death action in circumstances where, in the absence of death, a cause of action for injuries would have been available.” Lewis, supra, at 972.

Despite the fact that Sections 14, 54, and 241 have repeatedly been construed together as the open courts provisions, there is a lack of authority supporting such a construction. As Professor Lewis noted based upon his research, “I found no evidence that sections 14, 54, and 241 were ever conceived as some sort of package. In fact, I was not able to find evidence that any delegate ever stated any linkage between sections 54 and 241, or between either of them and section 14.” Lewis, supra, at 972. Thus, the whole notion that those sections were intended to be construed together is simply not supported by the debates from the 1890 Constitutional Convention.

Relevant to the present case, Kentucky's highest court relied upon the jural rights doctrine in declaring a prior version of KRS 95.830(2) unconstitutional in Happy v. Erwin because the statute attempted to confer to city officers and employees immunity from personal liability. See Happy, 330 S.W.2d at 414 ("KRS 95.830(2) to the extent it exempts officers and employees of cities from personal liability is unconstitutional and void."). In Haney v. City of Lexington, the Court abandoned municipal liability. See Haney, 386 S.W.2d at 742 ("In the V.T.C. Lines, Inc. case, this Court gave warning that it was dissatisfied with the rule of municipal immunity. We now recede from prior decisions which hold municipal corporations immune from liability for ordinary torts."). In declaring KRS 75.070 and 95.830(2) unconstitutional in the case sub judice, the Court of Appeals held that the statutes violated the Greens' jural rights. See Green's Motorcycle Salvage, slip op. at 9. The court noted:

As it has been previously determined by the court in Happy v. Erwin that the legislature may not confer municipal firefighters with absolute immunity under the pretext of sovereign immunity, to the extent that KRS 75.070 attempts to confer such immunity to firefighters, it is unconstitutional. Moreover, to the extent that the statute attempts to confer sovereign immunity to municipal fire departments, it is likewise unconstitutional.

Id. (citing Haney). While the Court of Appeals implied that Haney was decided on constitutional grounds, no constitutional provisions or the jural rights doctrine was mentioned in that decision.<sup>3</sup> Rather, Kentucky's highest court abolished common-law municipal immunity purely on public policy grounds. See Haney, 386 S.W.2d at 742.

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<sup>3</sup> While it is not clear from the Court of Appeals' decision, Happy declared KRS 95.830(2) unconstitutional to the extent that it attempted to confer absolute immunity upon individuals. See Happy, 330 S.W.2d at 414. The decision in Happy is, therefore, not inconsistent with the result that the Court should reach in this case.

The dissent in Happy criticized the decision of the majority to abolish municipal liability instead of deferring to the General Assembly and noted that “[t]he legislative power of the Commonwealth of Kentucky is vested in the General Assembly. There is an express prohibition against the exercise of this power by any person or collection of persons other than the General Assembly.” Haney, 386 S.W.2d at 743 (Montgomery, J., dissenting) (internal citations omitted) (citation omitted). This separation of powers between the judicial and legislative branches is the fundamental concept which the jural rights doctrine offends. In fact, dating back to the Magna Carta, courts were called upon to establish common law **in the absence** of legislation. See Lewis, supra, at 966. The common law was, however, always subject to change by the legislative process. See Williams, 972 S.W.2d at 272 (Cooper, J., dissenting) (citation omitted). Perhaps Professor Lewis best explained the quandary caused by the jural rights doctrine when he noted:

A major problem with the jural rights doctrine is that the people, whether as individuals, lobbies, or some other collective cannot talk to a court. Briefs amicus curiae may be filed, but the virtue of the judicial system is that its primary focus must be on the trial record and parties before it; judges are not generally equipped or expected to make textually generalized, interrelated rule-type decisions based on “legislative facts.” The common law decisions of a court are law, and no better system has been devised than this technique, by which general principles of law emerge from small bits of real life experience. But the technique has worked so well not because judges have a monopoly on wisdom but because the people have always reserved the power to modify principles that in the light of mounting experience have failed to work to their satisfaction. Determining the content of the law has always been a joint enterprise.

