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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-001310-MR

DEPARTMENT OF NATURAL RESOURCES,
KENTUCKY ENERGY AND ENVIRONMENT
CABINET — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 12-CI-00684

BERTHA ADKINS, AND
OTHER PLAINTIFFS; ROBERT
GREGORY STAPLETON, INDIVIDUALLY;
AND ROBERT GREGORY STAPLETON, AGENT
OF THE DIVISION OF MINE RECLAMATION
AND ENFORCEMENT — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MAZE, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Department of Natural Resources, Kentucky Energy and Environment Cabinet (hereinafter the "Cabinet") appeals from the denial of its

motion to dismiss the complaint filed by Appellees below on grounds of sovereign and governmental immunity. The complaint alleged that the Cabinet failed to enforce surface mining laws at a nearby surface mine, thereby contributing to property damage sustained in a 2010 flood by Appellees. The complaint sought monetary damages against the Cabinet and was later amended to include an action of mandamus. After a thorough review of the parties' arguments, the record, and the applicable law, we conclude that the Cabinet is a state agency engaged in governmental functions by regulating the surface mine; accordingly, the court below erred in failing to grant the motion to dismiss all claims excluding that for mandamus.

On July 17, 2010, the Harless Creek Community of Pike County, Kentucky, experienced torrential rainfall and flooding. After resolving their property damage claims in a separate civil action against two coal companies, the Appellees filed a second civil action against mine inspector Greg Stapleton[1] and the Cabinet on May 31, 2012. As discussed *infra,* the original complaint sought monetary damages against the Cabinet and was later amended to include an action of mandamus alleging that the Cabinet failed to enforce surface mining laws at a nearby surface mine, thereby contributing to property damage sustained in a 2010 flood by Appellees. The Appellees premised their cause of action on Kentucky Revised Statutes (KRS) 446.070 and 350.250. On June 21, 2012, the Cabinet filed a Kentucky Rules of Civil Procedure (CR) 12 motion to dismiss the complaint for

[1] We decline to comment on the validity of any suit involving Stapleton.

lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted on the sole ground of sovereign immunity. The trial court summarily denied said motion and the Cabinet now appeals.

On appeal the Cabinet presents multiple arguments[2] which we have condensed into the dispositive issue: namely, whether the trial court erred in

[2] These secondary arguments include whether the court had either subject matter or personal jurisdiction over the damages claims against the Cabinet; that neither KRS 446.070 or 350.250 was intended to waive sovereign immunity; and that the federal counterpart of KRS 350.250 is not intended to authorize actions against the Cabinet as a regulator. We believe that our discussion of KRS 350.250 *infra* is part of the dispositive issue *sub judice*, and decline to address the remaining secondary arguments concerning KRS 350.250 in great depth, though we now briefly address them in turn.

First, as to the jurisdictional arguments, we direct the Cabinet's attention to *Nelson County Bd. of Educ. v. Forte,* 337 S.W.3d 617, 622 (Ky. 2011), wherein the Kentucky Supreme Court explained:

> Thus, the soundest course is to commence the action in circuit court. A court's authority to determine its jurisdiction is grounded directly in the constitution, rather than statute. And while the constitution does give the legislature the right to determine when and how the Commonwealth may be sued, it cannot act in derogation of other constitutional grants of authority. Settling jurisdictional questions in the circuit court first complies with the constitutional mandate, and the purpose of the Board of Claims Act to address only those claims that are otherwise barred by immunity.

In light of *Forte,* the trial court could properly determine whether it had jurisdiction over Appellees' claims and did not err in so doing.

Second, we agree that KRS 446.070 does not constitute a broad waiver of sovereign immunity. In *Clevinger v. Board of Educ. of Pike County*, 789 S.W.2d 5, 9 (Ky. 1990), the Kentucky Supreme Court intimated same, stating: "Also affirmed is the trial court's dismissal of damages sought under KRS 446.070 and for alleged violations of state constitutional rights. The doctrine of sovereign immunity protects the board from liability for such claims." *Clevinger* at 9 citing *Smiley v. Hart County Board of Education* 518 S.W.2d 785 (Ky. 1975).

denying the motion to dismiss based on sovereign immunity. The Appellees assert that the trial court did not err.[3]

In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. *Mims v. Western–Southern Agency, Inc*., 226 S.W.3d 833, 835 (Ky. App. 2007). As such, "[t]he court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari–Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL–CIO v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). Therefore, "the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Accordingly, the trial court's decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

Generally, our appellate jurisdiction is restricted to final judgments. Ordinarily, an appeal from the denial of a motion to dismiss would not be permitted because it is regarded as interlocutory. Nevertheless, in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), the Kentucky Supreme Court recognized an exception to the general rule when it stated, "that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Prater* at 887. Consequently, we have jurisdiction to review the trial court's denial of a motion to dismiss in this case.

[3] The Appellees additionally argue that the "Cabinet has appealed an order they now acknowledge was appropriate." We disagree with Appellees' interpretation of the Cabinet's brief and, thus, decline to address this argument further.

