IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000280-DG

HOSPITAL OF LOUISA,
D/B/A THREE RIVERS MEDICAL CENTER — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2008-CA-001302-MR
JOHNSON CIRCUIT COURT NO. 07-CI-00103

JOHNSON COUNTY FISCAL COURT — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Ernest Napier was a 56-year-old Vietnam veteran who, on April 26, 2006, was arrested and became a prisoner at the Big Sandy Regional Detention Center (hereinafter "Big Sandy") in Johnson County, Kentucky, following an assault against his girlfriend, Paula Compton. A detailed account of the pretrial proceedings is necessary because these developments are germane to the ultimate integrity of Napier's bond release which is at the heart of the case.

Upon his initial arrest, Napier's bond was set at $100,000 cash by the Johnson District Court. At a preliminary hearing held on May 3, 2006, the Johnson District Court found probable cause that Napier had committed first-

degree assault and the case was bound over to the grand jury. At that time, Napier's bond was reduced to $50,000 cash. Napier subsequently filed a motion for bond reduction and, on June 7, 2006, the motion was sustained and an agreed order for pretrial home incarceration was entered. Then, on July 3, 2006, the Johnson District Court entered an order dismissing the case against Napier for failure to indict. That order stated that Napier "shall be immediately released from custody and/or any bond obligation."

Napier was eventually indicted by a Johnson County Grand Jury and charged with one count of assault in the first degree and for being a persistent felony offender in the second degree. He was arrested on August 3, 2006 on the warrant of arrest on indictment and his bond was set at $50,000 cash. He was again lodged in Big Sandy. Napier was subsequently found to be indigent and a public defender was appointed and defended him in court. On March 3, 2007, Napier entered a guilty plea to a reduced charge of assault in the second degree and the persistent felony offender charge was dismissed. He was sentenced to seven years imprisonment.

The issue before us involves Napier's releases from Big Sandy on two occasions prior to his guilty plea and sentencing. On August 8, 2006, Napier was released from Big Sandy for the sole purpose of obtaining medical treatment at the Hospital of Louisa, d/b/a Three Rivers Medical Center (hereinafter "Three Rivers"). Napier's release was conditioned upon his returning to the detention center after being discharged from Three Rivers. Napier was a patient at Three Rivers from August 8 to August 11. The bill for

his treatment was $34,477.17, based upon the full rate, and $4,671.00, based upon the Medicare rate. Later that month, on August 30, 2006, Napier was once again released from Big Sandy and admitted to Three Rivers on the condition that he return to Big Sandy upon completion of his medical treatment. During this hospital visit, Napier was a patient from August 30 to September 1. The cost of this stay was $26,057.87, at the full rate, and $7,669.00, at the Medicaid rate. Napier was also released from the custody of Big Sandy for medical treatment on two subsequent dates in October of 2006. However, none of the medical costs associated with either of these releases were incurred at Three Rivers and, thus, are not at issue in this appeal.

It is uncontested that Napier's medical treatment at Three Rivers in August and September was of an emergency nature and could not be postponed. The Veterans Administration refused to pay the hospital charges because Napier was—at least from their perspective—incarcerated. It is also uncontested that, at all times and for the purposes of this decision, Napier remained indigent. Further, there is no dispute that the purpose behind Big Sandy allowing Napier to be released from its custody in order to be admitted to Three Rivers was to enable the Johnson County Fiscal Court to avoid paying Napier's medical bills. The following is from the deposition of Henry "Butch" Williams, administrator of Big Sandy, who was deposed on February 1, 2008, as part of discovery in this action:

> Q. What is the practice on releasing prisoners on their own recognizance and letting them return for medical treatment?
>
> A. Basically, to get the county out of paying the bill, I guess.

Three Rivers brought action against the Johnson County Fiscal Court, claiming that it was responsible for the payment of Napier's medical bills because Napier was a Johnson County prisoner in the custody of Big Sandy at the time of his hospitalizations at Three Rivers. The facts of the case are uncontested. The Johnson Circuit Court entered summary judgment on June 12, 2008, in favor of the Johnson County Fiscal Court. It held that, even though Napier was released solely for the purpose of obtaining medical treatment with the condition that he return to Big Sandy, he was not a prisoner for whom medical expenses were required to be paid by the county. The Court of Appeals affirmed the judgment and this matter is now before us for consideration.