Lewis, supra, at 983. Continued reliance upon the jural rights doctrine destroys that joint enterprise and, as explained above, is inconsistent with the framers’ intent.<sup>4</sup>

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<sup>4</sup> The overall effect of the jural rights doctrine may have been best summarized by Professor Lewis in his statement that “[u]nder the court’s current interpretation of the open courts provisions, tort principles will be whatever the court decides they shall be;

As this Court stated in Williams, “constitutional doctrine is not immune from reconsideration and indeed this Court has declared that we will refrain from ‘sanctification of ancient fallacy.’” Williams, 972 S.W.2d at 267 (internal citation omitted) (citation omitted). The jural rights doctrine is simply not supported by Kentucky constitutional law and should be abandoned.<sup>5</sup> The Court should reverse the decision of the Court of Appeals and affirm the dismissal of this case.

**B. Sovereign immunity trumps the jural rights doctrine because sovereign immunity predated the 1891 Kentucky Constitution.**

The issues in this case present a conflict between the right of the General Assembly to cloak state agents in governmental immunity and the jural rights doctrine. As outlined below, sovereign immunity trumps the jural rights doctrine, and accordingly, the CVFD is immune from suit as an agent of the Commonwealth.

**1. *Doctrine of Sovereign immunity***

Section 231 of the Kentucky Constitution embodies the English common law rule known as sovereign immunity, which prohibits claims against the government treasury absent the consent of the sovereign. See Yanero v. Davis, 65 S.W.3d 510, 517 (Ky. 2001). However, the doctrine has been a fixture of Kentucky law even prior to the adoption of the present constitution. “[S]overeign immunity predates the adoption of Kentucky’s first Constitution.” Lexington-Fayette Urb. County Gov’t v. Smolcic, 142 S.W.3d 128, 134 (Ky. 2004). See also Garrison v. Leahy-Auer, 220 S.W.3d 693, 697 (Ky. App. 2006) (footnote omitted) (alteration in original) (“The doctrine of sovereign

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the merits or demerits of efforts by the General Assembly to modify those principles are irrelevant because it has no voice in the matter.” Lewis, *supra*, at 963.

<sup>5</sup> In addition, as discussed in Argument I(C), the open courts provisions—as they have been construed—violate the express separation of powers articulated in Sections 27 and 28 of the Kentucky Constitution.

immunity is older than this Commonwealth's Constitution, and, while not mentioned in the Constitution, it is an 'inherent attribute of a sovereign state[.]'). As early as 1828, Kentucky's highest court applied the doctrine for the first time. See Divine v. Harvie, 23 Ky. (7 T.B. Mon.) 439, 441 (1828). See also Yanero, 65 S.W.3d at 517-18 (discussing the history of sovereign immunity in the Commonwealth).

More recently, in the seminal case of Yanero v. Davis, this Court discussed in textbook fashion the history of sovereign immunity in Kentucky and outlined the derivative immunities afforded state agencies ("governmental immunity") and state employees ("official immunity"), stating as follows:

"Governmental immunity' is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency." The principle of governmental immunity from civil liability is partially grounded in the separation of powers doctrine embodied in Sections 27 and 28 of the Constitution of Kentucky. The premise is that courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy.

Id. at 519 (internal citation omitted) (citation omitted). An agency "is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary function." Id. at 519 (citation omitted). In contrast, this Court explained "official immunity" as follows:

"Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity . . . . Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same

immunity, if any, to which the agency, itself, would be entitled . . . . But 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. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.

*Id.* at 521-22 (internal citations omitted) (citation omitted). See also *Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007) (discussing the nature of qualified official immunity).

**2. *Sovereign immunity predates and trumps the jural rights doctrine.***

As Justice Liebson noted in *Perkins*, the jural rights doctrine is not stagnant. Neither, however, is the doctrine of sovereign immunity. Since the adoption of the current constitution, this Court has upheld the application of governmental immunity to agents of the Commonwealth that did not exist in 1891. For example, in *Yanero*, this Court held that the Kentucky Board of Education had the authority to delegate the responsibility of managing interscholastic athletics to the Kentucky High School Athletic Association (“KHSAA”), which was organized in 1917, pursuant to KRS 156.070(2). See *id.* at 530. Because of this statutory authority and because the KHSAA was performing the function of managing interscholastic athletics as part of the overall governmental function of secondary education, the KHSAA was entitled to qualified official immunity.<sup>6</sup> See *id.* This Court also noted that even though “many of [the KHSAA’s] member schools are private or parochial

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<sup>6</sup> In addition, the Court specifically noted that the KHSAA “draws no money directly from the state treasury.” *Id.* (citations omitted). Despite the lack of state funding, the KHSAA still had qualified official immunity.

institutions, not enjoying governmental immunity,” the KHSAA still had qualified official immunity. See id.

