Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-1784-MR

SOUTHPOINTE PARTNERS, LLC APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E
MCDONALD-BURKMAN, JUDGE
ACTION NO. 19-CI-002529

LOUISVILLE METRO GOVERNMENT; BETH ALLEN; DAVID TOMES; DAVID TOMES; DONALD ROBINSON; DONALD ROBINSON; EMILY LIU; EMMA SMITH; EMMA SMITH; JEFF BROWN; JEFF BROWN; JEFF O'BRIEN; JODY MEIMAN; JOE REVERMAN; KELLY JONES; LACEY GABBARD; LOUISVILLE METRO PLANNING COMMISSSION [sic]; LULA HOWARD; LULA HOWARD; MARILYN 'LEWIS; MARILYN LEWIS; RICH CARLSON; RICH CARLSON; ROBERT PETERSON; ROBERT PETERSON; RUTH DANIELS; RUTH DANIELS; VINCE JARBOE; AND VINCE JARBOE APPELLEES

AND

App. 2

NO. 2020-CA-0195-MR

SOUTHPOINTE PARTNERS, LLC APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 19-CI-006441

VINCE JARBOE; BETH ALLEN; DAVID TOMES; DONALD ROBINSON; EMILY LIU; EMMA SMITH; JEFF BROWN; JEFF O'BRIEN; JODY MEIMAN; JOE REVERMAN; KELLY JONES; LACEY GABBARD; LULA HOWARD; MARILYN LEWIS; RICH CARLSON; ROBERT PETERSON; AND RUTH DANIELS APPELLEES

ORDER
DENYING PETITION FOR REHEARING

(Filed Jul. 19, 2021)

** ** ** ** **

BEFORE: JONES, LAMBERT, AND THOMPSON, JUDGES.

Having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, the COURT ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: JUL 19 2021

/s/ Debra H. Lambert
JUDGE, COURT OF APPEALS

RENDERED: MAY 14, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-1784-MR

SOUTHPOINTE PARTNERS, LLC APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E.
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ACTION NO. 19-CI-002529

LOUISVILLE METRO GOVERNMENT; LOUISVILLE METRO PLANNING COMMISSION; VINCE JARBOE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LOUISVILLE METRO PLANNING COMMISSION AND IN HIS INDIVIDUAL CAPACITY; DAVID TOMES, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LOUISVILLE METRO PLANNING COMMISSION AND IN HIS INDIVIDUAL CAPACITY; ROBERT PETERSON, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LOUISVILLE METRO PLANNING COMMISSION AND IN HIS INDIVIDUAL CAPACITY; EMMA SMITH, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LOUISVILLE METRO PLANNING COMMISSION AND IN HER APPELLEES

INDIVIDUAL CAPACITY; LULA
HOWARD, IN HER OFFICIAL
CAPACITY AS A MEMBER OF THE
LOUISVILLE METRO PLANNING
COMMISSION AND IN HER
INDIVIDUAL CAPACITY; MARILYN
LEWIS, IN HER OFFICIAL
CAPACITY AS A MEMBER OF THE
LOUISVILLE METRO PLANNING
COMMISSION AND IN HER
INDIVIDUAL CAPACITY; JEFF
BROWN, IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE
LOUISVILLE METRO PLANNING
COMMISSION AND IN HIS
INDIVIDUAL CAPACITY; RICH
CARLSON, IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE
LOUISVILLE METRO PLANNING
COMMISSION AND IN HIS
INDIVIDUAL CAPACITY; RUTH
DANIELS, IN HER OFFICIAL
CAPACITY AS A MEMBER OF THE
LOUISVILLE METRO PLANNING
COMMISSION AND IN HER
INDIVIDUAL CAPACITY; DONALD
ROBINSON, IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE
LOUISVILLE METRO PLANNING
COMMISSION AND IN HIS
INDIVIDUAL CAPACITY; EMILY
LIU, IN HER INDIVIDUAL
CAPACITY; JOE REVERMAN,
IN HIS INDIVIDUAL CAPACITY;
JEFF O'BRIEN, IN HIS INDIVIDUAL

CAPACITY; LACEY GABBARD, IN HER INDIVIDUAL CAPACITY; JODY MEIMAN, IN HIS INDIVIDUAL CAPACITY; KELLY JONES, IN HIS INDIVIDUAL CAPACITY; AND BETH ALLEN, IN HER INDIVIDUAL CAPACITY

AND NO. 2020-CA-0195-MR

SOUTHPOINTE PARTNERS, LLC APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 19-CI-006441

VINCE JARBOE; BETH ALLEN; DAVID TOMES; DONALD ROBINSON; EMILY LIU; EMMA SMITH; JEFF BROWN; JEFF O'BRIEN; JODY MEIMAN; JOE REVERMAN; KELLY JONES; LACEY GABBARD; LULA HOWARD; MARILYN LEWIS; RICH CARLSON; ROBERT PETERSON; AND RUTH DANIELS, ALL IN THEIR INDIVIDUAL CAPACITIES APPELLEES

OPINION
AFFIRMING

(Filed May 14, 2021)

** ** ** ** **

BEFORE: JONES, LAMBERT, AND K. THOMPSON, JUDGES.

JONES, JUDGE: SouthPointe Partners, LLC ("Southpointe") appeals the judgments of Divisions Nine and Thirteen of the Jefferson Circuit Court.

SouthPointe originally filed suit against the Louisville Metro Government, the Louisville Metro Planning Commission (the "Planning Commission"), and its members, Vince Jarboe, David Tomes, Robert Peterson, Emma Smith, Lulu Howard, Marilyn Lewis, Jeff Brown, Rich Carlson, Ruth Daniels, and Donald Robinson in their official capacities; this action was assigned to Jefferson Circuit Court Division Nine. Therein, SouthPointe sought to appeal a decision of the Planning Commission pursuant to KRS[1]100.347 and asserted the following additional claims as against all defendants: (1) declaratory and injunctive relief; (2) negligence; (3) violation of 42 U.S.C.[2] § 1983; and (4) a claim that Louisville's Land Development Code is unconstitutionally vague. After finding in SouthPointe's favor with respect to its KRS 100.347 appeal, the circuit court dismissed the remainder of SouthPointe's claims and denied it leave to amend its complaint to add claims against each of the Planning Commission members in their individual capacities.

Subsequently, SouthPointe filed a second, separate suit against the Planning Commission members in their individual capacities as well as against seven other advisory officials, Emily Liu, Joe Reverman, Jeff O'Brien, Lacey Gabbard, Jody Meiman, Kelly Jones,

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[1] Kentucky Revised Statutes.

[2] United States Code.

and Beth Allen. This suit, which was based on the same conduct involved in the Division Nine suit, was assigned to the Division Thirteen of the Jefferson Circuit Court. This suit was ultimately dismissed after the circuit court determined that it arose from the same common nucleus of operative facts as the Division Nine suit, and therefore, was an impermissible attempt to claims split by SouthPointe.

On appeal, SouthPointe challenges: (1) the dismissal of its claims in the Division Nine suit; (2) the circuit court's denial of its motion to amend its complaint in the Division Nine suit; and (3) the circuit court's dismissal of the Division Thirteen suit. Having reviewed the record, and being otherwise sufficiently advised, we affirm as to each assignment of error.

I. BACKGROUND

SouthPointe, a commercial developer, is currently in the process of constructing SouthPointe Commons, a more than $80 million development in Fern Creek, Jefferson County, Kentucky. The Planning Commission approved the development in 2010, including the name of the main street of the development, "SouthPointe Boulevard." The actual construction of the development was delayed for several years as a result of unrelated litigation, but SouthPointe's predecessor-in-interest and managing member, Bardstown Capital Corporation, eventually won that litigation. Subsequently, in 2018, SouthPointe applied for the approval

of a minor plat ("the Minor Plat") in the development using its previously approved street name.

