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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000513-MR

JAMES MOORING — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 11-CI-00777

HARDIN COUNTY, KENTUCKY
d/b/a HARDIN MEMORIAL HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellant, James Mooring, appeals from the January 16, 2013, and February 12, 2013, orders of the Hardin Circuit Court granting Hardin County, Kentucky, (d/b/a Hardin Memorial Hospital), summary judgment on the basis of immunity. For the reasons set forth below, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 7, 2010, Mooring was admitted to Hardin Memorial Hospital ("Hardin Memorial") for total left knee replacement surgery. On May 18, 2010, following his knee surgery, a pressure ulcer was identified on Mooring's right heel. Mooring remained hospitalized at Hardin Memorial until May 27, 2010. A second pressure ulcer was identified on Mooring's left heel subsequent to discharge. Mooring had to undergo additional medical treatment for these pressure ulcers. On April 5, 2011, Mooring filed suit against Hardin Memorial. He alleged that Hardin Memorial "by and through its agents and/or employees deviated from the generally accepted standard of care" causing his pressure wound injuries.

Hardin County owns and operates Hardin Memorial. Elected officials of the Hardin County Fiscal Court serve on Hardin Memorial's board of directors. Hardin Memorial maintains excess liability insurance coverage with a third-party carrier for claims exceeding one million dollars. With respect to claims under one million dollars, Hardin Memorial has established an internal Risk Retention Program ("RRP").[1]

The RRP states that its purpose "is to provide Comprehensive General Liability Personal Injury and Advertising Liability, and Professional Injury Liability coverages." The funds in the RRP may be used to cover claims and associated expenses such as administrative costs, legal fees, and excess liability insurance premiums. The limits of coverage for all covered claims under the RRP

[1] The Risk Retention Program became effective on March 1, 2003.

are one-million-dollars per occurrence subject to a three-million-dollar annual aggregate. The last paragraph of the RRP states as follows:

> Nothing in this Program, its attachments, ancillary agreements or the administration of this Program is intended to or shall be construed in any way to waive or limit the defense of sovereign immunity for Claims against Protected Persons which defense is hereby specifically reserved.

On November 26, 2012, Hardin Memorial moved for summary judgment, arguing that Mooring's negligence action was barred by sovereign immunity because his claim did not exceed the million-dollar threshold. On January 16, 2013, the trial court granted, in part, Hardin Memorial's motion for summary judgment finding:

> The General Assembly has made it clear that the purchase of insurance or self-insurance does not generally effect a waiver of immunity. KRS 44.073(14). By specific statute relating to a hospital, the General Assembly, while not permitting a waiver of immunity, allows suits against hospitals to measure the liability of "an insurance carrier." KRS 67.186(3). A careful review of the latter statute does not suggest in any way that self-insurance constitutes a waiver of immunity or makes the self-insurance fund available as a source of recovery. Indeed, the language used in this statute implies the purchase of insurance from a separate entity as opposed to any self-insured program.
>
> Although this precise question has not been presented to our appellate courts, those courts have recognized the general proposition. "Participation in a self-insurance fund pursuant to an inter-local cooperation act does not give rise to an implied waiver of sovereign immunity." *Franklin County v. Malone*, 957 S.W.2d 195, 203 (Ky. 1997), overruled on other grounds, *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

> The law as it stands today is that the self-insurance program by [Hardin Memorial] does not constitute a waiver of immunity and does not require any payment from the self-insurance fund. This litigation will proceed for the purpose of measuring the liability, if any, of the insurance carrier which provides the additional coverage for [Hardin Memorial] *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001). *See also Ginter v. Montgomery County,* 327 S.W.2d 98 (Ky. 1959). Because this litigation must proceed for that purpose, it is inappropriate to grant summary judgment dismissing this case. While Plaintiff's Responses to Interrogatories dated August 9, 2011 does not exceed the sovereign immunity threshold of one million dollars ($1,000,000) in damages, the Court will not dismiss this case at this time since it [sic] not "impossible" for the Plaintiff to amend such responses.

Mooring subsequently stipulated that his damages did not exceed one million dollars. Thereafter, Hardin Memorial renewed its motion for summary judgment, which the trial court granted on February 12, 2013.

