UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1910

September Term, 2014

DION JONES

v.

MONTGOMERY COUNTY, MARYLAND,
ET AL.

Graeff,
Kehoe,
Reed,

JJ.

Opinion by Graeff, J.
Concurring Opinion by Kehoe, J.

Filed: April 5, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from a complaint filed in the Circuit Court for Montgomery County by Dion Jones, appellant, alleging that he was injured by "John Doe," an unnamed corrections officer, while incarcerated in the Montgomery County Detention Center (the "Detention Center"). Montgomery County (the "County"), appellee, which operates the Detention Center, filed a motion to dismiss the complaint on the ground of governmental immunity, which the circuit court granted. Mr. Jones then filed an amended complaint, substituting Corporal Deborah Hendricks for John Doe, and the court subsequently dismissed the amended complaint.

On appeal, Mr. Jones raises two questions for our review, which we have rephrased slightly as follows:

1. Did the circuit court err in dismissing the County from the suit on the basis of governmental immunity?

2. Did the circuit court err in restricting discovery and then determining that the addition of Corporal Deborah Hendricks as a defendant was barred by the statute of limitations?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 28, 2013, Mr. Jones filed a complaint, naming the County and John Doe as defendants. The complaint alleged that, on July 12, 2010, Mr. Jones was incarcerated in the Detention Center, a.k.a., the "Seven Locks Detention Center," which was operated and controlled by the County. While Mr. Jones was in transit to the cell area of the facility, he passed through a double door security system known as a "Sally Port." A "Sally Port" consists of two doors with a holding area between them. After the first door is opened, the

inmate enters the holding area until the first door is closed. The guard on duty then opens the second door to allow the inmate to pass into the next area. The complaint alleged that John Doe, an officer employed by the County and the guard on duty, either deliberately or with reckless disregard for Mr. Jones' safety, activated the closure mechanism as Mr. Jones was passing through the second door, trapping Mr. Jones between the sliding door and the door jamb. As a result, Mr. Jones suffered injuries to his neck, shoulder, and back.

Count I alleged that John Doe injured Mr. Jones with actual malice. Count II alleged that John Doe breached a duty of care, causing Mr. Jones' injuries. Count III alleged that the County was vicariously liable for John Doe's actions.

On August 26, 2013, the County filed a motion to dismiss, asserting that it was entitled to governmental immunity on Counts I and II, with respect to Count III, liability pursuant to the theory of *respondeat superior* could not attach to it in the absence of an identified employee or agent causing Mr. Jones harm. The County further asserted that Mr. Jones could not amend the complaint to include a specific defendant employee because the statute of limitations had expired on July 12, 2013, and any amendment would not relate back.

On September 18, 2013, the circuit court granted the County's motion to dismiss and ordered that all claims against the County be dismissed with prejudice. The court did not address the complaint as it related to John Doe.

On November 5, 2013, Mr. Jones filed a First Amended Complaint, in which he again named the County as a defendant. He also substituted Corporal Hendricks for John Doe. The County moved to strike the amended complaint, asserting that the court had

already dismissed all claims against it, and the amended complaint, which alleged the same facts as in the initial complaint, was not filed with leave of court to amend and was filed after the expiration of the limitations period.

On March 11, 2014, the court held a hearing. The court granted the County's motion to strike the amended complaint as to the County.

On March 31, 2014, Corporal Hendricks filed a motion to dismiss the amended complaint, asserting that Mr. Jones did not have standing to file an amended complaint after the County was dismissed as the only defendant. Corporal Hendricks further argued that Mr. Jones' claims were barred by the statute of limitations because he did not name Corporal Hendricks before the expiration of the limitations period, and the amended complaint, which added a new party, did not relate back to the original complaint.

On May 21, 2014, the circuit court held a hearing on Corporal Hendricks' motion to dismiss. The court and counsel agreed that, if Mr. Jones could show that Corporal Hendricks had knowledge of the lawsuit prior to the expiration of the limitations period, relation back would apply and the motion to dismiss should be denied. Thus, the court allowed a limited deposition of Corporal Hendricks to determine when she was aware of the lawsuit.

