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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001511-MR

JASON H. CROSS; MITZI R. CROSS; AND
CHRISTOPHER A. SPRADLIN — APPELLANTS

APPEAL FROM BARREN CIRCUIT COURT
v. HONORABLE THOMAS O. CASTLEN, SPECIAL JUDGE
ACTION NO. 01-CI-00493

LELAND E. COX, INDIVIDUALLY;
BARNEY JONES, INDIVIDUALLY, AND
AS SHERIFF OF BARREN COUNTY;
GULF INSURANCE COMPANY;
UNKNOWN INSURANCE CARRIER OF
LELAND E. COX; AND UNKNOWN
INSURANCE CARRIER OF BARNEY JONES — APPELLEES

OPINION
DISMISSING AND REMANDING

** ** ** ** **

BEFORE: MOORE, STUMBO AND WINE,[1] JUDGES.

MOORE, JUDGE: This appeal arises out of two summary judgments granted to Barney Jones, Sheriff of Barren County, in both his individual and official

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

capacities, and Deputy Sheriff Leland Cox, in his individual capacity. There, however, remains a pending motion to amend the complaint before the circuit court. Because all issues in the case have not been decided, the case is not final. Accordingly, this Court lacks jurisdiction to decide the matter, and it is hereby DISMISSED and REMANDED for a ruling on the pending motion and proceedings not inconsistent with this opinion.

FACTUAL BACKGROUND

This case has previously been on appeal to our Court and discretionary review was thereafter granted by the Kentucky Supreme Court. We recite from the Supreme Court's opinion as to the facts of this matter:

> On the morning of September 3, 2000, Barren County Deputy Sheriff Leland Cox went to execute an arrest warrant on an evasive David Price. Deputy Sheriff Cox requested assistance from Kentucky State Police Troopers, Jason H. Cross and Christopher A. Spradlin, who both responded in their separate cruisers. All three vehicles were northbound on Kentucky Highway 740 when they learned that Price was approaching from the opposite direction. When Price realized that his southbound path was blocked, he abandoned his vehicle and fled on foot into a grassy field. Both troopers pursued Price on foot, while Deputy Cox drove his cruiser into the open field. As Trooper Cross caught Price, Deputy Cox ran his cruiser over Trooper Cross, leaving tire tracks on his uniform. Somehow, Deputy Cox's cruiser then hit Trooper Spradlin, but missed Price. Not surprisingly, both Troopers sustained injuries.
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> Subsequently, Trooper Spradlin, as well as Trooper Cross and his wife, Mitzi R. Cross, filed a negligence action against Deputy Cox and his employer, Barren County Sheriff Barney Jones, in both their individual and official capacities, and against their respective insurers. *The*

> *liability of Deputy Cox and his insurers is no longer an issue*.[2] The liability of Sheriff Jones in his individual capacity is still before the trial court and not an issue before this court. The issues ruled on by the trial court and on appeal to this Court are whether the sheriff (the office of sheriff) has official immunity when sued in his official capacity for tortious acts of a deputy, and if so, whether KRS 70.040 waives that immunity.
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> The trial court held that Sheriff Jones and his insurer were not liable "on the basis of absolute and qualified official immunities." Additionally, the trial court determined that KRS 70.040 did not waive immunity of a sheriff for tortious acts of a sheriff's deputies. The Court of Appeals agreed that a sheriff is entitled to immunity when sued in his official capacity unless said immunity is waived. The Court of Appeals went on to discuss KRS 70.040 and held that the statute was a waiver of the sheriff's official immunity for tortious acts of his deputies. The Court of Appeals, however, declined to address the constitutionality of said statute. This Court granted discretionary review to determine whether a sheriff in his official capacity (the office of sheriff), has immunity for tortious acts of his deputy, and if so, does KRS 70.040 waive that immunity.

Jones v. Cross, 260 S.W.3d 343, 344 (Ky. 2008) (emphasis added).

To put the procedural posture of the case in context, we note that the sole issue previously on appeal was whether Sheriff Jones was entitled to immunity in his official capacity.[3] As stated by the Kentucky Supreme Court:

[2] As will be more fully discussed later in this opinion, the issue of Deputy Cox's individual liability was not an issue in the first appeal. Accordingly, it is not evident why the Supreme Court made this statement. For further clarity, we note that the trial court had not ruled on the individual capacity claims for either Sheriff Jones or Deputy Cox. Rather, the trial court reserved ruling on these issues until discovery was completed and the first appeal was final.

