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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000747-MR

KIMBERLY HOWARD,
EXECUTRIX OF THE ESTATE
OF EMMA JEAN HALL, DECEASED — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIMBERLY CHILDERS, JUDGE
ACTION NO. 15-CI-00103

BIG SANDY AREA DEVELOPMENT
DISTRICT, INC.; and JOHN DOES
1 THROUGH 5, UNKNOWN
DEFENDANTS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES AND KRAMER, JUDGES.

KRAMER, JUDGE: Kimberly Howard, as Executrix of the Estate of Emma Jean Hall (the Estate), appeals a summary judgment of the Magoffin Circuit Court

dismissing a negligence and wrongful death action the Estate filed against the appellee, Big Sandy Area Development District, Inc. Upon review, we affirm.

Big Sandy Area Development District, Inc., operates a regional homecare program for eligible individuals in conformity with 910 Kentucky Administrative Regulations (KAR) 1:180. The program's primary function is to prevent unnecessary institutionalization of functionally impaired persons over the age of 60 who lack adequate support, and to allow those individuals to live safer and more comfortable lives at home, by providing them supplementary in-home assistance with housekeeping, personal care, and a variety of other as-needed services.[1]

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[1] *See* Kentucky Revised Statutes (KRS) 205.460(1), part of the statutory authorization of 910 KAR 1:180; *see also* 910 KAR 1:180 § 1(11), explaining:

(11) "Homecare services" means services that:

(a) Are:

1. Provided to an eligible individual who is functionally impaired as defined by KRS 205.455(7); and
2. Directed to the individual specified in subparagraph 1 of this paragraph toward:
   a. Prevention of unnecessary institutionalization; and
   b. Maintenance in the least restrictive environment, excluding residential facilities; and

(b) Include:

1. Chore services as defined by KRS 205.455(1);
2. Core services as defined by KRS 205.455(2);
3. Escort services as defined by KRS 205.455(5);
4. Home-delivered meals as defined by KRS 205.455(8);
5. Home-health aide services as defined by KRS 205.455(9);
6. Homemaker services as defined by KRS 205.455(10);
7. Home repair services as defined by KRS 205.455(11);
8. Personal care services as established in subsection (16) of this section;
9. Respite services as defined by KRS 205.455(12)[.]

Beginning in 2004, Emma Jean Hall qualified for and was provided these homecare services. As an aside, there is no dispute that at all relevant times Hall retained the mental capacity to ask for help when she needed it, control her own finances, otherwise make her own decisions in every other facet of her life, and that she was adamantly opposed to living in a nursing home. But, Hall had become less physically capable as her age advanced, spent much of her days and nights sitting on her living room recliner, and needed assistance performing activities of daily living. Accordingly, she maintained an informal but regular network of support from friends, neighbors, and family members, and her individualized homecare plan was designed merely as a supplement. Thus, under the terms of her individualized homecare plan, an aide employed by Big Sandy would visit Hall twice per week for periods of two hours, Wednesdays and Fridays; and the aide would assist Hall with various household chores (such as laundry and dishes), and personal hygiene tasks (such as bathing and dressing). The scope of Hall's plan did not include the provision of health or medical services.

Big Sandy aides continued to visit Hall twice per week as described until May 21, 2014. On that date Big Sandy aide, Carol Miller, discovered Hall hunched over in the living room recliner where Hall usually sat. Hall appeared to be ill. Miller asked Hall if she needed help, and she called Howard Bacon, Hall's

son, after Hall instructed her to do so. After speaking with Carol, Bacon contacted his wife and his daughter who arrived about an hour later and asked Hall what was going on. Hall told them she was feeling ill. They asked Hall if they could take her to a hospital, and Hall agreed. Thereafter, Hall was taken by ambulance to Pikeville Medical Center. Upon examination, a severe bedsore was discovered in the region of Hall's coccyx. Hall ultimately passed away on June 6, 2014, due to complications from the bedsore. At the time, she was ninety-three years old.

