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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000960-MR

FEDERATED TRANSPORTATION
SERVICES OF THE BLUEGRASS, INC. APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 16-CI-04248

CHERYL WALLING, EXECUTRIX OF
THE ESTATE OF PEGGY WALLING APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: Federated Transportation Services of the Bluegrass, Inc. ("FTSB"), brings this interlocutory appeal challenging the Fayette Circuit Court's denial of its motion for summary judgment based on an assertion of governmental immunity. Following a careful review, we affirm.

FTSB is a non-profit Kentucky corporation which contracts with the Kentucky Transportation Cabinet to coordinate and provide nonemergency medical transportation ("NEMT") services for Medicaid patients. Various contracts permit FTSB to operate as a NEMT broker in twenty-four counties across the Commonwealth. On September 12, 2016, Peggy Walling[1] was being transported in a van by FTSB to a dialysis appointment in Lexington, Kentucky. Walling alleges FTSB's driver, Marion Jones,[2] failed to properly secure her in her wheelchair and, due to Jones' negligent operation of the vehicle, she was thrown from her wheelchair resulting in serious and permanent injuries.

Walling filed suit asserting claims of simple negligence and gross negligence in the operation of the vehicle against Jones, and negligent hiring, retention, training and/or supervision against FTSB. Following a period of discovery, FTSB moved for summary judgment asserting it was entitled to governmental immunity pursuant to *Comair v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). The trial court denied the motion, finding FTSB was not entitled to immunity. The trial court was persuaded by the previous holding by this Court in *Federated Transportation Systems of the*

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[1] Walling passed away during the pendency of this suit. Her Estate was substituted as the plaintiff and the action was properly revived.

[2] Jones passed away following the filing of the instant suit.

Bluegrass, Inc. v. Skiles, 2014-CA-000850-MR, 2015 WL 5645588 (September 25, 2015, unpublished), which concluded FTSB did not satisfy the two-pronged test for governmental immunity as laid down in *Comair*. FTSB timely appealed.

At the outset, we note the order at issue is clearly interlocutory which would normally be fatal to an appeal. However, the denial of a claim for absolute immunity is immediately appealable. In *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886-87 (Ky. 2009), our Supreme Court held:

> [a]s we observed recently in *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006), immunity entitles its possessor to be free "from the burdens of defending the action, not merely . . . from liability." *Id.* at 474 . . . . Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action. For this reason, the United States Supreme Court has recognized in immunity cases an exception to the federal final judgment rule codified at 28 U.S.C. § 1291. In *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court reiterated its position that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment." *Id.* at 525, 105 S.Ct. 2806, *citing Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

The question of immunity is a matter of law which we review *de novo*. *Sloas*, 201 S.W.3d at 475; *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003). Here, denial of FTSB's request for immunity was made in the context of a motion for summary judgment. Summary judgment is only proper when "it would be impossible for the respondent to produce evidence at the trial

warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id*. With these standards in mind, we turn to the matter before us.

> "'[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. 72 Am.Jur.2d, *States, Territories and Dependencies*, § 104 (1974).

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

Determination of whether an entity employed by a governmental agency is entitled to governmental immunity requires a multipart analysis. In *Kentucky Center for the Arts Corporation v. Berns*, 801 S.W.2d 327 (Ky. 1990),

our Supreme Court established a two-pronged test to determine entitlement by an entity to the shield of sovereign immunity. The first determination is whether the entity is a state agency. The second is whether the entity is exercising a function which is integral to state government. In *Comair*, the Court stated

> 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. It is an attempt to determine first whether an entity falls within the limitations on immunity found in *Haney* [*v. City of Lexington*, 386 S.W.2d 738 (Ky. App. 1964)]. Rather than attempting to reduce that idea to a simple test, however, it should instead be treated as a guiding principle, with the focus instead being on the origins of the entity. This inquiry can be as simple as looking at the "parent" of the entity in question, i.e., was it created by the state or a county, or a city? This amounts to recognizing that an entity's immunity status depends to some extent on the immunity status of the parent entity. *E.g., Autry* [*v. Western Kentucky University*], 219 S.W.3d [713,] 719 (noting that an entity "derives its immunity status through" the parent entity).
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> The more important aspect of *Berns* is the focus on whether the entity exercises a governmental function, which that decision explains means a "function integral to state government." 801 S.W.2d at 332. This determination has been the focus of sovereign immunity analysis from early on. *See Gross v. Kentucky Board of Managers of World's Columbian Exposition*, 105 Ky. 840, 49 S.W. 458, 459 (1899) (relying in part on the fact that the entity "was not created to discharge any governmental function").
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> This obviously will require a case by case analysis, but *Berns* itself offered a way to begin to frame the

> discussion by noting that 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." 801 S.W.2d at 332 (internal quotation marks omitted). The focus, however, is 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). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways.

295 S.W.3d at 99.

Here, FTSB contends it satisfies both prongs of the governmental immunity test, and the trial court erred in not so finding. We disagree.

It is undisputed FTSB is a private, non-profit corporation originally incorporated for the benefit of its members including the Lexington Chapter of the American Red Cross; Kentucky River Foothills Development Council, a Kentucky non-profit corporation; Bluegrass Community Action Agency, a Kentucky non-profit corporation; and Lexington Yellow Cab, an assumed name of United Transportation Company, Inc., a Kentucky for-profit corporation. No immune entity was involved in creating FTSB. However, FTSB urges us to consider it an agent of immune state agencies based on the level of control and supervision exerted over its daily business by those outside entities. In effect, FTSB asserts the Kentucky Transportation Cabinet, the Cabinet for Health and Family Services, and the Education and Workforce Development Cabinet—all immune governmental

agencies—are its “adoptive” parent entities that “control almost every facet of its operation as a NEMT” and therefore, it is entitled to immunity as an alter ego of those agencies. This assertion misses wide of the mark.

Through a competitive bidding process, FTSB became a contractor providing transportation services, agreeing to abide by statutory and regulatory requirements as well as oversight by the Transportation Cabinet and others. While the oversight and operational requirements may be broad, the contractual relationship has not converted FTSB from its original form as a private corporation into an immune alter ego of the Transportation Cabinet. Nothing in the record convinces us otherwise. Thus, FTSB has not satisfied the first prong of the *Comair* test and is not entitled to the shield of sovereign immunity. FTSB’s assertion to the contrary is without merit.

Furthermore, even were we to have agreed with FTSB as to its alter ego status, we would nevertheless be compelled to conclude it is not entitled to sovereign immunity as it does not perform an integral state function. FTSB provides the same type of transportation services as other for-profit taxi and transportation services in its service area. In *Transit Authority of River City v. Bibelhauser*, 432 S.W.3d 171, 174 (Ky. App. 2013), a panel of this Court held provision of similar services was “a quintessentially local proprietary venture[.]” Identical to the entity at issue in *Bibelhauser*, FTSB “does not provide a

transportation infrastructure, facilitate state-wide transit, legislate, administrate, or otherwise predominately serve state-level concerns or carry out functions 'integral to state government.'" *Id*. at 175. Its absence would not leave a state-level concern less than fully addressed as it is not the sole or predominant transportation provider in its service area and it unquestionably does not provide the primary means by which people or cargo move across the Commonwealth. Thus, FTSB fails the second prong of the *Comair* test.

FTSB is not entitled to governmental immunity and we discern no error in the denial of FTSB's motion for summary judgment. Therefore, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

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