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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1095-MR

LORA RUSSELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE DIANE MINNIFIELD, JUDGE
ACTION NO. 22-CI-03204

UNIVERSITY OF KENTUCKY
MEDICAL CENTER D/B/A UK
HEALTHCARE, D/B/A UNIVERSITY
OF KENTUCKY HOSPITAL A.B.
CHANDLER MEDICAL CENTER
D/B/A UK MEDICAL CENTER; AND
UNIVERSITY OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ECKERLE, A. JONES, AND TAYLOR, JUDGES.

JONES, A., JUDGE: Lora Russell ("Russell") appeals the Fayette Circuit Court's August 24, 2023, Order dismissing her claim against the Appellees, University of Kentucky Medical Center, d/b/a UK Healthcare, d/b/a University of Kentucky

Hospital A.B. Chandler Medical Center, d/b/a UK Medical Center and University of Kentucky (collectively, "UK Healthcare"), based on governmental immunity. After careful review, we affirm.

I. BACKGROUND

This matter concerns medical care Russell received at UK Healthcare, beginning when she was diagnosed with a carcinoid tumor on her lung in April 2019. Record ("R.") Vol. I at 7-17. Her care was directed by Dr. Aman Chauhan, an oncologist employed by the University of Kentucky. *Id.* Dr. Chauhan has since taken a position at the University of Miami in Miami, Florida. On March 4, 2021, Russell received a CT scan of her chest and abdomen. *Id*. Following the CT scan, Russell underwent a comprehensive PET scan on April 15, 2021. *Id*. On October 15, 2021, Russell had another chest CT scan, which showed abnormalities on her right kidney. *Id*. An MRI taken on November 5, 2021, revealed a mass on Russell's right kidney consistent with renal cell carcinoma. R. at 7-17.

Russell alleges that the mass on her right kidney was visible in the imaging from April 2019, according to the UK Healthcare physicians reading the imaging in November 2021. *Id*. On December 8, 2021, Russell was notified she had cancer in her kidney that was previously visible, but not noted, on the April 15, 2021, PET scan. *Id*. Surgery was performed on January 4, 2022, to remove Russell's right kidney. *Id*.

Russell filed suit on November 2, 2022, against UK Healthcare/Norton Healthcare Strategic Health Alliance, Inc., and the University of Kentucky Markey Cancer Foundation, Inc., along with the individual physicians, Aman Chauhan, M.D., Conor M. Lowry, M.D., and Halemane S. Ganesh, M.D. *Id*. On November 23, 2022, Russell filed an amended complaint adding the University of Kentucky, the University of Kentucky Medical Center, and Blaine T. Mischen, M.D., as defendants. R. Vol. I at 23-32. UK Healthcare/Norton Healthcare Strategic Health Alliance, Inc., and the University of Kentucky Markey Cancer Foundation, Inc., moved for dismissal based on their being improper parties. R. Vol. I at 35-47, 48-54, and 63-64. Dr. Lowry moved to dismiss the complaint on the grounds that he did not breach the standard of care owed to Russell, and Dr. Ganesh moved for dismissal alleging that he did not treat Russell. *Id*. These motions were not opposed by Russell, and on December 16, 2022, the trial court entered an Agreed Order dismissing those parties. R. Vol. I at 88-90.

The University of Kentucky, including the Medical Center, subsequently moved to dismiss based on governmental immunity, which the trial court granted. R. Vol. II at 161-67, 269-72. This appeal followed.

II. STANDARD OF REVIEW

A trial court is not required to make findings of fact when presented with a motion to dismiss. *Mitchell v. Coldstream Laboratories, Inc.*, 337 S.W.3d

642, 644-45 (Ky. App. 2010). Therefore, a motion to dismiss is reviewed *de novo*. *Id*. at 645. The determination of whether governmental immunity applies to a party is also a question of law, and, therefore, reviewed *de novo*. *University of Kentucky v. Regard*, 670 S.W.3d 903, 911 (Ky. 2023).

III. ANALYSIS

On appeal, Russell argues that UK Healthcare should not be entitled to governmental or sovereign immunity because it: (1) engages in proprietary activities; (2) does not perform "integral government functions"; and (3) is not under the direction and control of the state government and solely supported by Kentucky State Treasury funds.

"Sovereign immunity is a bedrock component of the American governmental ideal, and is a holdover from the earliest days of the Commonwealth, having been brought over from the English common law." *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009). Conceptionally, sovereign immunity is best viewed as an intrinsic attribute of the state itself. *Commonwealth v. Kelley*, 236 S.W.2d 695, 696 (Ky. 1951) ("Immunity from suit has always been an attribute of state sovereignty."); *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). The state's inherent immunity is broad; it protects the state not only from the imposition of money damages but also from the burdens of defending a lawsuit. *Meinhart v. Louisville Metro Government*, 627

S.W.3d 824, 830 (Ky. 2021); *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004) ("Immunity from suit includes protection against the 'cost of trial' and the 'burdens of broad-reaching discovery' that 'are peculiarly disruptive of effective government.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 409-10 (1982)).