[3] In the Court of Appeals' opinion in the first appeal, the Court noted that "[o]n appeal, appellants do not raise as error the dismissal of their claim against Deputy Leland E. Cox in his official capacity." *Cross v. Cox*, 2003-CA-001224-MR, at n.3 (Ky. App. 2008).

> The questions accepted for discretionary review are whether the sheriff in his official capacity (the office of sheriff) is entitled to official immunity for tortious acts of his deputies, and if so, whether KRS 70.040 waives that immunity. We opine that the sheriff in his official capacity (the office of sheriff) has official immunity for tortious acts committed by his deputies, but that KRS 70.040 waives said immunity for that office.

Id.

Once the interlocutory appeal was decided, the case was remanded to the trial court for resolution of the claims against Sheriff Jones, in his official capacity, for the alleged tortious acts of Deputy Cox. Also, still pending before the trial court were allegations that both Sheriff Jones and Deputy Cox were liable in their individual capacities. Upon remand, the trial court granted summary judgment to both Sheriff Jones and Deputy Cox in their individual capacities. Thereafter, the trial court granted summary judgment to Sheriff Jones in his official capacity. The Appellants thereafter timely filed their second notice of appeal.

The first issue Appellants present to this Court is dispositive, *i.e.,* there exists before the trial court a pending motion to amend the complaint. Appellants filed their motion to amend the complaint after the first notice of appeal on the interlocutory issue of whether Sheriff Jones had official immunity was entered. In their motion before the circuit court, they sought to amend the complaint regarding the liability of Sheriff Jones, arguing that he is vicariously liable for the alleged tortious acts of Deputy Cox pursuant to KRS 70.040 and to eliminate Sheriff Jones as a party in his individual capacity and remove the causes of action for negligent

hiring, retention, and training. Sheriff Jones and Deputy Cox responded to this motion arguing that because the case was on appeal at the time the motion to amend was filed, the trial court did not have jurisdiction to consider the motion. Thereafter, on February 28, 2005, Appellants renewed their motion to amend the complaint. Because the interlocutory matter of Sheriff Jones' liability in his official capacity was still on appeal, he responded to the motion to amend again arguing that the trial court lacked jurisdiction over the matter. On March 17, 2005, the trial court entered an order stating that it "reserves ruling on this matter pending a decision of the Kentucky Court of Appeals in order to avoid piecemeal litigation and also to have the entire record back before this Court." The Supreme Court rendered its opinion on April 24, 2008, reversing and remanding.

Although the Appellants had filed a motion to amend the complaint and a renewed motion to amend while the first appeal was pending, the record does not reflect another renewed motion to amend the complaint after the interlocutory appeal on the immunity issue was decided. Nonetheless, the Appellants patently argued in several papers filed with the circuit court that there remained a pending motion to amend the complaint and requested that the trial court rule on the motion. For example, in a memorandum filed by Appellants on April 29, 2010,[4] they raised the issue of amending the complaint and again asked the trial court to rule on the matter.

[4] This memorandum was filed in response to a question by a senior judge assigned to the case regarding which parties were before the court after the remand.

The motion to amend the complaint is highly relevant to the core of this case. In the Appellants' original complaint, their allegations relevant to Sheriff Jones focused on his hiring, retention and failure to train Deputy Cox. The motions for summary judgment, which the circuit court granted, were based on the allegations in the original complaint, *i.e.,* negligent hiring, retention and failure to train, not Sheriff Jones' liability for Deputy Cox's alleged negligence pursuant to KRS 70.040, which is the amendment to the complaint sought by Appellants.

Given the number of times the Appellants raised the issue of the motion to amend and requested that the court rule on it after the first appeal was decided—albeit not in a renewed motion to amend-- the circuit court should have construed the Appellants' filings liberally to include the motion to amend the complaint and should have ruled on the matter. As the record stands today, other than the circuit court's order that it reserved on the issue of the motion to amend the complaint during the pendency of the first appeal, the circuit court has never addressed or even mentioned this motion again. Kentucky Rule of Civil Procedure 15.01 provides that following the twenty-day period after a pleading is served, the court must decide whether to grant leave to amend a complaint although such "shall be freely given when justice so requires." *See M.A. Walker, Co. v. PBK Bank, Inc*., 95 S.W.3d 70, 74 (Ky. App. 2002) (citing Kentucky Rules of Civil Procedure 15.01).

Absent resolution of this pending motion, the case is not final; thus, this Court does not have jurisdiction over it. *See Jacoby v. Carrollton Federal Savings*

& Loan, 246 S.W.2d 1000 (Ky. App. 1952). "It has long been held that if an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." *Id.* at 1001 (citations omitted). Therefore, this appeal is hereby DISMISSED, and this case is REMANDED to the trial court for a decision on the pending motion to amend the complaint and proceedings not inconsistent with this opinion.

