

RENDERED: AUGUST 30, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000388-MR

JEFFERY CARPENTER

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 11-CI-00133

COMMONWEALTH OF KENTUCKY;  
GEORGE SEELIG AND TIMOTHY COLEMAN;  
DEPARTMENT OF PUBLIC  
ADVOCACY, MELANIE FOOTE,  
ALLEN GRAF, KATE HOLM, AND  
MICHAEL LEMKE

APPELLEES

OPINION  
AFFIRMING

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

VANMETER, JUDGE: Jeffrey Carpenter appeals *pro se* from the orders of the

Butler Circuit Court dismissing his *pro se* complaint against the Commonwealth of

Kentucky, the Department of Public Advocacy (“DPA”) and the prosecuting and defense attorneys associated with Carpenter’s criminal proceeding.<sup>1</sup> We affirm.

Carpenter was charged and convicted of sexual abuse in the first degree in Butler Circuit Court (00-CR-00042) in 2003. He was unsuccessful on his direct appeal and his post-conviction motions before the circuit court.

Throughout these proceedings he was represented by various attorneys employed by the DPA.

Carpenter filed the underlying civil complaint alleging several theories of liability against the DPA, its attorneys, as well as the Commonwealth, and the prosecutors in his criminal case. The complaint was dismissed due to lack of subject matter jurisdiction and upon a finding that the defendants were entitled to immunity. This appeal followed.

Carpenter alleges the trial court erred by dismissing his complaint because the defendants were not entitled to immunity. We disagree. The trial court’s dismissal of Carpenter’s complaint deals only with the legal issues of lack of subject matter jurisdiction and immunity, and is therefore subject to *de novo* review. *Greene v. Commonwealth*, 349 S.W.3d 892, 898 (Ky. 2011) (citation omitted).

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<sup>1</sup> The attorneys include George Seelig (also referred to as Greg) and Timothy Coleman, both assistant attorney generals, and Allen Graf, Michael Lemke, Melanie Foote, and Kate Holm, all with the DPA.

The principle of sovereign immunity was recognized in Kentucky as early as 1828. *Yanero v. Davis*, 65 S.W.3d 510, 517-18 (Ky. 2001) (citing *Divine v. Harvie*, 23 Ky. (7 T.B.Mon.) 439, 441 (1828)). Sovereign immunity precludes any suit against the state unless the immunity was waived by the state's consent. *Yanero*, 65 S.W.3d at 517 (citations omitted). To implement this principle, the General Assembly enacted the Board of Claims Act ("Act"), KRS<sup>2</sup> 44.070, *et seq.*, establishing the Board of Claims ("Board") and granting it

authority to hear claims and award damages, subject to certain limitations, incurred as the 'proximate result of negligence on the part of the Commonwealth, any of its cabinets, Departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, Departments, bureaus, or agencies.'

*Greene*, 349 S.W.3d at 899 (quoting KRS 44.070(1)). The constitutionality, scope and effect of the Board of Claims Act have been thoroughly discussed by our Supreme Court. *See Commonwealth v. Sexton*, 256 S.W.3d 29 (Ky. 2008); *Stratton v. Commonwealth*, 182 S.W.3d 516 (Ky. 2006); *Williams v. Ky. Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003); *Yanero* 65 S.W.3d 510. The Board is recognized as a "statutory exception to sovereign immunity, but is limited to the negligent performance of ministerial acts." *Greene*, 349 S.W.3d at 902. It follows that the Act creates "vicarious liability on the part of the Commonwealth for the

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<sup>2</sup> Kentucky Revised Statutes.

negligent performance of ministerial acts by officers and employees of the state.” *Id.* at 903. However, the right of an injured party to pursue claims in circuit court against state officers or employees for their own negligence in the performance of ministerial duties is not affected by the Act. *Id.* at 902-03.

Since the Board exercises “primary and exclusive jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth,” any allegation of vicarious liability on the part of the Commonwealth for the negligence of its officers or employees in the performance of ministerial duties must be brought before the Board. *See Williams*, 113 S.W.3d at 155 (quoting KRS 44.073(2)). Here, Carpenter did not avail himself of the Board to pursue his claim of vicarious liability against the Commonwealth, as required. Thus, his claim against the Commonwealth was properly dismissed for lack of jurisdiction.

Governmental immunity is derived from the doctrine of sovereign immunity and limits the tort liability of government agencies. *Yanero*, 65 S.W.3d at 519 (citation omitted). The immunity is extended to a state agency “to the extent that it is performing a governmental, as opposed to a proprietary, function.” *Id.* (citation omitted). The DPA is considered an agency of state government, and thus is entitled to governmental immunity with respect to the public functions it performs. *See KRS 31.010* (establishes the DPA as an independent agency of state

government attached to the Justice and Public Safety Cabinet). Carpenter brought suit against the DPA on theories of vicarious liability for the tortious actions of its employed attorneys during their continued appointed representation of him through various criminal proceedings. Indigent representation by the DPA is authorized under KRS 31.030 and clearly a governmental function. Accordingly, the DPA was entitled to immunity, and the trial court did not err by dismissing Carpenter's complaint.

As for the claims against the various attorneys, those employed by the DPA and those employed by the Attorney General's office, all are entitled to immunity in this instance. Prosecutors are entitled to absolute immunity with respect to the initiation and pursuit of prosecutions. *Yanero*, 65 S.W.3d at 518 (citing *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *McCollum v. Garrett*, 880 S.W.2d 530, 535 (Ky. 1994)). With respect to the defense attorneys, as we stated above, the DPA is considered an agency of state government and its attorneys are employees of the Commonwealth. KRS 31.010. Public officials are entitled to qualified official immunity from tort liability. *Yanero*, 65 S.W.3d at 522. Such immunity applies to the negligent performance of "(1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority." *Id.* (internal citations

omitted). Here, Carpenter alleged his defense attorneys were negligent in their representation of him during his criminal proceedings. Clearly, such a claim implicates public officials in the performance of discretionary functions. He does not allege the attorneys acted in bad faith or outside of the scope of their employment, but simply that they failed to represent him adequately. The proper avenue for relief under these circumstances is via RCr<sup>3</sup> 11.42, of which Carpenter availed himself without success.<sup>4</sup>

The orders of the Butler Circuit Court are affirmed.

ALL CONCUR.

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

<sup>4</sup> Carpenter also asserts that the trial court judge erred by refusing to recuse from the case, but presents no theory regarding the appropriateness or necessity of such recusal. That being the case, we are without an adequate basis to grant meaningful review on this issue.

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