KRS 441.045(3) requires that "the cost of providing necessary medical, dental, and psychological care for indigent prisoners in the jail shall be paid from the jail budget." We must address the question of whether Napier was, at the time he received his medical treatment at Three Rivers, a prisoner of Big Sandy, or whether he was out on bond or on his own recognizance with certain non-financial conditions. The following is a chronological listing of Napier's pertinent releases and his bond conditions:

1. August 18, 2006: $50,000 unsecured bond to go to hospital for treatment. To return to jail at 5 p.m. Bond will then revert back to $50,000 cash. No violation of law and no new arrest per judge.

2. August 30, 2006: $50,000 unsecured bond. To return to jail when released from hospital. (Napier was released from hospital on 9/1/06).

It is important to note that the $50,000 cash bond was not, in reality, reduced when Napier was at liberty to seek medical treatment at Three Rivers. Rather, the bond was simply lifted with no financial conditions so that Napier could be released from custody, obtain medical treatment, and then return to Big Sandy, where the cash bond was reinstated.

It is also significant to note that upon final sentencing, Napier was given 310 days credit for time spent in custody. A review of the record reflects that this credit includes the days Napier was released from Big Sandy for medical treatment. He would not have been entitled to jail credit if he was free on bond. *Bartrug v. Commonwealth*, 582 S.W.2d 61 (Ky.App. 1979). However, if Napier was hospitalized while still being considered "in custody," he would be entitled to jail credit. *Prewitt v. Wilkinson*, 843 S.W.2d 335 (Ky.App. 1992). Therefore, affording Napier jail time credit for the time he was receiving outside medical services is inconsistent with him not being considered "in custody" during that time.

The provisions of RCr 4.00 pertain to pretrial release through the posting of bail or other conditions. The obvious purpose of the criminal rules concerning bail is to ensure the accused's appearance at court. RCr 4.12 also authorizes the court to "impose any other conditions, including conditions requiring the defendant to return to custody after specified hours." Likewise, KRS 431.520(6) specifically allows the court to "[i]mpose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours."

KRS 520.010(2) defines custody as being any "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or constraint incidental to release on bail." In other words, if a person is released from the custody of the jail to go to work and return at certain times, that person is still in custody. That is considered "restraint." However, if that person has posted bond and is out on that form of release, then he is no longer in custody.

As noted by the Court of Appeals, it is not necessary that a person be physically inside the confines of the jail to still be considered a prisoner. The definition of escape, under KRS 520.010(5), includes "failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period." Therefore, an inmate failing to return to jail at a specified time, having been released for work purposes, can be charged with and convicted of escape. *Reynolds v. Commonwealth*, 113 S.W.3d 647 (Ky.App. 2003); *Commonwealth v. Johnson*, 615 S.W.2d 1 (Ky.App. 1981); *Weaver v. Commonwealth*, 156 S.W.3d 270 (Ky. 2005). "A prisoner who has been favored by being made a trusty and given a degree of liberty by employment outside prison walls is still in lawful control and custody." *Cutter v. Buchanan*, 286 S.W.2d 902, 903-904 (Ky. 1956) (citing 30 C.J.S., Escape, § 5).

We find that the status of Napier, upon release from Big Sandy, was similar to that of a person who is released from the confines of the jail to go out to work and return at a designated time without posting bond, or who is out on

furlough. What distinguishes this case from *Reynolds* and *Johnson* is that, here, there were actual bond forms prepared and signed by Napier and other court officials. Therefore, strictly as a matter of form, Napier was "out on bond" at the time he received medical services at Three Rivers. We cannot find fault with the analysis of the Court of Appeals that Napier was technically released on bail pursuant to the appropriate forms. However, we believe that the bond forms executed in this case were purely a paper trail intended to cover what was, in practice, a sham and subterfuge.

We agree that the reality of this case is that Napier was "dumped" on Three Rivers, who has been stuck with the expenses of his medical care. As Judge Wine said in his concurring opinion: "It is clear that the Appellee, Johnson County Fiscal Court, through a carefully coordinated effort, has avoided the onerous obligation of paying for a prisoner's medical care." We do not believe our courts need remain powerless to look behind the form to the substance which is so evident in this case. While the bonding court may have had the appropriate authority under the rules and statutes to maneuver the system to fit the fiscal interests of the county, such authority must be checked when it is abused. The purpose of bail is to guarantee the appearance of a defendant and compliance with the terms of a bond. The standard for review as to the appropriateness of the bond is whether the trial court, in fixing the bail, has abused its discretion. *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971).