More recently, this Court upheld the application of governmental immunity to a state university as an agent of the Commonwealth in Autry v. Western Kentucky University. See Autry, 219 S.W.3d at 717. In addition to governmental apply to a state university, this Court held that qualified official immunity applied to the WKU Student Life Foundation, which was created by a state university exclusively for the purpose of owning residence halls in approximately 1999.<sup>7</sup> See id. at 718.

Because the doctrines of sovereign immunity and jural rights have come in conflict, this Court has previously been called upon to determine the superior doctrine. In Lexington-Fayette County Urban Government v. Smolcic, this Court addressed this conflict in reaffirming the applicability of sovereign immunity to an urban county government. In rejecting the argument that the application of sovereign immunity would violate the jural rights doctrine, this Court held that “sovereign immunity ‘trumps’ jural rights because sovereign immunity predates the adoption of Kentucky’s first Constitution.” Smolcic, 142 S.W.3d at 134 (citing Fields v. Lexington-Fayette Urb. County Gov’t, 91 S.W.3d 110, 112 (Ky. App. 2001)). Similarly in Withers v. University of Kentucky, 939 S.W.2d 340 (Ky. 1997), this Court stated that “[o]nce it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it or abrogate the legal doctrine.” Id. at 344 (citations omitted).

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<sup>7</sup> The same conclusion can be drawn based upon this Court’s decision in Smolcic. Because the doctrine of sovereign immunity trumps jural rights, sovereign immunity applied to the Lexington-Fayette Urban County Government even though that form of government was not permitted until an act of the General Assembly in the early 1970s. See Smolcic, 142 S.W.3d at 132.

In construing a statute, courts are to apply the plain meaning of a statute whenever possible. See Bailey v. Reeves, 662 S.W.2d 832, 834 (Ky. 1984) (citation omitted) (“We have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.”); Reynolds Metal Co. v. Glass, 302 Ky. 622, 628, 195 S.W.2d 280, 283 (1946) (internal quotation marks omitted) (citation omitted) (“In the interpretation of writings, including statutes, the primary factor to be considered is to determine the intent of the maker, and which in turn is to be determined by the language employed. If that language is plain and unambiguous its meaning should be upheld as so expressed . . .”).

Turning to the statute relevant to the question of the CVFD’s immunity, KRS 75.070 provides:

(1) A municipal fire department, fire protection district fire department, and volunteer fire department and the personnel of each, answering any fire alarms, performing fire prevention services, or other duly authorized emergency services inside and outside of the corporate limits of its municipality, fire protection district, or area normally served by a volunteer fire department, shall be considered an agent of the Commonwealth of Kentucky, and acting solely and alone in a governmental capacity, and such municipality, fire protection district, or area normally served by a volunteer fire department, shall not be liable in damages for any omission or act of commission or negligence while answering an alarm, performing fire prevention services, or other duly authorized emergency services.

(2) No municipal fire department, fire protection district fire department or volunteer fire department answering any fire alarms, performing fire prevention services or volunteer fire department services inside the corporate limits of the district shall be liable in damages for any omission or act of commission or negligence while answering or returning from any fire or reported fire, or doing or performing any fire prevention work under and by virtue of this chapter and said fire departments shall be considered agents of the Commonwealth of Kentucky, and acting solely and alone in a governmental capacity.

KRS 75.070 (emphasis added). Based upon the plain meaning of KRS 75.070(1), it was the intent of the General Assembly to make a fire department—such as the CVFD—an agent of the Commonwealth. This is no different than, as this Court permitted in Yanero, the Kentucky Board of Education (as an agency of the Commonwealth) making the KHSAA its agent pursuant to KRS 156.070(2), which entitled the KHSAA to qualified official immunity. By virtue of KRS 75.070(1), the General Assembly has placed fire departments in the same position as the Kentucky Board of Education, thereby entitling them to governmental immunity.

As outlined above, the CVFD is an agent of the Commonwealth pursuant to KRS 75.070. Based upon the decisions in Yanero and Autry, the General Assembly acted within its authority in conferring governmental immunity upon the CVFD.