During her deposition, Corporal Hendricks testified that her first knowledge of the lawsuit came when she was served in March 2014. Following Corporal Hendricks' deposition, the court granted her motion to dismiss, with prejudice. This appeal followed.

DISCUSSION

I.

Governmental Immunity

Mr. Jones contends that the circuit court erred in granting the County's motion to dismiss the claims against it based on governmental immunity. He asserts that the "distinction between a governmental function," which shields a county from tort actions, and "a proprietary function," which does not, "is not an easy one to draw and may well be an evolving one." Mr. Jones concludes that, because the operation of a prison can be delegated to a private entity, it is not a governmental function, and therefore, the County does not have governmental immunity from suit in this case, and the circuit court erred in dismissing the case against the County on that ground.

The County contends that "the circuit court properly determined that the County is entitled to governmental immunity, because the operation of a detention center is a governmental function." Although it acknowledges the difficulty in distinguishing between governmental and proprietary functions it asserts that the focus in making that determination is on "'whether the act performed is for the common good of all or for the special benefit or profit of a corporate entity.'" *Tadjer v. Montgomery County*, 300 Md. 539, 547 (1984)). Applying that focus, the County argues that the operation of a detention center is a governmental function because protecting the community from criminal acts benefits the community as a whole. It asserts that "the ability of a local government to use contractors to perform some services does not transform the operation of a detention center into a proprietary function," as long as the private facility performs ministerial tasks and

the County maintains its discretionary authority. Based on the applicable factors, the County contends that the circuit court properly determined that the operation of a detention center is a governmental function, and the County was entitled to dismissal from suit based on governmental immunity.

This Court has explained the standard of review of a trial court's order granting a motion to dismiss for failure to state a claim upon which relief could be granted:

> "A trial court may grant a motion to dismiss if, when assuming the truth of all well-pled facts and allegations in the complaint and any inferences that may be drawn, and viewing those facts in the light most favorable to the non-moving party,' the allegations do not state a cause of action for which relief may be granted," *Latty v. St. Joseph's Soc'y of the Sacred Heart*, *Inc.*, 198 Md. App. 254, 262-63 (2011) (quoting *RRC Northeast, LLC v. BAA Md.*, Inc., 413 Md. 638, 643 (2010)).
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> "'We review the grant of a motion to dismiss de novo.'" *Unger v. Berger*, 214 Md. App. 426, 432 (2013) (quoting *Reichs Ford Road Joint Venture v. State Roads Comm'n*, 388 Md. 500, 509 (2005)). *Accord Kumar v. Dhanda*, 198 Md. App. 337, 342 (2011) ("We review the court's decision to grant the motion to dismiss for legal correctness."), *aff'd*, 426 Md. 185 (2012). We will affirm the circuit court's judgment "'on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009) (quoting *Pope v. Bd. of Sch. Comm'rs*, 106 Md. App. 578, 591 (1995)).

Advance Telecom Process LLC v. DSFederal, Inc., 224 Md. App. 164, 173-74 (2015).

Here, as the parties note, the issue whether governmental immunity from a tort action exists depends on whether the County was performing a governmental function, in which case it has immunity, or a proprietary function, in which case it does not have immunity. As this Court recently explained:

> Under Maryland common law, a local government is immune from tort liability when it functions in a "governmental" capacity, but it enjoys no

> such immunity when it is engaged in activities that are "proprietary" or "private" in nature. *See Mitchell v. Hous. Auth. of Baltimore City*, 200 Md. App. 176, 186 (2011). "'[T]here is no universally accepted or all-inclusive test to determine whether a given act of a municipality is private or governmental in its nature, but the question is usually determined by the public policy recognized in the jurisdiction where it arises.'" *Rios v. Montgomery Cnty.*, 386 Md. 104, 128 (2005) (quoting *Mayor & City Council of Baltimore v. Blueford*, 173 Md. 267, 275-76 (1937)). Guidelines from the Court of Appeals establish that the activity of a local government is considered governmental in nature "'[w]here the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest[.]'" *Rios*, 386 Md. at 128-29 (quoting *Blueford*, 173 Md. at 276).

