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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001858-MR

KENTUCKY RIVER FOOTHILLS DEVELOPMENT COUNCIL, INC. — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUS, JR., JUDGE
ACTION NO. 11-CI-00743

CATHY PHIRMAN, Administratrix of the Estate of MELISSA STEFFEN; JOANNE GILLIAM and DARYLL GILLIAM as Guardians of CONNER KEITH GILLIAM, And CARTER RAY GILLIAM, unmarried infants — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND VANMETER, JUDGES.

JONES, JUDGE: Appellant, Kentucky River Foothills Development Council, Inc., ("Kentucky River") appeals from the September 23, 2013, order of the Madison

Circuit Court denying its motion for summary judgment and finding that Kentucky River was not a government agency and, therefore, not entitled to governmental immunity. For the reasons set forth below, we AFFIRM.

I. Factual And Procedural Background

Kentucky River was created by Articles of Incorporation filed with the Secretary of State on October 22, 1962, as a private nonprofit corporation. In 1968, Kentucky River was designated as the community action agency to combat poverty for Clark County, and since that time has also become the community action agency for Estill County, Madison County, and Powell County.

Melissa Steffen committed suicide after leaving a substance abuse recovery program operated by Kentucky River, the Liberty Place Recovery Center for Women ("Liberty Place"). Melissa was apparently being treated at Liberty Place pursuant to a contract that Liberty Place had in place with the Kentucky Department of Corrections. On May 17, 2011, Melissa's Estate and minor children filed a wrongful death action in the Madison Circuit Court alleging that Kentucky River's negligence caused Melissa's death.[1] According to the complaint, among other tortuous actions, Melissa alleges that Liberty Place should not have accepted Melissa as a patient, failed to properly administer Melissa her psychiatric

[1] The May 17, 2011, complaint filed by Ms. Steffen's Estate and minor children was originally filed against Liberty Place Recovery Center. Liberty Place Recovery Center is operated by Kentucky River. The original complaint was amended on June 9, 2011, to include Kentucky River in this action.

mediations, and did not notify the proper persons of Melissa's departure from the facility.

On July 22, 2013, Kentucky River moved for summary judgment, arguing that the wrongful death action filed by the Estate and minor children was barred by immunity. The trial court held a hearing on the motion on August 20, 2013, and denied that motion by order rendered September 23, 2013, finding that Kentucky River did not qualify as an entity entitled to immunity under *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009).

Kentucky River now appeals.

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. Generally, an order denying a motion for summary judgment is interlocutory and, therefore, not appealable. *Battoe v. Beyer,* 285 S.W.2d 172 (Ky. 1955). Nevertheless, an order denying a motion for summary judgment based on a claim of sovereign immunity is immediately appealable. *Breathitt County Bd. of Educ. v. Prater,* 292 S.W.3d 883, 886-87 (Ky. 2009).

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.

[2] Kentucky Rules of Civil Procedure.

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). "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,* 295 S.W.3d at 94.

Governmental immunity is "a policy-derived offshoot of sovereign immunity," *Caneyville Volunteer Fire Dept. 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 apparent that Kentucky River is not entitled to sovereign immunity. It is neither the Commonwealth nor a county thereof. The question we must resolve is whether Kentucky River's status as a community action agency entitles it to governmental immunity. This appears to be an issue of first impression in Kentucky. To place this issue in the proper context, we believe that it is necessary to briefly review the law as related to the formation of community action agencies.

A.

The community action agency concept originated in Title II of the Economic Opportunity Act of 1962 ("the EOA"), 42 U.S.C.[3] §§ 2781-2837 (1976) (repealed 1981). Through the EOA's provisions, Congress sought to encourage the creation of community operated agencies that would coordinate federal, state, and private resources to combat poverty at a local level. *U. S. v. Orleans*, 425 U.S. 807, 818, 96 S.Ct. 1971, 1977, 48 L.Ed.2d 390 (1976). Under the EOA, funding flowed directly from the federal government to community action groups that were properly designated as such by state or local authorities and that complied with federal statutory and administrative requirements. *See Cervantes v. Guerra*, 651 F.2d 974, 975 (5th Cir. 1981). While Congress defined the basic structure and functions of these agencies and established requisites for federal funding, it largely left discretion in administering the programs and funding to the community action groups themselves. *See Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 634 (10th Cir. 1983).

