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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001841-MR

ELAINE MATTHEWS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01328

KENTUCKY DEPARTMENT OF
FISH AND WILDLIFE RESOURCES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Elaine Matthews appeals, *pro se*, from an order of the Franklin Circuit Court entered on September 28, 2010, dismissing her motion for injunctive relief against the Kentucky Department of Fish and Wildlife

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Resources (hereinafter referred to as "Department"). Upon review of the record, the briefs and the law, we affirm.

Matthews sought a court order compelling the Department to investigate the euthanasia of a male deer named "Fuzzy" at the Bernheim Arboretum & Research Forest, a privately owned, non-profit entity, in Clermont, Kentucky.[2] She alleged the arboretum hastened the animal's death by withholding food and medical treatment. She specifically argued veterinary care was not provided between May 14 and May 19, 2010, the date on which the deer was ultimately euthanized. She argued an investigation by the Department was necessary to enforce KRS 525.130(1)(a) and (b)[3] and to prevent recurrence of inhumane treatment being provided to other captive animals at the arboretum. The Department moved to dismiss the complaint arguing that: 1) Matthews' suit for prospective injunctive relief was barred by sovereign immunity; and 2) her complaint failed to state a claim upon which relief could be granted.

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[2] According to the Department's answer, this complaint was Matthews' third attempt "to have a court intervene in the care of the captive wildlife at" the arboretum. In March 2010, Matthews was charged in Bullitt District Court with disorderly conduct and resisting arrest after an incident at the arboretum. *Commonwealth v. Elaine Matthews,* Case No. 10-M-00413. Pursuant to an agreed order, the charges were deferred for two years provided Matthews complied with the agreed order, underwent a psychological evaluation and completed any follow-up care. Then, Matthews filed civil suit against the arboretum's Executive Director. *Elaine Matthews v. Mark Wourms,* Case No. 10-CI-00304. To resolve this case, in August 2010, the Bullitt Circuit Court entered an order overruling any motion pertaining to Fuzzy, stated that any issue relating to Fuzzy had been dismissed by an agreed settlement, and directed "that the affidavit of an expert shall be required in order to proceed with any further hearings as regards these animals" and Matthews "is not qualified to testify as to the standards of care which are the norm for animals in this situation. She is a well meaning lay person who has done her own research and has her own opinion as to what is necessary." Matthews is appealing the civil case.

[3] Cruelty to animals in the second degree, a Class A misdemeanor. Killing an animal "[f]or humane purposes" is specifically exempted from criminal liability. KRS 525.130(2)(c).

In granting the Department's motion to dismiss the complaint, the trial court wrote in pertinent part:

> [The Department] argues that the doctrine of sovereign immunity bars this action. The Supreme Court of Kentucky has noted that "sovereign immunity '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.'" *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.,* 286 S.W.3d 790, 801 (Ky. 2009) (quoting *Yanero v. Davis,* 65 S.W.3d 510, 517 (Ky. 2001) (internal citations omitted)). Applicable to this case is the doctrine of governmental immunity, which the *Caneyville* court described as "a policy-derived offshoot of sovereign immunity . . . premised upon protecting government entities from civil liability." *Caneyville,* 286 S.W.3d at 801 (citing *Yanero,* 65 S.W.3d at 519). "The constitutional and policy justifications for the doctrine are rooted in notions of separation of power, the principle being that courts should not be in the position to impose civil liability on government entities engaged in official functions, as this would disrupt the business of the government governing." *Id.* (citing *Yanero,* 65 S.W.3d at 519; Ky. Const. §§ 27, 28; *Dalehite v. United States,* 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).
>
> This Court believes that the doctrine of sovereign immunity, or more specifically the doctrine of governmental immunity, applies here to bar this suit for prospective injunctive relief.
>
> > Governmental immunity extends to state agencies that perform governmental functions (i.e., act as an arm of the central state government) and are supported by money from the state treasury. However, unless created to perform a governmental function, a state agency is not entitled to governmental immunity. An analysis of

> what an agency actually does is required to determine its immunity status.
>
> *Autry v. Western Kentucky University,* 219 S.W.3d 713, 717 (Ky. 2007) (internal citations omitted). The Department of Fish and Wildlife Resources is funded by the game and fish fund, which is maintained by the State Treasury, KRS 150.150(1). Moreover, the Department carries out an essential government function, by "enforc[ing] the laws and regulations adopted under [KRS Chapter 150] relating to wildlife" and "exercis[ing] all powers necessarily incident thereto." KRS 150.121. As such, the Department is entitled to the defense of governmental immunity. This immunity bars prospective injunctive relief as well as civil tort claims. Having so found, we do not address the Department's other arguments.

Matthews timely appealed. For the following reasons, we affirm.

On appeal, Matthews argues the Department was "unreasonable" in refusing to waive sovereign immunity and thereby violated due process. While her brief is filled with passion, it is devoid of citation to legal authority as required by CR 76.12.[4] Nevertheless, as a *pro se* litigant, we will afford her leeway. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983).

"[T]he state cannot be sued except upon a specific and explicit waiver of sovereign immunity." *Commonwealth v. Whitworth,* 74 S.W.3d 695, 699 (Ky. 2002); *Yanero,* 65 S.W.3d at 517. The Department is "a department of state government within the meaning of KRS Chapter 12." KRS 150.021(1). We have been cited no authority showing the state has waived sovereign immunity in the context of this matter. Furthermore, we have been cited no authority showing that

[4] Kentucky Rules of Civil Procedure.

"reasonableness" is the appropriate standard of review to apply, or that a due process violation occurred.

In "enforc[ing] the laws and regulations adopted under [Chapter 150] relating to wildlife[,]" the Department has determined the arboretum is in full compliance with Chapter 150. Conservation officers are not authorized to enforce laws outside KRS Chapter 150 "unless so directed by the commissioner in life threatening situations or when assistance is requested by another law enforcement agency." KRS 150.090(1). KRS 525.130, the statute Matthews seeks to have the Department enforce, falls outside KRS Chapter 150. Matthews has offered no proof a post-mortem investigation by the Department would fall within KRS 150.090(1). Therefore, we affirm the order entered by the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Elaine Matthews, *pro se*
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Margaret E. Everson
Assistant Attorney General
Frankfort, Kentucky