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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001290-MR

MARK SAUNIER, BARBARA
SAUNIER, AND COMFORT AND
PROCESS SOLUTIONS, INC.
(NOW KNOWN AS CPS SAUNIER, INC.) APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-01440

LEXINGTON CENTER CORPORATION
AND UNIVERSITY OF KENTUCKY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This is an appeal in a personal injury action in which the plaintiffs contest the dismissal of one defendant on immunity grounds and seek a new trial due to reversible error related to a second defendant. We affirm.

In late 2013, Mark Saunier injured his knees when he fell on an electrical cable protector at the bottom of a flight of steps at Rupp Arena while attending a University of Kentucky (UK) basketball game. Lexington Center Corporation (LCC) owns and operates Rupp Arena and in 1976 and 1998 had entered into a lease agreement with UK to hold basketball games in that location. The lease defines the duties of UK and of LCC and its employees, including fire marshals. Pursuant to Section IV(N) of the 1998 lease, UK, as the lessee, "shall have institutional control of the arena for all of its basketball games and shall provide and supervise ushers, security guards, first aid attendants and special police in order to exercise such control."

Saunier and his wife, Barbara, filed a complaint in Fayette Circuit Court in April 2014, naming LCC as the defendant. The Sauniers sought damages for LCC's negligence in the placement of the cable cover, which they alleged created a trip hazard and led to Mark's fall. Mark sought compensatory damages for his personal injuries, including medical expenses, pain and suffering, and wage loss. Barbara sought damages for loss of spousal consortium. LCC disputed the Sauniers' claims, citing contributory negligence among other defenses. After some discovery had been propounded, the Sauniers filed an amended complaint in October 2014, naming UK and UK's fire marshals on duty the night of his fall, Glenn G. Williamson and Jason D. Ellis. The Sauniers claimed that Williamson

and Ellis were negligent in their exercise of institutional control of Rupp Arena, specifically in permitting the raised cable cover to be placed where it constituted a tripping hazard and caused Mark to fall. LCC, Williamson, and Ellis raised the defense of governmental immunity in their answers to the amended complaint.

In November 2014, UK moved to be dismissed as a defendant based upon sovereign immunity pursuant to *Withers v. University of Kentucky*, 939 S.W.2d 340, 343 (Ky. 1997). The court granted the motion by order entered December 10, 2014.

In September 2015, Williamson and Ellis filed their first motion for summary judgment, seeking dismissal on the basis of qualified official immunity. LCC also filed a motion for summary judgment, arguing that LCC did not owe a duty to Mark pursuant to its lease with UK and that it was entitled to sovereign immunity because it was created to serve as an agency under the Lexington-Fayette Urban County Government. The Sauniers objected to both motions. The circuit court denied both motions in orders entered December 2 and 3, 2015. Williamson and Ellis appealed the ruling, and this Court reversed in an opinion rendered May 19, 2017. We held:

> While the duty to safely maintain a given area may be ministerial, "giving orders to effectuate" supervisory decisions has been held to be discretionary. *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014). To be sure, a general supervisor acts in a discretionary capacity, rather than a ministerial capacity, when delegating tasks

to subordinates. In *Marson*, the principal of a school acted in a discretionary capacity when delegating a more specific duty of supervision, or assigning ministerial tasks, to teachers and custodians. *Id*. at 299-300.

The evidence established that Williamson's and Ellis's duty relative to the aisle pads was discretionary. Botkin's testimony cast Williamson and Ellis in a general supervisory role with respect to safety issues in Rupp Arena, noting that while his own responsibilities were likewise unwritten, they included keeping the aisles in his own designated area "open" for the fire marshal.

The testimony of several witnesses established the authority of the fire marshal to give orders to effectuate their decisions regarding safety. As noted above, Botkin's testimony cast Williamson and Ellis in a supervisory role on issues of safety. Williamson testified in his deposition that if he had noticed the pad's position before Saunier fell, he would have "got on the radio and talked to somebody with Lexington Center and said 'we need to get this moved.'" Ellis testified similarly, that he would have either notified Williamson, or directed someone else to move the pad. This indicates not only that the fire marshals were not themselves tasked with moving or placing the pads, but also that the individuals whose duties did include movement and placement were subordinate to the fire marshals and obligated to move them upon request. Barber's testimony indicated that his staff, who place the pads, is not responsible for safety issues.

