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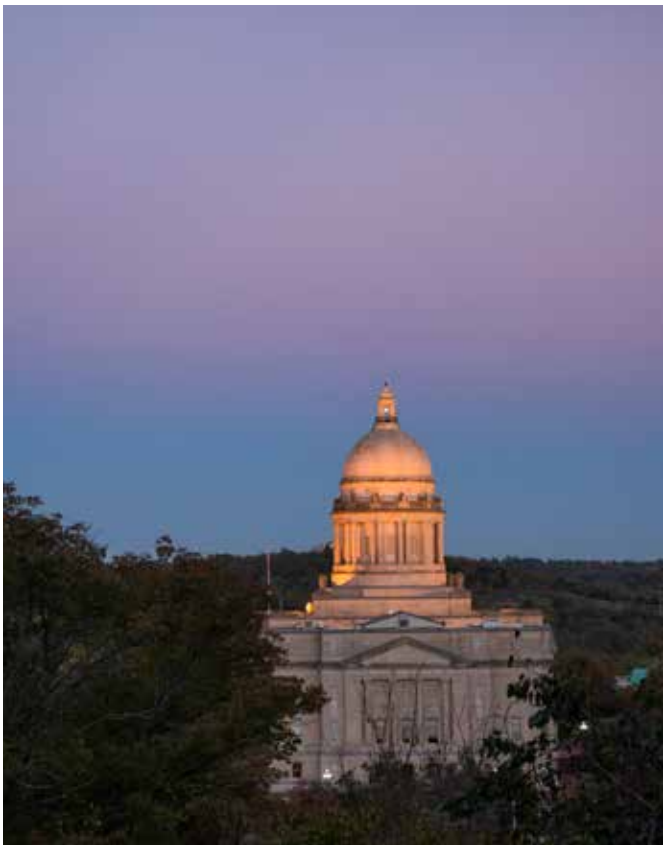
GOVERNMENTAL IMMUNITY – AN ANCIENT DOCTRINE WITH EVOLVING APPLICATIONS



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Currently, governmental immunity stands as an absolute bar to suit against governmental entities absent legislative waiver or consent. Although an ancient doctrine intertwined with sovereign immunity, statistics demonstrate that in recent years there has been a renewed interest in the application of governmental immunity to the defense of various matters. A cursory review of Kentucky cases addressing governmental immunity reveals that in the past one hundred years there have been 293 cases rendered discussing the subject. Illustrating the pace of change, the Courts of the Commonwealth have rendered 40 of those opinions since January 2018, 186 since January 2010, and 243 since 2000. When defending an action on behalf of a governmental or quasi-governmental entities, consideration of this doctrine – and how it may be evolving – is necessary for the proper defense of these entities, particularly to avoid waiver. *See United States v. Lee,* 106 U.S. 196 (1882); *Alden v. Maine*, 527 U.S. 706 (1999); *Hans v. Louisiana*, 134 U.S. 1 (1890).

A Brief History of Sovereign and Governmental Immunity

A common law and constitutional law doctrine known as sovereign immunity bars suits against federal and state governments in most circumstances. Our Constitution does not refer to sovereign immunity, as it is a doctrine of English law that became an established doctrine in the United States from our inception. As explained in United States v. Lee, 106 U.S. 196, 206 (1882):

> [T]he doctrine is derived from the laws and practices of our English ancestors; and . . . is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country...And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.

"Governmental 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). Governmental immunity is an offshoot of sovereign immunity but is derived from a different source. *Yanero v. Davis,* 65 S.W.3d 510, 519 (Ky. 2001). Legal scholars appear to be in general agreement that governmental immunity had its genesis in the English case of *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (1788). *See* Borchard, *Government Liability in Tort*, 34 Yale L.J. 1 (1924). In *Russell*, the court upheld a claim of immunity against a political subdivision upon the fear that "an infinity of actions" would arise and that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 2 T.R. at 671, 673, 100 Eng. Rep. at 362. Underlying the holding was presumably the English notion, based upon centuries of monarchial rule, that t*he King could do no wrong. Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). From this concept evolved doctrines exempting governmental units from vicarious tort liability because the ruling authority of the commonwealth could not as principal be held to account, either personally or under the concept of *respondeat superior*, for the negligent acts of his servants. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209 (1963).

