Supreme Court of Kentucky

No. 2021-SC-0259

JIM KING — *Appellant*

v.

On Appeal from Court of Appeals,
No. 2020-CA-0115-MR

BEVERAGE WAREHOUSE, LLC
AND GREGORY ANASTAS — *Appellees*

AMICUS BRIEF OF THE COMMONWEALTH OF KENTUCKY

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Certificate of Service

I served a copy of this brief on January 5, 2022 by U.S. mail to Derek Miles, R. Thad Keal, and Michelle Turner, Turner, Keal & Button, PLLC, 10624 Meeting Street, Suite 101, Prospect, Kentucky 40059; F. Larkin Fore, Fore Law, PLLC, Paragon Place, Suite 160, 9011 Shelbyville Rd., Louisville, Kentucky 40202; Chadwick N. Gardner, Gardner Law, PLLC, 5920 Timber Ridge Dr., Prospect, Kentucky 40059; Kate Morgan, clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Judith McDonald-Burkman, Judge, Jefferson Circuit Court, Division 9, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202. The record on appeal has not been withdrawn.

Michael R. Wajda

STATEMENT OF POINTS & AUTHORITIES

INTERESTS OF AMICUS AND PURPOSE OF BRIEF

Attorney General Daniel Cameron is the "chief law officer" of the Commonwealth and "all of its departments, commissions, agencies, and political subdivisions." KRS 15.020(1). He appears for the Commonwealth in "any litigation or legal business that any state officer, department, commission, or agency may have in connection with . . . his, her, or its official duties," except when a Commonwealth's attorney or county attorney has a duty to do so. KRS 15.020(3). His job also includes "appear[ing] for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested." *Id.* Where, as here, the ability of state and local officials to raise official immunity is at stake, the Commonwealth has an obvious interest.

This lawsuit began as a challenge to the application of a local liquor ordinance. But after the Court of Appeals refused to hear Appellant Jim King's interlocutory appeal, it now concerns the ability of officials in the Commonwealth to take an interlocutory appeal to preserve official immunity from suit. The Commonwealth, through Attorney General Cameron, files this amicus brief to argue that the Court should follow the federal rule and hold that Kentucky law allows an interlocutory appeal from the denial of official immunity at either or both the motion-to-dismiss stage and the summary-judgment stage.

BACKGROUND

In Kentucky, as elsewhere, certain defendants associated with the state have immunity from suit. This official immunity "derives from the doctrine of sovereign immunity, which holds that the state, legislators, prosecutors, judges, and others doing the essential work of the state enjoy an absolute immunity from suit." *Autry v. W. Ky. Univ.*, 219 S.W.3d 713, 717 (Ky. 2007). This case involves one such claim of immunity.

In 2009, Appellant Jim King served as the Alcoholic Beverage Control Administrator for St. Matthews, Kentucky. *King v. Beverage Warehouse, LLC*, No. 2020-CA-0115-MR, 2021 WL 1583841, at *1 (Ky. App. Apr. 23, 2021). When Liquor Barn sought a liquor license, competitor Beverage Warehouse protested. *Id.* King ultimately approved Liquor Barn's application, and it received a liquor license. *Id.* at *3. An initial round of litigation followed, but it ended when Liquor Barn dismissed its appeal after being sold. *Id.*

The litigation leading to this appeal began in 2016. Beverage Warehouse and owner Gregory Anastas sued, among others, the City of St. Matthews and King, in both his individual and official capacities. *Id.* St. Matthews and King filed motions to dismiss on the basis of qualified official immunity, which the

trial court denied. *Id.* at *4; [App.[1] Tab 3 at 4–5]. King and St. Matthews did not appeal this ruling.

King and St. Matthews later filed a motion for summary judgment, which the trial court granted. *King*, 2021 WL 1583841, at *4; [App. Tab 4 at 7]. But Beverage Warehouse and Anastas filed a motion to alter, amend, or vacate the summary-judgment order. The circuit court denied the motion but vacated part of its order granting summary judgment to St. Matthews and King. *King*, 2021 WL 1583841, at *4; [*see* App. Tab 6 at 1].

King then filed his own motion to alter, amend, or vacate the trial court's order on the basis of qualified official immunity. *King*, 2021 WL 1583841, at *5. The trial court denied this motion, and King appealed. *Id.*; [App. Tab 6 at 3].