Much like the principal in *Marson*, the fire marshal's task is not to perform the act intended to further the purpose of safety, but rather to assign the task to another to effectuate. The duty to look out for the safety of the game's attendees is a "general rather than a specific" duty, requiring Williamson and Ellis to act in a discretionary manner by devising procedures, assigning

> tasks, and providing general supervision to ensure the tasks were accomplished. *Marson* at 299.
>
> Because the trial court's decision denying Williamson and Ellis qualified immunity relied on an erroneous conclusion as to the nature of their duties, we reverse and direct the trial court to enter orders consistent with this opinion.

Williamson v. Saunier, No. 2015-CA-001993-MR, 2017 WL 2211376, at *3 (Ky. App. May 19, 2017). That opinion became final on July 21, 2017.

As a result of that ruling, the Sauniers filed a motion *in limine* in the circuit court requesting that there be no apportionment to the immune defendants (Williamson and Ellis) or any evidence admitted or argument that Mark's fall was their fault. LCC disagreed with this motion, arguing that a jury should hear evidence of fault against UK, Williamson, and Ellis, and that it was entitled to an apportionment instruction against them.

The court held a hearing on November 17, 2017, at which time the parties and the court extensively discussed apportionment to the immune defendants. The court noted that the caselaw was clear that with absolute immunity, no apportionment instruction would be permitted. And the court first thought the same reasoning would apply in qualified immunity cases and that appellate courts would not allow an apportionment instruction. The court, however, did not think this would be fair in the present case because it did not know how to address UK's involvement. The court ultimately decided to allow the

apportionment instruction and discussion of the contract by the parties at trial, noting that it was bound by the earlier decision of this Court.

By order entered November 27, 2017, and pursuant to this Court's opinion, the circuit court set aside the December 3, 2015, order and granted the motion for summary judgment filed by Williamson and Ellis. The Sauniers sought clarification and reconsideration of the circuit court's ruling related to apportionment. By separate motion, they sought to reinstate their claims against UK for the same reason the court expressed for allowing apportionment. The court heard arguments on these motions on December 8, 2017. The court first ruled that the contract could be admitted at trial. It then confirmed that it would include an apportionment instruction to the fire marshals.

In December 2017, LCC filed a motion for partial summary judgment related to Mark's claim for business loss, arguing that his damages should be limited to 49% because that was the amount of the business he owned. In January 2018, the Plaintiffs filed a third amended complaint to conform to the evidence, naming Comfort and Process Solutions, Inc. (now known as CPS Saunier, Inc.) (CPS), as a plaintiff. The Sauniers owned this corporation, and they claimed that as a result of Mark's injuries, they sustained business and economic losses. LCC objected to the motion, stating that the claims were barred by the statute of limitations and that the cause of action was not properly pled. The Sauniers also

objected to LCC's motion for partial summary judgment. They stated their economic loss was up to $2,618,766.00 and was due to the sale of the company falling through because of Mark's injuries. They attached a copy of the February 25, 2014, letter of intent setting forth the terms and conditions on which Huron Capital Partners was proposing to recapitalize CPS. Following brief arguments at a motion hour on January 5, 2018, the circuit court denied LCC's motion for partial summary judgment, granted the motion to file a third amended complaint, and denied the motion to reinstate UK. A jury trial was scheduled for July 30, 2018.