C. **This Court's prior decisions addressing the application of sovereign immunity support the conclusion that the CVFD is immune from suit in this case.**

To the extent that this Court deems it necessary to consider any of the factors articulated in its prior decisions in determining whether immunity applies, the CVFD is entitled to governmental immunity. For the reasons explained below, the Court should affirm the dismissal of the claims against the fire department.

In its decision, the Court of Appeals relied upon the holdings in Kentucky Center for the Arts Corp. v. Berns, 801 S.W.2d 327 (Ky. 1990). See Green's Motorcycle Salvage, slip op. at 8-9. Berns is distinguishable in that the statute involved was silent on whether the Kentucky Center for the Arts was cloaked in immunity. In fact, the crux of that case and the reason why the Court articulated the Berns test was to outline the factors considered in analyzing whether immunity applied to the entity created pursuant to statute. As recognized

in Yanero, the decision in Berns turned on the fact that it was engaged in a proprietary, not a governmental—function. See Yanero, 65 S.W.3d at 530. Unlike Berns, in this case the General Assembly has directly answered whether immunity applies to fire departments in the affirmative based upon the express language in KRS 75.070.

Based upon this Court’s subsequent decisions in Yanero and Autry, it is clear that the nature of the function being performed is the key to determining the availability of governmental immunity. Thus, this Court held that the KHSAA was entitled to qualified official immunity even though it received no funds from the state treasury. See id. at 530.

Under Yanero, the crux of the application of governmental immunity to the CVFD is the governmental versus proprietary function (i.e., public versus private) dichotomy. “The test for whether a government agency is performing a governmental function or a proprietary function is whether the agency is ‘carrying out a function integral to state government,’ or whether it is ‘engaged in a business of a sort theretofore engaged in by private persons or corporations for profit.’” Schwindel v. Meade County, 113 S.W.3d 159, 168 (Ky. 2003) (internal citation omitted) (citation omitted). Essentially, the question is whether a governmental activity has crossed over into a service or enterprise that has been traditionally provided by the private sector, thereby removing the protection of sovereign immunity.

Examination of the function undertaken by the CVFD reveals this Appellant is clearly performing a governmental function. There are probably few other responsibilities that are so inherently governmental in nature than fire protection services. See Terrell v. Louisville Water Co., 127 Ky. 77, 80, 105 S.W. 100, 101 (1907) (holding that firefighting is a governmental function); Phillips v. Kentucky Utils. Co., 206 Ky. 151, 153, 266 S.W.

1064, 1065 (1924) (citing Terrell); Davis v. City of Lebanon, 108 Ky. 688, 691, 57 S.W. 471, 472 (1900) (“The appellee is authorized by law to establish and provide for the prevention and extinguishment of fire, and it seems that such authority may be treated as a governmental function.”); Small v. Board of Council of City of Frankfort, 203 Ky. 188, 261 S.W. 1111 (1924), overruled on other grounds by Haney (“The extinguishment of fires is a function which a municipal corporation undertakes in its public, governmental capacity . . .”). In declaring that fire departments are agents of the Commonwealth in KRS 75.070, the General Assembly expressed the public policy that firefighting is a function integral to state government. Accordingly, the rationale of immunity is appropriate.

As this Court stated in Williams, “constitutional doctrine is not immune from reconsideration and indeed this Court has declared that we will refrain from ‘sanctification of ancient fallacy.’” Williams, 972 S.W.2d at 267 (internal citation omitted) (citation omitted). As outlined above, this Court should revisit the interplay of the doctrines of sovereign immunity and jural rights, and hold that the General Assembly exercised its authority in articulating the public policy of the Commonwealth in conveying immunity upon entities like the CVFD.

For these reasons, the CVFD is cloaked in governmental immunity. Accordingly, the Court should affirm the order of the Grayson Circuit Court.

**D. Based upon the separation of powers doctrine, this Court should defer to the General Assembly’s pronouncement of public policy.**

Like federal constitutional law, the doctrine of separation of powers is a bedrock principle of Kentucky jurisprudence. As this Court stated in Legislative Research Commission ex rel. Prather v. Brown, 664 S.W.2d 907 (Ky. 1984):

The framers of Kentucky's four constitutions obviously were cognizant of the need for the separation of powers. Unlike the federal constitution, the framers of Kentucky's constitution included an express separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on the one had, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach . . . .

Id. at 911-12. "Moreover, it has been [the Court's] view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'"<sup>8</sup> Id. at 912 (citation omitted). This Court has also explained:

Kentucky is a strict adherent to the separation of powers doctrine. As we stated in Sibert v. Garrett, 197 Ky. 17, 246 S.W. 455, 457 (1922):

"Perhaps no state forming a part of the national government of the United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does . . . [the Kentucky] Constitution . . . ."

Diemer v. Commonwealth, 786 S.W.2d 861, 864-65 (Ky. 1990). See also Board of Trs. of the Judicial Form Ret. Sys. v. Attorney Gen., 132 S.W.3d 770, 782 (Ky. 2003) (discussing the strong principle of separation of powers embodied in Kentucky constitutional law).

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<sup>8</sup> Specifically, Section 27 provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ky. Const. § 27. Section 28 provides that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Id. § 28.

As part of the constitutional separation of powers, Kentucky courts have recognized the unique role of the General Assembly in articulating public policy. As this Court has held, “[t]he establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest.” Commonwealth ex rel. Cowan v. Wilkerson, 828 S.W.2d 610, 614 (Ky. 1992). See also Compex Int’l Co. v. Taylor, 209 S.W.3d 462, 465 (Ky. 2006) (citation omitted) (“We have long observed that determinations as to public policy are a matter for the General Assembly.”).

As Kentucky’s highest court noted in quoting from another state supreme court:

The legislative hand is free except as the constitution restrains; and courts are bound by a most solemn sense of responsibility to sustain the legislative will in the appropriate field of its exercise, even though in the opinion of the judges as individuals the legislature had acted in an unwise manner.

Owens v. Clemons, 408 S.W.2d 642, 645 (Ky. 1966) (internal quotation marks omitted) (quoting Collison v. State ex rel. Green, 2 A.2d 97, 108 (Del. 1938)). See also Boone County v. Town of Verona, 190 Ky. 430, 432, 227 S.W. 804, 805 (1921) (“A very well settled principle, which has been continuously adhered to, is, that the General Assembly has the authority to enact any legislation, which is not prohibited by some provision of the Constitution of the state, or of the United States . . .”).<sup>9</sup>

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<sup>9</sup> As Kentucky’s highest court has explained in comparing the General Assembly to Congress:

The General Assembly has authority to enact any legislation which is not prohibited by some provision of the state or federal Constitution. The powers of the General Assembly and of the Congress of the United States in that particular differ in that the former may exercise all power not withheld

Throughout history, the importance of firefighting is well documented. As one treatise has noted:

Fire is one of the foremost foes of cities and towns. At one time or another it has caused great devastation in urban centers in nearly every country in the civilized world. The burning of Rome in the year 64 A.D., the many fires in London, including "The Great Fire" in 1666, the numerous fires in the United States, such as the Boston fire in 1872, the St. Louis fire in 1851, the Chicago fire in 1871, the most disastrous of modern times, and the San Francisco fire in 1906, are all matters of history. To combat this danger, fire companies, public or voluntary, exist in practically every populous center in the United States.

16A McQuillin, The Law of Municipal Corporations, § 45.02 (3d ed. 2007). In City of Louisville v. Weible, 84 Ky. 290, 1 S.W. 605 (1886), the Court described the powers of cities:

The power to protect, through her cities and towns, and other public agencies, the public health, the public morals and the public safety, can not be relinquished or surrendered; for the government is bottomed upon the fundamental principle of the promotion of the peace, safety, happiness and security of its citizens. Therefore, any surrender of its power to protect the public health, the public morals, the public peace, the public safety of the citizen, would violate this fundamental principle, and tend to revolution and anarchy. The power, therefore, can not be surrendered.

The State, however, and its municipalities intrusted with the execution of this power, may provide a means of protecting the public health. It is its duty to do so, and any means may be adopted that will effect the end, such as employing competent and trusty person to take the matter in charge under the supervision and control of the State or city.

Id. at 295, 1 S.W. at 607. In enacting KRS 75.070 and 95.830(2), the General Assembly has expressed the public policy of the Commonwealth that fire departments and firefighters

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by the State Constitution, while the latter may exercise only such power as is granted by the federal Constitution.

Shanks v. Howes, 214 Ky. 613, 618-19, 283 S.W. 966, 969 (1926).

shall not be liable for alleged negligent acts in responding to and addressing an emergency, which is done for the protection of the public.

