COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-00322-TG

MADISON COUNTY FISCAL COURT; CITY OF CYNTHIANA; CITY OF DANVILLE; CITY OF FLORENCE; CITY OF GEORGETOWN; CITY OF GLASGOW; CITY OF NICHOLASVILLE; CITY OF PARIS; CITY OF RICHMOND; CITY OF SOMERSET; AND CITY OF WINCHESTER — APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT; NO. 09-CI-01940
HON. THOMAS D. WINGATE, JUDGE

KENTUCKY LABOR CABINET, J.R. GRAY, in his official capacity as Secretary of the Kentucky Labor Cabinet; MICHAEL L. DIXON, in his official capacity as Commissioner of the Department of Workplace Standards of the Kentucky Labor Cabinet; MARJORIE ARNOLD, in her official capacity as Program Manager (Eastern), Wage and Hours of the Kentucky Labor Cabinet; JERALD ADKINS, in his official capacity as Program Manager (Western), Wage and Hours of the Kentucky Labor Cabinet; and UNNAMED COMPLAINANTS, individually — APPELLEES

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STATEMENT OF POINTS AND AUTHORITIES

Appellants respectfully state as follows on reply:

A. APPELLANTS ARE NOT ASSERTING INDEMNITY AGAINST THE COMMONWEALTH; APPELLANTS HAVE IMMUNITY.

Appellees reframe this lawsuit as an indemnification action because the Commonwealth's sovereign immunity purportedly bars Appellants' indemnity claim. The re-characterization is a classic "straw man" argument: disregard the actual issue and erect a non-issue easier to attack. The Court should reject Appellees' argument because it conflates indemnity with immunity. Indemnity is the right of a party to be reimbursed by another for the first party's liability. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 107 (Ky. 2003). Liability must exist before indemnification applies. By contrast, immunity exempts a party from liability and shields the immune party from the costs and burdens of litigation. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 888 (Ky. 2009). Thus, indemnity and immunity operate differently, and immunity has broader protections than indemnity. In this case, Appellants have always claimed to be exempt from overtime liability and litigation because Appellants are entitled to immunity.

Based on *City of Louisville v. Padgett*, 457 S.W.2d 485 (Ky. 1970), Appellees improperly attempt to morph Appellants' immunity defense into an indemnification claim. In *Padgett*, an injured passenger sued the driver, the City of Louisville, the sewer district, and the state road contractor – Ruby Construction Company – following an accident involving water in the roadway. The City of Louisville cross-claimed against Ruby for indemnification. Ruby was found not liable because it "only did what it was instructed to do by highway department officials." *Id.* at 490. Appellees incorrectly equate Appellants with the City of Louisville and its indemnification cross-claim against Ruby, but Appellants should be equated to Ruby and exempted from liability because

Appellants "only did what [they were] instructed to do by [state] officials" when paying overtime on state incentive funds. Although *Padgett* never mentions "immunity," Ruby was exempt from liability due to its contractual relationship with the highway department, which has immunity. The same concept logically extends to Appellants.

B. APPELLANTS' IMMUNITY APPLIES AGAINST THE LABOR CABINET ACTING ON BEHALF OF THE FIREFIGHTERS.

Next, Appellees argue that immunity does not stop the Labor Cabinet because immunity only bars private lawsuits. The Cabinet, however, seeks to collect back overtime wages. To collect such wages under KRS Chapter 337, the Cabinet must "stand in the shoes" of the firefighters, and immunity applies against the firefighters.

Pursuant to KRS 337.385(1), "[a]ny employer who pays any employee less than wages and overtime compensation to which such employee is entitled ... shall be liable to such employee." *Id.* Overtime liability only extends to the *employee*, not to the Labor Cabinet; moreover, KRS 337.385(2) sets forth the procedure for an employee to assign to the Labor Cabinet the right to collect back overtime wages on the employee's behalf: [1]

> At the written request of any employee paid less than the amount to which he is entitled under the provisions of KRS 337.020 to KRS 337.285, the executive director may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The executive director in case of suit shall have power to join various claimants against the same employer in one (1) action.