On May 18, 2015, Kimberly Howard, as Executrix of the Estate of Emma Jean Hall (the Estate), filed suit in Magoffin Circuit Court against Big Sandy Area Development District, Inc. The Estate asserted various civil claims based upon Big Sandy's provision of homecare services to its decedent from 2004 until May 21, 2014, alleging in sum that Big Sandy's provision of homecare services to Hall was negligent and was a substantial factor in bringing about Hall's death. In this respect, the Estate's arguments focused upon the fact that when Big Sandy's aides visited twice per week, one of the tasks Hall typically asked them to perform for her was assisting her with bathing. The Estate postulated that if the visiting aides had bathed Hall in a non-negligent fashion, Hall's bedsore would not have formed, or would have been detected earlier with fewer ill consequences.

Following a period of discovery and two motions for summary judgment from Big Sandy, however, the circuit court dismissed the Estate's action

on several bases. Namely, it concluded Big Sandy was entitled to governmental immunity from suit; the Estate had failed to demonstrate the nature of the applicable duty or standard of care Big Sandy had owed to its decedent; and, that the Estate had failed to demonstrate any action or inaction from Big Sandy had proximately caused or could have prevented Hall's bedsore and resulting death. This appeal followed.

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted). Likewise, whether an individual or governmental entity is entitled to immunity is a question of law reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary

judgment and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480.

With that in mind, the focus of our opinion is upon the circuit court's conclusion that Big Sandy was entitled to governmental immunity under the circumstances presented. That issue is dispositive of this appeal. Governmental immunity is "a policy-derived offshoot of sovereign immunity" that protects government agencies and entities from civil liability. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 801 (Ky. 2009) (citing *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001)). Under the doctrine, "a state agency [or entity] is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Yanero*, 65 S.W.3d at 519. In other words, immunity is a conditional status for a government agency or entity that turns on whether the agency or entity is performing an essential government function. *Caneyville*, 286 S.W.3d at 804.

The test for whether an entity qualifies for governmental immunity is two pronged. First, the Court must examine the origin, or "parent," of the entity to determine if the entity is an agency or alter ego of a clearly immune parent. *Comair, Inc. v. Lexington-Fayette Urban Cty. Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009). Second, the Court must assess whether the entity performs a "function integral to state government." *Id.*

Regarding the first prong, the circuit court concluded Big Sandy satisfied it; we agree with the circuit court's conclusion; and the Estate offers no argument to the contrary. Big Sandy is one of Kentucky's fifteen statutory "area development districts" (ADDs), and its service area includes the counties of Johnson, Magoffin, Martin, Floyd, and Pike. *See* Kentucky Revised Statute (KRS) 147A.050(11). ADDs provide a wide array of services for local governments in their respective regions, and they receive funding from a variety of sources. The long version is that they are statutorily-created, nonprofit, quasi-governmental inter-county bodies and independent contractors with contractual and regulatory duties imposed by federal and state law, designed in part to comply with Kentucky's participation in various federal programs. The short version is that ADDs are types of *political subdivisions* known as "special districts."[2]

As to the second prong, the circuit court also determined Big Sandy's administration and provision of homecare services -- the central focus of the Estate's various causes of action -- qualified as a function integral to state government. The Estate argues the circuit court erred on this point. As to why, the

[2] *See* KRS 65.005(2)(a) ("Special district" means any agency, authority, or political subdivision of the state which exercises less than statewide jurisdiction and which is organized for the purpose of performing governmental or other prescribed functions within limited boundaries. It includes all political subdivisions of the state except a city, a county, or a school district."); *see also* KRS 65.060 (applying the term "district" to "any board, commission, or special district created pursuant to . . . KRS 147A.050 to 147.120[.]") For a more extensive discussion of the general nature of ADDs, *see Gateway Area Development District, Inc. v. Cope*, No. 2013-CA-001855-MR and No. 2013-CA-001937-MR, 2015 WL 602726 (Ky. App. Feb. 13, 2015) (unpublished; cited here for purposes of illustration only and not as persuasive authority).