As a result of the Court of Appeals' decision, decisions made by firefighters in emergency situations are subject to question and can be second-guessed by juries. As Justice Cooper commented in his dissent in Williams:

[L]egislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, a witness can be recalled. The rationale for legislative preeminence in formulating broad public policy is reflective of these inherent strengths in the legislative process.

Williams, 972 S.W.2d at 275 (Cooper, J., dissenting). It is respectfully submitted that this Court should defer to the public policy determination made by the General Assembly in conferring immunity upon fire departments by making them agents of the Commonwealth.

**II. LIKE THE CANEYVILLE VOLUNTEER FIRE DEPARTMENT, CHIEF CLARK IS IMMUNE FROM SUIT. IN THE ALTERNATIVE, HE IS CLOAKED IN OFFICIAL IMMUNITY.<sup>10</sup>**

As discussed below, Chief Clark is also entitled to governmental immunity in the performance of his duties pursuant to KRS 75.070. In the alternative, he was performing a discretionary function in overseeing the extinguishment of the fire at Green's Motorcycle Salvage, and any claims against him should be dismissed on the basis of qualified official immunity.

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<sup>10</sup> While the Complaint's caption reflects that Chief Clark is sued in both his individual and official capacities, the Appellees have not articulated what he did separate from his role as fire chief in extinguishing the fire at their business. See, e.g., Walker v. Rowe, 791 F.2d 507, 508 (7th Cir. 1986) (holding that a plaintiff must plead something tortuous independent of the office the defendant holds . . . .").

A. **KRS 75.070 confers immunity upon Chief Clark for any claim arising from the extinguishment of the fire at the Greens' business.**

In addition to conferring immunity upon fire departments, KRS 75.070(1) expressly confers immunity upon firefighters—including individuals like Chief Clark. As explained above, this Court should defer to the General Assembly's determination that governmental immunity should apply to the actions of Chief Clark.<sup>11</sup>

Accordingly, the Court of Appeals erred in holding that Chief Clark was not immune pursuant to KRS 75.070. This Court should reverse the decision of the Court of Appeals and affirm the Grayson Circuit Court's dismissal of the claims against Chief Clark.

B. **Assuming, arguendo, that Chief Clark did not have governmental immunity, he was engaged in a discretionary function and is immune due to qualified official immunity.**

While rejecting the application of immunity in KRS 75.070 to Chief Clark, the Court of Appeals turned to its prior decision in Ashby v. City of Louisville in holding that official immunity applies to firefighters. See Green's Motorcycle Salvage, slip op. at 11. In Ashby, the court relied upon the Restatement (Second) of Torts § 895D(3) in holding that municipal police officers were entitled to immunity. See Ashby, 841 S.W.2d at 188-89. Without addressing whether Chief Clark was engaged in a discretionary or ministerial function because the Court of Appeals believed it could not determine from the pleadings whether the claims were premised upon discretionary functions, the court reversed and remanded the judgment in this case. See Green's Motorcycle Salvage, slip op. at 11-12.

“Official immunity” is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on

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<sup>11</sup> As this Court recognized in Yanero, any claim against Chief Clark is his official capacity is really a claim against the agency and entitles him to the same immunity. See Yanero, 65 S.W.3d at 522.

the status or title of the officer or employee, but on the function performed.” Yanero, 65 S.W.3d at 521 (citation omitted). As this Court held in Yanero, “[q]ualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.” Id. at 522 (internal citations omitted) (citation omitted).

In the Complaint, the Appellees specifically allege:

The Caneyville Volunteer Fire Department responded to the call notifying it of the fire at the Plaintiffs’ business premises, but by . . . the negligent acts and omissions of its Chief, Anthony Clark, failed to expeditiously extinguish the fire, which resulted in an increased loss of real property and personal property owned and possessed by the Plaintiffs.

Complaint, ¶ 8 (TR. 2). From the clear language of the Complaint, the Appellees are solely alleging that Chief Clark was negligent in directing the firefighters in extinguishing the fire, which inherently involved the exercise of judgment and discretion in an unpredictable environment.