Prior to trial, LCC filed motions seeking partial summary judgment on several claims, including the business and economic loss claim. This claim hinged on the interpretation of the following portions of Paragraph 6 from the letter of intent:

> a) The transaction would be structured as a purchase of stock and the parties would jointly make a 338(h)(10) election for tax purposes;
>
> . . .
>
> d) At the closing, the Company [CPS] would own all assets used in the business except for cash and marketable securities. The Company would only retain liabilities for (i) those operating liabilities for trade accounts payable and accrued operating expenses, and (ii) liabilities to perform ordinary course obligations of the Company under operating leases and written contracts disclosed to Buyer [Albireo Energy, LLC] in

> the definitive purchase agreement, but only to the extent accruing after closing and Sellers [the Sauniers] would indemnify Buyer for all other liabilities[.]

The court heard extensive arguments from the parties on this issue at a motion hour in May 2018, and the court requested the parties brief the issue of whether the proposed sale was a stock sale (which would belong to the Sauniers) or some other type of sale.

The court held a subsequent motion hour on June 14, 2018, where the parties presented additional argument regarding the Sauniers' business loss claim. Based upon the language of the letter of intent, the court found the sale to be an asset purchase, despite some language that would support it being a stock purchase. Therefore, it ordered that the Sauniers could not proceed on an individual claim on the economic loss claim. An order granting LCC's motion for summary judgment on the business and economic loss claim, and dismissing that claim with prejudice, was entered July 5, 2018.

On June 18, 2018, the Sauniers filed motions in limine, seeking, in part, to exclude the lease agreement between LCC and UK, which had been deemed admissible at two previous hearings. The court again denied this motion. At a later motion hour, the parties discussed who could testify about the interpretation of the lease. The Sauniers stated that it was a matter of law for the court to decide and that the court needed to define "institutional control" and what

the legal duties of the parties were. LCC countered that lay witnesses could testify about what they did on a day-to-day basis. The court ruled that the lay witnesses should be able to explain why they acted as they did on this particular day and denied the motion to limit or exclude this testimony.

A jury trial began on July 30, 2018. LCC moved for a directed verdict at the close of the Sauniers' case and renewed its motion at the end of its case, arguing that the Sauniers could not establish a negligence claim due to lack of duty because UK had been in control of Rupp Arena at the time of the fall and had responsibility for the aisle where the fall occurred. Therefore, the Sauniers could not establish that LCC owed Mark a duty of care. The court denied the motion and renewed motion, and it permitted the jury to decide the case. The Sauniers moved for a directed verdict on any apportionment to the fire marshals as immune parties and stated there was no evidence they were there that night or violated a duty of care. Therefore, the Sauniers argued, the second instruction should be omitted. The court found that there was sufficient evidence that the marshals were there to deny the motion. The Sauniers also moved for a directed verdict on liability. Again, the court held this was a factual issue for the jury.

The parties went on to discuss jury instructions. Counsel for the Sauniers did not have any issues with Instruction No. 1. As to Instruction No. 2, the court indicated the language it used was from this Court's prior opinion rather

than from the lease as the Sauniers requested. Counsel then argued that the court should define "institutional control" as it was used in Instruction No. 2. The court denied the request because it was not aware of a legal definition of this term and because it had permitted witnesses to testify as to what they believed their duties were based on their respective interpretations of the lease.

Following deliberations, the jury returned a defense verdict under Instruction No. 1, finding that LCC had not failed to meet its duty "to exercise ordinary care to provide its premises in a reasonably safe condition for use by the basketball game attendees, including Mark Saunier." The circuit court entered a judgment on August 9, 2018, memorializing the jury's verdict for LCC on liability and deeming all prior interlocutory orders and judgments to be final. This appeal now follows.

On appeal, the Sauniers present three arguments: 1) that UK was not entitled to governmental immunity; 2) that the circuit court erred in allowing evidence, argument, and duty/apportionment instructions against immune parties; and 3) that the business and economic loss claim was improperly dismissed.

For their first argument, the Sauniers contend that the circuit court erred in ruling that UK was entitled to immunity in this case because its role in the management or institutional control of a sports or entertainment arena was not an integral state function. "The determination of whether an entity is entitled to

protection by the constitutional principle of sovereign immunity is for the judiciary." *Withers*, 939 S.W.2d at 342.