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[1] Appellees argue the Labor Cabinet is trustee instead of assignee, but the same analysis applies. For example, in bankruptcy, the "trustee is ... subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor." *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 356 (3d Cir. 2001). Furthermore, Appellees misconstrue the Restatement of Trusts (Second). A trustee may bring any action as if the trustee owned the property free of trust, but the trustee has no greater right to obtain the beneficiary's property than the beneficiary.

KRS 337.385(2); *see also Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 361-62 (Ky. 2005). This "assignment" procedure establishes the Labor Cabinet as the firefighters' assignee, but subjects it to the same defenses as the firefighter-assignors. *Whayne Supply Co. v. Morgan Const. Co.*, 440 S.W.2d 779, 782-83 (Ky. 1969).

Appellees construe the assignment to be optional because the Labor Cabinet "*may* take an assignment" and "*may* bring any legal action necessary." [Appellees' Br. pp. 24-25]. Their construction of KRS 337.385(2) fails because, if not one assignment were required, the whole assignment provision would be "ineffectual and meaningless." *See Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005). Instead, to give "force and effect" to KRS 337.385(2), the word "may" must reflect the Cabinet's discretion whether to accept a wage claim assignment and prosecute it at all or refuse to accept a doubtful claim.[2] *See Terry v. Commonwealth*, 253 S.W.3d 466, 474 (Ky. 2007).

Appellees further argue the Cabinet may collect back overtime wages, with or without assignments, based on the Cabinet's enforcement authority in KRS Chapter 337. [Appellees' Br. p. 25]. However, the penalty provisions of KRS 337.990(7)-(8) specify the Cabinet's enforcement powers. Notably, for some wage and hour violations other than overtime, the penalty provisions in KRS 337.990(3),(4),(5) & (12) specifically empower the Cabinet to pursue unpaid wages or restitution as part of the penalty

[2] Appellees also appear to interpret KRS 337.385(2) to require wage claim assignments only for *court actions*. [Appellees' Br. pp. 27-28]. However, whether the Cabinet may pursue back overtime wages administratively, or must do so only in a "court action," is legally unclear. *See Parts Depot*, 107 S.W.3d at 358 n. 3. To the extent parallel administrative and judicial remedies exist to collect such wages, KRS 337.385(2) empowers the Cabinet to pursue "any legal action necessary." Regardless whether KRS 337.385(2) *requires* wage assignments only for court actions, the necessity of the Cabinet possessing ***at least one wage claim assignment*** to pursue any firefighter's back overtime wage claim, administratively *or* in court, seems clear from any statutory construction.

imposition process, but the overtime provisions in KRS 337.990(7)-(8) do not empower the Cabinet to collect overtime compensation. The legislature is presumed to act intentionally and purposefully by not giving the Cabinet authority to collect overtime compensation as part of its general enforcement and penalty powers.[3] *Liquor Outlet, LLC v. Alcoholic Beverage Control Bd.*, 141 S.W.3d 378, 385 (Ky. Ct. App. 2004).

Accordingly, KRS 337.385(2) requires the Labor Cabinet to have obtained at least one wage claim assignment to attempt to collect back overtime for firefighters, and Appellants may plead immunity since the Cabinet stands in the shoes of the firefighters.

C. THE LABOR CABINET CANNOT WAIVE APPELLANTS' IMMUNITY.

Appellees argue that "sovereign immunity was never intended to prevent the sovereign from policing itself." [Appellees Br. p. 19]. However, there is no ongoing compliance issue as a result of the remedial legislation enacted in 2009 by SB 46. Instead, the Cabinet is pursuing Appellants, not as departments of the sovereign, but for the benefit of the firefighter-assignors. Furthermore, the General Assembly – not the Labor Cabinet – determines if and when an immune governmental entity is subject to suit. Pursuant to Section 231 of the Kentucky Constitution, the General Assembly has exclusive power to "direct in what manner and in what courts suits may be brought against the Commonwealth." In KRS 44.072 and 44.073, the General Assembly has expressly preserved the sovereign immunity of the Commonwealth and its "agents." The Supreme Court of Texas recently considered the same issue whether one entity within the state can bring suit against another thereby abrogating the latter's immunity:

