

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000850-MR

FEDERATED TRANSPORTATION
SERVICES OF THE BLUEGRASS, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO.

WILLIAM SKILES, JR., BY AND THROUGH
HIS APPOINTED GUARDIAN, SYLVIAN HARRIS,
AND HIS APPOINTED CONSERVATOR,
GUARDICARE SERVICES, INC.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the denial of a motion to dismiss on the issue of sovereign immunity. Based upon the following, we affirm the decision of the Jefferson Circuit Court.

BACKGROUND SUMMARY

The Appellant, Federated Transportation Services of the Bluegrass, Inc. (Federated), is a non-profit Kentucky corporation which contracts with the Kentucky Transportation Cabinet to coordinate the transportation of individuals within Jefferson County. The individuals are Medicaid patients.

Appellee, William Skiles, Jr., was being transported by van in a wheelchair from Community Living, Inc. (hereinafter “Community”), a group home where he resided. Francine Taylor (hereinafter “Taylor”) was the driver of the van. Skiles, through his guardian, filed suit against Federated, Taylor, Westport Medical Transportation, LLC (hereinafter “Westport”) and Community asserting that: (1) Taylor failed to properly secure him into his wheelchair and the van and that Taylor negligently operated the van while transporting him; (2) Westport was vicariously liable for Taylor’s negligence since it was her employer; (3) Westport negligently hired, trained and/or supervised Taylor; (4) Community failed to secure him into his wheelchair; (5) Community negligently hired, trained and/or supervised unknown agents, servants, and/or employees; and (6) Federated negligently brokered the transportation of Skiles to Westport.

Federated filed a Motion to Dismiss the claim against it with the Jefferson Circuit Court asserting that it was entitled to governmental immunity. The circuit court denied the Motion to Dismiss. Federated then brought this appeal.

STANDARD OF REVIEW

In ruling on a motion to dismiss, a trial court should liberally construe the pleadings in the light most favorable to the plaintiff and all allegations should be taken as true. *Mims v. Western–Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). In ruling on a motion to dismiss, the trial court is not required to make any factual findings. *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005). The issue in a motion to dismiss, therefore, “is purely a matter of law.” *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002). Accordingly, we review the trial court's decision *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000). With these standards in mind, we review the trial court’s decision.

DISCUSSION

Federated appeals the single issue of whether it is entitled to governmental immunity.

“[G]overnmental immunity’ is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency.” 57 Am.Jur.2d, *Municipal, County, School and State Tort Liability*, § 10 (2001). The principle of governmental immunity from civil liability is partially grounded in the separation of powers doctrine embodied in Sections 27 and 28 of the Constitution of Kentucky. The premise is 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. 63C Am.Jur.2d, *Public Officers and Employees*, § 303 (1997). Put another way, “it is not a tort for government to govern.” *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427 (1953)

(Jackson, J., dissenting). Thus, a state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function. 472 Am.Jur.2d, *States, Territories and Dependencies*, § 104 (1974).

Yanero v. Davis, 65 S.W.3d 510, 519 (Ky. 2001).

In determining whether an entity employed by a governmental agency is entitled to governmental immunity, a court must determine whether the entity is exercising a function which is integral to state government. In *Kentucky Center for the Arts Corporation v. Berns*, 801 S.W.2d 327 (Ky. 1990), the Supreme Court of Kentucky set forth a two-pronged test to determine whether an entity was entitled to the shield of sovereign immunity. The first prong is whether the entity is a state agency. In *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009), the Court stated that “the basic concept behind the two-prongs - whether the entity in question is an agency (or alter ego) of a clearly immune entity (like the state or a county) rather than one for purely local, proprietary functions - is still useful.” As set forth in *Comair*, “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.[’]” *Id.*

While the Transportation Cabinet is an agency of state government, Federated has not set forth evidence to convince us that it is also an agency providing an integral function of state government. In *Transit Authority of River City v. Bibelhauser*, 432 S.W.3d 171, 174 (Ky. App. 2013) (“TARC”), a panel of

our court held that *TARC* satisfied the first prong of the test set forth above in that it “is an agency of the consolidated Louisville Metro, which is an entity immune from suit.” Federated, however, has not shown that it is an entity created by the Transportation Cabinet. While it has set forth statutory authority for the Transportation Cabinet to use organizations such as Federated, it has not shown that it is an agency of state government. Thus, Federated has not shown that it has met the first prong necessary to establish immunity.

Federated has also not satisfied the second prong set forth in *Comair* and *TARC*. Federated, by its own admission, is a non-profit Kentucky corporation that, among other things, coordinates “human service transportation delivery within a specific area,” pursuant to its agreement with the Transportation Cabinet. Affidavit of Pam Shepherd, par. 1.

Thus services provided by Federated are not integral to state government and are local and propriety in nature. In *TARC, supra*, the Court held as follows:

The record shows that TARC engages in a quintessentially local proprietary venture, i.e., providing transportation services just like other for-profit taxi and bus services in the Louisville Metro area.

TARC, supra at 174-75.

The court held that, in this way, TARC did not meet the second prong of the test for immunity. Neither does Federated. Based upon the above, we affirm the decision of the trial court.

ALL CONCUR.

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