In *Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014) (footnote omitted), the Supreme Court of Kentucky stated that "[t]he 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." Addressing the difference between sovereign and governmental immunity, the *Furtula* Court explained:

> Since the University of Kentucky is a state agency, and not the state itself, they can only have governmental immunity, which while related to and flowing from sovereign immunity, is nevertheless a slightly different concept. *See Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009) (discussing the "law of sovereign immunity, and the related doctrine[ ] of governmental immunity"); *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (noting that "governmental immunity" is different from but is "derived from the traditional doctrine of sovereign immunity"). The difference between the two is that sovereign immunity is absolute and an inherent aspect of the state, whereas a state agency's immunity is qualified to the extent that its existence depends on whether the agency is performing a governmental or proprietary function. *See Yanero*, 65 S.W.3d at 519. However, to the extent that the agency is performing a governmental function, as a state university does, its governmental immunity is functionally the same as sovereign immunity. *Id.* ("[A] state agency is entitled to immunity from . . . liability to the extent that it is performing a governmental, as opposed to a proprietary, function."). Because the immunities are similar, closely related, and

> indeed functionally the same as long as the entity is acting in a governmental capacity, the case law frequently uses the term "sovereign immunity" when discussing the immunity of state agencies. *See id*. (noting the terms are frequently used "interchangeably").

Furtula, 438 S.W.3d at 305 n.1. The Supreme Court has also described university boards as legislatively-created "independent bodies politic" with "immunity from suit." *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 382, 380 (Ky. 2016). And in *Withers*, 939 S.W.2d at 343, the Supreme Court stated, "on the basic question of whether the University of Kentucky is entitled to sovereign immunity, we have no reluctance to answer in the affirmative."

We agree with UK that it is entitled to immunity based upon the foregoing caselaw. We must next determine whether the General Assembly waived UK's immunity. "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." KY CONST. § 231. *See Furtula*, *supra*. The General Assembly opted to waive immunity for state universities, such as UK, in negligence actions as set forth in Kentucky Revised Statutes (KRS) 49.060 and 49.070 via a claim through the Kentucky Claims Commission. However, state universities were otherwise permitted to retain their immunity. *See* KRS 49.070(11) and (12). The Sauniers did not choose to bring their claims through the Kentucky Claims Commission, for

which UK could not have raised an immunity defense. We decline the Sauniers' request that we create an exception to § 231 of the Kentucky Constitution and hold that UK is not immune because its "institutional control" of Rupp Arena was not an integral state function. As UK argues in its brief, the language in *Withers* regarding the essential teaching and research function of UK's medical school is dicta.

Therefore, we hold that the circuit court properly granted summary judgment to UK and decline to reinstate the Sauniers' case against it.

For their second argument, this one related to their claims against LCC, the Sauniers present several evidentiary issues for which it seeks review. They contend that the circuit court erred when it allowed evidence to be admitted, argument against, and duty and apportionment instructions against immune parties Williamson and Ellis, the UK fire marshals. They also argue that the circuit court erred when it did not provide an interpretation or definition of the phrase "institutional control" contained within the lease but rather permitted witnesses to do so.

We shall first address the Sauniers' arguments as to the evidentiary issues, including whether the circuit court erred in admitting the lease as evidence, in allowing lay witnesses to testify as to what their obligations were under the lease, and in failing to define the phrase "institutional control." We review a trial

court's evidentiary rulings for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. at 581.

First, the Sauniers argue that the lease agreement should not have been admitted into evidence because it was unenforceable in the Fayette Circuit Court. But as LCC points out, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Kentucky Rules of Evidence (KRE) 401. We agree with LLC that "[t]he nature of UK's relationship with LCC and the obligations it undertook pursuant to the lease agreement were necessary and relevant facts for the jury to consider in determining fault in this case" and that "[t]he duties of LCC with respect to the arena during UK basketball games are defined by the lease." Therefore, this information was necessary for the jury to reach a proper verdict in this case, and we find no abuse of discretion in the circuit court's ruling to permit the lease agreement to be introduced.