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[3] Appellees refer to the federal Department of Labor ("DOL"), which may take action without the employee's consent, but Appellees' brief explains Congress amended federal law to grant this specific power to the DOL. [Appellees' Br. p. 27]. Kentucky law does ***not*** extend the Cabinet authority to collect back overtime wages without an assignment.

> The State argues that because the City's immunity is derived from the State, it "defies logic" to allow it to be asserted against the State.
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> First, the primary question here is not logic, but legislative intent. Judges cannot simply abrogate immunity every time they believe the Legislature's failure to do so "defies logic." For all the reasons noted above, legislation rather than logic governs immunity[.]

City of Galveston v. State, 217 S.W.3d 466, 473 (Tex. 2007). The legislature's control over immunity in Texas corresponds with Kentucky law.

In denying Appellants' motion to stay, the Court of Appeals ruled sovereign immunity does not extend to suits between agencies of the sovereign. The appellate court, however, relied on a decision from 1961 by an intermediate court in Louisiana. *Terrebonne Parish School Bd. v. St. Mary Parish School Bd.*, 131 So.2d 266 (La. Ct. App. 1961). *City of Galveston* provides better guidance since it closely accords with Section 231's legislative waiver requirement and with the General Assembly's express intent to preserve the immunity of "agents" of the Commonwealth. The Court of Appeals' ruling, which never considered *City of Galveston* or the Board of Claims Act, is faulty.[4]

D. APPELLANTS' IMMUNITY IS NOT WAIVED BY KRS CHAPTER 337.

Based on the General Assembly's power to waive sovereign immunity, Appellees argue that KRS Chapter 337 impliedly waives any immunity for local governments because KRS 337.010 does not expressly exempt county employers and KRS 337.285 mentions county employees. [Appellees' Br. p. 37]. However, only one Appellant is a county employer[5] while most Appellants are cities, and Appellees have cited no

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[4] In addition, the Court of Appeals never addressed the wage claim assignment issue under KRS 337.385(2), even though it was briefed by Appellants.

[5] "Madison County Fiscal Court" is the lone county Appellant, and the trial court expressly reserved ruling on whether its county immunity status was granted or denied. *See* [ROA p. 884 n. 8]. Hence, county immunity is not even an issue in this appeal.

provisions in KRS Chapter 337 referring to cities or municipalities. Furthermore, an implied waiver requires "such overwhelming implications from the text as will leave no room for any other reasonable construction." *Withers v. Univ. of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997). Under this standard, both state and federal courts have found no waiver of county sovereign immunity. *See Blankenship v. LFUCG*, 2008-CA-002044-MR, 2010 WL 3270045 (Ky. App. Aug. 20, 2010); *Crawford v. LFUCG*, No. 06-299-JBC, 2007 WL 101862 (E.D. Ky. Jan. 10, 2007).

In addition, Appellants were agents of the state while carrying out the firefighter incentive program. The state created the incentive supplement, contracted with local governments to distribute the incentive funds to firefighters, and directed Appellants how to pay overtime on the supplement in accordance with its design. Under these circumstances, suing Appellants for additional overtime liability is tantamount to suing the state. KRS Chapter 337 clearly ***does not waive*** the immunity of the state or its agents. *See, e.g., Tiller v. Univ. of Kentucky*, 55 S.W.3d 846, 850 (Ky. App. 2001).