In 1981, Congress repealed the community action agency provisions of the EOA and established the Community Services Block Grant Program, ("CSBGP") 42 U.S.C.A.[4] §§ 9901–9912 (1983 & Supp.1989). *See* 42 U.S.C.A. § 9912(a). The distinguishing feature of the CSBGP was that it shifted the

[3] United States Code.

[4] United States Code Annotated.

responsibility for running the program from the federal government to the States. *Guilford County Cmty. Action Program, Inc. v. Wilson*, 348 F. Supp. 2d 548, 552 (M.D.N.C. 2004). Instead of giving funds directly to community action agencies, funds to reduce poverty were allocated to the States through block grants. *Id.* "The States would then channel the funding to eligible entities, generally non-profit community action agencies that specialized in poverty reduction. In turn, those agencies provided funding to individuals and to programs designated to reduce poverty." *Id.*

The CSBGP permitted the States to opt out of the block grant program for the fiscal year 1982 and instead have the Secretary of Health and Human Services directly fund State and local community action agencies under the former law. 42 U.S.C. § 9911. Beginning in fiscal year 1983, all States were required to operate under the CSBGP or lose funding.

In response to the CSBGP, the Commonwealth of Kentucky enacted a set of statutes, KRS[5] 273.405 to 273.453, to govern the establishment and administration of community action agencies. The statutes, which mirror in large part the federal scheme under the EOA, became effective July 15, 1982.

By statute, the Commonwealth mandated that "[t]here shall be established community action agencies throughout political subdivisions of the Commonwealth." KRS 273.405. A "community action agency" is defined as "a

[5] Kentucky Revised Statutes.

corporation organized for the purpose of alleviating poverty within a community or area by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs." KRS 273.410 (2). The duties of community action agencies are set forth as follows in KRS 273.441(1):

> (a) Plan systematically for an effective community action program, develop information as to the problems and causes of poverty in the community; determine how much and how effectively assistance is being provided to deal with those problems and causes; and establish priorities among projects, activities, and areas as needed for the best and most efficient use of resources;
>
> (b) Provide planning or technical assistance to agencies; and generally, in cooperation with community agencies and officials, undertake actions to improve existing efforts to reduce poverty, such as improving day-to-day communications, closing service gaps, focusing resources on the most needy, and providing additional opportunities to low-income individuals for regular employment or participation in the programs or activities for which those community agencies and officials are responsible;
>
> (c) Initiate and sponsor projects responsive to needs of the poor which are not otherwise being met, with particular emphasis on providing central or common services that can be drawn upon by a variety of related programs, developing new approaches or new types of services that can be incorporated into other programs, and filling gaps pending the expansion or modification of those programs;
>
> (d) Establish effective procedures by which the poor and area residents concerned will be enabled to influence the character of programs affecting their interests, provide

> for their regular participation in the implementation of those programs, and provide technical and other support needed to enable the poor and neighborhood groups to secure on their own behalf available assistance from public and private sources;
>
> (e) Join with and encourage business, labor and other private groups and organizations to undertake, together with public officials and agencies, activities in support of the community action program which will result in the additional use of private resources and capabilities, with a view to developing new employment opportunities, stimulating investment that will have a measurable impact on reducing poverty among residents of areas of concentrated poverty, and providing methods by which residents of those areas can work with private groups, firms, and institutions in seeking solutions to problems of common concern.

The political subdivisions of our Commonwealth may either designate themselves as community action agencies or may designate "an eligible private nonprofit corporation" as their community action agency. KRS 273.435(2). If the latter, the nonprofit corporation's board of directors must be "established pursuant to KRS 273.437."[6] *Id.* "The governing board of a private, nonprofit community

[6] KRS 273.437(3) provides as follows:

