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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000123-MR

METCALFE COUNTY NURSING HOME CORPORATION AND METCALFE HEALTH SERVICES, INC. — APPELLANTS

v.

APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 10-CI-00170

MARSHA ROBERTS, AS ADMINISTRATRIX OF THE ESTATE OF MARY STONE, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF MARY STONE — APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: MAZE, MOORE AND STUMBO, JUDGES.

MAZE, JUDGE: Appellants, Metcalfe County Nursing Home Corporation and Metcalfe Health Services Inc., appeal the order of the Metcalfe Circuit Court denying its motion for summary judgment which asserted the affirmative defense of sovereign immunity in response to Appellee's, the Estate of Mary Stone

("Estate"), tort action. Upon reviewing the record, we affirm in part and reverse in part the trial court's order denying summary judgment.

**Background**

The following facts are not in dispute. On February 16, 2010, Mary Stone passed away at the age of eighty-six. Nearly four months prior, Ms. Stone had been discharged from Metcalfe Health Care Center ("Nursing Home") in Edmonton, where she had been a patient since 2001. Shortly after her death, Ms. Stone's estate filed this action against the Appellants for negligence in the Nursing Home's care for Ms. Stone while she was a patient there. The suit also named five unknown defendants in addition to Appellants. The suit did not name the Metcalfe County Fiscal Court or the County Judge Executive, who exercise control over both entities.

More than thirty years ago, both Appellants were created, according to their Articles of Incorporation, "at the request of the County of Metcalfe in Kentucky for the purpose of acting as an agency and instrumentality of said County" in providing health services to the aged population of the surrounding area. Citing this and other facts, the Appellants asserted the defense of sovereign immunity in its response to the Estate's Complaint. Following discovery, Appellants filed a motion for summary judgment. Specifically, Appellants asserted that both entities were immune from suit because they were born of the same immune parent (Metcalfe County government) and, as a nursing home, they

performed an integral government function. Appellants argued this satisfied the requirements for sovereign immunity under current Kentucky law.

The Estate responded to the motion for summary judgment, arguing that Metcalfe County does not directly control Appellants; rather, they are controlled in their day-to-day operations by Wells Health System, Inc. ("Wells"). The Estate also argued that Appellants did not provide a service "integral to state government," and was therefore not entitled to the immunity enjoyed by the state. With its response, the Estate tendered an order denying summary judgment for the trial court's consideration. The Estate's tendered order included the trial court's Findings of Fact and Conclusions of Law. The trial court signed the tendered order denying Appellants' motion on October 31, 2011. Appellants moved the court to alter, amend or vacate its order and objected to the findings and conclusions in the court's order, as it had been drafted by opposing counsel and "contained numerous argumentative statements unsupported by evidence on the record." Accordingly, the trial court entered its own order on December 29, 2011, which stated that the motion for summary judgment was denied.[1] This appeal follows.

**Standard of Review**

Appellants appeal from the trial court's interlocutory order denying their motion for summary judgment based on sovereign immunity. Generally,

[1] The entirety of the Order reads, "[t]his matter is before the Court on motion of the Defendants to alter, amend or vacate the Court's previously entered denial of Summary Judgment. The Court, after hearing arguments of counsel, does hereby find that based upon the entire record the Defendants are not protected by sovereign immunity. The Motion for Summary Judgment in that regard is DENIED."

under Kentucky Rule of Civil Procedure (CR) 56.03, the denial of a motion for summary judgment is not appealable. However, sovereign immunity entitles its possessor to be free from the burdens of not only liability, but also of defending the action. *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). *See also Lexington–Fayette Urban County Gov't v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). Therefore, an order denying a claim of sovereign immunity is immediately appealable pursuant to CR 54.02. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009). Furthermore, we review the case on a *de novo* basis, as it presents a question of law. *See Sloas*, *supra*, at 475; *N. Kentucky Area Planning Comm'n v. Cloyd*, 332 S.W.3d 91, 93 (Ky. App. 2010), *review denied* (Mar. 16, 2001).

## Analysis

### I. Sovereign Immunity Standard Under *Comair*

The law of sovereign immunity has been ever-changing in Kentucky. Despite this, the one clear certainty remains "that pure sovereign immunity, for the state itself, has long been the rule in Kentucky." *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). Additionally, each of the state's counties constitutes a "direct political subdivision [of the state and enjoys] the same immunity as the state itself[.]" *Comair*, *supra*, at 94. However, determining a particular entity's qualification for immunity is the more complex matter, as the reach of sovereign immunity becomes more complicated when

dealing with governmental and quasi-governmental entities and departments below the level of the Commonwealth itself.