E. APPELLANTS' IMMUNITY BARS DAMAGES FOR BACK WAGES.

Based on *Beichler v. West Virginia Univ.*, 700 S.E.2d 532 (W. Va. 2010), Appellees argue that immunity does not extend to the costs of complying with state laws. [Appellees' Br. p. 33]. However, in West Virginia, state and local governments are subject to the state's Wage Claim and Collection Act and have no immunity at all. 700 S.E.2d at 536-37. More on point, however, Texas courts have found immunity to bar damages against cities for back wages sought by firefighters as a result of alleged state law overtime violations. *See Anderson v. City of McKinney*, 236 S.W.3d 481, 483 (Tex. App. 2007) (citing *City of Houston v. Williams*, 216 S.W.3d 827 (Tex. 2007)).

F. APPELLANTS ARE AGENTS OF THE STATE.

Citing the Restatement and case law from other jurisdictions, Appellees argue that Appellants are not agents of the state because the state Fire Commission never consented or assented to an agency relationship. [Appellees' Br. pp. 30-32]. Appellees' argument fails because it overlooks applicable Kentucky law; in this case, Appellants were state agents consistent with the Board of Claims Act. In *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003), this Court applied the framework of that Act and held local school boards to be agents of the state Department of Education ("DOE") due to the "statutory relationship" between them. *Id.* at 153-54. Appellants have shown that local governments were agents of the state when carrying out the incentive program because of their similar statutory relationship with the Fire Commission. In addition to statutory controls, local governments were contractually bound to the Fire Commission. Appellants were clearly state agents consistent with *Williams* and the Board of Claims Act.[6]

G. THE LABOR CABINET DOES NOT HAVE JURISDUCTION TO APPLY KRS CHAPTER 337 INCONSISTENTLY WITH KRS CHAPTER 95A.

Appellees and the trial court have framed the jurisdictional issue to be whether the state incentive supplement is or is not "wages" under KRS 337.010. Appellees argue that

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[6] In addition to claiming immunity as state agents, Appellants consistently urged the courts below to extend sovereign immunity to cities as political subdivisions and alternatively asserted qualified official immunity. Appellees argue the sovereign immunity issue for cities is waived, but it was clearly preserved, as "sovereign immunity" was raised on the face of the pleadings, recited in the CR 76.03 prehearing statement, and raised in the Motion to Transfer to this Court. Further, sovereign immunity may be raised ***at any time***. *Dep't of Corr. v. Furr*, 23 S.W.3d 615, 616 (Ky. 2000). Appellees also argue that qualified official immunity only applies to negligence actions, but Appellees cite no authority for this limitation; and, it is contrary to Kentucky's doctrine that qualified official immunity stems from sovereign/governmental immunity (*see Autry v. WKU, et al.*, 219 S.W.3d 713, 717 (Ky. 2007), and sovereign immunity clearly ***does apply*** to non-tort actions. *See Ammerman v. Bd. of Educ., Nicholas Co.*, 30 S.W.3d 793, 797 (Ky. 2000).

the General Assembly failed to exempt the incentive supplement from KRS Chapter 337. [Appellees' Br. p. 40]. In addition, Judge Wingate believed the incentive supplement was subject to KRS Chapter 337 because local governments historically paid overtime on the state funds for unscheduled overtime hours. [ROA p. 892]. Respectfully, both Appellees and Judge Wingate misconceived the jurisdictional issue. Assuming the incentive supplement is "wages," the issue is whether KRS Chapter 337 or 95A controls when determining how the incentive supplement was intended to apply. The intent issue is pivotal, because under both federal and state law, overtime turns on intent.

Overtime is computed based on the "rate per hour." 803 KAR 1:060 § 6; *see also* 29 C.F.R. § 778.109. To determine the functional "rate per hour," federal law looks to the "employment contract" between the employer and employee. *Id.* § 778.108. In *Labor Cabinet v. Hasken*, 265 S.W.3d 215 (Ky. App. 2007), the issue was whether 803 KAR 1:060 § 6 also requires the "rate per hour" to turn on intent. The Hearing Officer, the Jefferson Circuit Court, and the Court of Appeals all held that Section 6 requires an examination into the intent of the parties. *Id.* at 221-22. Based on the CBA and the prior practices between the City of Louisville and its firefighters, the Court of Appeals found the firefighters were intended to be compensated on a 40-hour per week basis and accordingly upheld the 40-hour weekly/2,080-hour annual divisor. *Id.*