While reviewing the Minor Plat, the Planning Commission discovered a preexisting street named "Southpointe Boulevard" elsewhere in town. The Planning Commission admitted that this was an oversight in its initial 2010 review but refused to approve the Minor Plat until SouthPointe changed the duplicitous street name. However, the Planning Commission also rejected SouthPointe's suggested alternative, "SouthPointe Commons Boulevard," because it was supposedly two letters too long according to a 16-letter limitation for public street names found in the Land Development Code.

Yet again, the Planning Commission asked SouthPointe to rename its main street. However, this time, SouthPointe refused, and the Planning Commission allowed SouthPointe to apply for a waiver of the 16-letter requirement. SouthPointe did so, and a hearing was scheduled on the matter. The Louisville Department of Emergency Services ("Emergency Services") objected to the waiver by written letter, asserting a number of public safety concerns,[3] but did not attend the hearing.

On April 18, 2019, the Planning Commission held a second public hearing to consider SouthPointe's waiver request. This time, an Emergency Services

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[3] Emergency Services alleged that the 16-letter limitation was necessary for maximizing visibility of street signs for emergency responders, due to letter size and the susceptibility of long signs to twist or bend in heavy winds.

representative appeared. Six of the ten Planning Commission members, David Tomes, Robert Peterson, Lulu Howard, Jeff Brown, Rich Carlson, and Ruth Daniels, were also present. The Planning Commission voted 4-2 that it did not have the authority to grant the requested waiver because of the purported safety and welfare requirement within the Land Development Code. The present members of the Planning Commission acknowledged that the 16-letter requirement only applied to public street names but expressed their concern on the record with regard to proceeding against the objections of Emergency Services. The Planning Commission then voted 6-0 to approve the Minor Plat – on the condition that SouthPointe change the name of its main street to an unclaimed name conforming with the 16-letter limitation.

On April 23, 2019, SouthPointe filed case No. 19-CI-002529 in Jefferson Circuit Court. This action was assigned to Division Nine. SouthPointe brought the following claims: (1) an appeal of the Planning Commission's decision pursuant to KRS 100.347; (2) a claim for declaratory and injunctive relief; (3) a negligence claim; (4) a 42 U.S.C. § 1983 claim; and (5) a claim that Louisville's Land Development Code is unconstitutionally vague. SouthPointe sued Louisville Metro Government, the Planning Commission, and all of the Planning Commission's members in their official capacities (collectively referred to as "Louisville Metro"), including those who did not attend the April 18, 2019, meeting.

On June 5, 2019, SouthPointe moved for partial summary judgment on its KRS 100.347 appeal based upon the administrative record. On July 22, 2019, SouthPointe appeared at the appointed time for the hearing on its motion for partial summary judgment; however, the County Attorney representing Louisville Metro did not appear until the trial court summoned him by telephone. The circuit court refused to grant Louisville Metro a continuance and, on July 26, 2019, granted SouthPointe summary judgment on its KRS 100.347 appeal, ordering Louisville Metro to approve the Minor Plat so that construction could move forward.

On August 13, 2019, Louisville Metro moved for summary judgment on the remaining claims against it, arguing that it was protected from paying monetary damages by sovereign immunity. SouthPointe disagreed, arguing that the Claims Against Local Government Act (CALGA) contained a statutory waiver of immunity, and on August 21, 2019, moved for leave to amend its complaint. SouthPointe's proposed First Amended Complaint sought to name the Planning Commission members in their individual capacities as defendants and add six more defendants to SouthPointe's negligence claim, in both their official and individual capacities: Emily Liu, Joe Reverman, and Lacey Gabbard (three advisory-type officials with Louisville Metro Planning and Design Services), and Jody Meiman, Kelly Jones, and Beth Allen (three advisory officials with Louisville Metro Emergency Services). The proposed First Amended Complaint alleged that,

together, the individual defendants "refused to approve" SouthPointe's Minor Plat because of its 18-character street name and denied the requested waiver. SouthPointe alleged that the individual defendants had breached their "duty to perform or assist in the performance" of approving the Minor Plat in a timely manner and that none of these defendants was immune from liability.

On September 13, 2019, Division Nine denied SouthPointe's motion to amend, explaining that amendment was futile as the claims were destined for dismissal:

> CR[4] 15.01 states that, " . . . a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." CR 15 makes no reference to post-verdict motions other than the language of CR 15.02 which allows amendments to conform to the evidence. This portion of the rule is interpreted in *Lawrence v. Marks*, 355 S.W.2d 162 (Ky. 1961), wherein the Court stated that, "The trial court has a broad discretion in granting leave to amend, but the discretion is not without limitations. In *Garrison v. Baltimore & O. R. Co.*, D.C.Pa.1957, 20 F.R.D. 190, the court indicated that significant factors to be considered in determining whether to grant leave to amend are timeliness, excuse for delay, and prejudice to the opposite party."

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[4] Kentucky Rules of Civil Procedure.

Defendants assert that, in this case, justice does not require leave to amend since SouthPointe has no viable negligence or 42 U.S.C. 1983 claims against the proposed defendants. They contend that none of the seven new defendants voted on the SouthPointe development and four Planning Commission Members did not even attend the April 18, 2019 meeting. They further argue that KRS 100.347 does not provide for monetary damages. Defendants cite the case of *Robbins v. New Cingular Wireless, PSC, LLC*, 854 F.3d 315 (6th Cir. 2017), in which the unsuccessful litigants in an administrative appeal then filed a civil action seeking monetary damages alleging negligence, negligence per se, gross negligence and nuisance. The Court concluded that, "[b]ecause [KRS 100.347] offers plaintiffs an adequate and excessive remedy (i.e. appeal to a Kentucky court) for grievances related to a planning board's decision, a court must dismiss any collateral attack that seeks solely to rehash the same complaints."

The *Robbins* case deals with the dismissal and not with the granting of a motion to amend. However, recognized limitations upon amendments include unreasonable delay and *futility of amendment.* [Emphasis added] *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614 (Ky. App. 1988). Given the arguments of Defendants with regard to the propriety of SouthPointe's claims, the Court finds that SouthPointe's Motion to Amend is not warranted; even if

> permitted there are valid grounds for granting a motion to dismiss.

Record on Appeal ("R.") at 191-92.

SouthPointe subsequently filed a motion for reconsideration, which the circuit court denied on October 7, 2019:

> Plaintiff continues to argue that it may bring its tort claims in addition to its request for relief pursuant to KRS 100.347. This is simply not the case. *Robbins v. New Cingular Wireless, PSC, LLC*, 854 F.3d 315 (Ky. 2017) clearly provides that KRS 100.347 is the exclusive remedy for one aggrieved by the actions of the Planning Commission. The statute does not provide for tort damages.
>
> Similarly, Plaintiff once again argues that its 42 U.S.C. § 1983 claims are not frivolous. As noted in Defendant's Response, "A federal cause of action alleged under 42 U.S.C. § 1983 or otherwise, simply does not necessarily arise from every wrong which is allegedly committed under color of state law. *Studen v. Beebe*, 588 F.2d 560 (6th Cir. 1978)." The *Studen* case also arises out of a zoning dispute. Similarly, the case of *Kentner v. Martin County*, 929 F. Supp. 1482 (S.D. Fla. 1996) held that the actions of the zoning authorities did not rise to the level of a constitutional claim. The delay alleged by Plaintiff certainly does not rise to that level.
>
> While *Snyder v. Owensboro*, 528 S.W.2d 663 (Ky. 1975) held that approval of a plat is

a ministerial act, the case is distinguishable. It did not apply to a claim for damages against the Planning Commission and the application of qualified immunity. The governing law on the issue of qualified immunity is set forth in *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2002), in which the Court stated that, "when sued in their individual capacities, public officers and employees, enjoy only qualified immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. [Citation omitted]. 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, [Citation omitted] (2) in good faith; and (3) within the scope of the employee's authority." Further, the Court noted that, "An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or methods employed." Conversely, a ministerial action is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." As argued by Defendant, the officials herein performed a discretionary function when they considered and voted upon the plat herein.