Second, the Sauniers argue that the circuit court should not have permitted lay witnesses to testify about their interpretation of the lease. Again, we agree with LCC that these witnesses, including LCC's event supervisor, the

manager of LCC's engineering department, LCC's senior manager of arena events, and LCC's President and Chief Executive Officer, as well as UK's senior associate athletic director for operations, were all competent to provide factual and informational testimony about the lease. We find no abuse of discretion in this ruling.

Third, the Sauniers attack the circuit court's failure to interpret and define the phrase "institutional control," which was not defined by the lease. The testimony of the lay witnesses was sufficient to present the jury with a proper definition of this phrase, particularly as these witnesses had been acting pursuant to the terms of the lease for some time. We find no error in the circuit court's decision not to define this phrase for the jury.

Fourth, and finally, the Sauniers argue for two reasons that LCC was not entitled to a duty or apportionment instruction as to the UK fire marshals, Williamson and Ellis. First, they were found to be acting in a discretionary fashion in this Court's prior opinion and second, LCC did not introduce any evidence of what they did the night of Mark's fall. Furthermore, the instruction in question violated Kentucky's "bare bones" rule. Generally, "a trial court's decision on whether to instruct on a specific claim will be reviewed for abuse of discretion; the substantive content of the jury instructions will be reviewed *de novo*." *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015).

LCC, in response, argues that this issue is moot because the jury never got to this instruction. Kentucky courts have recognized that "unless there is an actual case involving a present, ongoing controversy, the issues surrounding it become moot." *Com., Dep't of Corrections v. Engle*, 302 S.W.3d 60, 63 (Ky. 2010). "Our courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).

We note that under Instruction No. 1, the court instructed the jury that "[i]t was the duty of [LCC] and its employees to exercise ordinary care to provide its premises in a reasonably safe condition for use by the basketball game attendees, including Mark Saunier." Eleven of the jurors answered "no" under Question No. 1, which asked, "Do you believe from the evidence that [LCC] failed to meet its duties as set out in Instruction No. 1 and that such failure was a substantial factor in causing the Plaintiff, Mark Saunier, to fall?" Once the jury found in favor of LCC under Instruction No. 1 on liability, it had no other instructions to consider.

If the jury had not reached a defense verdict under the first instruction, it would next have been instructed as follows under Instruction No. 2:

> It was the discretionary duty of Glen Williamson and Jason Ellis, as University of Kentucky Fire Marshalls, to exercise ordinary care to keep the aisles of Rupp Arena clear and unobstructed so as to permit safe

> ingress and egress, and identify safety issues, including potential trip hazards, and to direct someone to move the trip hazard, while the University of Kentucky exercised institutional control over Rupp Arena. You will find for the Plaintiff if you are satisfied from the evidence that the Fire Marshalls failed to satisfy its duty and that such failure was a substantial factor in causing Plaintiff's injuries.

And if the jury found liability on the part of LCC or the UK Fire Marshals or both, it would then have had to determine whether Mark failed to meet his duty of exercising ordinary care and what relative percentage of fault to assign to each party. Because the jury found in favor of LCC, it never reached the remaining instructions, including the one addressing the fire marshals. Therefore, we agree with LCC that this issue is moot. We also hold that this issue does not meet any of the exceptions to the mootness doctrine that would permit us to review it.

And even if we were to find error in this instruction, that error would be harmless for the same reason; the jury never reached that instruction. *See CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 69 (Ky. 2010) (footnotes omitted) ("When considering a claim of harmless error under [Kentucky Rules of Civil Procedure] CR 61.01, the court determines whether the result probably would have been the same absent the error or whether the error was so prejudicial as to merit a new trial.").

For their third and final argument, the Sauniers seek review of the circuit court's decision to grant LCC's motion for summary judgment on their

business and economic loss claim. Our standard of review is set forth in *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996):

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "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, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), *citing Steelvest, supra* (citations omitted).

