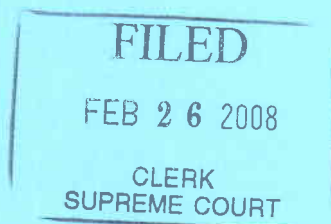


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2007-SC-000517-DG



CANEYVILLE VOLUNTEER FIRE DEPARTMENT  
CITY OF CANEYVILLE  
AND  
ANTHONY CLARK

APPELLANTS


VS. APPEAL FROM THE KENTUCKY COURT OF APPEALS  
No.: 2006-CA-0001142-MR

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

APPELLEES


BRIEF FOR APPELLEES, THE GREENS

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CERTIFICATE OF SERVICE

I certify that true copies of the foregoing Appellees' Brief were served this February 25, 2008 by mailing a copy to the following persons: Hon. Robert Miller, Judge, Grayson Circuit Court, 516 Fairway Drive, Brandenburg, KY 40108; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Greg N. Stivers, Jason Bell, Scott D. Laufenberg, Attorneys for Appellants, P.O. Box 844, Elizabethtown, KY 42702-0844; David P. Bowles, Chris J. Gandansky, Attorneys for Kentucky League of Cities, *Amicus Curiae*, 220 W. Main St., Suite 1900, Louisville, KY 40202.

  
Alton L. Cannon

**STATEMENT CONCERNING ORAL ARGUMENT**

The Greens agree that oral argument would assist the Court in resolving the issues in this matter.

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## COUNTERSTATEMENT OF THE CASE

The Appellants' Statement of the Case is substantially accurate as far as it reiterates the chronology of the events and the judicial proceedings.

If this matter is allowed to proceed to trial, the Greens will show that the cause of the total loss of the business was the fact the Caneyville Volunteer Fire Department lacked the equipment and the personnel to handle the fire.

Despite the Greens' pleadings, Chief Anthony Clark refused to seek assistance from the nearby Leitchfield Volunteer Fire Department until it was too late.

## ARGUMENT

For purposes of clarity, this brief will follow the formats of the appellants' brief and the brief for the *amicus curiae*, Kentucky League Of Cities.

### ***RESPONSE TO BRIEF FOR APPELLANTS***

#### **1. The General Assembly's legislative attempts to confer absolute immunity on volunteer fire departments and their personnel are unconstitutional.**

The Kentucky Constitution guarantees aggrieved persons access to the courts. Ky. Const. Sections 14 and 54. KRS 75.070 purports to confer absolute immunity on volunteer fire departments and their personnel for negligent conduct in fighting fires. KRS 95.830 purports to confer absolute immunity on cities and their employees for such negligent conduct. Was the Court of Appeals correct in holding that the statutes were unconstitutional?

The Kentucky General Assembly enacted the the statutes purporting to grant immunity from actions for negligence to volunteer fire departments and their personnel by the simple expedient of designating them as agencies of the Commonwealth of Kentucky.

In *Happy v. Erwin*, 330 S.W.2d 412 (Ky. 1959), this court's predecessor specifically held that a earlier version of statute—KRS 95.830 (2)—purporting to grant volunteer fire departments and their personnel was unconstitutional.

The state legislature may not abolish a common-law right of action. *Ludwig v. Johnson*, 243 Ky. 533, 49 S.W.2d 347 (1932).

**A. The Court should not abandon the jural rights doctrine.**

The doctrine of jural rights, guaranteeing access to the courts, predates the Kentucky constitution. The doctrine is acknowledged, by necessary inference, in the Kentucky Constitution. Should the Court abandon the doctrine?

Sections 14, and 54 of the Kentucky Constitution have been referred to as acknowledging the jural rights doctrine. First expressed in *Ludwig v. Johnson, supra*, there is a long line of appellate decisions acknowledging the continued vitality of the doctrine.

The Appellants devote a considerable effort, in their brief, to disparaging the doctrine of jural rights<sup>1</sup>. The appellants refer several times to an article by Professor Thomas P. Lewis, published in the University of Kentucky Law Journal. The article is entitled, *Jural Rights under Kentucky's Constitution: Realities Grounded in Myth*. The title telegraphs the professor's view of the doctrine of jural rights.

Despite Professor Lewis's apparent disdain for the doctrine of jural rights, Kentucky's appellate courts have confirmed these rights in a long line of decisions.

A search for Kentucky appellate decisions since 1992, when the article was published, resulted in at least thirty-nine opinions which have dealt in one way or another with the doctrine. This writer finds no support in the decisions to indicate that this Court intends to abandon the doctrine jural rights as guaranteed by the Kentucky Constitution. On the contrary the Court has further clarified the doctrine in holding that the

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<sup>1</sup> Neither the trial court nor the Court of Appeals used the phrase "jural rights" in reaching their respective decisions.

“...Kentucky Constitution must be applied to fundamental jural rights as presently accepted in society, not frozen in time to the year 1891 [the date of Kentucky’s Constitution]”. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky.1991).

