RENDERED: MARCH 6, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

**ORDERED NOT PUBLISHED BY SUPREME COURT:
AUGUST 19, 2009
(FILE NO. 2009-SC-000198-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000780-MR

BRENT WASSON APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 00-CI-00013

KENNETH MORRIS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; GRAVES,[1] SENIOR JUDGE.

STUMBO, JUDGE: This is a personal injury action arising out of an incident occurring on January 27, 1999, in Butler County, Kentucky, wherein Brent Wasson

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(Appellant), then a Kentucky State Trooper, was injured during the line of duty while responding to a domestic disturbance call. Appellant alleges negligence on the part of Kenneth Morris (Appellee), then Sheriff of Butler County. Appellant is appealing from an order granting summary judgment in favor of Appellee. We find that summary judgment was proper and affirm.

On January 26, 2007, Timothy Welborn went to visit Rebecca McPherson, his sister, at her home in Butler County. The next morning, Ms. McPherson contacted her mother, Bonnie Chaney, and informed her that Timothy had been acting erratically and making threats. Bonnie Chaney was a resident of Logan County.

Ms. Chaney then called the Butler County Sheriff's office. A dispatcher received the call and informed Appellee of the complaint. Appellee then called Ms. McPherson to investigate the report. Appellee stated that Ms. McPherson answered, sounded upset, but was calm. Appellee stated that Ms. McPherson did not request that anyone come to her house and that she advised him that she was not afraid of Mr. Welborn. According to Appellee, Ms. McPherson stated Mr. Welborn had no firearms and that he was not threatening anyone. Based on this conversation, Appellee concluded Mr. Welborn was not a threat and that no further action was necessary absent an involuntary commitment order obtained from the court.

Ms. Chaney then contacted the Russellville Police Department in Logan County. She informed the dispatcher of the situation and that her son was

mentally ill and making death threats. The dispatcher informed Ms. Chaney that because Ms. McPherson's residence was in Butler County, they did not have jurisdiction. However, the dispatcher called the Butler County Sheriff's office for Ms. Chaney.

Sheriff's Deputy Curtis Woods got the call and was told about Mr. Welborn making threats. Deputy Woods then contacted Appellee to tell him about the problem. Appellee stated that he had already spoken with Ms. McPherson and that there was no immediate danger. It is unclear whether Deputy Woods told Appellee that Mr. Welborn's mother had advised him that Welborn was making death threats. Appellant alleges that the Sheriff was never told about Mr. Welborn making death threats.

Ms. Chaney again contacted the Russellville Police Department and was told the Butler County Sheriff would not be sending anyone to investigate. The Russellville Police Department dispatcher then contacted the Kentucky State Police (K.S.P.) to request assistance. The K.S.P. dispatcher then contacted Appellant and another trooper. The troopers were in separate vehicles and in different locations. Appellant stated in his deposition that he was told Mr. Welborn had been making threats of violence.

Appellant was the first to reach the residence. Appellant did not wait for backup, but instead went to the door and made contact with the residents. Ms. McPherson seemed scared, so Appellant asked to be allowed in and Ms. McPherson complied. Appellant began talking with Ms. McPherson and Mr.

Welborn. Mr. Welborn then attacked Appellant, eventually gaining control over Appellant's firearm. Appellant was shot while trying to escape the house.

Appellant was able to return to his car and radio that he had been shot. Eventually, backup and emergency responders arrived, subdued Mr. Welborn, and transported Appellant to the hospital. This suit followed, initially naming a number of defendants; however, only Appellee remains a defendant to this suit. After discovery was completed and the other defendants dismissed as parties, Appellee sought and was granted summary judgment.

> 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. . . . "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 "[o]nly 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).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

In order to prove a claim of negligence, there must be "proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury."

Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003). When the defendant is a law enforcement official, an additional step in the analysis must be taken. For a law enforcement official, like Appellee, to owe a duty of care to a specific person, there must be a special relationship between the two. *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995). A special relationship exists when 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." *Ashby v. City of Louisville*, 841 S.W.2d 184, 190 (Ky. App. 1992). Here, Appellant was not in state custody; therefore, Appellee owed him no duty of care. Appellant cannot maintain a cause of action for negligence without Appellee owing him some duty of care.

Further, Appellee is immune from suit in both his official and individual capacities. These immunities were discussed in length in the case of *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). That case stated:

> "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity . . . . Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled . . . . But when sued in their individual capacities, public officers and employees enjoy only

> qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.,* those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.
>
> Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.,* one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." (Internal citations omitted).

Id. at 521-522.

Appellee's official immunity as Sheriff is absolute. However, Appellant argues to the contrary citing the recently published case of *Jones v. Cross*, 260 S.W.3d 343 (Ky. 2008), in which the Supreme Court interpreted KRS 70.040 in a manner that does permit the imposition of liability. KRS 70.040 states:

> The sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section. When a deputy sheriff omits to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission.

Jones v. Cross holds that KRS 70.040 waives the Sheriff's official immunity "for the tortious acts or omissions of his deputies." *Id.* at 346.

Appellant claims that if Deputy Woods had told Appellee of Mr. Welborn's death threats, then the Sheriff might have sent someone to Ms. McPherson's residence. Appellant claims that Deputy Woods was negligent in not telling the Sheriff this bit of information.

We cannot hold that KRS 70.040 waives Appellee's absolute official immunity in this case because neither Appellee nor Deputy Woods owed a duty to Appellant absent a special relationship. Because Appellant was not in state custody, there was no special relationship and therefore no duty of care owed. Deputy Woods did not commit a tortious act which injured Appellant and therefore there is no act for which Appellee could be liable under KRS 70.040.

Appellant also argues that Appellee is not entitled to qualified official immunity in his individual capacity because arresting Mr. Welborn should have been a ministerial duty. We disagree.

> An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature. Discretionary . . . duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. However, an act is not necessarily taken out of the class styled 'ministerial' because the

officer performing it is vested with a discretion respecting the means or method to be employed.

Upchurch v. Clinton County, 330 S.W.2d 428, 430 (Ky. 1959)(quoting 43 Am.Jur., Public Officers, sec. 258, p. 75). "[A] peace-officer's on-the-spot probable cause determination, as well as his decision whether to arrest, is an inherently discretionary act." *Caudill v. Stephens*, 2007 WL 625348 (Ky. App. 2007).[2] Here, Appellee had to determine if Mr. Welborn was a danger to himself or others and then decide if he could be arrested. This was a discretionary act, and not ministerial as claimed by Appellant. Appellant does not allege that Appellee's actions were discretionary, but done in bad faith. Therefore, Appellee is entitled to qualified official immunity.

Based on the foregoing, we find that summary judgment was appropriate because Appellant cannot maintain an action for negligence against Appellee as there was no special relationship. Also, Appellee is entitled to absolute official immunity in his representative capacity and qualified official immunity in his individual capacity.

ALL CONCUR.

[2] Kentucky Civil Rule 76.28(4)(c) allows us to consider this unpublished case.

BRIEF FOR APPELLANT:

James Blake Hornal
Bowling Green, Kentucky

Brian Schuette
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Brian Schuette
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Matt McGill
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