As a matter of law, the decisions made by Chief Clark in fighting the fire at the Greens’ business in his capacity as chief were discretionary functions for which Chief Clark is cloaked in qualified official immunity. See Ayres v. Indian Heights Volunteer Fire Dep’t, Inc., 493 N.E.2d 1229, 1232 (Ind. 1986) (affirming the dismissal of the claim against a fire department on the basis that “the manner in which the particular fire is combatted, [] is a discretionary function, by the fact that all fires are different and require separate and distinct judgments as to the proper manner of combatting [sic].”); id. at 1234 (discussing the holding in City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind. App. 1983) (holding that “the court held that decisions as to how to fight a particular fire require that discretionary judgments be

made regarding the appropriate methods and techniques for the unique situation presented by the fire.”)).

For these reasons, the Appellants alternatively argue that the Court of Appeals correctly held that Chief Clark has qualified official immunity in the performance of discretionary functions. The Court of Appeals erred in not affirming the dismissal of the claims against Chief Clark on this basis.

### **III. CITY OF CANEYVILLE CANNOT BE VICARIOUSLY LIABLE FOR ANY ALLEGED NEGLIGENCE BY THE CANEYVILLE VOLUNTEER FIRE DEPARTMENT.**

In its decision, the Court of Appeals explained that the City’s apparent liability hinges “upon the doctrine of respondeat superior.” Green’s Motorcycle Salvage, slip op. at 12. See also Complaint, ¶ 4 (TR. 2) (“The Defendant, Caneyville [sic] Fire Department, is an agency of the City of Caneyville.”). As the court noted, however, “[i]t is a fundamental rule under that doctrine that if the employee has no liability upon a claim, the employer likewise is without liability.” Green’s Motorcycle Salvage, slip op. at 12 (citing Patterson v. Blair, 172 S.W.3d 361, 364 (Ky. 2005)).

While the Court of Appeals was correct in holding that City could not be vicariously liable, the court erred in failing to apply the provisions of KRS 75.070(1), which expressly grants immunity to a city for any claim arising against a fire department in responding to the Greens’ fire. See also KRS 95.830(2) (conferring immunity upon the City for use of the firefighting apparatus in fighting fires). As explained above, the General Assembly exercised its authority in enacting this statute as an expression of the public policy that cities are immune from suit arising from the actions of fire departments in responding to emergencies. This Court should defer to the General Assembly’s determination and affirm

the order of the Grayson Circuit Court dismissing any claims against the City of Caneyville on this basis. See Williams, 972 S.W.2d at 275 (Cooper, J., dissenting).

### CONCLUSION

In his concurring opinion in Williams, then Chief Justice Stephens expressed his doubts about the jural rights doctrine and the majority's reliance on it in that case:

I reluctantly concur with the majority vote.

However, for some time, I have begun to doubt the validity of the doctrine of jural rights which "popped" into our law in 1932.

As the dissent points out, and as the Law Journal by Professor Thomas Lewis emphasizes, there is very little, if any, basis for this now routinely accepted doctrine in the Kentucky Constitution or in the Constitutional Debates.

Perhaps even more importantly, and recent in years, this Court has moved the jural rights doctrine far beyond its original aegis, so as to restrict even the General Assembly and this Court from changing its precedents, even though created after the adoption of the present constitution.

Williams, 972 S.W.2d at 269 (Stephens, C.J., concurring) (internal citations omitted).

Addressing his position on the outcome of that case, he stated "I only concur because I believe there should be extensive debate before this Court changes such an established rule of law. I hope that the logic of the dissent [by Justice Cooper] will be the beginning of such a process." Id. Almost ten years later, this case presents this Court with that opportunity, and the Court should embrace the opportunity by abandoning the jural rights doctrine.

For the foregoing reasons, Appellants Caneyville Volunteer Fire Department, City of Caneyville, and Anthony Clark respectfully request that this Court reverse the decision of the Court of Appeals and affirm the Grayson Circuit Court's dismissal of all claims against these Appellants.

Respectfully submitted,

KERRICK, STIVERS, COYLE & VAN ZANT, P.L.C.  
P.O. BOX 844  
2819 RING ROAD, SUITE 200  
ELIZABETHTOWN, KENTUCKY 42702-0844  
(270) 737-9088  
(270) 769-2905 -- FAX

By: 

Greg N. Stivers

Jason B. Bell

Scott D. Laufenberg

*Counsel for Appellants Caneyville Volunteer  
Fire Department, City of Caneyville, and  
Anthony Clark*