The doctrine of governmental immunity was imported to the United States in the early part of the 19th century with *Russell* being

relied upon to deny tort recovery against state and municipal governments. *See Mower v. Leicester*, 9 Mass. 247 (1812). Rhode Island recognized the doctrine as it applied to municipal corporations in *Wixon v. City of Newport*, 13 R.I. 454 (1881). There the court held that a municipality was immune for either the nonperformance or the negligent performance of its employees and officers while they were engaged in the exercise of a governmental function.

Immunity claims are different than other defenses. Immunity is a shield against suit and is meant to protect the state, special purpose units of governments, and to a lesser extent, its individual officers, from the expense and harassment of trial. *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). Although governmental tort immunity was adopted in the majority of jurisdictions, since the 1950s there has unfortunately been a gradual chipping away of the impenetrable barrier which it once presented. About the midpoint of the 20th century, there came a push that the doctrine could no longer be justified on the basis of "an amorphous mass of cumbrous language about sovereignty * * *." Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363, 1364 (1954).

Application Under Kentucky Law

In *Breathitt County Board of Education v. Prater*, along with addressing the availability of interlocutory review of immunity decisions, our Supreme Court addressed that governmental immunity, as explained in *Yanero*, is a public policy premised on the notion "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." 292 S.W.3d 883, 887 (Ky. 2009) (citing *Yanero*, 65 S.W.3d at 519). Given this underpinning, governmental 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. *Id.*

The Court in *Prater*, in addressing local boards of education, held that:

> [a] board of education is an agency of state government and is cloaked with governmental immunity; thus, it can only be sued in a judicial court for damages caused by its tortious performance of a proprietary function, but not its tortious performance of a governmental function, unless the General Assembly has waived its immunity by statute.

Prater, 292 S.W.3d at 887 (Ky. 2009) (*citing Grayson County Board of Education v. Casey*, 157 S.W.3d 201, 202-03 (Ky. 2005)). "The principle of governmental immunity from civil liability is partially grounded in the separation of powers doctrine embodied in Sections 27 & 28 of the Constitution of Kentucky." *See Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). As mentioned above, "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." *Id.* Put another way, "it is not a tort for government to govern." *Id.* 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. *Id.*

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.

In *Prater*, the question was whether the Board of Education's provision of on-site housing for its night watchperson is appropriately characterized as governmental or proprietary. The Court in *Prater* acknowledged that the distinction is sometimes difficult to draw but found in recent cases that the courts held that education is an integral aspect of state government and that activities in direct furtherance of education will be deemed governmental rather than proprietary. In *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), for example, the Court held that notwithstanding the fact that the University of Kentucky Medical Center competes with private hospitals, its essential role in the teaching mission of the University of Kentucky College of Medicine rendered its activities governmental. In *Yanero*, the Court held that interscholastic athletics contributed substantially to the educational purposes of the secondary schools and thus that a school board performed a governmental function when it authorized such athletics at its schools. 65 S.W.3d at 527. Similarly, in *Autry v. Western Kentucky University*, 219 S.W.3d 713 (Ky. 2007), the Court held that Western Kentucky University's provision of dormitory housing for its students constituted a governmental function, not a proprietary one: "Other providers of housing do so as a business, for profit; WKU does so as part of its definitive function. Viewed in this light, WKU clearly is entitled to governmental immunity."