The elements of negligence are set forth in *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003). In order to show negligence a

> plaintiff must prove (1) duty; (2) breach of standard of care; (3) causation; and (4) injury. In this case no authority has been cited to the Court which holds that officers who did not participate in the administrative hearing are responsible to a plaintiff aggrieved by a Planning Commission decision. Thus, Plaintiff is unable to establish the first element of negligence.
>
> The Court has no basis to vacate its previous Opinion and Order. Justice does not require leave to amend where the claims asserted are futile. Such claims are futile where, as here, they will be defeated by a properly pleaded motion to dismiss.

R. at 234-36.

Consequently, on October 15, 2019, SouthPointe filed a second claim, case No. 19-CI-006441, against the sixteen Louisville Metro officers and employees in their individual capacities, which was assigned to Division Thirteen of the Jefferson Circuit Court. SouthPointe asserted the same negligence and 42 U.S.C. § 1983 claims for monetary damages as well as a negligence *per se* claim based upon the same events as in its Division Nine suit. SouthPointe acknowledged the motion for summary judgment in case No. 19-CI-002529 pending before Division Nine but asserted that its suit before Division Thirteen was the first time that claims were brought against the individual-capacity defendants. Louisville Metro filed a motion to consolidate the new Division Thirteen case with the original

claim pending in Division Nine, which SouthPointe did not oppose.

However, on November 4, 2019, before the claims could be consolidated, Division Nine granted Louisville Metro summary judgment on the remaining claims:

> Metro is entitled to claim sovereign immunity on the grounds that no action may be brought against the state or a county without consent or waiver. *Yanero v. Davis*, 658 S.W.3d 510 (Ky. 2001). The same immunity is granted to consolidated local governments. *Jewish Hosp. Healthcare Services, Inc. v. Louisville / Jefferson Metro Government*, 270 S.W.3d 905 (Ky. App. 2008). Specifically, immunity has been afforded to Planning Commissions. *Northern Area Planning Commission v. Cloyd*, 332 S.W.3d 91 (Ky. App. 2010). Individual members are entitled to immunity when sued in their official capacities. *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003). Metro also contends that pursuant to KRS 100.347 no monetary damages are available. The case of *Snyder v. Owensboro*, 528 S.W.2d 663 (Ky. 1975) specifically holds that failure to timely consider and approve a minor plat is ministerial in nature. KRS 100.281 (1) provides for such approval to occur in 90 days.
>
> The [CALGA] states that nothing "shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties." KRS 65.2003. However, CALGA does not provide for a waiver of

> immunity. *Schwindel, supra*. Such a waiver may only be made by the General Assembly. *Department of Corrections v. Furr*, 23 S.W.3d 615 (Ky. 2000). KRS 100.347 provides the exclusive remedy for those aggrieved by actions or inactions of the Planning Commission. . . .
>
> The Court finds that the Planning Commission and its members are immune. The *Schwindel* case specifically holds that CALGA does not act as a waiver of immunity for the tortious performance of ministerial acts. The approval of a minor plat is just such a ministerial act. *Snyder, supra.*
>
> IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motion for partial summary judgment is GRANTED on the grounds of sovereign immunity.

R. at 239-41.

Thereafter, on January 30, 2020, Division Thirteen dismissed SouthPointe's suit, finding that SouthPointe's claims in the Division Thirteen suit arose "from the same common nucleus of operative facts as those in [the case before Division Nine], and constitute[d] [SouthPointe's] attempt to impermissibly split its cause of action." R. at 354-56.

On December 2, 2019, SouthPointe filed its notice of appeal in case No. 19-CI-002529, and on February 3, 2020, filed its notice of appeal in case No. 19-CI-006441. The two cases were later consolidated for appellate purposes.

II. STANDARD OF REVIEW

"[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial" unless "there is no legitimate claim under the law and it would be impossible to assert one given the facts." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991); *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013), *as corrected* (Nov. 25, 2013). A motion for summary judgment should be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor" even when the evidence is viewed in the light most favorable to him. *Steelvest*, 807 S.W.2d at 482; *Shelton*, 413 S.W.3d at 905. To survive a properly supported summary judgment motion, the opposing party must have presented "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482; *see also Neal v. Welker*, 426 S.W.2d 476, 479 (Ky. 1968) ("When the moving party has presented evidence showing that . . . there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact.").

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR 56.03). Because

there are no factual findings at issue, the appellate court reviews that trial court's decision *de novo. Shelton*, 413 S.W.3d at 905.

Likewise, we review a circuit court's granting of a motion to dismiss *de novo. Benningfield v. Pettit Env't, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005).

> A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling on the motion, the allegations in "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 868 (Ky. App. 1987). In making this decision, the trial court is not required to make any factual findings. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Therefore, "the question is purely a matter of law." *Id.*

Id.

Our standard of review of a denial of leave to amend a complaint is whether the circuit court abused its discretion. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v.*

English, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

III. Analysis

SouthPointe appeals three rulings: (1) Division Nine's denial of SouthPointe's motion for leave to amend its original complaint to add the individual-capacity claims; (2) Division Nine's summary judgment for Louisville Metro on sovereign immunity grounds; and (3) Division Thirteen's dismissal of SouthPointe's individual-capacity claims.

We first address SouthPointe's contention that Division Nine abused its discretion in denying SouthPointe's motion for leave to amend its complaint. More specifically, we must determine whether KRS 100.347 provides an exclusive remedy for claimants aggrieved by the final action of a planning commission. For the following reasons, we hold that Division Nine did not abuse its discretion in denying SouthPointe's motion for leave to amend its complaint to include the seventeen individual-capacity defendants.

KRS 100.347(2) provides:

> Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies. Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's

> recommendations made to other governmental bodies. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. Provided, however, any appeal of a planning commission action granting or denying a variance or conditional use permit authorized by KRS 100.203(5) shall be taken pursuant to this subsection. In such case, the thirty (30) day period for taking an appeal begins to run at the time the legislative body grants or denies the map amendment for the same development. The planning commission shall be a party in any such appeal filed in the Circuit Court.

SouthPointe maintains that "[w]hile these officials' failure to perform a ***discretionary*** act may only give rise to a KRS 100.347 appeal, their failure to timely perform the ***ministerial*** act of approving the Minor Plat gives rise to ***both*** a KRS 100.347 appeal and tort claims." Appellant's Brief ("Br.") at 12 (emphasis in original). SouthPointe provides no supporting authority for the creative contention that KRS 100.347 distinguishes between ministerial and discretionary acts, and we decline to assume that undertaking.

SouthPointe is correct that the Planning Commission members' approval of a minor plat is a ministerial duty. "*Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), provides the framework for deciding whether a public officer or employee is afforded immunity from tort liability." *Ritchie v. Turner*, 559 S.W.3d 822, 831 (Ky. 2018). "[W]hen 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." *Yanero*, 65 S.W.3d at 521. Under *Yanero*, "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 the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* at 522. As explained by *Snyder*, 528 S.W.2d 663, it is black letter law that the approval of a minor plat like that of SouthPointe is a ministerial duty. *Id.* at 664 ("[T]he approval of subdivision plats is a ministerial act. That our statute so intends is made obvious by the provision of KRS 100.281 that the planning commission may delegate to its secretary or any other officer or employee the power to approve plats.").

However, SouthPointe's reliance on *Yanero* for support in its proposition that an official's failure to timely perform the ministerial act of approving a minor plat gives rise to both a KRS 100.347 appeal and tort claims is misplaced. In *Yanero*, the Kentucky Supreme Court held that a coach's duty to supervise students during school-sponsored activities "was a ministerial, rather than a discretionary, function in that it involved only the enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice." *Yanero*, 65 S.W.3d at 529. The *Yanero* plaintiffs brought a variety of tort

claims for the failed performance of that ministerial duty; they did not bring a statutory claim, nor was one available to them as an exclusive remedy. *See id.* at 517. *Yanero* does not address claims brought under Kentucky statutory law; therefore, the distinction between whether a statute precludes additional common law claims lies elsewhere.