This appeal followed.

II. STANDARD OF REVIEW

A party moving for summary judgment must establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996); CR[2] 56.03.

Whether a defendant is protected by immunity is a question of law, which we review *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003).

III. ANALYSIS

In Kentucky, the law distinguishes between two distinct, but related, forms of immunity: sovereign immunity and governmental immunity. *See Furtula v. Univ. of Ky.*, 438 S.W.3d 303, 306, fn.1 (Ky. 2014).

Sovereign immunity derives "from the common law of England and was embraced by our courts at an early stage in our nation's history. It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001) (citation omitted). "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.'" *Transit Auth. of River City v. Bibelhauser*, 432 S.W.3d 171, 173 (Ky. App. 2013) (citations omitted).

[2] Kentucky Rules of Civil Procedure.

"Counties, which predate the existence of the state and are considered direct political subdivisions of it, enjoy the same immunity as the state itself." *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.,* 295 S.W.3d 91, 94 (Ky. 2009).

Governmental immunity is "a policy-derived offshoot of sovereign immunity," *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 801 (Ky. 2009), that seeks to protect government agencies and entities from liability. *Yanero*, 65 S.W.3d at 519. Under the doctrine of governmental immunity, "a state agency [or entity] is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Id.* Simply put, while a county government is wholly immune from suit, immunity is a conditional status for a government agency or entity that turns on whether the agency or entity is performing an essential government function. *Caneyville*, 286 S.W.3d at 804.

It is beyond dispute that Hardin Memorial was born of Hardin County and is exclusively owned and operated by it. Likewise, it cannot reasonably be argued that Hardin Memorial does not perform an essential government function. 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, it is clear to us that Hardin Memorial qualifies for immunity.

Nevertheless, the state may waive its immunity by making an express provision for such by 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).

The question in this case is whether Hardin Memorial waived immunity by establishing a form of self-insurance, the RRP, for claims of one million dollars and below. We therefore look to the relevant statutes and their provisions to determine whether express or implied waiver exists.

We begin with KRS[3] 67.186. It provides:

> (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

[3] Kentucky Revised Statute.

> 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 Kentucky Supreme Court addressed KRS 67.186 in *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001). In examining KRS 67.186, specifically subsection three, the Court in *Reyes* concluded that "the 'overwhelming implication[]' of the text of KRS 67.186(3) 'leave[s] no room for any other reasonable construction' that suit may be brought against the hospital and judgment obtained that is solely enforceable against the hospital's liability insurance carrier." *Id*. at 340.

Pursuant to KRS 67.186(3), as interpreted by the *Reyes* court, Mooring clearly would be able to maintain this action and collect any judgment that exceeded one million dollars because Hardin Memorial maintains excess liability insurance coverage for claims that exceed that amount. The problem for Mooring in this case is that it is undisputed that his claim is less than one million dollars and Hardin Memorial does not maintain an insurance policy with any outside carrier that would cover claims of one million dollars and under.

Relying heavily on *Dunlap v. Univ. of Ky. Student Health Serv. Clinic*, 716 S.W.2d 219 (Ky. 1986), Mooring argues that any difference between the liability

insurance referred in KRS 67.186 and the self-insurance fund Hardin Memorial established by way of its RRP is merely illusory. In *Dunlap*, the plaintiff brought a negligence action against the University of Kentucky Medical Center. The Kentucky Supreme Court examined KRS 164.939-.944, the University of Kentucky Medical Center Malpractice Act, and its effect on an otherwise immune entity. The Court in *Dunlap* held that KRS 164.939-.944 constituted a partial waiver of the university's "governmental immunity for the hospital to the extent that this insurance fund has been provided for by statute." *Id*. at 222.

