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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000865-MR

PATRICK D. FRYMAN — APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 07-CI-00313

FLEMING COUNTY HOSPITAL,
D/B/A FLEMING COUNTY
HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Appellant Patrick Fryman appeals from the entry of a summary judgment in favor of the appellee, Fleming County Hospital District, d/b/a Fleming County Hospital, wherein the Fleming Circuit Court found that Fleming County Hospital was entitled to judgment as a matter of the law on sovereign immunity

grounds. Fryman contends that Fleming County Hospital cannot properly be considered an instrumentality of the state entitled to sovereign immunity. We disagree.

**Background**

On the morning of December 18, 2006, Fryman presented to the emergency room of the Fleming County Hospital ("FCH"). He was seen in the emergency room by Dr. Jane Wiczkowski, before being transferred to the intensive care unit ("ICU"). Once transferred to ICU, he was seen by cardiologists who ordered his transfer to the cardiac catherization laboratory of St. Joseph East Hospital via helicopter.

Thereafter, Fryman sued Dr. Wiczkowski and the Fleming County Hospital District ("the District"), d/b/a Fleming County Hospital. Fryman alleged in his complaint that Dr. Wiczkowski "intentionally, maliciously and negligently failed and refused to provide a diagnosis and treatment of [his] illness," and that such failure caused him to suffer "grave and extensive injuries to his body and mind; pain and suffering; lost wages and a permanent loss of earning capacity; mental anguish, loss of enjoyment of life; disfigurement; and medical expenses." After FCH filed its answer, it later filed a motion for summary judgment on the ground that the claims against it were barred by the doctrine of sovereign immunity.

The trial court heard arguments on the motion and granted summary judgment in favor of FCH, holding that FCH and the District was an instrumentality of the state entitled to the protection of sovereign immunity.

**Standard of Review**

Upon review of a granted motion for summary judgment, our task is to determine whether the trial court was correct in finding that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Steelvest, Inc v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When asking this question, we review the record "in a light most favorable to the party opposing the motion." *Booth v. CSX Transportation, Inc.*, 211 S.W.3d 81, 83 (Ky. App. 2006). As the summary judgment process involves no fact-finding, we review the judgment *de novo*, giving no deference to the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

**Sovereign Immunity**

At issue in the present case is whether FCH and the District are entitled to immunity from claims of medical negligence against them for care rendered at FCH.

Sovereign immunity is a doctrine of law harking back to the common law of England and recognized in the Commonwealth through Section 231 of the Kentucky Constitution. *Reyes v. Hardin County*, 55 S.W.3d 337, 338 (Ky. 2001); *Withers v. University of Kentucky*, 939 S.W.2d 340, 342 (Ky. 1997). Stated simply, the doctrine of sovereign immunity prohibits the Commonwealth or its

instrumentalities from being sued without consent. *See Holloway Construction Company v. Smith*, 683 S.W.2d 248, 249 (Ky. 1984).

Until recently, our courts have applied the two-prong test set forth by the Supreme Court in *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1991), to determine whether an entity is entitled to the protection of sovereign immunity. The first prong of the test considered the degree to which the entity was under the "direction and control of the central State government." *Id*. at 331. The second considered whether the entity was "supported by monies which were disbursed by authority of the Commissioner of Finance out of the State treasury." *Id*.

However, after *Berns*, many Kentucky courts began to also place emphasis on an implicit "third element" -*whether the entity carries out a function which is integral to state government*. *See, e.g., Yanero v. Davis*, 65 S.W.3d 510, 527 (Ky. 2001); *Withers, supra.* Just recently, the Kentucky Supreme Court changed the test altogether by doing away with the *Berns* analysis. *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp*., 295 S.W.3d 91, 99 (Ky. 2009). The Court found that the two-pronged test from *Berns* was useful, but best left to that case. *Id.* Indeed, the *Comair* court felt that the *Berns* test was too simple and too limiting in that it failed to allow for subtlety and focused too much on central state government rather than including county governments. *Id*. In establishing the new analysis, or "test" to apply, the Court stated in pertinent part:

> [T]he basic concept behind the [two-prong test in *Berns*] -whether the entity in question is an agency (or alter ego) of a clearly immune entity (like the state or a county) rather than one for purely local, proprietary functions-is still useful. . . . Rather than attempting to reduce that idea to a simple test, however, it should instead be treated as a guiding principle, with the focus instead being on the origins of the entity. . .[and] whether the entity exercises a governmental function, which . . . means a "function integral to state government." . . . [B]oth of these inquiries-the sources of the entity in question and the nature of the function it carries out-are tied together to the extent that frequently only an arm of the state can exercise a truly integral governmental function . . . .