Under Kentucky law, "[w]here the statute both declares the unlawful action and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Waugh v. Parker*, 584 S.W.3d 748, 753 (Ky. 2019) (citing *Grzyb v. Evans*, 700 S.W.3d 399, 304 (Ky. 1985)) (other internal citations omitted); *see also Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 421 (Ky. 2010); *Mendez v. University of Kentucky Board of Trustees*, 357 S.W.3d 534, 545 (Ky. App. 2011). Likewise, under federal law, "where . . . 'a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.'" *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (quoting *Karahalios v. Federal Employees*, 489 U.S. 527, 533 (1989)).

Here, KRS 100.347 provides for a remedy, just not the remedial or monetary damages SouthPointe desires. Because KRS 100.347 "offers plaintiffs an adequate and exclusive remedy (i.e., appeal to a Kentucky court) for grievances related to a planning board's decision, a court must dismiss any collateral attack that seeks solely to rehash the same complaints." *Robbins*, 854 F.3d at 321; *Warren County Citizens for Managed Growth, Inc. v. Board of Comm'rs*, 207 S.W.3d 7, 17 (Ky.

App. 2006) (citations omitted) ("Because [KRS 100.347] affords an adequate remedy, a separate declaratory judgment action is not appropriate.").

With regard to whether a plaintiff may bring claims under KRS 100.347 and common law to address the same alleged wrong done by a planning commission, we find *Robbins v. New Cingular Wireless PCS, LLC*, *supra*, to be persuasive.[5] In that case, several Kentucky residents brought an action in state court against AT&T, the holder of a permit authorizing the construction of a cellphone tower near the residents' homes. *Id.* at 318. The residents challenged the planning commission's decision to grant the permit under KRS 100.347 in state circuit court. *Id.* Before the circuit court could dismiss the appeal, the residents filed a second, separate lawsuit against AT&T asserting claims for negligence, negligence *per se*, gross negligence, and nuisance.[6] *Id.* at 318. The plaintiffs' tort claims were dismissed for failure to state a claim, in part because the claims were barred by state law. *Id.* at 318-19. On appeal, the *Robbins* plaintiffs alleged that their "tort claims amount to more than a second shot at appealing the Commission's decision because they allege harms independent" of the Commission's decision and that because KRS 100.347 "authorizes a

[5] State courts are not bound by the decisions of lower federal courts; "[r]ather, the approach taken by federal courts may be viewed as persuasive but it is not binding." *U.S., ex rel. U.S. Attorneys ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 147 (Ky. 2014).

[6] New Cingular removed the case to federal court based on diversity jurisdiction. *Id.*

court to review planning decisions, but not 'property damages and common law tort damages due to an incompatible land use,' their tort claims do not attack the Commission's decision." *Id.* at 322. The Sixth Circuit dismissed both arguments because the *Robbins* plaintiffs could not show that "their harms [arose] from anything other than the Commission's decision." *Robbins*, 854 F.3d at 321.

SouthPointe attempts to distinguish *Robbins* from the present case by arguing that, unlike the *Robbins* plaintiffs who lost on their KRS 100.347 appeal, SouthPointe won its appeal. SouthPointe argues that the *Robbins* plaintiffs impermissibly "attempted to use tort claims to collaterally attack the planning commission's discretionary approval of the tower permit." Appellant's Br. at 13 (*Robbins*, 854 F.3d at 318, 320-22). Indeed, the procedural histories of these two cases are different; however, ultimately, the fact that SouthPointe prevailed on its KRS 100.347 appeal is irrelevant because it is not the issue of collateral attack that bars SouthPointe's tort and 42 U.S.C. § 1983 claims. Rather, the question of whether a plaintiff like SouthPointe is permitted to bring additional claims hinges on whether a Kentucky statute provides both the unlawful action and the remedy. KRS 100.347 does. Like the *Robbins* plaintiffs, SouthPointe has not shown that its harms arise from anything other than a planning commission decision and is therefore limited to its statutory action pursuant to KRS 100.347. *See* G*reater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427 (Ky. 1980) (holding that claims which are

broader in scope than implicated within the context of a zoning appeal may be brought by a separate complaint).

Consequently, SouthPointe's proposed amendments to its complaint including the additional individual-capacity defendants are futile. "Although amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First Nat'l Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988). "The decision to grant or deny leave to amend [a complaint] is ultimately left to the discretion of the trial court, which will not be disturbed absent an abuse of that discretion." *Nami Res. Co., L.L.C. v. Asher Land and Min., Ltd.*, 554 S.W.3d 323, 343 (Ky. 2018) (quoting *Kenney*, 269 S.W.3d at 869-70). Division Nine denied SouthPointe's motion for leave to amend its complaint, recognizing that there are "limitations upon amendments including unreasonable delay and futility of amendment." R. at 192. SouthPointe moved to amend its complaint for the sole purpose of pursuing its tort and 42 U.S.C. § 1983 claims – in context of this case no amendment could have made those claims viable in light of the exclusive remedy offered by KRS 100.347.[7]

Next, we address the issue of whether Division Nine erred in granting summary judgment on

[7] For the same reason, SouthPointe's damage claims against Louisville Metro and the official-capacity defendants are precluded by KRS 100.347.

SouthPointe's damages claims in favor of Metro and its official-capacity defendants on sovereign immunity grounds. While this argument is ultimately moot because of the exclusive remedy provided by KRS 100.347, we wish to provide a brief clarification regarding Louisville Metro and the Planning Commission's immunity.

"Louisville Metro is a government entity" entitled to sovereign immunity. *Louisville/Jefferson County Metro Gov't v. Cowan*, 508 S.W.3d 107, 109 (Ky. App. 2016); *see Lexington-Fayette Urban County Gov't v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004) ("[U]rban county governments constitute a new classification of county government . . . entitled to sovereign immunity"). "A consolidated local government shall be accorded the same sovereign immunity granted counties, their agencies, officers, and employees." KRS 67C.101(2)(e). "Sovereign immunity affords the state absolute immunity from suit and 'extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought.'" *Cowan*, 508 S.W.3d at 109 (quoting *Yanero*, 65 S.W.3d at 517-18). A waiver of sovereign immunity may only be made by the General Assembly. *Furr*, 23 S.W.3d at 616.

SouthPointe contends that CALGA, codified by KRS 65.200, *et seq.*, waives Louisville Metro's sovereign immunity. Specifically, SouthPointe relies upon KRS 65.2003, which states:

Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:

(1) Any claim by an employee of the local government which is covered by the Kentucky workers' compensation law;

(2) Any claim in connection with the assessment or collection of taxes;

(3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

(a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;

(b) The failure to enforce any law;

(c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

(d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or

(e) Failure to make an inspection.

Nothing contained in this subsection shall be construed to exempt a local government from

> *liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.*

(Emphasis added.)

According to SouthPointe, the final line of KRS 65.2003 functions as a waiver of Louisville Metro's immunity. However, our Supreme Court previously addressed SouthPointe's very argument and rejected it in *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003). Our Supreme Court explained that "[p]er KRS 65.200(3), CALGA applies not only to counties but also to municipalities and taxing districts," although, significantly, those entities enjoy different degrees of immunity. *Id.* at 164. According to the *Schwindel* Court:

> Obviously, the General Assembly knew the difference between a section and a subsection and intended the last sentence of KRS 65.2003 (section 18 of the Act) to pertain only to subsection (3), which pertains only to municipalities which, as noted *supra*, are not immune from vicarious liability for the tortious performance of ministerial duties by [their] employees.

Schwindel, 113 S.W.3d at 166.

In other words, the section upon which SouthPointe mistakenly relies as waiving Louisville Metro's immunity applies only to municipalities, not local governments and government entities. As previously mentioned, Louisville Metro is a government entity, not a

municipality, and has therefore not waived its immunity for damages suits.[8]

Finally, we address whether Division Thirteen erred in holding that SouthPointe impermissibly split its claims. After a review of the record and applicable case law, we agree with the circuit court's dismissal of SouthPointe's second claim, case No. 19-CI-006441. Regardless of SouthPointe's motivation for filing a second lawsuit against the individual defendants, SouthPointe may not split its causes of action stemming from the same nucleus of operative fact.