> Governing boards and community action boards shall be so established and organized that the poor and residents of the area concerned will be able to influence the character of programs affecting their interests and regularly participate in the planning and implementation of those programs. The articles of incorporation shall be deemed to meet these requirements if they provide that:
>
> > (a) One-third (1/3) of the members of the administering board shall be public officers, including elected public officials or their representatives, unless the number of public officers reasonably available or willing to serve is less than one-third (1/3) of the membership of the board;

action agency shall have the same legal powers and responsibilities granted under its state charter as the board of directors of any private, nonprofit corporation incorporated in the Commonwealth of Kentucky including the power to enter into legally binding agreements with any federal, state, or local agency, or with any private funding organization for the purpose of administering programs or providing services." KRS 273.439(1). A governing board of a private nonprofit community action agency also possesses the following specific powers:

> (a) To appoint the executive director of the community action agency;
> (b) To determine major personnel, organization, fiscal, and program policies;
> (c) To determine overall program plans and priorities for the community action agency, including provisions for evaluating progress against performance;
> (d) To make final approval of all program proposals and budgets;
> (e) To enforce compliance with all conditions of all grants contracts;

> (b) At least one-third (1/3) of the members of the administering board shall be persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area to be served by the agency;
>
> (c) The remaining members of the administering board shall be officials or members of business, industry, labor, religious, welfare, education, or other major groups and shall be interested in the community;
>
> (d) Each member of the board who is to represent a specific geographic area within a community shall reside in the area he represents; and
>
> (e) Total membership of the board is not less than fifteen (15) and not more than fifty-one (51).

> (f) To oversee the extent and the quality of the participation of the poor in the programs of the community action agency;
> (g) To determine rules and procedures for the governing board; and
> (h) To select the officers and the executive committee, if any, of the governing board.

KRS 273.439(2).

Pursuant to statute, the "state administering agency," which is "any agency of the Commonwealth designated by the Governor" is charged with applying for and administering funds under the federal CSBGP. KRS 273.446. A community action agency that receives such funds must use them as follows:

> (a) To provide a range of services and activities having a measurable and potentially major impact on causes of poverty in the community or those areas of the community where poverty is a particularly acute problem;
> (b) To provide activities designed to assist low-income participants including the elderly poor:
>
> > 1. To secure and retain meaningful employment;
> >
> > 2. To attain an adequate education;
> >
> > 3. To make better use of available income;
> >
> > 4. To obtain and maintain adequate housing and a suitable living environment;
> >
> > 5. To obtain emergency assistance through loans or grants to meet immediate and urgent individual and family needs, including the need for health services,

nutritious food, housing and employment related assistance;

6. To remove obstacles and solve problems which block the achievement of self-sufficiency;

7. To achieve greater participation in the affairs of the community; and

8. To make more effective use of other programs related to the purposes of KRS 273.405 to 273.453;

(c) To coordinate and establish linkages between governmental and other social programs to assure the effective delivery of such services to low-income individuals;

(d) To encourage the use of entities in the private sector of the community in efforts to ameliorate poverty in the community;

(e) To develop, promote or otherwise encourage economic development activities which result in assisting low-income persons to become economically productive members of their community;

(f) To provide education, counseling and technical assistance on compliance with equal opportunity legislation for individuals and community organizations, both public and private.

(2) In addition to required services and activities to be provided with funds made available under the federal act, these funds may be used to provide on an emergency basis for the provision of such supplies and services to meet immediate essential needs of low-income persons including the elderly poor.

KRS 273.443. Additionally, community action agencies may receive additional state and federal funds to administer programs consistent with the purpose of KRS 273.443. *See* KRS 273.446.

The day-to-day activities of the community action agencies are largely unregulated by statute. Likewise, nonprofit community action agencies are not limited to administering programs funded solely from state and federal grants. They may continue to offer additional services and programs apart from the programs and services offered through CSBGP funding.[7] Additionally, there is no prohibition against community action agencies accepting private donations as any other nonprofit is permitted to do.

Nevertheless, the state administering agency does exercise some administrative oversight. Pursuant to statute, the state administrating agency is charged with monitoring and evaluating the community action agencies' compliance with the regulatory state statutes, administrative regulations, and the provisions of the federal act. KRS 273.448(1). It is also vested with the authority to "receive and review annual independent audits of all funds received by community action agencies"; direct community action groups to supply it with any information necessary to "determine community action agencies' administrative, fiscal, and programmatic effectiveness in their use of funds made available under the federal act"; provide "training and technical assistance to community action

[7] This case is one example. Melissa was being treated at Liberty Place pursuant to a contract that it had entered into with the Department of Corrections.

agencies"; and assist community action agencies in interacting with governmental agencies to fulfill their goals and promote their services. *See* KRS 274.448(1)(b)-(h).