In 2009 the Kentucky Supreme Court reiterated that governmental immunity derives from sovereign immunity and is granted to qualified governmental agencies or entities. *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). The Court reasoned that the test has two parts: looking at the source of the entity in question and the nature of the function it carries out. *Id.* First, a court examines the origin, or "parent," of the entity to determine if the entity is an agency (or alter ego) of a clearly immune parent. Second, a court assesses whether the entity performs a "function integral to state government." *Id.* at 99. Examples at the state level include police, public education, corrections, tax collection, and public highways. *Id.* The Court acknowledged that the "function integral to state government" prong had been the focus of sovereign immunity from early on. *See Gross v. Kentucky Board of Managers of World's Columbian Exposition*, 105 Ky. 840, 49 S.W. 458, 459, 20 Ky. L. Rptr. 1418 (1899) (relying in part on the fact that the entity "was not created to discharge any governmental function"). Entities performing proprietary functions and/or addressing purely local concerns do not qualify for the protections of governmental immunity. *See, e.g., Transit Authority of River City v. Bibelhauser*, 432 S.W.3d 171 (Ky. App. 2013) (finding that Transit Authority met the first prong but not the second prong

of the *Comair* test).

The Kentucky Courts have recently reiterated the standard by which the Court reviews rulings concerning governmental immunity claims:

> The issue of whether a defendant is entitled to the defense of sovereign or governmental immunity is a question of law. *See Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (citing *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 825 (Ky. 2004)). Questions of law are reviewed de novo. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). We also note that "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). See *University of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017).

Univ. of Louisville v. Britt, No. 2016-CA-001036-MR, 2019 WL 1969511, at *2 (Ky. App. May 3, 2019) (emphasis added).

Current Immunity Cases in Kentucky

The Kentucky Supreme Court has recently granted discretionary review in two cases which will impact whether governmental immunity may be extended to area development districts and will examine, under the first prong of the *Comair* test, whether these districts qualify as either a public agency or special purpose units of government. These cases are *Howard v. Big Sandy Area Development District, Inc.*, 2018-SC-000601-D, and *Northern Kentucky Area Development District, Inc. v. Wilson*, 2018-SC-000601-D. Area development districts are a creature of statute and created under KRS 147A.050. On February 10, 1972, the Kentucky General Assembly established the area development districts as special purpose units of government with enactment of Kentucky Revised Statute 147A.050-120. Although KRS 147A.080(2) grants the authority to "sue and be sued," the Kentucky Supreme Court has clearly held that this power merely "authorizes suits on contracts or to protect one's property, but not for torts." *Grayson County Bd. of Educ. v. Casey, Ky.*, 157 S.W.3d 201, 207 (2005).

Howard v. Big Sandy Area Development District, Inc., 2018-SC-000601-D

In *Howard*, the Executrix of the Estate of Ms. Emma Jean Hall appealed 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 governmental immunity and other grounds. Big Sandy Area Development District operates, among other services, a regional homecare program for eligible individuals in conformity with 910 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]

The short version is that area development districts (ADDs) are types of political subdivisions known as "special districts."

The Court of Appeals and trial court applied the two-pronged *Comair* test for whether an entity qualifies for governmental immunity. First, the Court examined the origin, or "parent," of the entity and determined that the entity was an agency or alter ego of a clearly immune parent. *Comair*, 295 S.W.3d at 99. Second, the Court assessed whether the entity performs a "function integral to state government." *Id.* The circuit court concluded Big Sandy satisfied the first prong and agreed with the circuit court's conclusion. The Estate offered 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 KRS 147A.050(11). Area Development Districts 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 and Court of Appeals determined Big Sandy's administration and provision of homecare services qualified as a function integral to state government. The Court of Appeals explained that 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. *Id.* at 9. The Court held that 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. *Id.* at 11. Additionally, the General Assembly had 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. *Id.* at 12.

