

RENDERED: FEBRUARY 22, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000148-MR

HARLAN COUNTY; STEVE DUFF,
IN HIS OFFICIAL CAPACITY AS
HARLAN COUNTY SHERIFF; AND
ROGER DEAN HALL, IN HIS
OFFICIAL CAPACITY AS HARLAN
COUNTY DEPUTY SHERIFF

APPELLANTS

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RODERICK MESSER, SENIOR JUDGE
ACTION NO. 10-CI-00445

JAYNE BROWNING, INDIVIDUALLY; AND
JAYNE BROWNING AS ADMINISTRATRIX
OF THE ESTATE OF PAUL BROWNING, JR.

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Harlan County, Steve Duff, in his official capacity as Harlan County Sheriff, and Roger Dean Hall, in his official capacity as Harlan County Deputy Sheriff, (collectively referred to as appellants) bring this interlocutory appeal from a December 21, 2011, summary judgment of the Harlan Circuit Court holding that appellants were not shielded by sovereign immunity.¹ We affirm in part, reverse in part, and remand.

Paul Browning, Jr., who served as sheriff of Harlan County in the early 1980's, was murdered in Harlan County in March 2002. Some three years later, it was discovered that former Harlan County Deputy Sheriff Roger Hall had conspired in Browning's murder. At the time of his murder, Browning was a candidate for the office of sheriff in Harlan County running against then Sheriff Steve Duff. Eventually, Hall pleaded guilty to the criminal offense of facilitation to commit murder.

Consequently, appellees filed this civil action in 2010 against "Harlan County, Steve S. Duff, individually and in his official capacity as Harlan County Sheriff, and Roger Dean Hall, individually and in his official capacity as Harlan County Deputy Sheriff." In the complaint, appellees alleged that Sheriff Duff was negligent or grossly negligent in his hiring, training, and supervision of Deputy Sheriff Hall and that said negligence caused the wrongful death of Browning. Additionally, it was claimed that Sheriff Duff wantonly, recklessly, or intentionally planned and directed Deputy Sheriff Hall to cause the wrongful death of Browning

¹ An order adjudicating immunity may be appealed even though interlocutory. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

and that Deputy Sheriff Hall wantonly, recklessly, or intentionally planned, directed, and caused Browning's wrongful death. Appellants answered and moved for summary judgment. Appellants alleged that sovereign immunity barred appellants' tort action against Sheriff Duff and Deputy Sheriff Hall in their respective official capacities.

By summary judgment entered December 21, 2011, the circuit court concluded that Kentucky Revised Statutes (KRS) 70.040 waived any sovereign immunity enjoyed by the sheriff and his deputy in their official capacities:

[Appellants] also contend that claims against Steve Duff and Roger D. Hall, in their official capacities, are barred by sovereign immunity and absolute immunity. As the [appellee] points out, KRS 70.040 does waive a sheriff's official immunity.

As a consequence, the circuit court concluded that sovereign immunity was waived under KRS 70.040 and denied summary judgment. This appeal follows.

Appellants contend that the circuit court erred by rendering summary judgment determining that the sheriff and deputy sheriff, in their official capacities, were not entitled to sovereign immunity.² Appellants believe that Sheriff Duff and Deputy Sheriff Hall are protected by sovereign immunity when sued in their respective official capacities. Appellants maintain that summary judgment should have been rendered dismissing Sheriff Duff and Deputy Sheriff Hall in their

² In this appeal, we are only concerned with whether Sheriff Steve Duff and Deputy Sheriff Roger Dean Hall, in their respective official capacities, are entitled to sovereign immunity. There are no issues presented concerning whether Sheriff Duff and Deputy Sheriff Hall, in their individual capacities, are entitled to official immunity.

official capacities because no material issues of fact were presented upon the issue of sovereign immunity.