Estate summarizes its argument most succinctly on page fifteen of its appellate brief:

> The State has not taken on a general duty to provide home health for Kentucky's sick and elderly, as laudable as such a function may be. Big Sandy and its authorizing legislation could disappear tomorrow, and the Commonwealth would not be substantially altered as a polity and a commonwealth. In contrast, it is unimaginable that the Commonwealth would stop taking responsibility for policing, public education, public water and waste,[3] the corrections system, and public highways and airway infrastructure.

We disagree. In determining whether an entity's function is integral to state government the court's examination should focus "on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (*e.g.*, by counties)." *Comair*, 295 S.W.3d at 99. Here, the Estate is correct in stating that functions that have been *traditionally* considered integral to state government include policing, public education, the corrections system, and the provision of public highways and airway infrastructure. *Id*.

However, functions that have not been *traditionally* considered integral to state government, such as the provision of social welfare programs, can be *made* integral through legislation. That much is also implicated in *Comair*,

[3] Public water and waste management is considered a local proprietary function, *not* an integral governmental function. *See Coppage Construction Co., Inc. v. Sanitation Dist. No. 1*, 459 S.W.3d 855, 864 (Ky. 2015).

which explained that making "provisions for the poor" qualified as an integral governmental function. *Id*. at 100 (quoting *Marion County v. Rives & McChord*, 133 Ky. 477, 118 S.W. 309, 311 (1909)). In *Bowman v. Frost*, 289 Ky. 826, 158 S.W.2d 945 (1942), our former High Court elaborated further on this point in the context of discussing the constitutionality of an act of the General Assembly extending aid to the needy blind, explaining in relevant part:

> Care of the poor and those unable to care for themselves has long been recognized as a public duty, and as civilization progressed the care of the state for its dependent classes grew and expanded. Today social services unknown to former generations are being extended to the less fortunate members of society, and are being demanded and obtained as of right. Food and shelter have become the clearly recognized obligation of society to every inhabitant of the state. Various methods have been adopted to fulfill this obligation, including the construction and operation by the state or its subdivisions of asylums for the insane, hospitals for the sick, and poorhouses for the destitute. To sensitive persons confronted with the necessity of accepting public assistance, the typical poorhouse is an object of dread. As organized society becomes more conscious of its obligations to its dependent members, more humane methods for caring for them are being adopted.
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> . . . .
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> The aid provided for in the act before us is not a mere gift or bounty, but is a payment by the state in discharge of a duty to a recipient who is entitled to it as of right, having established his eligibility under the act. It is true his legal right results solely from statute, since there was no common-law obligation on the state to care for the poor, but when the state undertakes by statute to assume the

> obligation, his right attaches. In 21 R.C.L. 701, it is said: "The care of the state for its dependent classes is considered by all enlightened people as a measure of its civilization, and the care of the poor is generally recognized as among the unquestioned objects of public duty, but in spite of this, the duty under the common law was purely moral and not legal. There is therefore no legal obligation at common law on any of the instrumentalities of government to furnish relief to paupers. The obligation to support such persons results only from statute. The reason for this seeming barbarity of the common law was that matters of charity were thought more appropriate for the church."
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> Relief by the state of the needy and afflicted who are unable to care for themselves is an accepted exercise of valid authority under the police power in promotion of the general welfare, and when the Legislature provides for the performance of this governmental function constitutional provisions should be construed, if possible, so as not to interfere with its proper exercise.
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> . . . .
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> [T]he support of the poor—meaning such persons as have been understood as coming within that class ever since the organization of the government, persons who are without means of support . . . is and has always been a direct charge on the body politic for its own preservation and protection; and that as such, in the light of an expense, stands exactly in the same position as the preservation of law and order. The expenditure of money by the state for such purposes is in performance of a governmental function or duty . . . if the purpose is to supply food and shelter to the poor, including those who are destitute because of enforced unemployment, provided only that the money be not administered through forbidden channels.

Id. at 947-48 (internal citations and quotes omitted).

In sum, where the Commonwealth undertakes by statute to provide for the health and welfare of its dependent classes, it performs a state governmental function on par with the preservation of law and order. Continuing in this vein the Court has held, in the context of determining whether governmental immunity applied to a hospital operated by the Cabinet for Health and Family Services, that "performing the functions of administering programs for individuals with mental illnesses and providing services for the treatment of mentally impaired individuals . . . were undoubtedly vital functions carried out under the direct auspices of state government and were functions integral to state government." *Hamblen ex rel. Byars v. Kentucky Cabinet for Health & Family Servs.*, 322 S.W.3d 511, 516-17 (Ky. 2010) (citations omitted).