SouthPointe cites to *Coomer v. CSX Transp. Inc.*, 319 S.W.3d 366, 370 (Ky. 2010), for its contention that it may bring separate claims against the individual-capacity defendants. According to *Coomer*, for litigation to be barred by claim splitting, a form of claim preclusion, three elements must be present: (1) identity of the parties; (2) identity of the causes of action; and (3) final resolution on the merits. *Id.* at 371. However, SouthPointe fails to acknowledge the *Coomer* Court's explanation that claim preclusion and claim splitting,

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[8] Similarly, Kentucky law affords planning commissions governmental immunity. *Cloyd*, 332 S.W.3d at 96. " '[G]overnmental immunity' is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency." *Yanero*, 65 S.W.3d at 519 (quoting 57 Am. Jur. 2d, *Municipal, County, School and State Tort Liability*, § 10 (2001)). Accordingly, planning commissions "can be sued for damages for the tortious performance of a proprietary function but not a governmental function." *Schwindel*, 113 S.W.3d at 168.

although "closely related," are actually separate rules. *Id.* According to our Supreme Court:

> The rule [against claim splitting], "found in Restatement (Second) of Judgments, §§ 24 and 26, is an equitable rule, limiting all causes of action arising out of a single 'transaction' to a single procedure." It rests upon the concept that "parties are required to bring forward their whole case" and may not try it piecemeal. Therefore, it "applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> "The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts."

Id. (citations omitted).[9]

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[9] The *Coomer* Court recognized that claim splitting is subject to a number of exceptions, none of which has been argued by SouthPointe. The exceptions in full are:

> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or
>
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief

It is under this equitable rule that SouthPointe's claim before Division Thirteen fails. SouthPointe has never disputed that its claim arose from the same "transaction." *Id.* Accordingly, under Kentucky law, SouthPointe was required to bring its claim against the various defendants in a single lawsuit rather than piecemeal.

> in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or
>
> (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or
>
> (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or
>
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982). SouthPointe has not relied upon any of these exceptions, and so our analysis stops here.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgments of both Division Nine and Division Thirteen of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Christopher W. Brooker Louisville, Kentucky	John F. Carroll Travis J. Fiechter Louisville, Kentucky

NO. 19-CI-006441 JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN
JUDGE ANN BAILEY SMITH

SOUTHPOINTE PARTNERS, LLC PLAINTIFF

VS.

VINCE JARBOE, et al DEFENDANTS

OPINION AND ORDER GRANTING MOTION TO DISMISS

(Filed Jan. 30, 2020)

The plaintiff filed this action after the Jefferson Circuit Court, Division Nine, the Honorable Judith McDonald-Burkman presiding, denied its motion to amend its complaint to include the identical claims the plaintiff alleges here. *See Southpointe Partners, LLC v. Louisville Metro Planning Commission*, 19-CI-002529. Upon motion of the defendants, this Court granted their motion to consolidate the claims made in this case with 19-CI-002529; at the time this Court ordered the case consolidated, however, on December 20, 2019, the plaintiff had appealed Division Nine's entry of summary judgment on Counts 3-5 of the complaint.[1] The plaintiff now moves the Court to set aside the consolidation order on the basis that the Jefferson Circuit Court had lost jurisdiction over 19-CI-002529 at the time the clerk entered the order. The plaintiff further moves the Court to rule on the defendants' motion to

[1] The plaintiff filed the notice of appeal on December 2, 2019.

dismiss that was pending at the time the clerk entered the consolidation order.

Being sufficiently advised, **IT IS ORDERED** that this Court's order of December 20, 2019 is **VOID** and held for naught, the Court having lost jurisdiction to enter it ten days after Division Nine entered its final order in 19-CI-002529 on November 4, 2019.

IT IS FURTHER ORDERED that having resolved the instant motion to dismiss by applying Kentucky's well-known standard for motions to dismiss,[2] the Court **GRANTS** the motion, finding that the instant complaint arises from the same common nucleus of operative facts as those in 19-CI-002529, and constitutes the plaintiffs attempt to impermissibly split its

[2] Courts view the motion to dismiss for failure to state a claim with disfavor and rarely grant it. *Philipps & Kramer*, 6 Kentucky Practice CR 12.02 at 266 (6th Ed. 2005). A motion to dismiss for failure to state a claim should not be granted unless it appears that the pleading party would not be entitled to relief under any set of facts which he could prove in support of her claim. *Pari-Mutuel Clerks' Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). The complaint should not be dismissed merely because the allegations do not support the precise legal theory the plaintiff puts forth, since the court is under a duty to examine a complaint to determine if it provides for relief under any legal theory. *Phillips & Kramer, supra*, at 267. When considering a motion to dismiss, the pleadings should be liberally construed in a light most favorable to the plaintiff and all factual allegations in the complaint should be taken as true. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987). Unless the law and facts support dismissal "beyond doubt," the Court should not grant a motion for failure to state a claim. *Carver v. Branch*, 946 F.2d 451, 452 (6th Cir. 1991).

cause of action. *Kirchner v. Riberd*, 702 S.W.2d 33, 34 (Ky. 1986).

This is a final and appealable order, there being no just reason for delay.

/s/ Ann Bailey Smith
ANN BAILEY SMITH, JUDGE
DIVISION THIRTEEN

DATED: January 28, 2020

cc: Christopher W. Brooker, Esq.
John F. Carroll, Esq.
Travis Feitcher, Esq.

NO. 19-CI-2529 JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

SOUTHPOINTE PARTNERS, LLC PLAINTIFF

V.

LOUISVILLE METRO GOVERNMENT, ET. AL. DEFENDANTS

OPINION AND ORDER

(Filed Nov. 4, 2019)

This matter comes before the Court on Defendant Louisville Metro Government's (Metro) Motion for Partial Summary Judgment. Plaintiff Southpointe Partners, LLC (Southpointe) has filed its Combined (1) Response to Metro's Motion for Summary Judgment and (2) Memorandum in Support of Motion to Reconsider Denial of Leave to Amend. The latter issue has been resolved by this Court's Order of October 7, 2019. Metro has filed a Reply to that Response and the issues now stand submitted.

Metro has moved for summary judgment on claims 3-5 of Southpointe's Complaint. Claim 3 is one for negligence alleging that the Planning Commission was performing a ministerial act when it failed to approve Southpointe's minor plat. Claim 4 is one alleging violation of 42 USC § 1983 based on Metro's arbitrary actions in violation of Southpointe's constitutional rights. Finally, Claim 5 asserts that the Land Development Code is unconstitutionally vague. Southpointe

argues that when a plan is approved the street name is also approved. If this interpretation is incorrect it renders the statute vague. The Court has previously granted summary judgment to Southpointe on Claims 1 and 2.

Metro is entitled to claim sovereign immunity on the grounds that no action may be brought against the state or a county without consent or a waiver. *Yanero v. Davis* 658 SW 3d 510 (Ky. 2001). The same immunity is granted to consolidated local governments. *Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government*, 270 SW 3d 905 (Ky. App. 2008). Specifically, immunity has been afforded to Planning Commission. *Northern Area Planning Commission v. Cloyd*, 332 SW 3d 91 (Ky. App. 2010). Individual members are entitled to immunity when sued in their official capacities. *Schwindel v. Meade County*, 113 SW 3d 159 (Ky. 2003). Metro also contends that pursuant to KRS 100.347 no monetary damages are available. The case of *Snyder v. Owensboro*, 528 SW 2d 663 (Ky. 1975) specifically holds that failure to timely consider and approve a minor plat is ministerial in nature. KRS 100.281 (1) provides for such approval to occur in 90 days.