In Kentucky, the office of sheriff is a constitutional office and is elected from each county. Ky. Const. §§ 99 and 100; *Shipp v. Rodes*, 196 Ky. 523, 245 S.W. 157 (1922). The sheriff is recognized as the chief law enforcement officer of the county. *Shipp*, 245 S.W.157. The office of the sheriff receives most of its funding from the county and its residents. See KRS 64.121; KRS 70.036. Accordingly, a sheriff is a county official and absent a waiver thereof is cloaked with sovereign immunity when sued in his official capacity. See *Com. Bd. of Claims v. Harris*, 59 S.W.3d 896 (Ky. 2001)(holding that a jailer sued in his official capacity is cloaked with the county's sovereign immunity). Hence, a sheriff is entitled to sovereign immunity when sued in his official capacity.

With this fundamental background, we note that summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Here, the issue of whether Sheriff Duff and Deputy Sheriff Hall are entitled to the protection of sovereign immunity is a question of law. See *Jefferson County Fiscal Court v. Pierce*, 132 S.W.3d 824 (Ky. 2004).

In the complaint, appellants claimed that both Sheriff Duff and Deputy Sheriff Hall acted negligently, grossly negligent, wantonly, recklessly, and/or intentionally in causing the wrongful death of Browning. In response, both Sheriff

Duff and Deputy Sheriff Hall, in their official capacities, sought dismissal of the above claims upon the basis of sovereign immunity. However, the circuit court declined to afford Sheriff Duff and Deputy Sheriff Hall sovereign immunity and relied upon KRS 70.040.

KRS 70.040 reads:

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.

KRS 70.040 has been interpreted as imposing “liability on the sheriff in his official capacity for acts committed by his deputies.” *Jones v. Cross*, 260 S.W.3d 343 (Ky. 2008). Hence, KRS 70.040 constitutes a legislative waiver of the sovereign immunity traditionally enjoyed by a sheriff at common law. *Id.* As a result, a sheriff, in his official capacity, is liable for the acts or omissions of his deputies per KRS 70.040.

In this case, Sheriff Duff, in his official capacity, is not shielded by sovereign immunity for claims arising from the alleged wrongful acts of Deputy Sheriff Hall pursuant to KRS 70.040. Under KRS 70.040, the General Assembly has plainly waived the sovereign immunity traditionally enjoyed by a county sheriff in regard to acts of his deputy. *See Jones*, 260 S.W.3d 343. However, KRS

70.040 does not waive sovereign immunity as to acts of the sheriff individually.³ KRS 70.040 is clear that the office of sheriff is only liable for acts of his deputies. Therefore, Sheriff Duff, in his official capacity, is still shielded from liability for his own intentional or unintentional torts as KRS 70.040 does not operate as a waiver thereof and no other authority is cited to support such a waiver. *Jones*, 260 S.W.3d 343; *Calvert Invs. Inc. v. Louisville & Jefferson Co.*, 805 S.W.2d 133 (Ky. 1991). Hence, Sheriff Duff, in his official capacity, is shielded from liability by the doctrine of sovereign immunity for his own acts but is not shielded from liability for the acts of Deputy Sheriff Hall.

We now turn to Deputy Sheriff Hall's argument for immunity in his official capacity. A deputy sheriff, unlike the sheriff, is not a constitutional officer named and designated in the Constitution. However, the deputy sheriff is an employee of the sheriff and acts in an official capacity for that office. KRS 70.030. An action against an official in his official capacity is in reality an action against the pertinent governmental entity, and an official sued in his official capacity is shielded by the same immunity enjoyed by such governmental entity. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). Accordingly, we believe, Deputy Sheriff Hall would be entitled to the same immunity possessed by Sheriff Duff, in his official capacity, while performing duties as deputy sheriff. As hereinbefore discussed, Sheriff Duff, in his official capacity, was protected by sovereign immunity at common law; however, such sovereign immunity was waived by the General Assembly by enactment of

³ There is a distinction between the wrongful acts of a sheriff and the wrongful acts of his deputy. See 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 146 (2001).

