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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-001096-MR

LOUISVILLE METRO DEPARTMENT  
OF CORRECTIONS AND LMDC  
DIRECTOR MARK BOLTON

APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 14-CI-001506

FERRON W. TOMLINSON

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Louisville Metro Department of Corrections (LMDC) and its director, Mark Bolton (Bolton), have appealed from the Jefferson Circuit Court's denial of their motions to dismiss an action filed by Ferron W. Tomlinson

(Tomlinson) based on assertions of governmental immunity. Following a careful review, we affirm in part, reverse in part, and remand.

In early 2013, Tomlinson was incarcerated and in custody of LMDC. On March 14, 2013, a Jefferson District Court Judge ordered his release. For some unknown reason, Tomlinson was not released from custody until July 26, 2013, some 134 days later. On March 17, 2014, Tomlinson filed suit against LMDC and its director, Bolton, seeking damages for false imprisonment and negligent supervision.<sup>1</sup> On March 28, LMDC and Bolton moved to dismiss the case based on claims of governmental and official immunity. On June 6, LMDC and Bolton filed a second motion to dismiss, wherein they asserted Tomlinson's counsel had been suspended from the practice of law at the time the instant complaint was filed. Both motions were denied in a cursory order entered on June 25, 2014. This appeal followed.

At the outset, we note the order at issue is clearly interlocutory which would normally be fatal to an appeal. However, the denial of a claim for absolute immunity is immediately appealable pursuant to *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009), wherein our Supreme Court held:

As we observed recently in *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006), immunity entitles its possessor to be free “from the burdens of defending the action, not

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<sup>1</sup> On June 25, 2014, the trial court permitted the filing of an amended complaint which clarified the claims against Bolton were being brought against him both individually and in his representative capacity.

merely . . . from liability.” *Id.* at 474 . . . . Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action. For this reason, the United States Supreme Court has recognized in immunity cases an exception to the federal final judgment rule codified at 28 U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court reiterated its position that “the denial of a substantial claim of absolute immunity is an order appealable before final judgment.” *Id.* at 525, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411, *citing* *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

Furthermore, the question of immunity is a matter of law which we review *de novo*. *Sloas*, 201 S.W.3d at 475; *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003).

Turning to the merits of LMDC’s immunity claim, we note first an agency of the state government<sup>2</sup> enjoys what is termed “governmental immunity” from civil damages actions. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

Governmental immunity, as explained in *Yanero*, is a public policy, derived from the doctrine of sovereign immunity, which is premised on the notion “that courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy.” 65 S.W.3d at 519. Given this underpinning, governmental

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<sup>2</sup> It is undisputed Louisville/Jefferson County Metro Government (Metro Government) is a political subdivision of the Commonwealth and is therefore entitled to sovereign immunity. This truth is borne out by the discussion and holding in *Jewish Hosp. Healthcare Svcs., Inc. v. Louisville/Jefferson County Metro Government*, 270 S.W.3d 905, 906 (Ky. App. 2008). It is further undisputed LMDC is an agency of Metro Government.

immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, *i.e.*, public acts integral in some way to state government. *Id.* The immunity does not extend, however, to agency acts which serve merely proprietary ends, *i.e.*, non-integral undertakings of a sort private persons or businesses might engage in for profit. *Id.*

Further, the Commonwealth and its agencies are immune from suit unless there has been an express waiver allowing suit. A waiver will be found “only where stated 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. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974)). There being no suggestion of waiver in this matter, the question becomes whether operation of a jail is a governmental or proprietary function.

By law, Kentucky Revised Statutes (KRS) 441.025, the fiscal court of each county *shall* provide for the incarceration of prisoners arrested in the county. Thus, there can be no reasonable doubt that the operation of a county jail is a government function. It is not suggested that a jail, a state prison, or federal penal institution can be operated by the private sector without governmental consent, contract, and regulation. LMDC operates only with the consent, funding and oversight of its parent political subdivision, the Metro Government, without which the operations would simply not exist. Clearly, in the absence of some authority to the contrary, providing for a county jail is a governmental function as evidenced by

the language of KRS 441.025. Thus, LMDC shares the immunity afforded to the Metro Government and should have been granted a dismissal in this action on such grounds. For this reason, we are compelled to reverse the trial court and remand for entry of an order dismissing LMDC as a party based on immunity grounds.

Although LMDC is entitled to governmental immunity, its officers and employees are not necessarily or automatically similarly cloaked. Pertinent to this appeal,

[u]nder *Yanero*, public officers and employees are entitled to “qualified official immunity” for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, that (2) were made in good faith (*i.e.*, were not made in “bad faith”), and (3) were within the scope of the employee’s authority. *Yanero*, 65 S.W.3d at 522. Conversely, no immunity is afforded for the negligent performance or omissions of a ministerial act, or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive, *i.e.*, again the “bad faith” element. *Id.* at 523. And, “[o]nce the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act [was in bad faith].” *Id.*

*Sloas*, 201 S.W.3d at 475-76. With these standards in mind, we turn to the allegations of error presented in relation to Bolton.

Based on the sparse record before us, we cannot determine—nor could the trial court—whether Bolton’s allegedly negligent acts or omissions were discretionary or ministerial in nature, nor whether the alleged negligence—if proven—should be imputed to Bolton individually or in his representative capacity

as Director of LMDC. The entire record on appeal is seventy-one pages, with the vast majority of that being devoted to LMDC and Bolton's motions seeking dismissal.<sup>3</sup> No discovery has occurred and the bare bones pleadings contain insufficient meat upon which such a determination could be based. Therefore, we believe the trial court correctly denied Bolton's motion to dismiss on immunity grounds based on the dearth of information available and we affirm as to that ruling. However, in so holding, we make no comment as to the merits of Bolton's assertion of immunity or Tomlinson's arguments in opposition thereof which will only become clear with the development of the record below.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed as to the denial of Bolton's motion to dismiss, and reversed as to the denial of LMDC's motion and remanded for further proceedings and entry of appropriate Orders consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Stephen P. Durham  
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BRIEF FOR APPELLEE:

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<sup>3</sup> The record appears to contain less than ten pages of documents which are not directly related to the various motions to dismiss. None of the documents attempt to explain what Bolton allegedly did or failed to do which resulted in Tomlinson's continued incarceration.