Zilichikhis v. Montgomery Cnty., 223 Md. App. 158, 192, *cert. denied*, 444 Md. 641 (2015). *Accord Tadjer*, 300 Md. at 546-47.

Based on these guidelines, the Maryland appellate courts have found the operation of the following to be governmental functions for which governmental immunity exists: (1) a courthouse, *Heffner v. Montgomery*, 76 Md. App. 328, 335 (1988); (2) a health department, *Rivera v. Prince George's County Health Department*, 102 Md. App. 456, 464 (1994), *cert. denied*, 338 Md. 117 (1995); (3) a public park, *Mayor and City Council of Baltimore v. Whalen*, 395 Md. 154, 169 (2006); and (4) a town pool, *Town of Brunswick v. Hyatt*, 91 Md. App. 555, 564-65 (1992).

Applying these guidelines to the issue presented here, we note that the acts of the County in maintaining prisons and jails "'is sanctioned by legislative authority.'" *Zilichikhis*, 223 Md. App. at 192 (quoting *Rios*, 386 Md. at 128). Maryland Code (2013 Repl. Vol.) § 10-304(c)(1)-(2) of the Local Government Article ("LG") permits a county to "establish and maintain local correctional or detention facilities and juvenile facilities,"

and may "regulate all individuals confined in the facilities."[1] Under that authority, the County created the Montgomery County Department of Correction and Rehabilitation (the "DCR") as an agency within the executive branch of government. Section 1A-201(a)(1) (2014, as amended) of the Montgomery County Code ("Mont. Co. Code"). The functions delegated to the DCR include the responsibility to "operate all programs pertaining to detention and rehabilitation of persons under the jurisdiction of the county government awaiting trial or having been convicted of a crime in violation of state, federal, county or other local laws." Mont. Co. Code § 2-28. Thus, applying the guidelines set forth by the Court of Appeals, we note that the operation of a correctional facility is sanctioned by legislative authority, and protecting the public from criminals clearly promotes the welfare of the public, factors that support the circuit court's conclusion that the County has governmental immunity relating to acts involved in operating a detention facility.

Indeed, the Maryland Court of Appeals previously has stated that the operation of prisons and jails is a government function. In 1919, the Court of Appeals stated:

> "The erection and operation of prisons and jails . . . is a purely governmental function, being an indispensable part of the administration of the criminal law. They are a part of the police system for the preservation of order and the security of society, and are established by the state in the exercise of its sovereign powers, in performance of its duty to provide for the custody, employment and maintenance of convicts. They are a public necessity."

[1] In 2010 this statute was codified as Md. Code (2010 Supp.) Art. 25A § 5(C). It was recodified in 2013, with the inception of the Local Government Article, without substantive change.

Jones Hollow Ware Co. of Baltimore City v. Crane, 134 Md. 103, 115 (1919) (quoting William M. McKinney & Burdett A. Rich, *Establishment, Maintenance and Regulation of Prisons*, 21 RCL 1168 (1918)).

In 1930, the Court reiterated this view. It explained:

> The protection of the citizen against . . . violence, or disorder is essentially a governmental function to be exercised by the state under its police power, through proper agents. And while in many cases it is difficult on the facts to mark the boundary between acts and duties which are in their essence governmental, and those which are of a corporate or municipal nature, that doubt does not exist in respect to the duties of agencies charged with the administration of the criminal law, the conservation of the public peace, or the protection of the citizen from violence. But the acts of such agencies done in the performance of duties imposed upon them by law are almost everywhere regarded as governmental in their nature, and for the benefit of the entire public.

Wynkoop v. Mayor and City Council of Hagerstown, 159 Md. 194, 201 (1930).

Mr. Jones suggests, however, that the "concept of the operation of a prison as a purely governmental function," as determined by the Court of Appeals in *Jones* almost 100 years ago, may no longer be applicable. In support, he notes that governmental functions cannot be delegated, but government agencies are contracting for private prisons. Thus, he asserts, the "concept of the operation of a prison as a purely governmental function . . . has evolved into a composite of government and proprietary" functions, with the "operation being proprietary such that governmental immunity in the operation of the prison no longer attaches."