Particularly relevant to this appeal, the General Assembly has also deemed the provision of programs for the health and welfare of the *aging* is not merely a local issue, but an integral county and statewide governmental function. That much is apparent from KRS 67.083(3), which indicates one of the "governmental functions necessary for the operation of the county" is "(d) Provision of . . . programs for the health and welfare of the aging[.]" This is also

apparent from KRS 205.460,[4] the statute that primarily mandated the homecare program at issue in this matter. Specifically, KRS 205.460(1) provides:

[4] The services for elderly persons required of the Cabinet and specified in KRS 205.460 arise in part due to the Commonwealth's participation in Title III of the Older Americans Act (OAA), Pub. L. 89-73, 42 United States Code (U.S.C.) §§ 3001-3058ff, a federally-funded program created by Congress to subsidize the States' provision of services to the elderly. The overarching objectives of the OAA are, in relevant part, as follows:

> The Congress hereby finds and declares that, in keeping with the traditional American concept of the inherent dignity of the individual in our democratic society, the older people of our Nation are entitled to, and *it is the joint and several duty and responsibility of the governments of the United States, of the several States and their political subdivisions*, and of Indian tribes to assist our older people to secure equal opportunity to the full and free enjoyment of the following objectives:
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> > . . . .
> > (4) Full restoration services for those who require institutional care, and a comprehensive array of community-based, long-term care services adequate to appropriately sustain older people in their communities and in their homes, including support to family members and other persons providing voluntary care to older individuals needing long-term care services.
> > . . . .
> > (8) Efficient community services, including access to low-cost transportation, which provide a choice in supported living arrangements and social assistance in a coordinated manner and which are readily available when needed, with emphasis on maintaining a continuum of care for vulnerable older individuals.

42 U.S.C. § 3001 (emphasis added.) Like Medicaid, Supplemental Nutrition Assistance Program benefits, and other federal Spending Clause legislation, the OAA offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 191 L.Ed.2d 471 (2015) (discussing the relationship between the states, the federal government, and private parties that benefit from the similar conditionally funded Medicaid program). With that said, the Commonwealth accepted this bargain and with it the notion that *it, along with its political subdivisions, maintained a joint and several duty and responsibility* to "assist our older people to secure equal opportunity to the full and free enjoyment" of the OAA's objectives. 42 U.S.C. § 3001.

> The *cabinet* shall fund, directly or through a contracting entity or entities, in each district, a program of essential services which shall have as its primary purpose the prevention of unnecessary institutionalization of functionally impaired elderly persons. The *cabinet* may use funds appropriated under this section to contract with public and private agencies, long-term care facilities, local governments, and other providers to provide core and essential services. The *cabinet* may provide core and essential services when such services cannot otherwise be purchased.

(Emphasis added.)

The direct import of KRS 205.460(1) and its additional provisions is that the Cabinet for Health and Family Services[5]-- a *state* agency[6]-- is ultimately responsible for providing what the General Assembly has deemed, through social welfare legislation, to be an integral governmental function. Namely, the Cabinet is to provide, subject to budgetary constraints and the participation requirements of the program, "services, including but not limited to client assessment and case management services, designed to identify a functionally impaired elderly person's needs, develop a plan of care, arrange for services, monitor the provision of services, and reassess the person's needs on a regular basis[,]"[7] in addition to

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[5] As used above, "the cabinet" is a reference to the Cabinet for Health and Family Services. *See* KRS 205.455(3).

[6] *See* KRS 194A.010.

[7] *See* KRS 205.455(3) (defining "core services" as the term is used in KRS 205.460).