The standards under which community action groups must operate in this Commonwealth are set out in 922 KAR[8] 6:010. It requires each community action group to: create a Board of Directors in accordance with KRS 273.437 and 273.439; adopt written by-laws;[9] conduct open board meetings with minutes; meet the federal assurances and reporting requirements; submit all information necessary to ensure fiscal, administrative and programmatic effectiveness in utilizing federal block funds; develop written personnel policies; develop, review and annually update written fiscal and programmatic operation policies and

[8] Kentucky Administrative Regulations.

[9] The by-laws must include:

(a)The purpose of a community action agency;
(b) Duties and responsibilities of the board;
(c) Number of members on the board;
(d) Qualifications for a board membership;
(e) The types of membership;
(f) The method of selecting a member;
(g) Terms of a member;
(h) Officers and duties;
(i) Method of electing an officer and chairperson;
(j) A standing committee, if applicable;
(k) Provision for approval of programs and budgets;
(l) The frequency of board meetings and attendance requirements; and
(m) Provision for official record of meetings and action taken.

See 922 KAR 6:010(2)(a)-(m).

manuals; and ensure development of data collection and record keeping practices to allow for monitoring and evaluation.

B.

The test for whether an entity qualifies for governmental immunity is two-pronged. *Comair,* 295 S.W.3d at 99. The court must first examine the origin, or "parent," of the entity to determine if the entity is an agency (or alter ego) of a clearly immune parent. *Id.* Second, the court must assess whether the entity performs a "function integral to state government." *Id*. "In determining whether an entity's function is 'integral to state government' the court's examination should focus . . . on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways." *Id*. "Actually, both 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 (whereas municipal corporations tend to exercise proprietary functions addressing purely local concerns)." *Id.* at 99-100.

In *Bibelhauser*, 432 S.W.3d at 173, a panel of this Court discussed what an entity must show in order to satisfy the "government function" prong as required under *Comair*. Specifically, the *Bibelhauser* court stated that an entity:

> [M]ust show that it addresses "state level governmental concerns that are common to all of the citizens of this state...." *Id*. Serving "purely local" concerns is insufficient. *Id*. Second, TARC must show that it serves a function that is "integral" to addressing that state level concern. Id. at 101. To qualify as "integral," TARC's actions "must be necessary, an essential part of carrying out that state-level government function." *Stanford*, 948 F.Supp.2d at 737 (internal quotation marks omitted). In other words, without TARC performing its function, the state-level concern would not be fully addressed. *Id*. at 739.

Id. at 174.

We agree with Kentucky River that providing services to the poor at the county level has historically been treated as an integral government function. As set forth in *Comair*, "a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, *of provisions for the poor*, of military organization, of the means of travel and transport, and especially for the general administration of justice." *Id.* (quoting *Marion County v. Rives & McChord*, 133 Ky. 477, 118 S.W. 309, 311 (1909) (emphasis added)).

This fact alone, however, does not mean that Kentucky River is entitled to governmental immunity. Certainly, many private entities perform functions that are also integral to state government and do so partially through the receipt of public funds. This does not necessarily cloak those entities with governmental immunity.

This rationale is consistent with the approach followed in *United States v. Orleans*, 425 U.S. 807, 816, 96 S.Ct. 1971, 1977, 48 L.Ed.2d 390 (1976), wherein the Supreme Court held that the receipt of public funds in the performance of a public function by a community action organization receiving its entire funding under contract with the federal government in compliance with federal regulations did not transform the organization into a federal agency for the purpose of the Federal Tort Claims Act nor make its employees federal employees.