The County does not dispute that "many jurisdictions have chosen to use private facilities to house those individuals who must serve time in a jail or prison," but it asserts that, by using a private facility, a government does not necessarily delegate its governing

power to a private facility. Instead, the private facility must comply with the same laws that govern jails and prisons, and therefore, the County's delegation of ministerial tasks "does not amount to an unlawful delegation of the discretion that remains within the governing power."

Both parties cite *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, *cert. denied*, 353 Md. 473 (1999), as instructive. Accordingly, we begin our analysis with a discussion of that case.

In *Andy's Ice Cream*, the Zoo Commission, a non-profit instrumentality of the City, was created to operate, manage, and promote the Salisbury Zoological Park for the City. *Id.* at 131-32. Among the responsibilities the City asked the Zoo Commission to perform was the selection of a contractor to provide concessions in the park. *Id.* at 160. Andy's Ice Cream, the unsuccessful bidder for the contract, brought suit, alleging that the City had improperly delegated contracting authority, a discretionary power and responsibility of the City, to the Zoo Commission. *Id.* at 125.

To determine whether the delegation of contracting authority was appropriate, this Court explained that municipal corporations have only the powers that are conferred upon them by the legislature. *Id.* at 160. We explained that the power of the City is prescribed in its charter, and to delegate the prescribed powers to an independent agency would "'be a serious violation of the law.'" *Id.* at 161 (quoting *Mugford v. City of Baltimore*, 185 Md. 266, 271 (1945)). We noted, however, that, although legislative or discretionary powers cannot be delegated, ministerial or administrative functions can be delegated. *Id.* When

ministerial authority is delegated, the delegation must contain sufficient guidelines to ensure that the delegee will act in accordance with the legislative will. *Id.* at 162.

We then turned to the question whether the City's delegation of final decision-making authority to the Zoo Commission, i.e., the selection and hiring of a contractor, was a ministerial/administrative function or a discretionary function. We concluded that the authority delegated by the City to the Zoo Commission was discretionary authority specifically vested in the City, and therefore, it was non-delegable. *Id.* at 165. We noted that, had the City reviewed bids and selected the contractor, or even if the Zoo Commission had only reviewed the bids in an advisory capacity, rather than in the decision-making capacity, the result would have been different. *Id.*

Applying that analysis here, a county would not be precluded from using a private facility for its prison needs, as long as there were sufficient guidelines to ensure that the facility act in accordance with the legislative will, and the facility performs only ministerial functions.[2] In that scenario, the same legal principles that apply to the county when operating a detention facility, *see generally*, Md. Code (2008 Repl. Vol.) Title 8, Subtitle 1 of the Correctional Services Article, would apply to a private facility, and a private facility would not be permitted to make decisions that require the government's exercise

[2] Mr. Jones makes no allegation that the County has elected to exercise its authority to contract with a private entity for custody of inmates in a county detention facility. He asserts, however, that the question is not whether the County has elected to exercise that authority, but rather, "whether that authority exists as a matter of law."

of discretion.[3] Accordingly, whether a county operates a facility or uses a contractor, the operation of a detention facility remains a governmental function.

Other courts similarly have concluded that the operation of a prison is a governmental function. *See, e.g.,* In *City of Atlanta v. Mitchum*, 769 S.E. 2d 320 (Ga. 2015) (the care of inmates in the custody of a municipal corporation is a governmental function for which sovereign immunity is not waived); *Mt. Carmel Med. Ctr. v. Bd. of Cnty. Comm'rs of Labette Cnty.*, 566 P.2d 384, 387 (Kan. Ct. App. 1977) ("Kansas has long held that the maintenance and operation of law enforcement departments and jails are governmental functions as distinguished from proprietary."); *Whitler v. McFaul*, 703 N.E.2d 866, 870 (Ohio Ct. App. 1997) (no claim for relief where negligence arose out of the performance of a governmental function, the detention of a prisoner in a county jail), *appeal not allowed*, 690 N.E.2d 550 (Ohio 1998); *Spruytte v. Dep't of Corr.*, 266 N.W.2d 482, 483 (Mich. Ct. App. 1978) (the operation and maintenance of a prison is