The Claims Against Local Government Act (CALGA) states that nothing "shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties." KRS 65.2003. However, CALGA does not provide for a waiver of immunity. *Schwindel, supra.* Such a waiver may only be

made by the General Assembly. *Department of Corrections, v. Furr*, 23 SW 3d 615 (Ky. 2000). KRS 100.347 provides the exclusive remedy for those aggrieved by actions or inactions of the' Planning Commission. It states:

(a)ny person or entity claiming to be injured or aggrieved by any final action of the Planning Commission shall appeal from the final action to the Circuit Court of the county in which the property which is the subject of the commission's action lies. Such appeal shall be taken within thirty (30) days after such action . . . all final action which have not been appealed within thirty (30) days shall not be subject to judicial review.

The Court finds that the Planning Commission and its members are immune. The *Schwindel* case specifically holds that CALGA does not act as a waiver of immunity for the tortious performance of ministerial acts. The approval of a minor plat is just such a ministerial act. *Snyder, supra.*

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motion for partial summary judgment is GRANTED on the grounds of sovereign immunity.

/s/ Judith McDonald-Burkman

JUDITH MCDONALD-BURKMAN, JUDGE
JEFFERSON CIRCUIT COURT

DATE: 11-4-19

Cc: Christopher W. Brooker
John F. Carroll/Travis J. Fiechter

NO. 19-CI-2529 JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

SOUTHPOINTE PARTNERS, LLC PLAINTIFF

V.

LOUISVILLE METRO GOVERNMENT, ET. AL. DEFENDANTS

OPINION AND ORDER

(Filed Oct. 7, 2019)

This matter comes before the Court on Plaintiffs motion for reconsideration of the Court's denial of its motion for leave to amend on grounds that its reply brief may not have been considered. Defendant has filed a response.

On August 28, 2019 the Court entered an Agreed Scheduling Order in which the parties agreed that Plaintiffs reply would be due on September 10, 2019. Plaintiffs reply was filed on September 9, 2019 but was not accepted by the Circuit Court Clerk's Office until September 10, 2019. However, no copy of the reply reached the Court's chambers and the Court issued its ruling on September 10, 2019. That Order was entered on September 13, 2019. Clearly, Plaintiffs reply was not considered. The Court will consider it at this time.

Plaintiff continues to argue that it may bring its tort claims in addition to its request for relief pursuant to KRS 100.347. This is simply not the case. *Robbins v. New Cingular Wireless, PSC, LLC*, 854 F. 3d 315 (Ky.

2017) clearly provides that KRS 100.347 is the exclusive remedy for one aggrieved by the actions of the Planning Commission. The statute does not provide for tort damages.

Similarly, Plaintiff once again argues that its 42 USC § 1983 claims are not frivolous. As noted in Defendant's Response, "A federal cause of action alleged under 42 USC § 1983 or otherwise, simply does not necessarily arise from every wrong which is allegedly committed under color of state law. *Studen v. Beebe*, 588 F. 2d 560 (6th Cir. 1978)." The Studen case also arose out of a zoning dispute. Similarly, the case of *Kentner v. Martin County*, 929 F. Supp. 1482 (S.D. Fla. 1996) held that the actions of the zoning authorities did not rise to the level of a constitutional claim. The delay alleged by Plaintiff certainly does not rise to that level.

While *Snyder v. Owensboro*, 528 SW 2d 663 (Ky. 1975) held that approval of a plat is a ministerial act, the case is distinguishable. It did not apply to a claim for damages against the Planning Commission and the application of qualified immunity. The governing law on the issue of qualified immunity is set forth in *Yanero v. Davis*, 65 SW 3d 510 (Ky. 2002), in which the Court stated that, "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. [Citation omitted]. 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, [Citation omitted] (2) in good faith; and (3) within the scope of the employee's authority." Further, the Court noted that, "An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed." Conversely, a ministerial act is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." As argued by Defendant, the officials herein performed a discretionary function when they considered and voted upon the plat herein.

The elements of negligence are set forth in *Pathways, Inc. v. Hammons*, 113 SW 3d 85 (Ky. 2003). In order to show negligence a plaintiff must prove 1) duty; 2) breach of the standard of care; 3) causation and 4) injury. In this case no authority has been cited to the Court which holds that officers who did not participate in the administrative hearing are responsible to a plaintiff aggrieved by a Planning Commission decision. Thus, Plaintiff is unable to establish the first element of negligence.

The Court has no basis to vacate its previous Opinion and Order. Justice does not require leave to amend where the claims asserted are futile. Such claims are futile where, as here, they will be defeated by a properly pleaded motion to dismiss.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's motion for reconsideration is DENIED.

/s/ Judith McDonald-Burkman

JUDITH MCDONALD-BURKMAN, JUDGE
JEFFERSON CIRCUIT COURT

DATE: 10-3-19

Cc: John F. Carroll/Travis J. Fiechter
Christopher W. Brooker

NO. 19-CI-2529 JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

SOUTHPOINTE PARTNERS, LLC PLAINTIFF

V.

LOUISVILLE METRO GOVERNMENT, ET. AL. DEFENDANTS

OPINION AND ORDER

(Filed Sep. 13, 2019)

This matter comes before the Court on Plaintiff Southpointe Partners, LLC's (Southpointe) Motion for Leave to File First Amended Complaint. Defendants have responded and the issue now stands submitted.

Southpointe seeks to amend its complaint to name Metro officers and employees in their official and individual capacities. It appears that even if Metro is immune from suit for failure to perform ministerial functions, its employees and representatives are not. *Yanero v. Davis*, 65. SW 3d 510 (Ky. 2001). Southpointe concedes that such defendants will most likely not have to pay legal fees or any judgment based on the Claims Against Local Governments Act. KRS 65.2005.

CR 15.01 states that, " . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." CR 15 makes no reference to post-verdict motions other than the language of CR 15.02 which allows amendments to conform to the evidence.

This portion of the rule is interpreted in *Lawrence v. Marks*, 355 SW 2d 162 (Ky. 1961), wherein the Court stated that, "The trial court has a broad discretion in granting leave to amend, but the discretion is not without limitations. In *Garrison v. Baltimore & O. R. Co.*, D.C.Pa.1957, 20 F.R.D. 190, the court indicated that significant factors to be considered in determining whether to grant leave to amend are timeliness, excuse for delay, and prejudice to the opposite party."

Defendants assert that, in this case, justice does not require leave to amend since Southpointe has no viable negligence or 42 USC 1983 claims against the proposed defendants. They contend that none of the seven new defendants voted on the Southpointe development and four Planning Commission Members did not even attend the April 18, 2019 meeting. They further argue that KRS 100.347 does not provide for monetary damages. Defendants cite the case of *Robbins v. New Cingular Wireless, PSC, LLC*, 854 F 3d 315 (6th Cir. 2017) in which the unsuccessful litigants in an administrative appeal then filed a civil action seeking monetary damages alleging negligence, negligence per se, gross negligence and nuisance. The Court concluded that, "[b]ecause Ky. Rev. Stat. Ann § 100.347 offers plaintiffs an adequate and excessive remedy (i.e. appeal to a Kentucky court) for grievances related to a planning board's decision, a court must dismiss any collateral attack that seeks solely to rehash the same complaints."

The *Robbins* case deals with dismissal and not with the granting of a motion to amend. However,

recognized limitations upon amendments include unreasonable delay and *futility of amendment.* [Emphasis added] *Shah v. American Synthetic Rubber Corp*, 655 SW 2d 489 (Ky. 1983); *First National Bank of Cincinnati v. Hartman*, 747 SW 2d 614 (Ky. App. 1988). Given the arguments of Defendants with regard to the propriety of Southpointe's claims, the Court finds that Southpointe's Motion to Amend is not warranted; even if permitted there are valid grounds for granting a motion to dismiss.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff Southpointe Partners, LLC's Motion for Leave to File First Amended Complaint is DENIED.

/s/ Judith McDonald-Burkman

JUDITH MCDONALD-BURKMAN, JUDGE
JEFFERSON CIRCUIT COURT

DATE: 9-10-19

Cc: John F. Carroll/Travis J. Fiechter
Christopher W. Brooker

NO: 19-CI-2529 JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

SOUTHPOINTE PARTNERS, LLC PLAINTIFF

V.