In *Kentucky Ctr. for the Arts v. Berns*, 801 S.W.2d 327 (Ky. 1990), the Supreme Court devised a "two-pronged" test to determine whether an entity created by statute for the purpose of public entertainment was entitled to sovereign immunity. The Court ultimately found that the Center for the Arts fell outside the realm of protected entities. In doing so, the Court stated that the dispositive factors were (1) whether the entity was under the "direction and control of the central State government" and (2) whether it was "supported by monies which are disbursed by authority of the Commissioner of Finance of the State treasury." *Berns* at 331. Subsequent cases from the Court would cite this analysis as the test for sovereign immunity, focusing on one seemingly implicit part of the *Berns* decision: the function of an entity. *See Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001)(quoting *Berns, supra*, at 332)("The ultimate holding in *Berns* was that the Center for the Arts, though created by the state, was not entitled to immunity because it 'was not created to discharge any governmental function, and was not carrying out a function integral to state government.'"); *see also Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage Inc.*, 286 S.W.3d 790, 802 (Ky. 2009)("The real thrust of . . . *Berns* . . . is whether the entity carries out an integral governmental function.").

*Berns* continued as the legal standard in sovereign immunity law until recently, when the Supreme Court took up the same issue as it pertained to the

Lexington-Fayette Urban County Airport Corporation and its liability for a 2006 plane crash. In that case, the Supreme Court stated that *Berns* was "an attempt to generally distinguish between state agencies and municipal corporations." *Comair*, *supra*, at 98. Nevertheless, the Court stated that "the two-pronged 'test' was useful in *Berns*, but it is best left in that case," declaring it "overly simple, failing to allow for subtlety, and too limiting." *Id*. at 99.[2]

Thus, *Comair* represented a shift in sovereign immunity analysis and introduced its own "test" which utilized what the Court called the "guiding principle" of *Berns* (examination of the entity's function), but otherwise abandoned *Berns* as the seminal case on the topic. While the Estate asserts that elements of *Berns*, such as control of the entity, still have bearing on our decision, this very Court has stated that *Comair* represented an abandonment of the two-pronged test in *Berns*, rather shifting the inquiry exclusively "to two primary endeavors: examination of the subject entity's 'parent' body and analysis of the function of the entity." *Cloyd*, 332 S.W.3d at 95. In other words, it must first be determined whether the entity in question was born of an immune parent and, secondly, whether the entity serves the "integral governmental function" alluded to in *Berns*. Accordingly, we examine the present case under the analysis in *Comair*.

[2] While the Estate urges us to continue to apply an analysis like that in *Berns*, which would scrutinize the day-to-day operation of Appellants' entities by Wells, its emphasis on this factor is mistaken. As we stated above, and as the Estate quotes in its brief, the Court in *Comair* stated that the two-pronged test in *Berns* was "still useful." The Estate fails to mention, however, that the Court has adopted a new test which abandons *Berns*. The Court announced a new test for sovereign immunity which eliminated the "control" element the Estate urges us to adopt, but retained the "government function" element.

In the present case, both entities' Articles of Incorporation describe an on-going and inseparable bond between the management of each entity and the government of Metcalfe County. According to their respective Articles, both entities were "created at the request of the County of Metcalfe, Kentucky, for the purpose of acting as an agency and instrumentality of said County." In the case of Metcalfe County Nursing Home Corporation, its Board of Directors *is* the Metcalfe County Fiscal Court and County Judge Executive. Similarly, members of the Board of Directors for Metcalfe Health Services, Inc. are nominated by the County Judge Executive and approved by a majority vote of the Fiscal Court. Both entities are not-for-profit, are forbidden from carrying indebtedness and are required to cede any remaining assets to the government of Metcalfe County upon dissolution.

These facts describe entities which were clearly born of Metcalfe County government, which *Comair* informs us is considered a "direct political subdivision [of the state and enjoys] the same immunity as the state itself[.]" *Comair*, *supra*, at 94. Metcalfe County established both entities and charged that county's legislative and executive branches with their management. Therefore, we find that the first requirement under the *Comair* analysis, that an entity be born of an immune "parent," is clearly met.

