RENDERED: September 12, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-001749-MR

FLOSSIE WATTS, AS MOTHER
AND REPRESENTATIVE OF
FREDDIE G. HOLLAN, DECEASED — APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 93-CI-0054

HENRY DUNN, INDIVIDUALLY, AND
IN HIS OFFICIAL CAPACITY AS
SHERIFF OF WOLFE COUNTY — APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: JOHNSON, KNOPF and MILLER, Judges.

JOHNSON, JUDGE: Flossie Watts (Watts), as mother and representative of Freddie G. Hollan, deceased, appeals from the order of the Wolfe Circuit Court entered on June 17, 1996, that dismissed with prejudice Watts' negligence claims against Henry Dunn (Sheriff Dunn), in his individual capacity and in his official capacity as sheriff of Wolfe County.[1] Watts' position on appeal is that Sheriff Dunn is liable because he had a legal duty to arrest a

[1] We have been unable to find anything in the record to indicate that Watts sued as the personal representative of the deceased as required by Kentucky Revised Statutes (KRS) 411.130. However, this is not an issue before this Court.

drunk driver and that he breached that duty, thereby causing the death of Freddie Hollan. Sheriff Dunn asserts that he is not liable in either his individual or official capacity. We affirm.

On May 2, 1992, Freddie Hollan (Hollan) was a passenger in a car of a friend, Gregg Oliver (Oliver). At approximately 12:30 p.m., Sheriff Dunn simultaneously stopped the Oliver vehicle and a vehicle driven by Danny Ratliff (Ratliff) for speeding. Sheriff Dunn drove up beside each car, talked to the drivers, and allowed both vehicles to go without a citation or arrest.

Ronnie Rose (Rose) testified by deposition that he witnessed Sheriff Dunn stop the vehicles. Rose stated that from his observation of Ratliff he believed Ratliff was drunk. At the time of this incident, Ratliff was purportedly under house arrest in Morgan County for a conviction of driving under the influence. Bob Haddix (Haddix), the owner of a local gas station, testified by deposition that Oliver and Hollan had stopped at his service station that afternoon to get gas and Hollan stated that they had almost been arrested by Sheriff Dunn. Haddix testified that Hollan was seated in the Oliver vehicle with a beer resting between his legs.

At approximately 5:40 p.m., Sheriff Dunn was in transit to the local ballpark when he was almost run off the road by a vehicle. Sheriff Dunn turned his car around, turned on his blue lights, and pursued the vehicle. Sheriff Dunn then noticed in the roadway ahead of him smoke and dust. Upon arriving at the scene, Sheriff Dunn found that the Ratliff vehicle had crossed the double yellow line into the path of the Oliver vehicle. Hollan was killed

in the crash. Ratliff was arrested and later tried and convicted of manslaughter in the second degree, assault in the second degree, and wanton endangerment in the first degree.

Watts brought this suit alleging negligence on the part of Sheriff Dunn for not arresting Ratliff for driving under the influence during the earlier traffic stop. After initial discovery, Sheriff Dunn moved for summary judgment. Sheriff Dunn asserted four grounds in support of his motion: (1) that he was not negligent in that he had no common-law duty to Hollan pursuant to Fryman v. Harrison, Ky., 896 S.W.2d 908, 909 (1995); (2) that his arrest authority pursuant to KRS 431.005 and Gould v. O'Bannon, Ky., 770 S.W.2d 220, 221-222 (1989), involved discretionary acts subject to official immunity; (3) that he was entitled to sovereign immunity pursuant to Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967), Moores v. Fayette County, Ky., 418 S.W.2d 412 (1967), and Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, Ky., 805 S.W.2d 133 (1991); and (4) that the case should be dismissed because Watts failed to join Ratliff, an indispensable party, in the action.

After briefing and oral argument, the trial court determined that no genuine issue existed with respect to any material fact and Sheriff Dunn was entitled to judgment as a matter of law. The trial court found Ashby v. City of Louisville, Ky.App., 841 S.W.2d 184 (1992), and Fryman, supra, to be controlling. The trial court used the Fryman two-part "special relationship" test, declaring that no special relationship existed upon

which a legal duty could rest, and then dismissed the suit with prejudice.[2] This appeal followed.

We agree with the trial court that there is no genuine issue as to any material fact, and thus we must determine whether the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.02. There is no requirement that this Court defer to the trial court since factual findings are not in issue. Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996). Pursuant to Rules of Supreme Court 1.030(8)(a), we are bound by and must follow the Supreme Court precedent of Fryman. Thus, under the special relationship test as set forth in Fryman, we must affirm.