As recognized in *Caneyville*, while Kentucky places the most weight on the governmental function element, other factors should also be considered in particularly close cases. These could include: (1) whether state statutes and case law tend to characterize the entity as an arm of the state; (2) whether state resources may be required in satisfying adverse judgments against the entity; (3) whether the state has a financial or otherwise relevant beneficial interest in litigation affecting the entity; (4) how the entity is funded; (5) its level of autonomy; (6) whether the entity deals with primarily local or statewide problems; (7) how state law/courts treat the entity; (8) the ability of the entity to sue and be sued in its own name; (9) whether the entity holds and uses property; (10) whether the entity can take or sell property; (11) the independent management authority of the entity; (12) whether the entity performs governmental or proprietary functions; (13) the entity's corporate status; and (14) whether the entity's property is subject to state taxation. *Caneyville,* at 286 S.W.3d at 803-04.

We believe this is why it is particularly important to consider the first prong of the *Comair* test, whether the entity was established by the government, in tandem with the governmental function prong. A careful examination of the nature by which an entity was created and whether it has an immune parent entity will necessarily entail a consideration of a number of the factors identified in *Caneyville* such as how the state statute characterizes the entity, the extent by which the state controls the entity and its property, and whether, and to what extent, the entity functions apart from the state.

It is undisputed that Kentucky River was not created by or at the behest of the state or any county of the state. As evidenced by the Kentucky Secretary of State's Records, Kentucky River was created in 1962, by private citizens, as a nonprofit corporation.[10] Six years later, in 1968, Clark County designated Kentucky River as a community action agency for the purpose of receiving funds under the EOA. This designation carried on through the 1982 revisions to the community action agency statutes by virtue of the grandfathering provision in KRS 273.435(5).[11]

[10] A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet. *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004).

[11] This section provides as follows: "All community action agencies which were organized and operating subject to the provisions of KRS 273.410 to 273.455 [FN1] as of September 30, 1981, shall be recognized as the community action agencies for each applicable political subdivision unless and until each political subdivision exercises the authority granted under this section."

While acknowledging that it was not created by a governmental agency, Kentucky River nonetheless believes that it is entitled to governmental immunity. It argues that Clark County's decision to designate Kentucky River as its community action agency transformed Kentucky River into a government created agency as of 1968 and that it has continued in that role since. It argues that Clark County's designation essentially transformed it into an entity created by Clark County, an immune parent.

A careful review of KRS 273.405 to 273.453 convinces us that designation as a "community action agency" is a status conferred upon a nonprofit entity, but that the designation itself does not alter the fundamental nature of the nonprofit. Rather, the nonprofit continues to operate as a nonprofit, but with the additional designation that allows it to receive and disburse federal grant funds to its local residences. The designation as a community action agency does not create an organization. Moreover, the continuing existence of the nonprofit entity operates independent of that designation. Although the community action agency status is conferred by the county, the organization itself cannot be said to be a creature of the state or the county.

For example, KRS 273.439(1) provides: "The governing board of a private, nonprofit community action agency shall have the same legal powers and responsibilities granted under its state charter as the board of directors of any private, nonprofit corporation incorporated in the Commonwealth of Kentucky[.]"

We fail to appreciate why the General Assembly would have found it necessary to include this provision if it intended a community action designation to convert a private, nonprofit entity into a governmental agency by virtue of the community action agency designation.

While Clark County's decision to designate Kentucky River as a community action agency saddled Kentucky River with additional state oversight and the duty to comply with certain state and federal regulations as a condition of receiving federal block grant funds, it did not convert Kentucky River into an entity existing only for the benefit the state. Kentucky River remained free to and did offer services and programs outside of the scope of its designation as a community action agency receiving federal block grants. *Compare Autry v. Western Kentucky Univ.,* 219 S.W.3d 713, 718 (Ky. 2007) ("SLF was formed as a non-profit organization with a specific and limited purpose . . . while SLF is an incorporated entity, it exists *only* to serve WKU, and derives its immunity status through WKU.").

In support of its position that its designation as a community action agency transformed its nature, Kentucky River relies on *Louisville v. Martin*, 574 S.W.2d 676 (Ky. 1978). We believe *Martin* is distinguishable in a number of important respects. In *Martin*, a professor brought suit for lost wages against the University of Louisville. The court ultimately determined that the University of

Louisville was entitled to sovereign immunity. In discussing how the University obtained its immune status, the court stated:

> Prior to July 1, 1970, the University of Louisville was a municipal institution under Chapter 165 of the Kentucky Revised Statutes and, by KRS 164.810(3) promulgated that year, the university was designated as a "state institution."