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[3] As the Maryland Office of the Attorney General has opined:

> "While the county has authority to contract for prison services, it cannot wholly abdicate its responsibility for the operation of a county jail. The operation of a jail is clearly an exercise of the police power, and the police power cannot be delegated to a private entity. 'Although local governments are normally bound by their contracts, . . . it has long been recognized that questions of invalidity and enforceability arise when governmental bodies attempt by ordinance or contract to surrender or bargain away their discretionary legislative functions.' *Maryland Classified Employees Ass'n v. Anderson*, 281 Md. 496, 508 (1977) (citation omitted).

71 Op. Att'y Gen. 197, 203 (1986).

a governmental function within the statute governing governmental immunity from tort liability). *See also Scott v. Utah Cnty.*, 356 P.3d 1172, 1188 (Utah 2015) (a county's prison inmate work-release program was essential to the core governmental function of housing and rehabilitating inmates, and therefore, the use of employers outside the prison did not transform the program into a private endeavor).

Pursuant to guidelines set forth by the Court of Appeals, and pursuant to the weight of authority, we agree with the County that the operation of a detention facility is a governmental function. Accordingly, the circuit court correctly concluded that the County was immune from tort liability, and it properly granted the motion to dismiss the claims against the County.

II.

Suit Against Corporal Hendricks

Mr. Jones' next argument involves the circuit court's ruling dismissing the claim against Corporal Hendricks on the ground that it was barred by the statute of limitations. As indicated, on November 5, 2013, more than three years after the July 2010 incident, Mr. Jones filed a First Amended Complaint substituting Corporal Hendricks for John Doe. The court and counsel agreed that, if Mr. Jones could show that Corporal Hendricks had knowledge of the lawsuit prior to the expiration of the limitations period, relation back would apply and the motion to dismiss should be denied. Thus, the court allowed a limited deposition of Corporal Hendricks to determine when she was aware of the lawsuit.

Mr. Jones contends that, based on his notice to the County of his intent to file a claim, the County's investigation would have identified the guard involved, and it is "inconceivable" that the guard would not "be on notice that a claim was to be made." He asserts that the court erred in restricting discovery "only to the time between filing of the suit and the running of limitations."

The County contends that "the circuit court correctly applied the principles of relation back and concluded that the addition of Corporal Hendricks as a defendant was barred by the statute of limitations." It asserts that substituting Corporal Hendricks' name for John Doe constituted the addition of a new party, which is permissible only "when the party being added had notice of the lawsuit during the limitations period." And because Corporal Hendricks' testimony made clear that she did not have such notice, the County argues that the circuit court properly found that the amended complaint was barred by the statute of limitations. It further asserts that the court "did not err when choosing to limit discovery to the single issue of notice to the corporal, because the case could not proceed if it was barred by the statute of limitations."

In *Nam v. Montgomery County,* 127 Md. App. 172 (1999), this Court addressed a similar argument. In that case, the plaintiffs filed suit against Montgomery County, Montgomery General Hospital, Inc., and Emergency Medicine Associates, P.A., as a result of the death of their newborn daughter. 127 Md. App. at 176-77. The Nams amended their complaint to add "John Doe, M.D." as a defendant, as the county employee who allegedly negligently treated Ms. Nam, resulting in their daughter's death. *Id.* at 177. Lizzie James ultimately was identified as the nurse on duty who diagnosed and treated Ms. Nam. *Id.*

The Nams, however, did not file a second amended complaint naming Lizzie James, as opposed to John Doe, as the health care provider until after the statute of limitations had expired. *Id.* at 179.

This Court addressed whether the doctrine of relation back applied to render the statute of limitations inapplicable to the claim against Ms. James. The doctrine of relation back provides that:

> [I]f the factual situation remains essentially the same after the amendment as it was before it, the doctrine of relation back applies and the amended cause of action is not barred by limitations. *Smith v. Gehring*, 64 Md. App. 359, 364, 496 A.2d 317, 319 (1985). In other words, if an amendment merely corrects the name of an original party, as opposed to adding a new party, the doctrine is applicable. *Smith*, 64 Md. App. at 364, 496 A.2d at 319. Conversely, if a new defendant is added, the doctrine of relation back does not apply. *Id*., 496 A.2d at 320.

