

RENDERED: JANUARY 5, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-000867-MR

DAVID JOHNSTON, IN HIS INDIVIDUAL CAPACITY;  
MICHAEL MCKENNEY, IN HIS INDIVIDUAL CAPACITY;  
JASON BULLOCK, IN HIS INDIVIDUAL CAPACITY;  
LARRY KEOWN, IN HIS INDIVIDUAL CAPACITY;  
BRANDON THOMAS, IN HIS INDIVIDUAL CAPACITY;  
AND KENNY AUTRY, IN HIS INDIVIDUAL CAPACITY            APPELLANTS

v.                                    APPEAL FROM OHIO CIRCUIT COURT  
   HONORABLE RONNIE C. DORTCH, JUDGE  
   ACTION NO. 13-CI-00108

JAMES ROACH

APPELLEE

OPINION AND ORDER<sup>1</sup>  
DISMISSING

\*\* \*\* \* \* \* \* \*

BEFORE: DIXON, J. LAMBERT AND NICKELL, JUDGES.

---

<sup>1</sup> When final disposition of an appeal is made by an “Opinion and Order,” as in this case, the party adversely affected may move for reconsideration as provided by Kentucky Rules of Civil Procedure (CR) 76.38(2) within ten days of entry, but a petition for rehearing is unauthorized. CR 76.32(1).

NICKELL, JUDGE: David Johnston, Michael McKenney, Jason Bullock, Larry Keown, Brandon Thomas, and Kenny Autry (hereinafter referred to collectively as Appellants) appeal from the Ohio Circuit Court's denial of their motion for summary judgment based on qualified official immunity. We believe this appeal is interlocutory and must be dismissed.

On April 13, 2012, James Roach was in the Ohio County Community Center. The Ohio District Courtroom is located on the top floor of the community center. While climbing the stairs to reach the top floor, Roach allegedly slipped on a liquid and fell down the stairs, injuring himself. On April 11, 2013, Roach brought the underlying suit against Appellants, who are members of the Ohio County Fiscal Court, in both their individual and official capacities. Roach also named Ohio County, Kentucky, in his complaint.

The trial court eventually dismissed the claims against Ohio County and Appellants, in their official capacities, due to sovereign immunity. After about two years of discovery, Appellants moved for summary judgment, arguing they were entitled to qualified official immunity. The trial court denied the motion, finding the existence of genuine issues of material fact and thus, Appellants were not entitled to judgment as a matter of law. The court made no further explanation.

This appeal followed. Upon review, we *sua sponte* dismiss this action for lack of jurisdiction.<sup>2</sup>

An order denying a motion for summary judgment is inherently interlocutory in nature. It is not a final order, and therefore is generally not appealable. See *Battoe v. Beyer*, 285 S.W.2d 172 (Ky. 1955) (citations omitted). However, exceptions do exist to this general rule. One well-established exception is that an immediate appeal lies from a trial court's denial of governmental immunity, even in the absence of a final order. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). The cloak of immunity entitles its possessor to be free "from the burdens of defending the action, not merely . . . from liability." *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citations omitted). It is under this theory that Appellants prosecute this appeal. However, in the context of any such exception, the decision embodied in the interlocutory order must, to be subject to our review, "conclusively determine the disputed question . . . and that question must involve a 'clai[m] of right separable from, and collateral to, rights asserted in the action[.]'" *Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985) (citations omitted) (adopted by *Prater*, 292 S.W.3d at 886-87). Our review reveals no such conclusive determination of

---

<sup>2</sup> The matter of our appellate jurisdiction is an issue we are required to raise *sua sponte*, "as it cannot be acquired by waiver, consent, or estoppel." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (footnotes omitted).

the immunity issue. We therefore believe the trial court's order remains interlocutory, the *Prater* exception is inapplicable, and dismissal is required.

A trial court does not conclusively determine any disputed question, resolve any right, or otherwise provide this Court with anything to review where its interlocutory order denies a claim of immunity, or any other kind of claim, on the basis that, in its view, additional discovery is necessary, or genuine factual issues remain. In the instant matter, the trial court made no finding as a matter of law on the issue of qualified immunity which we could review. Instead, the trial court found "there are genuine issues of material fact and the Defendants are not entitled to judgment as a matter of law[.]" thereby making the appealed order interlocutory, which we cannot review. We have repeatedly held such interlocutory orders are not appealable under any exception, and thus not subject to the jurisdiction of this Court. Moreover, binding precedent mandates this result. *See Chen v. Lowe*, 521 S.W.3d 587 (Ky. App. 2017).

For the foregoing reasons, this appeal must be, and hereby is,  
DISMISSED.

ALL CONCUR.

ENTERED: January 5, 2018

/s/ C. Shea Nickell  
JUDGE, COURT OF APPEALS

**BRIEF FOR APPELLANTS:**

Michael T. Lee  
Owensboro, Kentucky

**BRIEF FOR APPELLEE:**

L. Christopher Hunt  
Hartford, Kentucky