Id. at 677. However, it was not the mere "designation" of the University of Louisville as a state institution that changed its character and structure. A close reading of the statutes cited in *Martin* reveals that the University of Louisville's board of trustees was required to amend its "charter and articles of incorporation in such manner as to conform to the provisions of KRS 164.810 to 164.870" to enable the designation. KRS 164.810(3). In other words, the University itself had to take unilateral action to convert its prior status and surrender its control to the State. *See* KRS 164.810 to 164.870. This included "vest[ing] in the Commonwealth for the use and benefit of the University of Louisville (without execution and recording of any instruments of conveyance) title to all property which may be vested in the University of Louisville at the date such qualifying action is perfected according to law." KRS 164.870. It also included provisions allowing the Governor to appoint all its Board members. KRS 164.821(1).

Unlike *Martin*, no statute aimed specifically at Kentucky River designated it as a governmental agency. Furthermore, its designation as a community action agency did not require it to amend its articles of incorporation. The designation

did not vest the Commonwealth with any interest in Kentucky River's real or personal property. While the designation involved some oversight and regulation by the Commonwealth, the Commonwealth did not take control of Kentucky River's day-to-day operations or have direct oversight in the administration of programs funded separate from the block grants. Furthermore, Kentucky River remained free to serve other interests outside the scope of its designation as a community action agency. In all respects, Kentucky River continued to function as a private, nonprofit entity.

In today's world, state and federal governments routinely provide funding to private agencies through grants. The purpose of such grants is generally one traditionally associated with government. For example, the grants often must go towards poverty, education, housing, medical research, or other similar concerns. Almost all entities that receive such grants are subject to some government oversight and regulation. Should this make them entitled to governmental immunity?

We do not believe so. Such entities are not created by government (the parent test) and can exist apart from it, just as Kentucky River. The receipt of money from the government to further a cause important to government should not transform an otherwise private entity into a governmentally immune agency. A line must be drawn somewhere before the concept of governmental immunity is expanded far beyond any reasonable parameter.

Kentucky River was not established by the government for its benefit. It was established as a private nonprofit long before it was designated as a community action agency. And, if that designation ceased tomorrow, it could carry on as a private nonprofit. Indeed, we have not been provided with any authority to show that Kentucky River's contract with the Department of Corrections (the way Melissa found herself at Liberty Center), which is wholly separate from the grants it receives as part its community action agency status, is somehow dependent on the community action agency designation.

We believe Kentucky River is, and still remains, a private nonprofit corporation, and continues to operate as a nonprofit corporation with the additional designation as a community action agency. While this designation subjects Kentucky River to additional oversight and regulation, as a condition of receiving federal grants, we do not believe that it transforms Kentucky River, a private, nonprofit corporation, into a state-created governmental agency.[12]

[12]We note that because the community action agency concept was created by the federal government, almost every state has community action agencies that receive federal grants via the state. Moreover, most states, like Kentucky, modeled their community action agency statutes on the EOA. Thus, to some degree many of their requirements are similar. Several other jurisdictions have concluded, like us, that the community action designation does not lead to the conclusion that the community action agency is entitled to immunity. *See, e.g.*, *Sanchez by Rivera v. Montanez*, 645 A.2d 383, 388 (Penn. 1994) ("[W]e hold today that CAP [a community action agency], a private, nonprofit corporation subject to a variety of governmental regulation and funding, is nonetheless not a local agency entitled to governmental immunity, but a corporate entity capable of being sued.")*; Edwards v. Oakland Livingston Human Service Agency*, No. 263738, 2006 WL 1044284, at *1 (Mich. App. April 20, 2006) ("OLHSA, a nonprofit private agency, has not provided any law, nor are we aware of any, that transforms a private agency into an agency of the state or into a political subdivision simply by its designation as a community action agency."); *N.Z. v. Lorain Head Start*, No. 98CA007254, 2000 WL 59911, at *2 -3 (Ohio App. Jan. 12, 2000) ("LCAA is a nonprofit organization with the additional designation as a community action agency. It is not an agency created by the state and,

While Kentucky River performs some functions of government, it was neither created by the government nor does it exist solely for the benefit of the government. Clark County's decision to designate Kentucky River as a community action agency pursuant to state statute did not transform it into a government-created agency. Thus, we find no error in the trial court's determination that Kentucky River failed to satisfy the "parent" test under *Comair*.