The United States Court of Appeals for the Sixth Circuit cited this Court’s holding in *Williams v. Wilson*, 972 S.W.2d 260 (Ky.1998) and approved the doctrine of jural rights in a Kentucky case dealing with a product liability action involving a defective automobile in which the driver was killed when he was ejected from his vehicle in an accident when the door latch failed. *Clark v. Chrysler Corp.*, 310 F.3d (C.A.6, Ky. 2002)<sup>2</sup>

**B. Sovereign immunity trumps jural rights.**

The appellants also contend that sovereign immunity “trumps” jural rights. However, this argument is irrelevant—the issue is not whether sovereign immunity takes precedence of jural rights but whether the General Assembly can confer sovereign immunity on volunteer fire departments and their personnel by the simple expedient of declaring them to be agencies of the Commonwealth.

The Greens do not claim that their rights take precedence over sovereign immunity; they claim that the City of Caneyville, the Caneyville Volunteer Fire Department, and its personnel are not entitled to sovereign immunity from their negligence in allowing the Greens’ business to burn down. *Happy, supra*.

**(1) *The doctrine of sovereign immunity.***

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<sup>2</sup> This case was later reversed on other grounds by the United States Supreme Court. See: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (U.S.,2003).

The Greens agree that sovereign immunity is an ancient doctrine originating in the common law of England and that the Commonwealth of Kentucky and its agencies are entitled to sovereign immunity.

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

This argument is irrelevant, as stated previously.

**C. The Caneyville Volunteer Fire Department is not entitled to sovereign immunity.**

The Caneyville Volunteer Fire Department is not "...the Commonwealth, its cabinets, departments, bureaus, and agencies and its officers, agents, and employees."

KRS 44.073(11). It is not entitled to sovereign immunity.

**D. Sovereign immunity is a traditional doctrine affording immunity to the Commonwealth of Kentucky.**

Sovereign immunity is a traditional doctrine that dates to the common law of medieval England. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). The parties have dealt at length with the history of the doctrine. Sovereign immunity is a right of the Commonwealth of Kentucky, its agencies and its political subdivisions.

**2. The General Assembly cannot confer sovereign immunity on Chief Clark.**

The General Assembly does not have the authority to confer immunity on volunteer fire departments and their personnel. *Happy, supra*.

The City of Caneyville, the Caneyville Volunteer Fire Department and Chief Clark cannot be vested with sovereign immunity by an enactment of the General Assembly or by simply designating them as agencies of the Commonwealth of Kentucky. *Happy, supra*.

**A. KRS 75.070 is unconstitutional and cannot confer sovereign immunity on Chief Clark.**

The General Assembly cannot confer sovereign immunity on Chief Clark by using language in a statute in an attempt to subvert the guarantees of the Kentucky constitution. *Happy, supra*.

**B. Chief Clark is not entitled to qualified official immunity.**

The issue of qualified official immunity was not raised in the Appellants' motion to dismiss filed in the trial court<sup>3</sup>. The Court of Appeals held that Chief Clark was entitled to qualified official immunity. Should this Court reverse the Court Of Appeals insofar as it held that Chief Clark was protected by qualified official immunity?

Qualified official immunity is an affirmative defense, which must be specifically pled. *Yanero, supra*, citing: *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L.Ed.2d 572 (1980).

**C. Whether Chief Clark's actions were ministerial or discretionary is a question of fact and must be decided initially in the trial court.**

In *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) this Court discussed the doctrine of sovereign immunity, and the principles of governmental immunity and official immunity. The Court clarified the distinction between ministerial duties and discretionary duties when immunity is invoked.

"Qualified official immunity applies to public officers or employees if their actions are discretionary (i.e., involving personal deliberation, decisions and judgment)

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<sup>3</sup> See Appendix.

and are made in good faith and within the scope of their authority or employment.” *Autry v. Western Kentucky University*, 295 S.W.3d 713 (Ky. 2007).

The act of hosing water onto a fire does not involve discretion. In any event, this is a fact question, which should be decided by the trial court on remand. “An act is not “discretionary” merely because some judgment is used in deciding on the means or method used.” *Autry. Supra.*

**3. The City of Caneyville is liable for the negligent acts and omissions of Chief Clark.**

A municipal corporation, such as the City of Caneyville, is not immune from liability for ordinary torts. *Gas Service Company, Inc. v. City of London*, 687 S.W.2d 144 (Ky. 1985.) The Caneyville Volunteer Fire Department is an agency of the City of Caneyville and Anthony Clark was the Chief of the fire department. The City of Caneyville is liable for the negligent conduct of Chief Clark under the doctrine of *respondeat superior*. *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. App. 1964).

***RESPONSE TO BRIEF FOR AMICUS CURIAE, KENTUCKY LEAGUE OF CITIES***

**1. The Appellants are not entitled to governmental immunity.**

An agency of the Commonwealth is entitled to governmental immunity. The City of Caneyville is a municipal corporation and the Caneyville Volunteer Fire Department is its agency; they are not state agencies. Are they entitled to governmental immunity?