In considering King's appeal, the Court of Appeals explained that although a denial of summary judgment is generally not appealable, an exception exists for orders denying "a substantial claim of absolute immunity or qualified official immunity." *King*, 2021 WL 1583841, at *5. But the Court of Appeals deemed this exception inapplicable here. It concluded that King could not appeal the trial court's summary-judgment decision denying official immunity because he did not file an interlocutory appeal when the trial court denied his motion to dismiss. *Id.* at *5–6. The Court of Appeals based this conclusion entirely on *Baker*

[1] Citations to the Appendix refer to that attached to the Appellant's opening brief.

v. Fields, 543 S.W.3d 575 (Ky. 2018), which stated that "orders denying claims of immunity . . . should be subject to prompt judicial review." *King*, 2021 WL 1583841, at *5 (emphasis omitted) (quoting *Baker*, 543 S.W.3d at 577–78). The Court of Appeals reasoned that the trial court's summary-judgment orders "did not serve to invoke or extend the appellate jurisdiction of this Court." *Id.* at *6.

ARGUMENT

The Court of Appeals held that a government official must appeal an order denying official immunity as soon as the trial court issues it. The failure to do so, the Court of Appeals reasoned, divests Kentucky's appellate courts of jurisdiction to consider a later interlocutory appeal. Going forward, if a government official does not promptly take an interlocutory appeal from an order denying immunity, that official must wait until after final judgment to seek appellate relief related to immunity. The Court of Appeals identified only a single precedent to support its holding. But that lone decision has no bearing on the issue presented here. The better rule, and the one that prevails in many appellate courts, is that a government official can take an interlocutory appeal to contest immunity at either or both the motion-to-dismiss stage and the summary-judgment stage.

I. The Court should allow King's interlocutory appeal to proceed.

The Court of Appeals made Kentucky's appellate courts an outlier by holding that a government official can lose his or her ability to take an interlocutory appeal concerning immunity by not promptly taking such an appeal after the trial court first considers the issue. The Court of Appeals did not identify a single decision from this Court (or any other court) that stands for this proposition. The only precedent the court below cited for its holding was this Court's *Baker* decision.

Baker, it is true, held that "orders denying claims of immunity . . . should be subject to prompt appellate review." *Baker*, 543 S.W.3d at 577–78 (quoting *Breathitt Cnty. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009)). But *Baker* did not address the question presented here. Rather, the "sole issue" addressed there was whether "the Court of Appeals exceeded its scope of appellate review when it addressed the substantive claim of negligence on an interlocutory appeal of a decision about qualified immunity." *Id.* at 577. The Court of Appeals nevertheless used *Baker* to conclude that an order denying immunity can only receive interlocutory review if a party pursues the appeal promptly after the trial court first considers immunity. This takes *Baker* several steps beyond the "sole issue" it decided. *Baker* simply did not address how government officials must time their interlocutory appeals.

But *Baker* is not altogether irrelevant to the question presented here. In addressing the scope of an interlocutory appeal, *Baker* emphasized that its holding was "in line with federal courts' review of interlocutory appeals." 543 S.W.3d at 578. And *Baker* is not the first time this Court has measured its interlocutory-appeal jurisprudence against federal case law. *See Prater*, 292 S.W.3d at 886–87 (finding the United States Supreme Court's reasoning to be "persuasive" in holding that "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment"); *see also Maggard v. Kinney*, 576 S.W.3d 559, 564 (Ky. 2019) (recognizing that *Prater* "adopted a recognized application of the federal collateral order doctrine"). If the Court of Appeals had asked how federal appellate courts have approached the question presented here, it would have realized that its holding is a minority position.

Since at least 1996, it has been settled in federal court that defendants claiming immunity can appeal both from motions to dismiss and from motions for summary judgment. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Supreme Court held that it is "clearly establish[ed] that an order rejecting the defense of qualified immunity at *either* the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal." *Id.* at 307 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). The *Behrens* Court noted that its previous decision in *Mitchell* "dealt with the second of two interlocutory appeals on immunity claims,"

Behrens, 516 U.S. at 306 n.2, and it did not "assign[] any significance to the successive aspect of the second appeal." *Id.*

Going further, the *Behrens* Court expressly rejected the Ninth Circuit's "one-interlocutory-appeal rule." *Id.* at 311. The Supreme Court held that "resolution of the immunity question may require more than one judiciously timed appeal." *Id.* at 309. That is because the "legally relevant factors" related to immunity "will be different on summary judgment than on an earlier motion to dismiss." *Id.* Although this may lead to some delay, the Supreme Court noted "[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims." *Id.* at 310 (quoting *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977)). The Court also noted that "successive pretrial assertions of immunity seem to be a rare occurrence," *id.*—a point borne out by this case and the fact that this Court has yet to resolve the question presented here.