IV. CONCLUSION

For the reasons set forth above, the order of the Madison Circuit Court is affirmed.

CLAYTON, JUDGE CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. As noted in the majority opinion, the Kentucky Supreme Court has directed that the governmental immunity analysis is fact intensive and to be determined on a case-by-case basis. *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp*., 295 S.W.3d 91, 99 (Ky. 2009). While I acknowledge the thoroughness of the majority opinion, I am struck, as shown by the majority, of the extent to which Kentucky River Foothills Development Council, Inc., as an organization and in its activities,

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accordingly, it is not a political subdivision entitled to the benefit of the immunity[.]"); *Hauth v. Southeastern Tidewater Opportunity Project*, 420 F. Supp. 171 (E.D. Va. 1976) (holding that the community action agency was not a municipal corporation performing a governmental function, and was, therefore, not entitled to sovereign immunity in a negligence action).

is regulated by statute and regulation. Certainly, as pointed out by the majority, county designation, state and federal support could be withdrawn at any time,[13] but our decision needs to be based on the facts before us, not a hypothetical situation which may never arise.

The starting point in the governmental immunity analysis is, of course, *Comair*, which sets out a two-part test.

> First, the court is to examine the origin, or "parent," of the entity to determine if the entity is an agency (or alter ego) of a clearly immune parent. *Id*. at 99. Second, the court is to assess whether the entity performs a "function integral to state government." *Id*. For the latter determination, the court is to consider the balance of the entity's functions, not just the particular action at issue in the case. *See id*. at 98 (viewing the entity's functions as a whole); *N. Ky. Area Planning Comm'n v. Cloyd*, 332 S.W.3d 91, 95–96 (Ky.App.2010) (assessing the balance of the entity's activities).
>
> If the entity satisfies both prongs of the test, then the entity is totally immune from tort liability. If not, then the entity is subject to suit. *See Stanford v. U.S.*, 948 F.Supp.2d 729, 736 (E.D.Ky.2013) (citing *Sanitation Dist. No. 1 v. McCord Plaintiffs*, No. 2011–CA–000819–MR, 2013 WL 275602, at *2 (Ky.App. Jan. 25, 2013) (if either prong is absent, then the entity enjoys no immunity)).

Transit Auth. of River City v. Bibelhauser, 432 S.W.3d 171, 174 (Ky. App. 2013).

As to the first factor, whether Kentucky River is an agency or alter ego of an immune parent, I suggest that it is. While it is organized as a non-profit

[13] Whether an organization may lose its governmental status in the future does not seem to be a valid basis for analyzing an immunity claim. Any number of immune entities could be turned over to and run by private entities including airport boards and universities.

corporation under the KRS Chapter 273, corporate organization was no bar to the immune status of the Lexington-Fayette Urban County Airport Board. More significant is the fact that four counties have designated Kentucky River as their Community Action Agency to provide services to the poor and underserved in those counties. KRS 273.405 to 273.453. Having been so designated, it is subject to the counties' control, KRS 273.435(2), and the composition of its board of directors is mandated by statute. KRS 273.437. In the case of Kentucky River, the four county judge-executives sit on its board. As a community action agency, the legislature has designated it as a "district," KRS 65.060, thereby subjecting it to budgeting and fiscal oversight of the counties, KRS 65.065, and the Auditor of Public Accounts. KRS 65.070. As shown by the majority opinion and these statutes, no real question exists but that a community action agency is an agency of the counties involved here: Clark, Estill, Madison, and Powell. *See* KRS 273.405 (providing "[t]here shall be established community action agencies throughout political subdivisions of the Commonwealth[]"); *see also Pennyrile Allied Cmty. Servs., Inc. v. Rogers,* 2013-SC-000012-DG, 2015 WL 736827 (Ky., Feb. 19, 2015), as modified (March 3, 2015) (petition for rehearing pending) (stating "PACS's status[14] as a 'political subdivision' of state government . . . have not