Id. at 186.

In assessing whether an amendment merely corrects the name of an original party or adds a new party, a two-part analysis is applicable. We explained:

> The critical factors are (1) who, on the facts of the case, was the appropriate defendant, and (2) whether that party had notice of his, or her, or its, intended status as defendant within the limitations period. In each of the three cases we have discussed, the significance of service of process was that by that means notice to the intended defendant was made apparent. In *McSwain* [*v. Tri-State Transportation Co. Inc.*, 301 Md. 363, 483 A.2d 43 (1984),] the Court of Appeals relied not only on service of process, but also on pre-suit notice to the intended defendant, Transportation. That service of process on the intended defendant is not essential to stop the running of limitations appears from our decision in *Reed v. Sweeney*, 62 Md. App. 231, 488 A.2d 1016 (1985).

Id. (quoting *Smith*, 64 Md. App. at 365). *Accord Ferguson v. Loder*, 186 Md. App. 707, 720 (2009).

Here, Corporal Hendricks testified at her deposition that she did not have notice of the lawsuit until she was sued in March 2014, after the statute of limitations had passed. Mr. Jones contends, however, that she was on notice because the County was on notice. We specifically rejected this argument in *Nam*, where this Court stated:

> The Nams are of the view that the notice to Montgomery County is sufficient. We disagree. The fact that the County knew of the suit and has an obligation under certain circumstances to pay a judgment does not suffice to eliminate the need for Ms. James to be sued within the period of limitations and for there to be service of process upon her. This is so because she conceivably might end up with personal liability. Section 5-302(d) [of the Local Government Tort Claims Act] makes "[t]he rights and immunities granted to [her] contingent on [her] cooperation in the defense of the action." Section 5-302(b) of the Act sets forth circumstances that might lead to execution against her. In this case the complaint in the circuit court does not specify a dollar amount of the claimed damages. We have no idea what a jury might render as a verdict were this case to go to trial and be decided adversely to Ms. James. It must not be forgotten, however, that Section 5-303(a) states, "The liability of a local government may not exceed $200,000 per an individual claim. . . ." Thus, it is possible if this case were tried that Ms. James might end up with personal liability. It follows therefore that the assertion by the Nams that because the County has to pay the damages then notice to it is sufficient must fall. Moreover, we observe that their contention is like saying that notice to an automobile liability carrier of a claim against its assured would make unnecessary the filing of a suit against that assured within the period of limitations. Such is not the law. We hold that it was necessary for Ms. James to be sued within the period of limitations. She was not. The John Does filing does not suffice. This was no misnomer, or correction of a previously identified party.

Id. at 187-88.

This same analysis applies to the present case. Accordingly, we conclude that circuit court properly dismissed Corporal Hendricks as a party because suit against her was

barred by the statute of limitations, and it properly limited discovery to the issue of notice because the case could not proceed if it was barred by limitations.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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I respectfully concur. The Majority's analysis of the existing state of the law is absolutely accurate. Whether we approach the problem conceptually through applying the reasoning in decisions like *Tadjer v. Montgomery County*, 300 Md. 539, 547 (1984), and *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 192, *cert. denied*, 444 Md. 641 (2015), or by relying on the direct and binding authority represented by the Court of Appeals' decisions in *Jones Hollow Ware Co. of Baltimore City v. Crane*, 134 Md. 103, 115 (1919), and *Wynkoop v. Mayor and City Council of Hagerstown*, 159 Md. 194, 201 (1930), the result is the same. It is crystal clear that, as a matter of Maryland law, a local government engages in a governmental function when it operates a detention facility.

I part company with the Majority because I would not accept Mr. Jones' invitation to conceptualize how the principles of governmental immunity might apply if, hypothetically, Montgomery County attempted to privatize its jail functions.