North Kentucky Area Development District, Inc. v. Wilson, 2018-SC-000601-D

Northern Kentucky Area Development District (NKADD) is one of fifteen area development districts in the state of Kentucky created by KRS 147A.050. Area development districts are inter-county bodies which work with local governments in their particular regions on a wide-ranging number of projects and issues. NKADD provides a variety of services to eight counties in the Northern Kentucky region, including programs focused on ensuring quality of life for the elderly, mentally and physically impaired, homeless, and impoverished, as well as providing employment and educational opportunities. The Supreme Court's decision in Wilson will likely impact the governmental immunity analysis when analyzing similar entities under the first prong

of the *Comair* analysis.

One program offered by NKADD is a regional adult homecare service operated in conjunction with the Cabinet for Health and Family Services. This is essentially the same program offered by Big Sandy Area Development District in the *Howard* case addressed above. The Cabinet, either directly or through a contracting entity, is tasked with funding and implementing in each area development district formed under KRS 147A.050 a program "of essential services" designed at preventing "the unnecessary institutionalization of functionally impaired elderly persons." See KRS 205.460(1). Plaintiff Wilson filed a complaint with the Boone Circuit Court against NKADD alleging that NKADD violated the Kentucky Whistleblower Act by subjecting her to reprisal after she reported the suspected fraud and asking for compensatory and punitive damages.

NKADD moved for summary judgment arguing that NKADD was not a political subdivision under the Kentucky Whistleblower Act. The Boone Circuit Court granted NKADD's renewed motion for summary judgment, relying on the test for sovereign immunity set forth in *Comair* and determining that NKADD was not a "political subdivision" of the state, and therefore not subject to the Kentucky Whistleblower Act. Specifically, the court found that the interests that NKADD serves are not functions "integral to state government" as required under the *Comair* test. Plaintiff Wilson appealed the granting of summary judgment, and the Court of Appeals reversed.

The Kentucky Whistleblower Act was enacted to discourage governmental abuses of power and to encourage those who may have knowledge of any such abuses to step forward with that knowledge without the fear of retaliation. *See Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792-93 (Ky. 2008). The Kentucky Whistleblower Act, codified as KRS 61.102 *et seq.*, provides in pertinent part:

> "No employer shall subject to reprisal . . . any employee who in good faith reports . . . any facts or information relative to an actual or suspected violation of any law . . . ."

In turn, "employer" is defined as "the Commonwealth of Kentucky *or any of its political subdivisions*[.]" *Id.* citing KRS 61.101(2).

In reversing summary judgment, the Court of Appeals explained that NKADD is a statutorily-created entity pursuant to KRS 147A.050(7), and KRS 147A.080(10) states that "[a]n area development district shall be deemed a 'public agency' as defined by . . . KRS Chapter 65." In turn, KRS 65.230 defines a "public agency" as:

> *any political subdivision of this state, any agency of the state government* or of the United States, a sheriff, any county or independent school district, and any political subdivision of another state.

The Court of Appeals held that the plain language of the statutes, when read together as a whole and by process of elimination under KRS 65.230, indicates that area development districts potentially fall into one of two categories, either of which fall under the Kentucky Whistleblower Act: a political subdivision of the Commonwealth of Kentucky or an agency of the Commonwealth of Kentucky. *See Stanford v. U.S.*, 948 F. Supp. 2d 729, 736 (E.D. Ky. 2013) (a federal court applying Kentucky

law found that an area development district was a political subdivision of the state pursuant to KRS 147A.080(10) and KRS 65.230). The Court found, pursuant to the plain language of the foregoing statutes and taking the statutory framework as a whole, that area development districts are political subdivisions subject to the Kentucky Whistleblower Act. *Id*. at 8. This holding is consistent with the holding in *Howard* regarding the first prong under the *Comair* analysis.

Other matters where discretionary review is currently being sought

Another matter in which discretionary review is currently being sought is the case of *Federated Transportation Services of the Bluegrass, Inc. v. Walling*, No. 2019-SC-000310. In *Walling*, the Court of Appeals held that Appellant had not satisfied the first prong of the *Comair* test and is not entitled to the shield of sovereign immunity. Appellant had argued that private entities to which the state delegates functions should be afforded governmental immunity for those functions. The Court explained that Appellant FTSB is a nonprofit 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.