*Id*. at 99. Thus, our analysis of whether the District is entitled to the protection of sovereign immunity turns on the District's origins and whether it can be said to carry out a function integral to state government.

It is well established that counties are considered direct political subdivisions of the state and enjoy the same immunity as the state itself. *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003). *See also Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004). Furthermore, it has long been understood that county hospitals are immune from suit and that such immunity has not been removed by the legislature. OAG 75-19 (*stating that "a county hospital is not suable in a tort action*"). *See also* OAG 62-1019; 1956 OAG 39,158. However, as there appears to be scant case law on the issue, we reaffirm this maxim here through a brief application of the test set forth in *Comair, supra*.[1] *But see Rather v. Allen County War Memorial*

[1] The Supreme Court references the sovereign immunity of county hospitals in *Reyes, supra*, although the Court therein addressed the somewhat different issue of whether a county hospital could be included in an action for the sole purpose of determining the limits of the hospital's policy of insurance under Kentucky

*Hospital*, 429 S.W.2d 860 (1968); *Hill v. Ohio County*, 468 S.W.2d 306, 307 (Ky. 1971).

**The *Comair* Test**

The District was formed pursuant to KRS 216.310, *et seq*., which was enacted by the Legislature to allow counties to form hospital districts. The Legislature shed light on the purpose of this legislation in KRS 216.310, which states as follows:

> This legislation is designed to permit a county to form a hospital district or two (2) or more counties to join together in the formation of a hospital district in order to provide a broader basis for local support of hospitals and related health facilities including supportive services and the training and education of health personnel. . . .

In addition, the Legislature established county hospital districts as taxing districts through KRS 216.317, which states as follows:

> Upon the creation of a hospital district, as provided in KRS 65.182 and 216.320, the district shall constitute and be a taxing district within the meaning of Section 157 of the Constitution of Kentucky and the county shall be a participating county in the district.

Further, KRS 216.315 states that the secretary for the Cabinet for Health and Family Services shall be the secretary for all county hospital districts. Moreover, KRS 216.323 grants the county judge executive of the county the authority to appoint members to the hospital district's board. Finally, KRS 216.335 gives the District the power to enter into contracts, buy and sell land, and exercise the power of eminent domain.

Revised Statute(s) ("KRS") 67.186.

The District is a creature of statute and is funded by tax dollars. State actors act as its secretary and appoint its board members. Thus, it is clear that Fleming County is the District's "parent." As counties are arms of the state, the Commonwealth is also the District's "parent." *See, e.g., Comair, supra*. *See also Cullinan v. Jefferson County*, 418 S.W.2d 407 (1967). With this established, the next question is whether the District and FCH carry out a function which is integral to state government.

This task is easily accomplished, however, as it is clear that the District is carrying out the policy of the state at large by carrying out the Legislature's stated purpose of providing "health and hospital care for the collective benefit of all the people within an area." This is defined as the state's objective in KRS 216.310. As such, we find that the District and FCH are protected from suit by the doctrine of sovereign immunity.

As the Supreme Court held in *Reyes, supra*, a suit may still be "brought against a county hospital for the *sole purpose* of measuring a negligence claimant's entitlement to proceeds from the hospital's policy of liability insurance." *Id.* at 337-338 (Emphasis added). Such suit is authorized by statute under KRS 67.186. However, we do not reach this issue here, as Fryman has not argued for the application of KRS 67.186, either before this Court or in the trial court. As the Kentucky Supreme Court stated in *Rather v. Allen County War Memorial Hospital, supra*,

> Since KRS 67.186 creates an exception to immunity and since that exception is by legislative enactment separate and apart from Section 231 of the Kentucky Constitution (which establishes immunity) it [is] incumbent upon [a] plaintiff to plead that [he or] she [comes] within the exception after the county . . . assert[s] its immunity as a ground for dismissal of the complaint.

*Id*. at 862. Thus, we will not reverse on the ground that Fryman could have maintained an action against FCH for the sole purpose of measuring his entitlement to proceeds from FCH's liability insurance policy as it is not properly before us.

Accordingly, the judgment of the Fleming Circuit Court is hereby affirmed.

ALL CONCUR.

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