[14] The Kentucky Supreme Court opinion in *Pennyrile* does not discuss in any detail what Pennyrile is or does, other than to say "PACS is a government program focused on rural development." Slip op. at 2. The earlier Court of Appeals opinion, however, goes into more detail: "PACS is a private, non-profit, community action agency created as a special district under [KRS] 273.435. Its goal is to reduce and eliminate poverty through education, training and work." *Rogers v. Pennyrile Allied Cmty. Servs., Inc.*, 2012-CA-000204-MR (Ky. App., Dec. 14, 2012), slip op. at 2 n. 1, *reversed on other grounds*, 2013-SC-000012-DG, 2015 WL 736827

been challenged in this action[]"); *Gateway Area Dev. Dist., Inc. v. Cope,* 2013-CA-001855-MR, 2013-CA-001937 (Ky. App., Feb. 13, 2015) (accepting that an area development district, as inter-county body formed pursuant to KRS Chapter 147A, is a governmental body under prong one of the *Comair* analysis); *Bibelhauser*, 432 S.W.3d at 174 (noting that Transit Authority of River City satisfied first prong of *Comair* test).

The more important part of the *Comair* analysis is the second prong, *i.e*., whether the entity carries out an integral governmental function. 295 S.W.3d at 99. In *Bibelhauser*, this court interpreted the second prong as requiring the entity to prove that it carries out a

> "function integral to state government." *Comair,* 295 S.W.3d at 99. This showing is two-fold. First, [the entity] must show that it addresses "state level governmental concerns that are common to all of the citizens of this state...." *Id.* Serving "purely local" concerns is insufficient. *Id.* Second, [the entity] must show that it serves a function that is "integral" to addressing that state level concern. *Id.* at 101. To qualify as "integral," [the entity's] actions "must be necessary, an essential part of carrying out that state-level government function." *Stanford,* 948 F.Supp.2d at 737 (internal quotation marks omitted). In other words, without [the entity] performing its function, the state-level concern would not be fully addressed. *Id.* at 739.

432 S.W.3d at 174.

In this regard, the Kentucky Supreme Court stated:

(Ky., Feb. 19, 2015).

> This obviously will require a case by case analysis, but [*Kentucky Ctr. for the Arts Corp. v.*] *Berns* [801 S.W.2d 327 (Ky. 1990)] itself offered a way to begin to frame the discussion by noting that sovereign immunity should "extend ... to departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure." 801 S.W.2d at 332 (internal quotation marks omitted). The focus, however, is on state level governmental concerns that are common to all of the citizens of this state, **even though those concerns may be addressed by smaller geographic entities (e.g., by counties)**. Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways.

Comair, 295 S.W.3d at 99 (emphasis added). As noted, the Court in *Comair* delineated five state level governmental concerns: police, public education, corrections, tax collection, and public highways, but it also quoted extensively from an older case, *Marion County v. Rives & McChord*, 133 Ky. 477, 118 S.W. 309 (1909), which included among the general concerns of the state government, provisions for the poor. *Id*., 133 Ky. at 482, 118 S.W. at 311.

That Kentucky River is designed and functions to carry out the governmental function of providing services to the poor is also not a matter of serious dispute. KRS 273.410(2) defines "community action agency" as "**a corporation organized for the purpose of alleviating poverty within a community or area** by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs[]" (emphasis added). If any

question exists, it is to the final part of the *Comair* analysis, as discussed in *Bibelhauser*: are Kentucky River's actions "'necessary, an essential part of carrying out that state-level government function' . . . .without [which] . . . the state-level concern would not be fully addressed." 432 S.W.3d at 174.

I do not believe the record is sufficiently developed on this final aspect of the Comair analysis for us to make a decision either way. I would vacate the trial court's order and remand to that court so as to permit the parties to develop the record more completely as to the operations of Kentucky River and the program at issue in this case. As was disclosed at oral argument, the trial court permitted an amendment of the complaint, so vacating and remanding would not cause a practical delay in the final adjudication of this case.

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