This is a case of first impression for this Court.

Balancing the rights of the accused with the interest of society after a person has been charged with a crime, but not yet convicted, is one of the most troublesome challenges for our trial judges. The presumption of innocence is arguably the most revered principle of criminal justice in our United States. It distinguishes us from other advanced nations in placing a shield around the individual citizen from the powerful sway of government in the punishment of crimes. To carry out this most hallowed concept, we have fashioned—through our statutes, rules, and case law—a delicate framework for judicial discretion in regard to pretrial restraint and confinement. It gives tremendous power to our judges. Because this mechanism is guided by the presumption of innocence, it is entitled to serious consideration. Therefore, when its purpose is diverted to the siren call of money, it threatens to undermine the very foundation of one of our most critical pillars of justice. We do not deem it either wise or judicious to stand by and condone, through appellate absolution, the "carefully coordinated effort" to subvert the system.

There are certain implied powers which are inherent in our Court and go beyond actual fraud. This inherent authority encompasses "bad faith conduct, abuse of judicial process, any deception of the court and lack of candor to the court." *Potter v. Eli Lily and Co.*, 926 S.W.2d 449, 454 (Ky. 1996). "Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 457 (4th Cir. 1993). "In addition to the Court's Constitutional rule making power, the Court is also vested with certain 'inherent' powers to do that

which is reasonably necessary for the administration of justice within the scope of their jurisdiction." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984) (quoting *Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. 1961)). In *Craft*, we said, while considering the rule making power and the judicial power to be one and the same, that "the grant of judicial power [rule making power] to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice." *Id.*

We do not find fraud or deception in the bonding actions of the Johnson Circuit Court. The question of bad faith can be debated. The apparent hospital visit to Mr. Napier by the victim—which apparently occurred during one of his medical releases—seems to belie a good faith bond of $50,000. But there is no question that the use of the bonding procedure to avoid the expense of incarcerating a defendant, as was done in this case, is an abuse of judicial process.

Courts are extended great discretion in the exercise of their bonding powers. *Abraham v. Commonwealth*, 565 S.W.2d 152, 158 (Ky.App. 1997); *Long*, 467 S.W.2d at 141. We are acutely aware of the tremendous cost to local governments of housing and taking care of inmates in our local jails. Therefore, it is important to clearly state that a prisoner in need of medical services may be—solely to avoid a financial hardship upon the county—released from custody on bond or non-financial conditions. In such instances, the county may avoid responsibility of medical treatment. Those constraints,

however, must not take on the badge of continual incarceration in the jail as exists in this case.

A "bail bond" is a written understanding between an accused and the Commonwealth of Kentucky. RCr 4.00. In exchange for release from custody, the accused and/or surety agrees to certain conditions including, in some instances, the posting of a cash bond. *Miller v. Commonwealth*, 192 Ky. 709, 234 S.W. 307 (1921) (explaining that bail is contract between sureties and the state that the accused will appear in court at time and place designated to answer charge and submit himself to trial and will be amenable to orders and processes of court).

Being an "understanding," a bail bond is subject to the constraints and interpretations of contract law. We find the type of bail bond entered into by the court in this case was both unconscionable and injurious to public policy. *Johnson v. Dalton*, 318 S.W.2d 415, 417-18 (Ky. 1958) ("There is a class of contracts known as 'sham' writings which may be attacked by extrinsic evidence to show that the purported agreement was not intended to be binding on the parties."). It has been said that "[w]here the writing is executed and delivered as a sham, either in jest or for the purpose of concealing the real transaction from others, it obviously is not adopted as the final and complete expression of the real agreement." *Johnson*, 318 S.W.2d at 418 (quoting Morgan, Basic Problems of Evidence, Vol. 2, American Law Institute (March, 1954)).

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Restatement (Second) Contracts, § 208.

A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764 (Ky.App. 1985). The doctrine of unconscionability has developed as a narrow exception to this fundamental rule. *Louisville Bear Safety Service, Inc. v. South Central Bell Telephone Company*, 571 S.W.2d 438, 440 (Ky.App. 1978).

