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SUPREME COURT OF KENTUCKY
2007-SC-000517-DG

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

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF SERVICE

This is to certify that the original and ten (10) copies of this Appellants' Reply Brief were hand delivered to **Susan Stokley Clary**, Clerk of the Supreme Court, New Capitol Bldg., 700 Capitol Avenue, Frankfort, KY 40601-3488, on this 12th day of March, 2008. 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

ARGUMENT

I. **THE JURAL RIGHTS DOCTRINE DISRUPTS THE CHECKS AND BALANCES UPON WHICH OUR REPUBLICAN FORM OF GOVERNMENT IS BASED AND MUST BE ABANDONED.**

In discussing the separation of powers between the branches of a republican government, Alexander Hamilton explained in *The Federalist No. 78*:

The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.

The Federalist No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). See also *Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972) (quoting *The Federalist No. 78*). Similarly, in *The Federalist No. 51*, James Madison stated that “[i]n republican government, the legislative authority necessarily predominates.”¹ *The Federalist No. 51*, at 290 (James Madison) (Clinton Rossiter ed., 1961). While the *Federalist Papers* were written to garner support for the ratification of the U.S. Constitution, the principles of a republican form of government that they describe apply equally to the Kentucky Constitution of 1891. Based upon Sections 27 and 28 of the present Kentucky Constitution, the importance of the separation of powers and the checks and balances is articulated even clearer than in the U.S. Constitution.

¹ See also *The Federalist No. 78*, at 436-37 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.”).

As elected officials, our state legislators perform their legislative role by interacting with constituents and interested parties, holding legislative hearings, and crafting legislation based upon their findings. They advocate for specific causes and support legislation important to their constituents. It is the legislative branch's role—and its alone—to define public policy through its legislative enactments.

From its inauspicious creation in 1932, the jural rights doctrine has been invoked to protect from legislative curtailment common-law actions as they existed before the present Constitution.² Over time the doctrine has evolved to usurp the legislative function from the General Assembly. Under the present conception of the jural rights doctrine, tort law concepts as enunciated by the Kentucky Supreme Court are inviolate. See Thomas P. Lewis, Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth, 80 Ky. L.J. 953, 953 (1992) (“The structure [of jural rights] is remarkable because only judges may enter; the General Assembly is locked out.”).

Professor Lewis totally debunked the myth behind the jural rights doctrine in his 1992 law review article. Although the doctrine is predicated upon a link among Sections 14, 54, and 241 of the Kentucky Constitution supposedly intended by its drafters, no such intent is expressed in the language of these sections. To the contrary, each section has a separate and unrelated history relating to due process of law (Section 14), monetary caps on claims against railroads (Section 54), and limitations on wrongful death actions (Section 241). Professor Lewis analyzed thousands of pages of chronicled debates

² The Appellees mistakenly assert that the jural rights doctrine predates the Kentucky Constitution. See Appellees' Brief, at 6. In fact, “jural rights” is mentioned nowhere in the 1891 Constitution or any reported state decisions prior to Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932), more than 40 years after the present Constitution was adopted.

preceding the 1891 Constitution and concluded that there was no support for the notion that the framers intended to confer upon Kentucky courts the role of creator/protector of tort rights affecting citizens of this Commonwealth. Thus, not only does the jural rights doctrine contradict the separation of powers mandated by Sections 27 and 28 of the Constitution, the doctrine has no historic foundation whatsoever. Because the jural rights doctrine effectively crowns the Kentucky Supreme Court as “emperor” of tort law in Kentucky, the Lewis law review article essentially has proclaimed: “THE EMPEROR HAS NO CLOTHES!”

Conspicuously absent in the 16 years since Professor Lewis’ article is any scholarly research or reported decisions taking issue with his conclusion that there is no constitutional foundation for the jural rights doctrine prior to its invention in 1932. Faced with this issue in Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998), the majority ignored Professor Lewis’ detailed analysis altogether, instead perpetuating the jural rights doctrine on the basis of this Court’s own previous decisions despite the scholarly evidence that the doctrine’s foundation was pulled out of thin air. See id. at 267-68. The dissent, however, paralleled the analysis of Professor Lewis’ article. See id. at 269-75. In his concurring opinion, Chief Justice Stephens likewise expressed acceptance of the article’s analysis, but deferred on the basis of stare decisis alone while inviting further debate on the viability of the jural rights doctrine. See id. at 269.

It is respectfully submitted that the time has come to restore Kentucky government to its tripartite system established by our founders by abandoning the jural rights doctrine. The function of lawmaking should be the sole function of the General Assembly. This Court’s role consists of insuring that statutes passed by the General

Assembly do not offend the Constitution and “filling the gaps” with common law on legal issues on which there are no pertinent statutory enactments.

II. IF NOT REVERSED, THE EFFECT OF THE COURT OF APPEALS’ DECISION WILL HAVE A LONG-TERM DETERIMENTAL IMPACT ON THE SAFETY OF THE PUBLIC.

Volunteer fire departments serve the important governmental and societal function of protecting persons and property. Many of the fire departments throughout the Commonwealth, like the Caneyville Volunteer Fire Department (“CVFD”), are staffed by volunteers who dedicate themselves to the service of their community. When the call comes in the middle of the night, these volunteer firefighters leave the safety and comfort of their own homes to save the lives and property of their neighbors. We—as a Commonwealth—owe these volunteers a debt of gratitude for their selfless service.

Volunteer fire departments may not have the same financial resources as their municipal counterparts.³ The significance of these limitations is underscored in the present case where the Appellees’ claims are predicated on the “fact [that] the Caneyville Volunteer Fire Department lacked the equipment and the personnel to handle the fire” which destroyed their business. Appellees’ Brief, at 4. Claims like this can be expected to adversely affect volunteer fire departments. Volunteer firefighters will decline to serve because of the potential liability from jurors second-guessing their split-second decisions in emergency situations, not to mention questioning the adequacy of their equipment or staffing. Ultimately, the general public will be harmed by the lack of fire protection that inevitably will result from lawsuits like this one.

³ Contrary to the Appellees’ assertion that the CVFD is the agent of the City, volunteer fire districts are created through special taxing districts set up by **the County** under KRS 75.010 and KRS 65.182. Thus, these agencies are more appropriately characterized as agents of the county and protected by sovereign immunity.

Policy considerations like the effect of statutory immunity for firefighters upon fire protection throughout the state should sound misplaced in this forum. These arguments should instead be directed to the legislative branch for consideration, with input from all affected facets of our Commonwealth. Through the legislative process, the General Assembly is intended to function as the conscience of the state in passing laws governing interactions among and the liabilities between our citizens. The jural rights doctrine usurps this function from the legislative to the judicial branch in a manner never intended by the framers of our Constitution. Accordingly, this Court should accept the challenge of Chief Justice Stephens in Williams to revisit the underlying premises of the jural rights doctrine and abandon the doctrine.

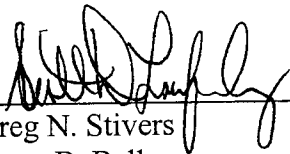
CONCLUSION

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 the Appellants.

Respectfully submitted,

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