Other courts have taken *Behrens*' instructions to heart. The Second Circuit held that "nothing in [*Behrens*] suggests that a defendant is required to appeal an initial denial at the pleading stage in order to appeal a subsequent denial on summary judgment. Such an approach would precipitate many needless appeals." *Vega v. Miller*, 273 F.3d 460, 464 (2d Cir. 2001). As the Second Circuit observed, "even the dissenters in *Behrens*, who favored permitting only one appeal, noted that a defendant could decline to appeal from a denial of their defense at the

pleading stage and appeal the subsequent denial at the summary judgment stage." *Id.* at 466 (citing *Behrens*, 516 U.S. at 323 (Breyer, J., dissenting)). The Third Circuit agreed, stating "there is nothing to prevent a defendant from appealing an adverse ruling issued at one stage but not the other." *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996). The Third Circuit specifically declined to adopt "a rule that would dramatically increase the number of interlocutory appeals at the dismissal stage." *Id.* These same reasons counsel this Court to reverse the decision below.

The Fifth Circuit stated this rule even more emphatically. It said that an official "can take multiple immediate appeals because the official can raise qualified immunity at any stage in the litigation . . . and continue to raise it at each successive stage." *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 330–31 (5th Cir. 2020). The Seventh Circuit was equally clear. It held a defendant "may appeal from an order conclusively denying a motion (based on qualified immunity) seeking summary judgment, whether or not the [defendant] has appealed from an order denying a motion to dismiss the complaint, and whether or not the motion for summary judgment rests on new legal or factual arguments." *Fairley v. Fermaint*, 482 F.3d 897, 901 (7th Cir. 2007). The Seventh Circuit specifically noted that this holding "relieves public officials from any pressure to take what may be premature appeals from orders declining to dismiss complaints." *Id.* at 902.

The Ninth Circuit also allows two appeals from denials of official immunity. In fact, the Ninth Circuit, whose one-interlocutory-appeal rule the Supreme Court discarded in *Behrens*, went even further and recognized that "the reasoning in *Behrens* is consistent with the existence of appellate jurisdiction over an appeal from a second denial of a motion for summary judgment based on qualified immunity." *Knox v. Sw. Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997). It specifically rejected "the erroneous argument that an interlocutory appeal from the denial of [an immunity claim] is proper only if timely filed from the district court's decision on the first motion." *Id.*

And the Tenth Circuit joined its sister circuits in an opinion later vacated on other grounds. *Robbins v. Wilkie*, 433 F.3d 755, 763–64 (10th Cir. 2006), *rev'd and remanded*, 551 U.S. 537 (2007), *and vacated on other grounds*, 497 F.3d 1122 (10th Cir. 2007) (noting "public officials should not be forced to appeal an order denying dismissal on qualified immunity to preserve appeal of a potential subsequent order denying summary judgment on the same issue"). Time and time again, the federal courts have applied *Behrens* to allow an interlocutory appeal under the circumstances presented here.

This extensive federal precedent, of course, is not dispositive of how Kentucky law handles this issue. But nor is it irrelevant. As noted above, this Court has repeatedly looked to federal case law when deciding questions related to interlocutory appeals of immunity determinations. *See Baker*, 543 S.W.3d at 578;

Prater, 292 S.W.3d at 886–87. The federal system has successfully operated under the rule from *Behrens* for 25 years. The Court of Appeals offered no rationale for why Kentucky law should chart a different course. This Court should now make clear that the rule in Kentucky courts is the same as the federal rule.