At issue, KRS 350.250 states:

(1) Any person with an interest which is or may be adversely affected having knowledge that any of the provisions of this chapter or regulations adopted thereunder are not being enforced by any public officer or employee, whose duty it is to enforce such provisions of this chapter and regulations thereunder, may bring such failure to enforce the law to the attention of such public officer or employee. To provide against unreasonable and irresponsible demands being made, all such demands to enforce the law must be in writing, under oath, with facts set forth specifically stating the nature of the failure to enforce the law. If such public officer or employee neglects or refuses for any unreasonable time but in no event longer than sixty (60) days after demand to enforce such provision, any such person shall have the right to bring an action of mandamus in the Circuit Court of the county in which the operation which relates to the alleged lack of enforcement is being conducted; provided, that any action pursuant to this section may be brought immediately after a demand for enforcement when the violation or order complained of constitutes an imminent threat to the health or safety of the complaining person or would immediately affect a legal interest of the complaining person. The court, if satisfied that any provision of this chapter or regulation thereunder is not being enforced, shall make an appropriate order compelling the public officer or employee, whose duty it is to enforce such provision, to perform his duties, and upon failure to do so such public officer or employee shall be held in contempt of court and shall be subject to the penalties provided by the laws of the Commonwealth in such cases.

(2) The court having jurisdiction of a complaint made pursuant to subsection (1) of this section may in its final order award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

> (3) Any person who is or may be adversely affected by the violation by any person of any rule, regulation, order or permit issued pursuant to this chapter may bring a civil action for injunctive relief or for damages or both (including reasonable attorney and expert witness fees) in the Circuit Court of the county in which the surface coal mining operation complained of is located. *Nothing in this subsection shall be construed to be a waiver of sovereign immunity by the Commonwealth.*
>
> (4) In such action under this section, the cabinet, if not a party, may intervene as a matter of right.

KRS 350.250(emphasis added).

Appellees interpret KRS 350.250 as providing them a statutory cause of action against the Cabinet for monetary damages. The Cabinet argues that while a mandamus action under KRS 350.250(1) is permissible, KRS 350.250(3) specifically states that the Cabinet's sovereign immunity is not waived. We agree based on the plain language of the statute. *See Guenther v. Guenther*, 379 S.W.3d 796, 799 (Ky. App. 2012) ("In interpreting a statute we adhere to the general and oft-repeated maxim that, 'Our main objective is to construe the statute in accordance with its plain language and in order to effectuate the legislative intent.'") (Internal citations omitted). Thus, we must ascertain whether the Cabinet was entitled to governmental immunity since KRS 350.250(3) clearly expresses that sovereign immunity is not waived by the statute.

This Court in *Lisack v. Natural Resources and Environmental Protection Cabinet,* 840 S.W.2d 835, 837 (Ky. App. 1992), confirmed that the

Cabinet is indeed a state agency. In *Prater*, the Kentucky Supreme Court addressed when a state agency is entitled to immunity from suit:

> [G]overnmental 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.

*Prater* at 887.

If the Cabinet is entitled to governmental immunity, it would also be entitled 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). Accordingly, the dispositive issue is whether the Cabinet was engaged in a proprietary function or a governmental function in regulating the coal mine. The parties have not argued that the Cabinet performed a proprietary function in regulating an industry, here, a coal mine. We are unaware of any basis to find that the Cabinet was engaged in a proprietary function, i.e., one that was of a sort that private persons or business might engage in for profit. Accordingly, we must conclude that the Cabinet was engaged in a governmental function, entitling the Cabinet to governmental immunity. The trial court erred in not dismissing the Appellees' complaint on all claims excluding the mandamus action provided for in KRS 350.250(1).

In light of the aforementioned, we reverse and remand this matter to the trial court for further proceedings.

THOMPSON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the majority that the Appellees' claims for monetary damages against the Cabinet are barred by the doctrine of sovereign or governmental immunity. 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. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). "Governmental immunity" is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency. *Id.* at 519. But by its express terms, the doctrine of sovereign immunity only applies to claims seeking monetary damages against a state agency. *See Clevinger v. Board of Education of Pike County*, 789 S.W.2d 5, 9 (Ky. 1990). The doctrine does not bar claims for injunctive or declaratory relief.

Thus, I also agree with the majority that the Appellees' mandamus claim under KRS 350.250(1) should not be dismissed. However, I express no opinion whether the Appellees have stated any grounds for such relief. Indeed, the Appellees did not request injunctive relief or a writ of mandamus until they filed their First Amended Complaint, and that Complaint only generally requests "[i]njunctive relief either in the form of writ of mandamus or other injunctive relief requiring [the Cabinet] to take immediate corrective action to remedy the prior lack of enforcement and cause the mining site to be properly reclaimed and stabilized so

as not to pose an imminent threat to Plaintiffs." Upon remand, the trial court must determine whether the Appellees are entitled to such relief.

BRIEFS FOR APPELLANTS:

Tamara J. Patrick
Lance C. Huffman
Jacquelyn A. Quarles
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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ORAL ARGUMENT FOR APPELLEES:

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