We pause to clarify the record in the first appeal regarding confusion surrounding the status of Deputy Cox's individual liability upon remand.[5] Appellees cite to a May 5, 2004 Order from this Court entered during the first appeal dismissing the issue of Deputy Cox's individual liability upon Appellants' motion to do so and a statement as noted *supra* in the Supreme Court's opinion that "*The liability of Deputy Cox and his insurers is no longer an issue*."[6] Upon a review of the entire trial court record and the Court of Appeals' record in the first appeal,[7] the issue of the individual liability of Deputy Cox was never properly before the Court during the first appeal.

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[5] For example, before us the Appellees state that "the Kentucky Court of Appeals, Kentucky Supreme Court, and the Barren Circuit Court have already concluded that Leland Cox, individually and in his official capacity as Deputy Sheriff, can no longer be a party to this litigation. Thus, *no judgment shall ever be rendered against Leland Cox, individually or in his official capacity as Deputy Sheriff*."

[6] *Cross*, 260 S.W.3d at 344.

[7] This panel retrieved from archives the Court of Appeals record in *Cross v. Cox*, 2003-CA-001224-MR to review it in full.

In the first appeal, Appellants initially included an issue in their prehearing statement regarding Deputy Cox's individual liability. However, Appellants later moved to dismiss this issue on appeal--correctly citing that the trial court had not ruled on this issue because discovery needed to be taken regarding it.[8] Accordingly, there was not an order from the trial court regarding Deputy Cox's individual liability from which to appeal. Consequently, there was no appellate jurisdiction to decide this matter. *See William C. Eriksen, P.S.C. v. Kentucky Farm Bureau Mut. Ins. Co.*, 336 S.W.3d 909, 913 (Ky. App. 2010) (citing *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006)). Consequently, it was proper for the Appellants to move our Court during the first appeal to dismiss it, which the Court did on May 5, 2004.

Regarding the lone and inaccurate statement in the Supreme Court's opinion regarding the individual liability of Deputy Cox, it cannot be construed as the law

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[8] Specifically, in Appellants' "Voluntary Dismissal of Portion of Appeal," they conceded that upon reviewing the trial court record, the trial court "stopped short of disposing of the causes of action against Deputy Cox in a manner that would have made that issue appealable at this time. Therefore, Appellants voluntarily dismiss the issue of immunity of Deputy Cox and dismiss Leland E. Cox, individually and as Deputy Sheriff of Barren County, and the Unknown Insurance Carrier of Leland E. Cox as appellees in this appeal."

Furthermore, in Appellees' brief before this Court in the first appeal, they specifically argue that Appellants' brief is confusing regarding whether the issue of individual liability is before the Court and request that that portion of the Appellants' brief be struck. In Appellees' own words, they stated as follows:

> To the extent the Appellants are attempting in their Brief to have this Court enter an opinion as to whether Barney Jones, individually, and Leland Cox, individually, are entitled to qualified immunity, such is not a proper issue for this Court's consideration at this time. Appellees respectfully request that this Court strike, disregard, not consider and deny Appellants' Brief and appeal as it pertains to qualified immunity for Barney Jones and Leland Cox, in their individual capacities.

of the case. To begin with, Deputy Cox was not even a party to the case before the Supreme Court. To further clarify why the misstatement of the status of Deputy Cox's individual liability cannot be construed as the law of the case, we quote from the former Court of Appeals as follows:

> Notwithstanding the firmness of [the law of case rule] in general, a number of courts have maintained and held that the rule is not inflexible but is subject to exception, although the exception must be rare and the former decision must appear to be clearly and palpably erroneous. In such a case it is deemed to be the duty of the court to admit its error rather than to sanction an unjust result and 'deny to litigants or ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely our ipse dixit in a prior ruling in the same case.' *McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300, 305, 67 A.L.R. 1381.
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> The court should look to the effect of its own error rather than merely acknowledge that error was committed and let it go at that. It should wipe out the effect of the mistake in the first opinion rather than perpetuate the error which would otherwise result in great wrong to the litigant and establish a bad precedent. That is essential justice.

Union Light, Heat & Power Co. v. Blackwell's Adm'r, 291 S.W.2d 539, 542 (Ky. 1956).

For the reasons as stated and for purposes of clarity of the record, there has been no appellate adjudication of Deputy Cox's liability in his individual capacity.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

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