The Supreme Court in Fryman stated that government officials have no common-law duty to protect citizens from harm from a third party absent a special relationship and that a special relationship exists only if "'the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor.'" Id. at 910 quoting Ashby, supra. Fryman was subsequent to the Court of Appeals decision in Ashby that correctly applied two distinct and separate special relationship tests for the two distinct and separate claims of a constitutional violation and common-law negligence. However, the Court's analysis in Ashby

[2] The trial court's order granting summary judgment indicates that this action "alleges negligence on the part of Defendant Henry Dunn and his governmental employer, Wolfe County." However, we note that Wolfe County was never a party to this action. The suit merely involved the alleged liability of Sheriff Dunn and any reference by the trial court to Wolfe County is of no consequence.

was confusing and the Supreme Court in Fryman exacerbated the problem by merging the separate special relationship tests for a 42 USC § 1983 action and a negligence action into the same test.

Fryman is also confusing when it attempts to explain why Evans v. Morehead Clinic, Ky.App., 749 S.W.2d 696 (1988), is not controlling. Fryman at 911. In Evans, the Court of Appeals, relying upon Restatement (Second) of Torts § 315, held that "if the psychiatrist or therapist determined[,] or under the applicable standards of his profession reasonably should have determined[,] that his patient poses a serious risk of violence, the psychiatrist or therapist has a duty of ordinary care to protect a reasonably foreseeable victim of that danger." Id. at 699. In Fryman, the Supreme Court stated that the victim "was not known or identifiable or foreseeable." Id. at 911. Thus, after adopting the special relationship test from Ashby to determine whether a public official had an affirmative legal duty to a third party in the performance of his official duties, the Supreme Court applied the traditional foreseeability analysis. There does not appear to have been any need for the Fryman Court to have undertaken a foreseeability analysis since the victim was not in custody and the perpetrator was not a state actor. Consequently, Fryman is inconsistent.

Under the Fryman special relationship test, a jailer who negligently permitted a prisoner in his custody to be injured by an assault by another inmate who was not a state actor would have no legal duty to the victim. Such an application of Fryman would be contrary to the law of many years in this Commonwealth that has recognized that a jailer has a legal duty to prevent foreseeable

harm to a prisoner from another inmate. Glover v. Hazelwood, Ky., 387 S.W.2d 600 (1964). See also Annotation, Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or Prison for Death or Injury of Prisoner, 14 A.L.R.2d 353 (1950).

In granting Sheriff Dunn's summary judgment, the trial court, as it was required to do, followed binding precedent and applied the special relationship test as set forth by the Supreme Court in Fryman. In our opinion, the Fryman special relationship test is truly unique since our research has not revealed any other jurisdiction that follows this approach. We encourage the Supreme Court to re-examine Fryman, and to review the case at bar from the more traditional analysis of whether Sheriff Dunn's duties were "discretionary" or "ministerial." See James L. Isham, J.D., Annotation, Failure to Restrain Drunk Driver As Ground of Liability of State or Local Government Unit or Officer, 48 A.L.R.4th 320 (1986); and Upchurch v. Clinton County, Ky., 330 S.W.2d 438 (1959).

For the foregoing reasons, the order of the trial court is affirmed.

KNOPF, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MILLER, JUDGE, CONCURRING BY SEPARATE OPINION: I wish to make the following observations: This is a simple negligence action to determine the tort liability of the Sheriff of Wolfe County for failing to arrest a drunk driver who subsequently caused the death of appellant's decedent. As I read the complaint, I do not perceive Wolfe County to be a party litigant.

The appeal centers upon the issue of whether the sheriff enjoys immunity from tort liability. I view the sheriff's decision not to arrest the drunk driver as an act of discretion within the fulfillment of his duties. It is well settled that as a governmental official, he has immunity from tort liability in acts of discretion. Because he was performing a discretionary act to which immunity attaches, I view Fryman v. Harrison, Ky., 896 S.W.2d 908 (1995), and the attendant issue of the sheriff's "duty" as being immaterial to the resolution of this appeal. It seems to me that the special relationship test enunciated in Fryman is fundamentally flawed in its application to ordinary torts of state governmental officials. That test is properly applied to civil rights actions wherein the governmental actor is, of course, the perpetrator of the harm.

The well-established and time-honored rule in attaching tort liability is that of "duty" and "breach of duty." The general rule is, at least absent a contractual or statutorily-imposed duty, that every individual owes a duty to exercise ordinary care to prevent damage to the person or property of another if harm is to be foreseen. It is not necessary to foresee a particular harm, but only to foresee that some harm might occur. If a duty is breached and damage occurs, the individual must answer in damages if, in fact, the breach is a substantial factor in causing the harm. In any event, from whatever source the duty arises, the rule has its exceptions: certain classes of people are granted immunity from answering in damages notwithstanding breach of duty. For example, persons classified as officials while acting on behalf of govern-

ment enjoy immunity in the performance of some acts, depending upon whether the acts are categorized as ministerial or discretionary.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Hon. Jim M. Alexander
ALEXANDER & AMOS
Lexington, KY

BRIEF FOR APPELLEE:

Hon. W. Kenneth Nevitt
Hon. R. Thaddeus Keal
WILLIAMS & WAGONER
Louisville, KY

ORAL ARGUMENT FOR APPELLEE:

Hon. W. Kenneth Nevitt
WILLIAMS & WAGONER
Louisville, KY