Also, it has been long standing law in this Commonwealth, going back for over one hundred years, that a contract or agreement will not be enforceable if it "tends to be injurious to the public, or is contrary to the public good." *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S.W. 477, 479 (1917). *See also Kentucky Ass'n of Highway Contractors v. Williams*, 213 Ky. 167, 280 S.W. 937 (1926); *Hennis v. B. F. Goodrich Co.*, 349 S.W.2d 680 (Ky. 1961); *Kirwan's Adm'r v. Citizens' Union Nat. Bank*, 222 Ky. 65, 299 S.W. 1104 (1927); *Robinson's Trustee v. Hamilton*, 1873 WL 11145 (Ky.App. 1873).

Simply put, the bond agreement in this case is both unconscionable and against public policy. We hold it an abuse of discretion for the trial court to engage in a sham bond agreement. Therefore, it is a nullity and unenforceable

for the purpose of orchestrating exoneration of the county from its lawful obligation under KRS 441.045(3). Napier was, therefore, a prisoner at the Big Sandy Regional Detention Center, on medical release, during his hospitalizations at Three Rivers Medical Center in the same manner as prisoners who are given work release or are on furlough and who are obligated to return to jail upon completion of the authorized work hours.

Based upon the foregoing, we hereby reverse the decision of the Court of Appeals and remand this matter to the trial court for further proceedings consistent with this opinion.

Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J., dissents by separate opinion in which Minton, C.J., and Abramson, J., join.

VENTERS, J., DISSENTING: Although I agree with the majority's conclusion that the procurement of the inmate's release on bail so that the county might evade its duty to provide medical care for an indigent inmate was a misuse of the rules and statutes that govern release on bail, the circuit judge's complicity in that artifice was an abuse of discretion which cannot be addressed in this procedural context. I cannot escape the conclusion that, justly or unjustly, KRS 441.045 provides no platform from which the hospital may assert a claim against the county government. I therefore respectfully dissent.

While not raised by the parties or the lower courts, I believe the decision in *Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government*, 270 S.W.3d 904 (Ky. App. 2008), is dispositive of this case by its

holding that KRS 441.045 does not waive sovereign immunity upon claims brought in relation to a county's duty to provide health care for indigent prisoners. Upon application of this holding, the Johnson Circuit Court was without jurisdiction to entertain Three Rivers's lawsuit against Johnson County Fiscal Court from its inception. Accordingly, I would vacate the opinion of the Court of Appeals and remand the cause to the circuit court for dismissal of the complaint.

THREE RIVERS'S CLAIM IS BARRED BY SOVEREIGN IMMUNITY

In *Jewish Hospital*, the Court of Appeals addressed, as relevant here, a situation almost identical to the dispute between Three Rivers and the Johnson County Fiscal Court. In that case, Louisville/Jefferson County Metro Government ("Metro Government"), along with the Commonwealth, entered into a contract with University of Louisville Hospital ("University Hospital") under which indigent persons, including inmates of Metro Corrections, would receive medical care at University Hospital. Jewish Hospital was not a party to this contract. In the meantime, an unrelated plan was placed into operation by area hospitals allowing any hospital to deem itself to have insufficient facilities, and subsequently to divert incoming patients to other hospitals in the area.

From time to time, when Metro Government sent inmates to University Hospital, that facility would invoke the diversion plan and divert them to Jewish Hospital. Metro Government had no involvement with these diversions, and the diversions were not directly related to University Hospital's contract with Metro Government. Over time, Jewish Hospital accrued unpaid billings

relating to indigent inmates of approximately $300,000.00. Metro Government refused to pay Jewish Hospital for services rendered, arguing that to do so would be the equivalent to paying double since it already paid for medical services via its contract with University Hospital. Jewish Hospital filed suit against Metro Government seeking to recover on the unpaid bills.[1] The circuit court dismissed Jewish Hospital's complaint on the grounds that Metro Government was protected from the claims by sovereign immunity.

Jewish Hospital challenged the circuit court's ruling, arguing that Metro Government was not entitled to sovereign immunity because the General Assembly had waived immunity by requiring county jails to pay for necessary medical care of indigent prisoners under KRS 441.045(3). The Court of Appeals addressed Metro Government's entitlement to sovereign immunity as follows:

> 'Immunity from suit is a sovereign right of the state.' *Foley Construction Company v. Ward*, 375 S.W.2d 392, 393 (Ky. 1963). 'The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.' Kentucky Constitution, Section 231. A county 'is a political subdivision of the Commonwealth as well, and as such is an arm of the state government. It, too, is clothed with the same sovereign immunity.' *Cullinan v. Jefferson County*, 418 S.W.2d 407, 408 (Ky. 1967), *overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510, 527 (Ky. 2001). Therefore, absent an explicit statutory waiver, Metro Government is entitled to sovereign immunity. The only question remaining is whether there was an explicit waiver of its sovereign immunity by the General Assembly's enactment of KRS 441.045(3).