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

We agree with LCC that because the jury did not return a verdict in the Sauniers' favor, this claim must necessarily fail as well. However, even if we

were to reach this issue, we recognize that the letter of intent was not a contract for sale but merely set forth a proposal to purchase the Sauniers' company. And because the Sauniers' economic loss claim would be derivative to the corporation's right to bring a cause of action, they could not bring this suit individually. We also agree with LCC that while the language of the letter of intent is rather questionable, the intended sale was an asset sale, not a stock purchase. Therefore, the circuit court properly granted summary judgment in LCC's favor on the business and economic damages claim.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

JONES, JUDGE, CONCURS IN PART AND WRITES SEPARATE OPINION.

JONES, JUDGE, CONCURRING IN PART: I write separately with respect to the University of Kentucky's entitlement to immunity. Sovereign immunity applies only when the state has been sued directly. The Appellants did not sue the Commonwealth of Kentucky in this instance. They sued the University of Kentucky. The University of Kentucky is not the state itself. It is an agency of the state. "Governmental immunity is granted to agencies that have been established by an immune entity [such as the Commonwealth of Kentucky] and that perform a

‘“function integral to state government.”’” *Transit Authority of River City v. Bibelhauser*, 432 S.W.3d 171, 173 (Ky. App. 2013) (quoting *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 98 (Ky. 2009) (quoting *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 332 (Ky. 1990))). Therefore, whether the University of Kentucky is entitled to immunity in this case depends on: (1) whether it is a state agency and (2) whether it was performing a function integral to state government or was engaged in a proprietary activity separate from its role as an educational and research facility.

Resolving the first question is easy. The University of Kentucky is a state agency. It has been held to be so by our case law, and it is recognized as such by KRS 164.100. Therefore, the University of Kentucky is entitled to governmental immunity when it is performing an essential government function. The second question, however, requires more consideration and analysis. Governmental immunity does not extend 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. Thus, an agency of the state government cloaked with governmental immunity can be sued for damages caused by its performance of a proprietary function. *Grayson County Bd. of Educ. v. Casey*, 157 S.W.3d 201, 202-03 (Ky. 2005).

Collegiate sports play an important and essential role in the post-secondary education context. In connection with offering a men's basketball team to its student-body, the University of Kentucky provided a venue where spectators, who paid an admissions fee, could watch the games played by the team. The issue seems to me to be whether the University of Kentucky's activities in connection with that venue ceased to be educational in nature and became proprietary insomuch as it charged admissions and offered concessions and other amenities to the fans.

Our Supreme Court considered a similar issue in *Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003). In that case, the Appellant, Leah Schwindel, was injured while a spectator at an interscholastic softball tournament. Among others, Schwindel sued the Meade County Board of Education. While Schwindel recognized that providing interscholastic sports instruction, coaching, and teams was a government function of public schools, she alleged that the school board's function as related to her was not governmental but proprietary. She was not a direct participant in the sporting event. She was a paying guest. Therefore, she maintained that as related to her presence at the game the defendants were operating an enterprise for profit not fulfilling the role of a public school. She pointed out that the defendants charged her an admission fee and sold refreshments and event programs for income and profit, which was separate from their role of

providing interscholastic sports instruction, coaching, and teams for their students. The Supreme Court of Kentucky rejected this argument. It held that "[t]he fact that an admission fee was charged or that refreshments and event programs were sold at the softball tournament did not convert this event from a governmental function into a proprietary one." *Id.* (citations omitted).

> [T]he sponsorship and conduct of an interscholastic athletic tournament by a board of education is a governmental function. The receipt of income from admission fees and sales of refreshments and event programs to defray expenses or even to provide additional financial support for other school activities did not convert this interscholastic athletic event into a proprietary function.

Id. at 168-69 (citations omitted).

I believe the logic of *Schwindel* is equally applicable with respect to collegiate sporting events hosted by public universities, like the University of Kentucky. Therefore, I agree that the University of Kentucky was entitled to governmental immunity in this instance. However, given that there is no published authority directly on point and that thousands of fans from the Commonwealth pay to watch hundreds of different sporting events played by our public university students each year, I urge the Supreme Court of Kentucky to provide some definitive guidance on this issue should discretionary review be sought.

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