LOUISVILLE METRO GOVERNMENT, ET. AL. DEFENDANT

OPINION AND ORDER

This matter comes before the Court on the Plaintiff SouthPointe Partners LLC's (SouthPointe) Motion for Partial Summary Judgment. Defendant failed to file a response and the issues now stand submitted.

The within motion was filed on June 5, 2019. On June 10, 2019, both parties appeared at this Court's motion hour to obtain a hearing date after briefing was complete. This Court assigned the matter to June 22, 2019 at 8:30 a.m. for oral arguments. However, Defendant Louisville Metro Government (Metro) sought the opportunity to make a settlement demand. Therefore SouthPointe agreed to permit the case to "stand still" until June 21, 2019. As of June 24, 2019, SouthPointe had still not received the demand and counsel wrote to counsel for Metro, outlining the procedural history of the Motion for Partial Summary Judgment and acting forth a briefing schedule. According to that schedule, Metro's Response was due by July 11, 2019 and SouthPointe's Reply was due by July 19, 2019. The oral arguments remained scheduled for July 22, 2019 at 8:30 a.m.

On July 18, 2019 at 3:00 p.m. Metro filed a Motion for Enlargement of Time on the grounds that the parties were engaged in settlement negotiations. The motion was noticed for the Court's Motion Hour on July 22, 2019. Clearly, this Motion was not timely filed in order to be heard at the Court's motion hour on July 22, 2019 at 1:45. JRP 304. SouthPointe appeared for oral arguments on July 22, 2019 at 8:30 a.m. No representative for Metro appeared. The Court called counsel for Metro from the bench and advised that the Court and the Plaintiff were prepared to go forward. At approximately 8:45 Hon. Paul B. Whitty arrived on behalf of Metro. However, he was not prepared to proceed and sought an enlargement of time on the grounds that settlement negotiations were pending. Mr. Whitty also indicated that he would be leaving the office and another attorney would be taking over the case.

Based on Metro's failure to file a timely response, based upon its filing of a Motion for Enlargement of Time and based upon failure to timely appear for oral arguments, this Court determined that it would rule on SouthPointe's motion as filed and would not permit a response by Metro or a continuance of the hearing.

SouthPointe is in the process of constructing an 80 million dollar development in Fern Creek. The main street is to be called "SouthPointe Boulevard". That name was approved at the time of rezoning in 2010 and was even used in the title of the Ordinance as well as cited 11 times in the binding elements attached to the project. However, in 2018 when the minor plat was filed Metro learned that another street exists with a

similar name. Joe Reverman of the Metro Government's Department of Planning and Design Service (DPDS) testified that someone should have caught the duplication, indeed in LDC §§ 6.3.5. C. 6.3.5. G it is the duty of DPDS to run such a search. Nevertheless, Metro refused to approve the minor plat unless SouthPointe changed the name of the street. SouthPointe offered to change the name of the street to SouthPointe Commons Boulevard. Although the change would solve the duplication problem it runs afoul of Metro's 16 character rule. However, that rule applies to public streets and SouthPointe Commons Boulevard is a private street. LDC § 6.3.5. A. Metro urged SouthPointe to change the name of the street to Southpoint Common Boulevard. However, SouthPointe notes that the misspelling would be confusing to service providers and first responders. SouthPointe sought a waiver of the 16 character limit. However, Metro argued that such a long name would result in the street sign being more susceptible to wind damage and the possibility of falling down, the sign would be more expensive and it would set a dangerous precedent. The Court takes notice however that there are a number of streets with names exceeding the 16 character limit.

In spite of the fact that SouthPointe addressed all of these concerns, offering to pay for the preparation and installation of the sign and submitting letters of support from the Fern Creek Fire Department, LMPC continued the matter for a second hearing. At that time, it was argued that the 16 character limitation is a public safety rule and cannot he waived.

LMPC determined that it would conditionally approve the minor plat. However, the condition was the change of the street name. SouthPointe then filed the within action, an administrative appeal pursuant to KRS 100.347.

The standard for summary judgment analysis is set forth in CR 56 and is interpreted by *Steelvest, Inc. v. Scansteel Ser. Cir., Inc.*, 807 SW 2d 476 (Ky. 1991). Following that standard, the Court must view the evidence in the light most favorable to the non-moving party and award summary judgment only where there are no genuine issues of material fact that would make it possible for the non-moving party to prevail at trial. The non-moving party has the duty to produce at least some affirmative evidence that there are issues of fact. Further, in *Welch v. American Publ. Co.*, 3 SW 3d 724 (Ky. 1999), the Supreme Court re-examined the standard for summary judgment analysis in this Commonwealth. Chief Justice Lambert wrote that, "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail, in the analysis, the focus should be on what is of record rather than what might be presented at trial."

In *American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission*, 379 SW 2d 450 (Ky. App. 1964) the Court of Appeals, Kentucky's highest Court at that time, noted that, even in the absence of a statute authorizing judicial review, the Circuit Court may assume jurisdiction to determine the issue of "arbitrariness." A reviewing

court must examine the conduct of the agency for "(1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support. . . ." The Court summarized that, "all of these issues may be reduced to the ultimate question of whether the action taken by the administrative agency was arbitrary."

SouthPointe asserts that Metro has exceeded its granted powers in two ways. First, by conditioning approval of the minor plat on a name change, Metro is contravening the doctrine of finality since it has previously approved the name. Second, by enforcing the 16 character limit for public streets Metro ignores the fact that SouthPointe Commons Boulevard is a private street which is only required to be named. Thus, SouthPointe concludes that Metro's conduct has been arbitrary in this matter.

The Court has reviewed SouthPointe's Motion and Exhibits. In Exhibit "B" the Planning and Zoning Minutes of May 20, 2010, one of the items on the agenda is listed as "approval of a preliminary subdivision plan to create five tracts and proposed public and private roads (SouthPointe Blvd. and Street "A"). Aida Conic, the Case Manager on this matter testified at the hearing that SouthPointe Boulevard would be partially public and partially private."

Exhibit "C" is Ordinance 124, Series 2010 providing for the development. On page 3 SouthPointe Boulevard was mentioned specifically, the Ordinance was enacted on July 29, 2010.

Exhibit "D" sets forth the binding elements. SouthPointe Boulevard was mentioned in elements 28, 29, 30, 31, 32 and 33. Exhibit "E" is the DRC Staff Report dated January 3, 2018. It specifically lists SouthPointe Boulevard as a private road. Finally Exhibit "F" is a letter from LMES which concedes that SouthPointe Commons Boulevard is a private road.

Based on the foregoing, the Court finds that Metro has acted arbitrarily by exceeding its powers when it refused to recognize the street name approved in 2010 and in enforcing the 16 character limit on a private road.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is GRANTED. Defendants are ordered to approve the Minor Plat labeled 18MINORPLAT1136 with either SouthPointe Boulevard or SouthPointe Commons Boulevard as the approved name of the private street shown thereon within ten (10) days of the entry of this Order. The final name of the street shall be selected by SouthPointe Partners, LLC who shall inform Defendants by letter, a copy of which shall be filed with the Court within five (5) days. Defendants shall thereafter enter the chosen name into the Street Index File as required by KDC 6.3.5 B.

/s/ Judith McDonald-Burkman

JUDITH MCDONALD-BURKMAN, JUDGE
JEFFERSON CIRCUIT COURT

DATE: 7-24-19

Entered in Court: Jul 26 2019

Cc: Christopher W. Brooker/John Baker
Travis J. Fiechter/Paul B. Whitty

Supreme Court of Kentucky

2021-SC-0309-D
(2019-CA-1784 862020-CA-0195)

SOUTHPOINTE PARTNERS, LLC MOVANT

V. JEFFERSON CIRCUIT COURT
19-CI-002529 & 19-CI-006441

LOUISVILLE METRO
GOVERNMENT ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: March 16, 2022.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

MINUTES OF THE MEETING
OF THE
LOUISVILLE METRO
PLANNING COMMISSION MEETING
April 18, 2019

A meeting of the Louisville Metro Planning Commission was held on Thursday, April 18, 2019 at 1:00 p.m. at the Old Jail Building, located at 514 W. Liberty Street, Louisville, KY 40202.