[1] The decision does not state whether Jewish Hospital sought reimbursement from University Hospital.

> In *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), a patient argued that legislative authority to purchase medical insurance constituted a waiver of a state hospital's sovereign immunity. The Kentucky Supreme Court, however, held that the General Assembly made clear its intention to only narrowly and explicitly waive governmental sovereign immunity. We must agree with the logic in *Withers* and now reiterate its holding that '[w]e will find waiver only where stated "by the *most express language* or by such *overwhelming implications* from the text as [will] leave no room for any other reasonable construction."' *See id.*, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464-65, 53 L.Ed. 742 (1909) (emphasis added). The only condition expressly created by KRS 441.045 is Metro Government's responsibility to pay for necessary medical care of indigent inmates, which it has provided for by its in-house care facilities and the [contract with University Hospital.[2]] As there is no such express language in KRS 441.045 creating a waiver of immunity on all financial claims against the Metro Government for medical care of inmates, we do not find that sovereign immunity was waived in this case, and thus the trial court did not err in its dismissal on those grounds.

Id. at 907.

Jewish Hospital is not distinguishable in any meaningful respect from the present facts. Its reasoning is sound. As it correctly notes, waiver of sovereign immunity must be by clear legislative expression or overwhelming implication. An examination of KRS 441.045 discloses no indication of legislative intent to waive a county's cloak of sovereign immunity against claims to recover the unpaid medical expenses of indigent prisoners.

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[2] The fact that Metro Government had complied with its statutory duty by providing for care for indigent inmates through its in-house care facilities and the contract with University Hospital is not, in my view, relevant to the issue of whether sovereign immunity on the point has been waived by the legislature.

The significance of the decision is that *where there is no contract*[3] *between the plaintiff hospital and defendant county*, a claim cannot be brought by the hospital against the county to recover unpaid indigent prisoner medical expenses because the county's preexisting sovereign immunity has not been waived. Thus, Jewish Hospital and Three Rivers stand in identical positions in their respective lawsuits. Metro Government's contract with University Hospital is irrelevant to its assertion of sovereign immunity against Jewish Hospital, as is the diversion plan utilized by the local hospitals and the unilateral decision of University Hospital to divert indigent prisoners to Jewish Hospital.[4] None of this affects the essential fact that a hospital without a contract for reimbursement was attempting to bring a lawsuit against a county

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[3] Other provisions of KRS 441.045 address those situations where there is a contract between the county and a hospital, such as between Metro Government and University Hospital, for the provision of indigent medical care. Therefore, it is unnecessary to decide in this case the implications in the event a county breaches a contract relating to indigent medical care. *See also* the Kentucky Model Procurement Code, KRS Chapter 45A; KRS 45A.245(1) ("Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth . . . may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth."); and *Fedorov v. Board of Regents for University of Georgia*, 194 F.Supp.2d 1378, 1394 (S.D.Ga. 2002) ("The State is only subject to a lawsuit for breach of contract if the contract is in writing . . . . An 'implied' contract does not satisfy this requirement.").

[4] In fact, the record discloses that Paul B. Hall Hospital in Johnson County, where Napier originally went for care on his first need of medical assistance, did the same thing that University Hospital did, that is, divert a patient (Napier) to another hospital (Three Rivers). In this vein, the Court of Appeals opinion is mistaken, in the light most favorable to Three Rivers, that Napier, by his own initiative, chose Three Rivers to treat his gangrenous gall bladder.

upon a claim for which sovereign immunity had not been waived. Those are the identical facts in this case.

SOVEREIGN IMMUNITY IS NOT WAIVED BY FAILURE OF A GOVERNMENTAL ENTITY TO ASSERT IT

The remaining question is whether the Fiscal Court waived its entitlement to sovereign immunity in this appeal as a result of failing to raise the issue either before the circuit court, the Court of Appeals, or this Court. The weight of authority reflects that it did not. As explained below, sovereign immunity is a variety of subject-matter jurisdiction, and thus Johnson Circuit Court was without authority to entertain the lawsuit in the first instance.