As the Court stated in *Yanero*, supra, “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 Court in *Yanero* went on to observe in

citing *Haney, supra*, and *Gas Service Co., Inc. v. City of London, Ky.* 386 S.W.2d 144 (Ky. 1985), that “municipal immunity was curtailed, if not effectively abolished”.

The City of Caneyville is a municipal corporation and is not entitled to governmental immunity for the negligent conduct of its agents and employees.

**2. The General Assembly does not have the authority to confer immunity on the Caneyville Volunteer Fire Department.**

The Kentucky League of Cities discusses the theory of statutory construction at some length. There is but one way to construe KRS 75.070 and KRS 95.830—they purport to grant absolute immunity for negligence on volunteer fire departments and their personnel. There is no way to construe the statutes that would make them pass constitutional muster. Ky. Const. Sections 14 and 54.

**3. The City Of Caneyville is liable for the negligence of the Caneyville Volunteer Fire Department.**

A principal is liable for the negligence of its agents and employees. The Caneyville Volunteer Fire Department is an agency of the City of Caneyville. Is the City of Caneyville liable for the negligence of the Caneyville Volunteer Fire Department in allowing the Greens’ building burn down?

It is undisputed that the Caneyville Volunteer Fire Department is an agency of the City of Caneyville and that Anthony Clark is the Fire Chief. It is axiomatic that a principal is liable for the negligent acts and omissions of its agents and employees under the traditional doctrine of *respondeat superior*. *Gas Service Company, supra*, *Haney, supra*.

**4. Chief Clark is not entitled to immunity.**

**A. Chief Clark is not entitled to governmental immunity as a matter of law.**

The Kentucky League of Cities asserts that Chief Clark is immune from tort liability as a matter of law under KRS 75.070. The Court of Appeals correctly held that KRS 75.070 is unconstitutional. *Happy, supra*.

**B. Chief Clark is not entitled to qualified official immunity as a matter of law.**

Chief Clark is not entitled to qualified official immunity as a matter of law. This would, at the very least, present a question of a fact to be determined by the trial court. As the Court noted in *Yanero, supra*, "...an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to orders of others, or when the officer's duty is absolute, certain and imperative, involving merely execution of a specific act arising from fixed or designated facts."

In *Pile v. City of Brandenburg*, 215 S.W.3d 36 (Ky. 2006) the Court dealt with a negligence action for wrongful death against city police officer; the trial court had granted the city and the police officer a summary judgment on the grounds that they were entitled to immunity. The Court held that:

"In *Jones v. Lathram*, the language of *Yanero v. Davis*, 65 S.W.3d 510 (2001) provides in part that an officer or employee is afforded no immunity for tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to the orders of others or whether the officer's duty is absolute, certain and imperative, involving merely execution of specific acts arising from a fixed and designated fact.

Any local government such as the City of Brandenburg could be liable for negligence arising out of the acts or omissions of its employees in the discharge of their ministerial

duties. See KRS 65.2003(3). The negligent operation of an emergency vehicle by a police officer which violates existing police procedures or regulations or statutory traffic regulations is certainly actionable and outside the scope of the common law doctrine of “special relationship” relied on by the City and Officer Miller.”

Individuals are not protected from ordinary tort liability by the doctrine of governmental immunity. *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004); *University of Louisville v. O'Bannon*, 770 S.W.2d 215(Ky.,1989).

The Kentucky League of Cities--as it acknowledges in its brief--is an insurance company, which offers liability insurance coverage to its municipality members. The trial court chastised the Greens' for not having the contents of their building insured and the Appellants “jumped on the bandwagon”.

The question of insurance is the real core of this litigation. As alleged in the Complaint, the Caneyville Volunteer Fire Department carried liability insurance. The defense of sovereign immunity was raised by its insurance carrier.


The appellants and the Kentucky League of Cities argue at length on the public policy of the immunity of Volunteer Fire Departments. The *amicus curiae* is understandably silent as to any public policy concerns about a company that sells liability insurance to cities, collects the premiums on the policies but when claims are made seeks refuge in the sanctuary of sovereign immunity.

## CONCLUSION

The Court should affirm the decision of the Court Of Appeals in holding that the statutes purporting to grant immunity to the appellants are unconstitutional. As a lawyer said over two thousand years ago, "*Summum ius summa injuria.*"<sup>4</sup>

The Court should overrule the decision of the Court of Appeals, insofar as it held that Anthony Clark, as fire chief, is entitled to qualified official immunity.

Submitted this February 25, 2008.

  
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<sup>4</sup> More law, less justice. "Injustice often arises also through chicanery, that is, through an over-subtle and even fraudulent construction of the law. This it is that gave rise to the now familiar saw, "More law, less justice." Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general went to ravaging their fields by night, because, he said, the truce stipulated "days," not nights. ...Cicero, De Officiis, I, 33.