Although the intent of the employer and employee generally determines the rate per hour under Section 6, the incentive supplement is funded and controlled ***solely*** by the state instead of the local-government employer, and thus, the intent of the incentive fund program controls. As Appellees have repeatedly noted, Judge Wingate found Appellants contracted with the state – not the firefighters. [ROA p. 883 n. 13]. Therefore, the intent

between the employer and employee as to the incentive supplement cannot be contrary to the state's intent; instead, the ***specific*** statutory, regulatory, and contractual regime set up by the state in KRS Chapter 95A must govern how the supplement was intended to apply.

Appellees argue the Jefferson Circuit Court in *Hasken* previously resolved whether the intent embodied in KRS Chapter 95A conflicts with KRS Chapter 337. [Appellees' Br. pp. 9-11]. Unlike the Court of Appeals in *Hasken*, the circuit court separately considered the statutory and regulatory provisions of KRS Chapter 95A. The circuit court upheld the 40-hour weekly/2,080-hour annual divisor based on 815 KAR 45:035 § 1(7), which provides: "'Professional firefighters' means an individual described in KRS 95A.210(4) who works a minimum of 2,080 hours per year[.]"

The Jefferson Circuit Court ruling is limited because little or no evidence of historical context of the supplement's implementation and contemporaneous construction was entered into the administrative record, and the circuit court never had the opportunity to review such information. In contrast to the limited record in *Hasken*, Appellants have shown that: the state contemporaneously interpreted the supplement to be inclusive of scheduled overtime compensation; the state's contemporaneous construction was consistent with the statutory term "regular salary" in KRS Chapter 95A, which term never changed until the remedial, 2009 statutory amendments; and the state's contemporaneous construction acquired longstanding application over nearly twenty-five years providing the basis for the state's overtime instructions. [Appellants' Br. pp. 36-40].[7]

[7] The definition of "professional firefighter" only sets a ***minimum*** 2,080 annual hour requirement, and exists to exclude part-time firefighters while including full-time, exempt fire chiefs who work only 40 hours per week along with line firefighters who regularly work "scheduled overtime" over 40 hours. Thus, the "professional firefighter" definition only identifies ***who*** is eligible for the state incentive supplement; it does not indicate ***what***

Notably, Appellees never dispute Appellants' historical account. [Appellees' Br. p. 1]. In fact, Appellees invite the Court to consider whether the incentive supplement's historical context changes the outcome of *Hasken*. [*Id.* p. 10]. The Court should accept the invitation because the incentive supplement's historical context is conclusive; it proves the state construed and implemented the supplement to include scheduled overtime compensation. Further, because the supplement has an embedded scheduled overtime component, the 3,328 annual divisor was perfectly proper, as illustrated by the citation of amici Ashland, Paducah, and Hazard to *Fulmer v. City of St. Albans*, 125 Fed.App'x 459, 461 (4th Cir. 2005)(upholding 3,328 divisor to convert firefighter pay intended to be inclusive of scheduled overtime compensation into an hourly rate).

The Labor Cabinet does not have jurisdiction to deviate from the intent established by the state as a matter of law under KRS Chapter 95A. To the extent the Cabinet is applying a uniform 2,080 divisor based on *Hasken*, the Cabinet is improperly determining intent under the rubric of KRS Chapter 337 instead of Chapter 95A. This jurisdictional issue provides a clear path for limiting *Hasken* and restoring the expectations of the parties. The 2,080 annual divisor upheld in *Hasken* directly conflicts with how the incentive supplement was always construed and intended to apply; KRS Chapter 95A specifically governs this issue, and therefore, must control.

Respectfully submitted,

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the supplement was intended to compensate for. Indeed, the Fire Commission promulgated other regulations and directives construing the supplement to include scheduled overtime compensation. *See, e.g.,* 815 KAR 45:035 § 1(12) (1980) [ROA p. 659].