Commissioners present:
Rich Carlson (Acting Chair)
Lula Howard
Robert Peterson
Ruth Daniels
Jeff Brown
David Tomes

Commissioners absent:
Vince Jarboe, Chair
Marilyn Lewis, Vice Chair
Donald Robinson
Emma Smith

Staff members present:
Emily Liu, Director, Planning & Design Services
Joe Reverman, Assistant Director, Planning & Design Services
Julia Williams, Planning Supervisor
Joel Dock, Planner II
Dante St. Germain, Planner II
Lacey Gabbard, Planner I
Jay Luckett, Planner I
Paul Whitty, Legal Counsel
Beth Stuber, Transportation Planning

Tony Kelly, MSD
Chris Cestaro, Management Assistant

The following matters were considered:

* * *

PLANNING COMMISSION MINUTES
April 18, 2019

PUBLIC HEARING

CASE NO. 19WAIVER1007

Request:	CONTINUED FROM THE 03/21/19 PLANNING COMMISSION – Waiver of street name length
Project Name:	7505 Baidstown Road Street Name
Location:	7595 Bardstown Road
Owner:	Frank Csapo, Southpointe Partners LLC
Applicant:	John Campbell – Heritage Engineering
Representative:	Jon Baker – Wyatt Tarrant & Combs LLP
Jurisdiction:	Louisville Metro
Council District:	22 – Robin Engel

Case Manager: Lacey Gabbard, AICP, Planner I

Notice of this public hearing appeared in The Courier-Journal, a notice was posted on the property, and notices were sent by first class mail to those adjoining property owners whose names were supplied by the applicants.

The staff report prepared for this case was incorporated into the record. The Commissioners received this

report in advance of the hearing, and this report was available to any interested party prior to the public hearing. (The staff report is part of the case file maintained in Planning and Design Services offices, 444 S. 5th Street.)

Agency Testimony:
00:16:06 :Lacey Gabbard presented the case and showed a Power Point presentation (see staff report and recording for detailed presentation.)

00:17:38 Beth Allen, representing Louisville Metro EMS, explained the agency's opposition to the street name (see recording and also letter of explanation, on file.)

00:18:13 In response to a question from Commissioner Carlson, Ms. Allen said that EMS had met with the applicant's attorney (Jon Baker) to discuss options for other street names. She discussed alternative name options that had been presented to the applicant.

The following spoke in support of this request:
Jon Baker, Wyatt Tarrant & Combs, 500 West Jefferson Street, Louisville, KY 40202

Summary of testimony of those in support:
00:20:09 Jon Baker, the applicant's representative, presented the applicants case. He said the street name "Southpointe Boulevard" had already been approved three separate times (via rezoning, and two development plans.) He said these are private streets, not public streets, and therefore the LDC street name

requirements do not apply. See recording for detailed presentation.

00:25:08 In response to a question from Commissioner Brown, Mr. Baker said the name being requested today is "Southpointe Commons Boulevard". He explained why that name was chosen, and the differences between public and private street names. Commissioner Brown and Mr. Baker discussed sections of the Land Development Code that deal with this subject.

00:28:23 Commissioner Carlson asked what the process is for naming streets, and at what point does MetroSafe/EMS get involved in approving the names. Mr. Baker said the Code does not address that question. Joseph Reverman, Assistant Director of Planning & Design Services, said the Code does address it as far as how street names should be changed, and does address the naming of streets on development plans. He reviewed the history of the "Southpoint Drive" and "Southpointe Commons" development and street names.

00:30:59 Mr. Baker discussed how the Code deals with how to initiate street name assignments.

Discussion:

00:33:31 In response to a question from Commissioner Howard, Mr. Reverman and Commissioner Carlson discussed how suffixes ("Drive", "Lane", "Street", "Boulevard" etc.) are suffixes, differentiating streets from each other.

00:37:12 Ms. Allen described how emergency responders handle calls, and how unique street names are necessary to avoid confusion and direct a responder to where they need to go.

00:39:33 Paul Whitty, legal counsel for the Planning. Commission, asked Ms. Allen if EMS's opposition was based on Section 6.3.5A, which refers to conformance with the Manual of Uniform Traffic Control Devices. Ms. Allen said not specifically on the Manual, but EMS has had conversations with Metro Public Works regarding their concerns with the history of how this regulation was put in place. Her understanding is that this regulation was put into the 2003 Land Development Code because the increased street name lengths were causing street signs to get longer and larger, which causes problems loading and attaching signs to poles. Longer and heavier signs can cause a public safety issue if they fall off or blow off during inclement weather.

00:41:28 Commissioner Howard asked if there are any national regulations regarding street sign size and number of letters. Ms. Allen said she believes there are federal guidelines for interstates, and that Emergency Services is responsible for local street name regulations.

00:45:06 Kelly Jones, Deputy Director of Louisville Metro Emergency Services, said it is the responsibility of the governmental bodies of Louisville Metro to look Into changing regulations regarding street names if they want to, not Emergency Services. Emergency

Services was asked to weigh in, and they did. He quoted Section 11.8.1 Appendix 11A of the Land Development Code.

00:48:01 Commissioner Carlson asked Mr. Jones about the importance of street signs to the Police Department during a pursuit. Mr. Jones said they are very important, and elaborated.

Rebuttal:
00:50:24 Mr. Baker emphasized the importance of this project to the Fern Creek area and the importance of making speedier progress on the project. He said the details put forth by the applicant are in compliance with the Land Development Code. He said there is no evidence that two extra letters will cause a hazard, and explained why this street name will not cause confusion.

00:52:34 Commissioner Brown and Mr. Baker discussed the MUCTD (the Federal guidelines that apply to any public roadway that is open and available to the public.) Commissioner Brown said the Manual does discuss "driver comprehension", which does need to be taken into consideration when designing a street name sign. Mr. Baker said the MUCTD also states that "advance signage" can be used prior to the intersection.

Deliberation:
00:54:10 Commissioners' deliberation.

An audio/visual recording of the Planning Commission hearing related to this case is available on the Planning & Design Services website, or

you may contact the Customer Service staff to view the recording or to obtain a copy.

Waiver of Land Development Code section 6.3.5.1 to allow a private street name length to exceed the allowed number of characters (16) by 2

01:10:56 On a motion by Commissioner Brown, seconded by Commissioner Daniels, the following resolution was adopted:

RESOLVED, the Louisville Metro Planning Commission does hereby determine that this change in street name is not eligible for a waiver as this Is a safety and welfare requirement within the Land Development Code and therefore ineligible under Section 11.8.1.

The vote was as follows:

YES: Commissioners Peterson, Daniels, Brown, and Carlson.

NO: Commissioners Tomes, Howard,

NOT PRESENT: Commissioners Jarboe, Lewis, Robinson, and Smith.

01:12:01 After this vote was taken, Mr. Baker asked the Planning Commission to instruct staff to deny Case No. 18MINORPLAT1136, a record plat that has "Southpointe Boulevard" on it. Emily Liu (Director of Planning & Design Services), Mr. Reverman, Mr. Baker, and the Commissioners discussed this at length (see recording for detailed discussion.)

01:17:54 On a motion by Commissioner Brown, seconded by Commissioner Howard, the following resolution was adopted:

RESOLVED, the Louisville Metro Planning Commission does hereby **APPROVE** the minor plat for Case No. 18MINORPLAT1136 **ON CONDITION** that the street name be revised to meet the Land Development Code requirements and approval from Emergency Services, and that the street name is a valid name that is available within that street index file.

The vote was as follows:

YES: Commissioners Tomes, Peterson, Daniels, Brown, Howard, and Carlson.

NOT PRESENT: Commissioners Jarboe, Lewis, Robinson, and Smith.

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