Because much of the state's work is actually performed at the agency level, the doctrine of sovereign immunity has evolved over time. *Jacobi v. Holbert*, 553 S.W.3d 246, 254 (Ky. 2018). It is now well-established that departments, boards, and agencies that are integral parts of state government enjoy the same type of immunity as the state itself. *See Bryant v. Louisville Metro Housing Authority*, 568 S.W.3d 839, 846 (Ky. 2019). However, the immunity of governmental and quasi-governmental agencies is referred to as "governmental" as opposed to "sovereign" immunity. *Id.*

The central difference between governmental and sovereign immunity is that the state, as a separate, sovereign entity, enjoys automatic, unqualified immunity. The state's immunity flows from its very existence as a sovereign. Governmental immunity, however, is not automatic. The immunity of "public and quasi-public agencies outside the fundamental departments of state government" depends on whether the agency was created by or at the behest of the state and

whether it is performing a function that is integral to state government. *Board of Trustees of Kentucky School Boards Insurance Tr. v. Pope*, 528 S.W.3d 901, 904 (Ky. 2017) (citing *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009)).

While, over the years, Kentucky appellate opinions have inconsistently labeled the immunity of the Commonwealth's public universities, sometimes calling it sovereign and other times referring to it as governmental, the result has remained consistent.[1] Public universities within Kentucky are immune from suit except as authorized by the General Assembly. *Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014) ("The state universities of this Commonwealth, including the University of Kentucky, are state agencies that enjoy the benefits and protection of governmental immunity except where it has been explicitly waived by the legislature."); *Department of Corrections v. Furr*, 23 S.W.3d 615, 617 (Ky. 2000) ("The doctrine of sovereign immunity sweeps broadly. It shields *inter alia* counties, boards of education, public universities, university hospitals and all departments, boards or agencies that are such integral

[1] The Commonwealth's public universities are "independent agenc[ies] and instrumentalit[ies] of the Commonwealth," which are attached to the executive branch. *University of Kentucky v. Moore*, 599 S.W.3d 798, 809 (Ky. 2019). As such, they are more properly described as enjoying governmental as opposed to sovereign immunity. *See id*.

parts of state government as to come within regular patterns of administrative organization and structure.") (internal quotation marks and citations omitted).

The narrower issue presented by Russell pertains to whether the University of Kentucky's proprietary healthcare operations should be entitled to the same level of immunity. This issue has already been resolved by the Kentucky Supreme Court. In *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), a patient filed a medical malpractice action against the University of Kentucky for negligence of certain physicians at its hospital. In rejecting many of the same arguments Russell asserts before us, the Kentucky Supreme Court held that even though UK Healthcare generated its own funds by charging for healthcare and had procured liability insurance, its function remained primarily governmental, and its healthcare-related activities were an integral part of fulfilling the Commonwealth's mission of providing public healthcare, entitling it to immunity. The Court explained:

> Appellants seek to avoid the blanket of immunity by reference to *Gross v. Kentucky Board of Managers*, 105 Ky. 840, 49 S.W. 458 (1899), a case from the last century which holds that not every corporation created by the state is entitled to sovereign immunity. *Gross* was relied upon in *Kentucky Center for the Arts v. Berns*, Ky., 801 S.W.2d 327 (1991), in making a distinction between a governmental function and a proprietary function performed by an entity having governmental roots. Relying on the "change in performance location" example found in *Berns*, 801 S.W.2d at 330-31, appellants contend that in a major aspect, the University

> of Kentucky Medical Center is nothing more than a hospital which is in full competition with and performs the same function as private hospitals. As such, they argue that in this respect, the University should be stripped of its immunity.
>
> The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school. Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible. Medical students and those in allied health sciences must have access to a sufficient number of patients in a variety of settings to insure proper training in all areas of medicine. Such is essential to the mandate of KRS[2] 164.125(1)(c).
>
> Moreover, and even if we were so inclined, there would be no authority for a decision of this Court whereby we refused to accord an immune entity its protection under the law. Sovereign immunity is "deeply implanted in the law of the Commonwealth through Section 231 of the Kentucky Constitution." *Kestler v. Transit Authority of Northern Kentucky*, Ky., 758 S.W.2d 38 (1988). Once it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it or abrogate the legal doctrine. *Fryman v. Harrison*, Ky., 896 S.W.2d 908 (1995); *Calvert Investments, Inc. v. Louisville & Jefferson Metropolitan Sewer District*, Ky., 805 S.W.2d 133 (1991).

Id. at 343-44 (footnote omitted). The Court further held that the UK Healthcare's purchase of liability insurance whether or not pursuant to statutory authorization did not amount to a waiver of immunity. *Id.* at 344.

[2] Kentucky Revised Statutes.

Withers is dispositive of the issue before us and is binding on this Court. SCR[3] 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.").

IV. CONCLUSION

For the foregoing reasons, the Fayette Circuit Court's August 24, 2023, Order is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[3] Kentucky Supreme Court Rules.