"services which are most needed to prevent unnecessary institutionalization of functionally impaired elderly persons . . . [which] shall include chore services, home-delivered meals, home-health aide services, homemaker services, respite services, escort services, and home repair services."[8]

But, the Cabinet is also authorized to provide these services directly or indirectly through another entity. This, in turn, leads to the role played by ADDs. The Cabinet has traditionally effectuated its statutory mandate on a local level by delegating its responsibilities to Big Sandy and the other ADDs, which the Cabinet oversees by and through its Department for Aging and Independent Living. *See* KRS 194A.030(13). Accordingly, the ADDs provide direct or contracted services on behalf of the Cabinet -- including but not limited to the homecare services at issue in this matter specified in 910 KAR 1:180 -- to qualified older citizens on a regional basis.

As discussed, the central position of each claim asserted by the Estate is that Big Sandy should be held civilly liable for what it characterizes as Big Sandy's negligent provision of services specified under 910 KAR 1:180 to its decedent. As further discussed, however, Big Sandy is a political subdivision and its provision of services specified under that regulation qualified as an integral

[8] *See* KRS 205.455(6) (defining "essential services" as the term is used in KRS 205.460).

governmental function.[9] Accordingly, both prongs of *Comair* were satisfied, and Big Sandy was entitled to governmental immunity.

The Estate also focuses greatly upon acts or omissions of various employees of Big Sandy, which it likewise characterizes as negligent. The circuit court discussed this point in depth, determined nothing indicative of negligence occurred in this matter, and dismissed on that basis as well. Upon review of the record we agree with the circuit court's conclusion, but this point is ultimately irrelevant for two reasons. First, because Big Sandy was entitled to governmental immunity, it is not vicariously liable for the negligence of its employees. *See Grayson Cty. Bd. of Educ. v. Casey*, 157 S.W.3d 201, 203 (Ky. 2005). Second, while employees of an entity entitled to governmental immunity *can* be sued for negligence in their individual capacities,[10] the Estate chose not to identify or sue any named employee of Big Sandy. It limited the arguments of its brief and the

[9] We reemphasize that ADDs provide a variety of other services. However, this appeal does not involve any other services Big Sandy may provide; the issue is solely whether Big Sandy has immunity with regard to its provision of services pursuant to 910 KAR 1:180; and our holding is limited to that issue only. For parity of reasoning, *see Kentucky River Foothills Development Council, Inc. v. Phirman*, 504 S.W.3d 11, 14 (Ky. 2016).

[10] The immunity that an agency enjoys is extended to the official acts of its officers and employees. However, when such officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity. *See Yanero v. Davis*, 65 S.W.3d 510, 522-23 (Ky. 2001).

issues stated in its prehearing statement solely to the proposition that Big Sandy alone bore liability in this matter.[11]

The Estate argues Big Sandy is not entitled to governmental immunity because Big Sandy carries a policy of liability insurance. However, the Estate cites no authority relevant to the circumstances presented in support of its argument, and the same argument has been generally rejected in published case law. *See Casey*, 157 S.W.3d at 207.

Lastly, the Estate argues summary judgment was premature because it would have liked to have conducted further discovery. In light of our conclusion that Big Sandy was entitled to governmental immunity, however, this point is moot.

Finding no error, we accordingly AFFIRM.

ALL CONCUR.

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[11] In its prehearing statement, the Estate summarizes the focus of its appeal by explaining in relevant part: "Appellant opposes *Appellee's* contention that *it* is entitled to any type of immunity, and that *it* assumed no duty to Emma Jean Hall." (Emphasis added.) And, in the body of its notice of appeal, the Estate further provided: "The Appellees [sic] against whom this appeal is taken is Big Sandy Area Development District, Inc."

That said, while the Estate has made no argument that any employee of Big Sandy bore individual liability in this matter, we have nevertheless listed "John Does 1 through 5, Unknown Defendants" as appellees because the Estate listed them as "defendants" in the caption of its notice of appeal and, under our rule of substantial compliance, naming a party in the caption of the notice effectively adds that party as an appellee, irrespective of what is stated in the body of the notice. *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 74 (Ky. 2002); *Blackburn v. Blackburn*, 810 S.W.2d 55 (Ky. 1991); *R.C.R. v. Commonwealth*, 988 S.W.2d 36 (Ky. App. 1998).

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