While Kentucky has not directly addressed this point, it has been stated in the federal context that sovereign immunity is a type of subject matter jurisdiction:

> [s]overeign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.' *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 770, 85 L. Ed. 1058 (1941). *See also United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965, 77 L. Ed. 2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction").

F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994).

Additional authority provides that the same rule applies in the state context. *See, e.g.*, 81A CJS *States* § 534 (2010) ("Sovereign immunity is jurisdictional immunity from suit. The constitutionally guaranteed principle of state immunity acts as a jurisdictional bar to an action against the state by precluding a court from exercising subject-matter jurisdiction."); 72 Am. Jur.

2d *States, Territories, and Dependencies* § 120 (2010) (Sovereign immunity has been said to be a jurisdictional question, which cannot be waived by conduct or undermined by estoppel); *Ex parte Alabama Dept. of Mental Health and Mental Retardation*, 937 So.2d 1018, 1022 (Ala. 2006) (Sovereign immunity is a jurisdictional bar that deprives a court of subject-matter jurisdiction.); *Latham v. Department of Corrections*, 927 So.2d 815, 820 (Ala. 2005) (Even where the State has not properly argued sovereign immunity as a defense to an action, a trial or an appellate court should, at any stage of the proceedings, dismiss a suit when it becomes convinced that it is a suit against the State.); *Leonhard v. U.S.*, 633 F.2d 599, 618 fn 27 (C.A.N.Y. 1980) (Noting that a sovereign immunity defense is jurisdictional and cannot be waived); *LaRoche v. Doe*, 594 A.2d 1297, 1300 (N.H. 1991) ("Sovereign immunity is a jurisdictional question 'not to be waived by conduct or undermined by estoppel.'") (*citing* W.P. Keeton, D. Dobbs, R. Keeton, G. Owen, Prosser and Keeton on the Law of Torts § 131, at 147 (5th ed. Supp. 1988)).

Thus I would hold that sovereign immunity is a type of subject matter jurisdiction and thereby subject to the same rules we apply to the latter type of cases. "It is well-established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte*, as it cannot be acquired by waiver, consent, or estoppel." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 269 (Ky. App. 2005). Upon application of this principle, I believe this Court should *sua sponte* recognize that Johnson County Fiscal Court is protected by sovereign immunity from this lawsuit, that the suit was invalid from its

inception, vacate the decision of the Court of Appeals, and remand the cause to Johnson Circuit Court for dismissal of Three Rivers' complaint with prejudice.[5]

For the foregoing reason I respectfully dissent.

Minton, C.J. and Abramson, J., join.

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[5] That is not to say, however, that hospitals burdened by violations of KRS 441.045 may not seek vindication of their positions on this point, prospectively, by means of a declaratory judgment action pursuant to KRS 418.040. *See Jewish Hospital,* 270 S.W.3d at 910. However, because this case is not properly brought, the issues presented in this appeal may not be decided on the merits. *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992). ("Our courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy.")

COUNSEL FOR APPELLANT:

Eldred E. Adams, Jr.
Adams & Adams
110 East Main Street
P. O. Box 606
Louisa, KY 41230

COUNSEL FOR APPELLEE:

Michael S. Endicott
225 Court Street
P. O. Box 181
Paintsville, KY 41240

COUNSEL FOR AMICUS CURIAE,
KENTUCKY HOSPITAL ASSOCIATION:

Wesley Reed Butler
Barnett, Benvenuti & Butler, PLLC
489 E. Main St., Ste. 300
Lexington, KY 40507-1541

COUNSEL FOR AMICUS CURIAE:
KENTUCKY ASSOCIATION OF COUNTIES, INC.;
KENTUCKY COUNTY JUDGE-EXECUTIVE ASSOCIATION, INC.;
THE KENTUCKY MAGISTRATES AND COMMISSIONERS ASSOCIATION;
THE KENTUCKY JAILERS ASSOCIATION

Brent L. Caldwell
Caldwell, Caldwell & Caldwell, PLLC
156 Market Street
Lexington, KY 40507

Timothy A. Sturgill
Kentucky Association of Counties
380 Kings Daughters Dr.
Frankfort, KY 40601