II. Allowing the interlocutory appeal promotes judicial efficiency.

Following the federal rule will promote judicial economy. If the Court affirms the decision below, it will encourage some, or perhaps many, premature interlocutory appeals. With such a rule, defendants claiming immunity whose motions to dismiss are denied must file an immediate interlocutory appeal—or forever lose the ability to seek interlocutory relief. While an interlocutory appeal may lead to a reversal in some cases, other defendants may find it prudent to endure discovery before raising official immunity again. For example, say a trial court denies immunity at the motion-to-dismiss stage by correctly pointing out a factual issue that needs to be explored. With the federal rule, the litigants can explore this factual issue without needing to take an immediate interlocutory appeal. If the decision below stands, however, it will incentivize defendants in that circumstance to file interlocutory appeals anyway, even if their cases would be better served by undergoing discovery before appealing. In this way, the Court of Appeals' decision will unnecessarily burden the appellate system.

In addition, it is possible to read the Court of Appeals' decision as applying a one-interlocutory-appeal rule like the one applied by the Ninth Circuit in *Behrens*. *See King*, 2021 WL 1583841, at *6 ("These later orders did not serve to invoke or to extend the appellate jurisdiction of this Court."). If the Court were to adopt such a rule, it would dissuade some, or maybe many, government officials with viable motions to dismiss from seeking such relief.[2] These defendants would forgo filing motions to dismiss to preserve their ability to argue both factual and legal issues in a later-filed motion for summary judgment, which they can follow with an interlocutory appeal if necessary. *Cf. Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) ("Summary judgments play an especially important role when dealing with immunities . . . ."). But that result frustrates the purpose of immunity. As this Court has held, qualified official immunity is "*an immunity from suit*, that is, from the burdens of defending the action, not merely just an immunity from liability." *Sloas*, 201 S.W.3d at 474 (citing *Mitchell*, 472 U.S. at 526) (emphasis added). A one-interlocutory-appeal rule would lead to more government officials with a viable legal basis for dismissal at the CR 12 stage nevertheless choosing to undergo otherwise unnecessary discovery to ensure the case is ultimately decided in their favor. This Court should not counsel such delay.

[2] This is likely in light of the "exacting standard of review" for evaluating motions to dismiss in Kentucky. *Brown-Forman Corp. v. Miller*, 528 S.W.3d 886, 889 (Ky. 2017) (quoting *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010)).

The Appellees may argue that a drawback to adopting the federal rule is that it will prompt successive appeals, which will tie up the appellate courts and impede the prompt resolution of matters. But as a matter of Kentucky law, "interlocutory appeals are appropriate only in 'rare cases.'" *Maggard*, 576 S.W.3d at 566 (quoting *Baker*, 543 S.W.3d at 577); *see also Commonwealth v. Farmer*, 423 S.W.3d 690, 695–98 (Ky. 2014) (limiting the circumstances in which an interlocutory appeal can be taken). And as noted above, *Behrens* observed that "successive pretrial assertions of immunity seem to be a rare occurrence." 516 U.S. at 310. Indeed, in the 25 years since *Behrens*, the Supreme Court has not reconsidered its holding there due to a deluge of successive interlocutory appeals. In fact, the Supreme Court's observation from *Behrens* about the infrequency of successive interlocutory appeals has played out here. King is not seeking to take successive interlocutory appeals. He declined to appeal at the motion-to-dismiss stage, and now seeks to appeal only after the trial court's denial of summary judgment.

The Court of Appeals' reasoning is further flawed because it appears to assume that raising immunity at the motion-to-dismiss stage looks identical to raising the issue at the summary-judgment stage. *See King*, 2021 WL 1583841, at *5–6. But as *Behrens* explained, the "legally relevant factors" related to immunity "will be different on summary judgment than on an earlier motion to dismiss." 516 U.S. at 311. That is most certainly true under Kentucky's civil rules. At the

motion-to-dismiss stage, a trial court focuses on the pleadings, whereas at summary judgment its attention turns to the record evidence. *Brown-Forman Corp. v. Miller*, 528 S.W.3d 886, 889 (Ky. 2017); *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Given this fundamental difference between the stages of litigation, a motion to dismiss based on immunity may look nothing like a later-filed motion for summary judgment based on immunity. The Court of Appeals' rule overlooks this difference. It will instead force a premature interlocutory appeal, even if a defendant would find it prudent to undergo discovery before later raising immunity again.

* * *

For all these reasons, the Court should follow the federal rule and hold that Kentucky law allows an appeal from the denial of official immunity at either or both the motion-to-dismiss stage and the summary-judgment stage.

CONCLUSION

The Court should reverse the Court of Appeals' decision and remand for consideration of King's appeal from the trial court's denial of immunity.

Respectfully submitted by,

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