KRS 70.040 as concerns actions of a sheriff's deputies. The plain language of this statute clearly contemplates that deputies shall be liable for damages to the sheriff incurred by the sheriff upon waiver of immunity for his deputies' acts and omissions. Accordingly, the only logical interpretation of the statute is to legally construe it to waive immunity for deputies also while acting in their official capacity. Thus, Hall, in his official capacity as a deputy sheriff, is not entitled to the protection of sovereign immunity.

Appellants next contend that sovereign immunity is not waived under KRS 70.040 because Deputy Sheriff Hall's acts were "intentional . . . motivated by reasons personal to Mr. Hall . . . [and] were not acts undertaken or committed within the course and scope of his duties as a Harlan County Sheriff's Deputy." Appellants' Brief at 13. The issue of whether Deputy Sheriff Hall's acts were committed within the course and scope of his duties as deputy sheriff is simply irrelevant to the application of sovereign immunity under KRS 70.040, as previously discussed and otherwise not before the Court in this appeal.⁴

Lastly, appellants argue that Harlan County should be dismissed as a party. In particular, appellants contend:

The Appellees' Complaint does not articulate a demonstrable claim against Harlan County. Presumably, Harlan County was joined as an Appellant on the basis of possible vicarious liability for the alleged acts of the individual Appellants. It is well settled, however, that

⁴ In *Lawson v. Burnett*, 471 S.W.2d 726, 788 (Ky. 1971), the Court noted that a sheriff is liable for injury caused by a deputy's "official act" but not liable for "a personal act of his deputy." Thus, as to the ultimate liability of the sheriff, the course and scope of the deputy's duties may be relevant, but such is not at issue in this appeal. *See id.*

county governments cannot be held liable for the negligent acts of its employees.

We agree with appellants that the complaint fails to set forth a justiciable claim against Harlan County. As noted, the office of sheriff is an independent constitutional office that serves as a county official, but is elected by the voters in each county. Ky. Const. § 99. And, like the county judge-executive, a sheriff is required to post a performance bond before assuming office. Ky. Const. § 103. *See also* KRS 70.020 and KRS 134.230. Additionally, an action against the sheriff and his deputies, in their official capacity, is essentially an action against the county. *Harris*, 595 S.W.3d 896.

Absent a waiver, the county is protected by immunity for any claim against the sheriff arising under KRS 70.040. It is well-recognized that a county is viewed as a political subdivision of this Commonwealth and as such, is “cloaked” with sovereign immunity. *Lexington-Fayette Urban County Gov’t v. Smolcic*, 142 S.W.3d 128 (Ky. 2004). The doctrine of sovereign immunity precludes maintaining any negligence action against the Commonwealth unless the Commonwealth expressly consents or otherwise waives its immunity. *Yanero*, 65 S.W.3d 510. KRS 70.040 provides no waiver of claims against a county or its fiscal court for actions of the sheriff’s office or its deputies.

In sum, we hold that Sheriff Duff, in his official capacity, is entitled to sovereign immunity for his own intentional or unintentional wrongful acts but not entitled to sovereign immunity for the intentional or unintentional wrongful acts of

Deputy Sheriff Hall. As a result thereof, Deputy Sheriff Hall, in his official capacity, is also not entitled to sovereign immunity. Finally, appellees' claims against Harlan County should be dismissed, and Harlan County should be dismissed as a party to this action.

This opinion should not be misconstrued as holding Sheriff Duff, in his official capacity, liable for the alleged negligent or intentional wrongful acts of Deputy Sheriff Hall. We simply hold that Sheriff Duff, in his official capacity, is not shielded by sovereign immunity and that appellees' claims against Sheriff Duff, in his official capacity, may not be summarily dismissed upon sovereign immunity grounds.

For the foregoing reasons, the Order of the Harlan Circuit Court is affirmed in part, reversed in part, and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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