As explained by the Kentucky Supreme Court, *Dunlap* was not well-received by our General Assembly:

> The General Assembly was in session when our decision in *Dunlap* was rendered. Immediately, and without even waiting for a ruling on rehearing, the General Assembly enacted certain new statutes designed unmistakably to overrule *Dunlap.* This fact was recognized in *Blue v. Pursell,* Ky.App., 793 S.W.2d 823 (1990), in *University of Louisville v. O'Bannon,* Ky., 770 S.W.2d 215, 216 (1989), and in *Hutsell v. Sayre,* 5 F.3d 996 (6th Cir.1993). *Green River v. Wigginton, supra,* and *Kestler v. Transit Authority of Northern Kentucky, supra,* both acknowledged the recent enactment of the new statutes, but on the basis of non-retroactivity, saw no need to fully analyze their effect.
>
> KRS 44.072 began with a declaration of legislative intent with respect to the means whereby persons negligently injured by the Commonwealth must assert their claims. It continued:
>
> The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the General Assembly to otherwise expressly preserve the sovereign

> immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employees while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies and expressly waived as set forth by statute.
>
> After having declared its intention to otherwise preserve sovereign immunity, the General Assembly enacted an express waiver pursuant to the Board of Claims Act. KRS 44.073(2), states as follows:
>
> The Board of Claims shall have primary and exclusive jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any officers, agents or employees thereof while acting within the scope of their employment by the Commonwealth, or any of its cabinets, departments, bureaus, or agencies.
>
> To prevent misunderstanding, if any there could have been as to its intention with respect to preservation or waiver of sovereign immunity, the General Assembly added KRS 44.073(14):
>
> The filing of an action in court or any other forum or the purchase of liability insurance or the establishment of a fund for self-insurance by the Commonwealth, its cabinets, departments, bureaus, or agencies or its agents, officers, or employees thereof for a government related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereby held.

Withers, 939 S.W.2d at 345.

The Court in *Withers* stated "[o]n the basis of the statutes quoted hereinabove and the general tenor of KRS 44.072 and KRS 44.073, we now believe that any construction of other statutes to result in a waiver of immunity

which differs from the language of the Board of Claims Act is untenable." *Id*. As such, the Court held that "[i]n KRS 44.072 and KRS 44.073, the General Assembly has manifested its determination to waive the immunity of the Commonwealth only narrowly and only by means of the Board of Claims Act. As such, persons having negligence claims against the Commonwealth may be heard in the Board of Claims, but not elsewhere. It should be recognized, however, that notwithstanding the provisions of the Board of Claims statutes, the General Assembly retains the power to subsequently enact other waivers as its discretion dictates." *Id*. at 346.

There is no doubt that Hardin Memorial is an immune entity and at no time has waived that immunity. KRS 67.186 provides that a county "may" purchase liability insurance, but does not require it. KRS 67.186(3), however, makes it clear that even though suit may be maintained to recover against the insurance policy, no amount of the judgment can be against the "county, fiscal court, the members thereof, or such hospital, but shall only measure the liability of the insurance carrier."

Certainly there are many similarities between the RRP and liability insurance coverage procured from a third party. However, we must be ever mindful of the explicitness with which immunity must be waived. KRS 67.186(3) is silent with respect to self-insurance. It speaks only to coverage procured from an outside insurance company and provided under a separate policy of insurance. Lest there be any doubt, KRS 44.073(14) makes clear that the immunity should not be deemed waived by the creation of a self-insurance fund. Our case law also

instructs that the funds spent on paying a claim as part of a self-insurance program are different than funds spent to pay a claim covered by an outside insurance policy. *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 204 (Ky. 1997) (overruled on other grounds in *Commonwealth v. Harris*, 59 S.W.3d 896, 899 (Ky. 2001)) ("In a self-insurance group, the funds have not been expended until a claim is made and such funds could be used to reduce contributions or make refunds in the following years. In regard to commercial insurance, any loss sustained is the loss of the insurance carrier.").

Accordingly, we must conclude that Mooring is precluded from maintaining this suit because Hardin Memorial is immune. Mooring is limited to seeking recovery from the Board of Claims and subject to its limitations.

We acknowledge that this is a harsh result. But, we are compelled to follow the law. Our Supreme Court in *Dunlap* construed the immunity statutes more liberally. That construction was met with swift action by the General Assembly to clarify the statutes regarding immunity when insurance or self-insurance is at issue. We believe that the decision reached in this case is in accord with and dictated by the applicable case law and statutes.

IV. CONCLUSION

As such, for the forgoing reasons, we affirm the order of the Hardin Circuit Court.

ALL CONCUR.

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