We turn to the issue of Appellants' respective functions and whether they are sufficiently "governmental" in nature. The Supreme Court has defined "governmental functions" as a "function integral to state government;" or more descriptively, those addressing "state level governmental concerns that are

common to all of the citizens of the state, even though those concerns may be addressed by smaller geographic entities (*e.g.,* by counties)." *Comair*, *supra*, at 99-100. The Supreme Court has also held that a county board of education's provision of "public education within a particular geographical area" to be a "governmental function." *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). The Court has further held that a public university which operates student dormitories, even though a private foundation conducts the day-to-day operation of the dormitories, serves an "integral governmental function," in doing so, *Autry v. W. Kentucky Univ.*, 219 S.W.3d 713 (Ky. 2007). In contrast, this Court has found that a public golf course does *not* serve a governmental function and does not enjoy immunity from suit. *Kenton Co. Pub. Parks Corp. v. Modlin*, 901 S.W.2d 876 (Ky. App. 1995). Finally, the fact that an entity performs the same function as other private enterprises does not, by itself, abrogate the entity's immunity. *Young ex rel. Young v. Univ. Hosp. of Albert B. Chandler Med. Ctr., Inc.*, 2008 WL 2779902, 2007-CA-001075-MR (2008).

The entities in the present case are like the entities in *Comair* and *Autry*. As both parties point out, the Airport Board in *Comair* existed "solely to provide and maintain part of the Commonwealth's air transportation infrastructure." *Comair*, *supra*, at 101. The Airport Board did not actually provide transportation. Western Kentucky University exists to "educat[e] state citizens at the college level" and does not actually hold title to, or lease, dormitories. *Autry*, *supra*, at 718. Similarly, the Metcalfe County Nursing Home Corporation exists to

provide "building facilities to be utilized for" nursing home purposes, and Metcalfe Health Services, Inc. exists solely for the operation of these facilities. It is not the purpose of either entity to provide health care services for the patients at the Nursing Home. Rather, Appellants' operation of the Nursing Home in Edmonton merely provides an infrastructure within which the care of the elderly and dependent citizens of that region can take place.

We agree with Appellants that, like transportation and education, and unlike entertainment and golf, caring for the elderly and infirm is a concern "common to all citizens of the state," even if it is, or merely could be, addressed on a smaller geographic scale, such as in Metcalfe County. *Comair*, *supra*, at 99-100. Indeed, "there is perhaps no broader field of [the state's] police power than that of public health." *Lexington-Fayette Co. Food and Beverage Association v. Lexington-Fayette Urban County Gov't.*, 131 S.W.3d, 745, 750 (Ky. 2004). Thus, consistent with their charters and with their origins in service to Metcalfe County, Appellants perform an integral governmental function for the citizens of Metcalfe County and the surrounding region.

We find that Appellants meet both elements of the *Comair* analysis and that they are therefore entitled to the protection of sovereign immunity, subject, of course, to any waiver of that immunity.

## II. Waiver of Immunity

The trial court's first order concluded that Appellants had waived "any issue of qualified official immunity."[3] However, the trial court's orders do not seem to directly address waiver of *sovereign* immunity.[4] Nevertheless, both Appellants and the Estate address this issue, with Appellants contending that the purchase of limited liability insurance by the Nursing Home did not waive their immunity from suit. The Estate counters that KRS 67.186, in conjunction with KRS 216.313, constitutes an express waiver by the General Assembly of immunity for hospitals and nursing homes, to the extent of their insurance coverage.

The state may waive its protection under sovereign immunity by making express provision for such in statute. However, immunity can be waived only "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Withers v. Univ. of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997); *see also Dep't of Corrections v. Furr*, 23 S.W.3d 615 (Ky. 2000). We therefore look to the relevant statutes and their provisions to determine whether express or implied waiver exists.

One such statute cited by the Estate as a source of waiver is KRS 67.186, which grants counties the power to purchase liability insurance for county-operated hospitals. The statute states:

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[3] We presume this finding refers to the five unnamed defendants in the case, as qualified official immunity applies to individuals and not entities.

[4] The trial courts second order simply states, "[t]he Defendants are not protected by sovereign immunity." Whether this is concluded under the *Comair* analysis or is due to some waiver of immunity is unclear from the court's brief order.

(1) The fiscal court of any county in which there is a county operated hospital may provide for liability and indemnity insurance for the benefit of the hospital against the negligence of the employees of such hospital.

(2) The insurance policies so purchased by the fiscal court shall be purchased only from insurance companies authorized to transact business in this state, and any such policy shall bind the insurer to pay, subject to the terms and conditions of the policy, any final judgment, not in excess of the policy limits, rendered against the insured hospital or hospital employees for the death or injury of any patient, or damage to the property of any patient, resulting from the negligence of the hospital, its agents or employees.

(3) This section shall not be construed as waiving the immunity of the county or county operated hospital from suit only to the extent of the policy limits, and no judgment may be enforced or collected against the county, fiscal court, the members thereof, or such hospital, but shall only measure the liability of the insurance carrier. No attempt shall be made in the trial of any suit to suggest the existence of any insurance which covers in whole or in part any judgment or award which has been rendered in favor of the claimant, but if the verdict rendered by the jury exceeds the limits of applicable insurance, the court shall reduce the amount of said judgment to a sum equal to the applicable limit stated in the policy.