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. The Court found that 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. The Court of Appeals went on to find that even had they agreed with FTSB as to its alter ego status, the Court would nevertheless be compelled to conclude it is not entitled to sovereign immunity as it does not perform an integral state function. Ultimately, the Court found that FTSB provides the same type of transportation services as other for-profit taxi and transportation services in its service area. FTSB seeks review of the "integral state function prong" as well requesting that the Court extend the entitlement of immunity due to their provision of medically necessary transportation to Medicaid recipients.

Discretionary review is also being sought for a second time (after remand) in *Upper Pond Fork Volunteer Fire Department, Inc v. Kinser*, 2019-SC-000563-D, in which the Court is being asked to determine whether there is a factual component to the governmental immunity analysis when the Courts have previously acknowledged that in Kentucky, there is a "longstanding tradition of treating fire-fighting as a governmental function . . . . " *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009). In Caneyville the Court recognized that *"indeed, one would be hard-pressed to think of a more representative government function." Id.* (emphasis added).[3]

In *Upper Pond*, the Kentucky State Police had received a call that a man was trapped under a car on a strip job road next to KY 199 in the Stone area of Pike County, Kentucky. When the Trooper arrived on scene, he found Mr. Kinser lying beside his car and his arm was under the front tire. Upper Pond Fork Volunteer Fire Department performed emergency services to free Mr. Kinser. Mr. Kinser claims they did so negligently. The trial court denied dismissal upon governmental immunity grounds and an interlocutory appeal was sought under the authority of *Prater*. The Court of Appeals *sua sponte* dismissed the appeal as being premature. Thereafter, discretionary review was sought and granted in 2018-SC-000179-D. The Supreme Court remanded with instructions to consider *"whether there was sufficient evidence to warrant a summary judgment on immunity grounds."* (emphasis added)." The Court of Appeals, after remand, again dismissed the appeal finding that the trial court did not conclusively determine any disputed question, resolve any right, or otherwise provide a record for review. The trial order denied a claim of immunity for the time being on the basis that further discovery was needed. It is movant's argument that there are no issues of fact to address in analyzing the absolute defense of governmental immunity.

Immunity claims are different than other defenses. Immunity is a shield against suit and is meant to protect the state, and to a lesser extent, its individual officers from the expense and harassment of trial. *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). The interest in avoiding the burden of litigation is lost if immunity is denied and the claimant is subjected to prolonged litigation, discovery and trial. The United States Supreme Court has held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment [.] ..." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). The Kentucky Supreme Court has been persuaded on this basis and in the holding of *Breathitt County Board of Education v. Prater*, found, "the Supreme Court's reasoning persuasive, and thus agree . . . that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Id*. 292 S.W.3d 883, 887 (Ky. 2009).

Conclusion

Governmental immunity, when properly used, is an effective shield against suit and will protect those entities shielded from the expense and harassment of prolonged litigation, discovery and trial. Notwithstanding the ancient origins of this doctrine, Kentucky's governmental immunity doctrine continues to evolve and remains a viable, complex and developing absolute defense against suit which is essential to the competent representation of governmental, quasi-governmental, special purpose units, and other entities throughout the Commonwealth.

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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), defining "homecare services."

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 147A.120[.]") For a more extensive discussion of the general nature of ADDs, s*ee Gateway Area Development District, Inc. v. Cope*, No. 2013-CA-001855-MR and No. 2013-CA-001937-MR, 2015 Ky. App. Unpub. LEXIS 870, 2015 WL 602726 (Ky. App. Feb. 13, 2015) (unpublished).

3 Additionally, KRS 75.070 provides fire departments and firefighters with absolute immunity from civil liability when performing any emergency services.