The Estate argues that the Nursing Home is a "county operated hospital" covered under the statute, and proceeds under the theory adopted in *Reyes v. Hardin County*, 55 S.W. 3d 337 (Ky. 2001). In *Reyes*, a medical negligence suit against Hardin Memorial Hospital, the Supreme Court stated that the provisions in KRS 67.186(3) "'leave no room for any other reasonable

construction' than that suit may be brought against the hospital and a judgment obtained that is solely enforceable against the hospital's liability insurance carrier." *Reyes* at 340 (quoting *Withers*, *supra*). Therefore, in the context of county operated hospitals, "[KRS 67.186] is an express, though limited, waiver of immunity . . ." and the essential question becomes whether a nursing home, such as the one operated by Appellants, constitutes a "hospital," the immunity of which is waived under KRS 67.186. *Id*. at 342.

The term "hospital" is undefined by the legislature within Chapter 67 itself. However, KRS 216.313, which permits counties to establish hospital districts, states:

> As used in KRS 216.310 to 216.360:
>
> (1) "Hospital" means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment, or care, for more than twenty-four hours, of two (2) or more nonrelated individuals suffering from illness, disease, injury, deformity, or a place *including nursing and convalescent homes* and all institutions for the care of the sick, devoted primarily to providing, for more than twenty-four (24) hours, obstetrical or other medical or nursing care for two (2) or more nonrelated individuals.

KRS 216.313(1)(*emphasis added)*. Looking more generally at KRS Chapters 67 and 216, a common purpose emerges which may shed light on the legislature's intent regarding the above definition. Chapter 67 provides for the powers and organization of county governments, stating that "the fiscal court shall have the power to carry out governmental functions necessary for the operation of the

county." KRS 67.083(3). In particular, Chapter 67 grants a county's fiscal court the power to legislate, tax and regulate for the "provision of hospitals, ambulance service, programs for health and welfare of the aging and juveniles, and other public health facilities and services . . . ." KRS 67.083(3)(d). Similarly, Chapter 216 and its surrounding statutes grant counties the authority to tax, govern and regulate in the establishment of hospital districts "in order to provide a broader basis for local support of hospitals and related health facilities." KRS 216.310.

The Estate asserts that this definition of "hospital" should be considered in the absence of such a definition in KRS 67.186 itself. In response, Appellants urge us not to look beyond the strict terms of *Withers*, and they contend that such interplay as that proposed by the Estate is unreasonable because it is not provided for "by the most express language." *Withers*, *supra*, at 346. On this point, however, we agree with the Estate.

"The universal rule is, that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do." *Reyes*, *supra*, at 342 (quoting *Grieb v. Nat'l Bond & Inv. Co.*, 94 S.W.2d 612, 617 (Ky. App. 1936)). Furthermore, we, as the Supreme Court has done, "presume that [the legislature] intended for [KRS 67.186] to be construed as a whole, for all of its parts to have meaning, *and for it to harmonize with related statutes*." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011)(citing to *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775 (Ky. 2008))(emphasis added).

Accordingly, the common purpose shared by these statutes – providing counties the authority to provide for the health and welfare of its citizens – permits interplay among Chapter 216 and Chapter 67, where the term "hospital" would otherwise go undefined. KRS 216.310 *et seq*. provides the specific statutory authorization for the general powers set out in KRS 67.083(3)(d), and thus, the two may be read together. In doing so, we find that Chapter 67 applies to the facility which Appellants operate and serves as an express, but limited, waiver of Appellants' sovereign immunity. While Appellants are correct that the mere purchase of liability insurance by an immune entity does not constitute waiver of its immunity, the statutory provisions of Chapters 67 and 216 do. Under these statutes, as well as the precedent in *Reyes*, suit may be brought against Appellants and a judgment may be obtained which is solely enforceable against the Appellants' liability insurance carrier. Appellants' protection under sovereign immunity is otherwise unaffected.

**Conclusion**

For the reasons stated above, we find that the trial court was ultimately correct in denying Appellants' motion for summary judgment. Created at the behest of, and in service to, Metcalfe County government, and serving an integral governmental function, Appellants are entitled to the protection of sovereign immunity – a conclusion the trial court failed to reach. However, the provisions of KRS 67.186 apply to Appellants and constitute a limited waiver of their immunity. Hence, this case may continue for the limited purpose of

determining whether the Estate is entitled to a judgment for which Appellants' insurance provider, but not the Appellants themselves, shall be liable.

STUMBO, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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