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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001945-MR

LELAND COX, INDIVIDUALLY; AND BARNEY JONES, IN HIS OFFICIAL CAPACITY AS SHERIFF OF BARREN COUNTY — APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, SPECIAL JUDGE
ACTION NO. 01-CI-00493

JASON H. CROSS, MITZI R. CROSS, and CHRISTOPHER A. SPRADLIN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: This appeal arises out of an order granting the appellees' motion to vacate the summary judgment which dismissed Deputy Cox in his individual capacity and denying the appellants' motion to dismiss the appellees'

amended complaint. The appellants argue that the circuit court exceeded its authority and ask this Court to reverse. We affirm.

We rely on the summation of facts as given by the Kentucky Supreme Court in its earlier consideration of this case:

> A sheriff's deputy seriously injured two Kentucky State Troopers while all three were attempting to capture a fugitive. 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 [Kentucky Revised Statute] 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.
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> 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.
>
> 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. 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.
>
> 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, 344-45 (Ky. 2008).

The Supreme Court held:

> [T]he legislative waiver of immunity is very clear, and . . . the plain language of KRS 70.040 leaves no room for any other reasonable construction than a waiver of the sheriff's official immunity (the office of sheriff) for the tortious acts or omissions of his deputies. *See Grayson County Bd. of Educ. v. Casey*, 157 S.W.3d 201 (Ky.

> 2005), *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001), and *Withers v. Univ. of Ky.*, 939 S.W.2d 340 (Ky. 1997) for examples of "limited" waivers of liability.

Jones, 260 S.W.3d at 346. The matter was remanded to the Barren Circuit Court for further proceedings.

Subsequently, on remand, the circuit court granted two summary judgments, namely, to Barney Jones, Sheriff of Barren County, in both his individual and official capacities, and Deputy Sheriff Leland Cox, in his individual capacity. On appeal to this Court, a separate panel again sent it back to the circuit court, holding that, because there were pending issues, the case was not final and "there was no appellate jurisdiction to decide this matter." *Cross v. Cox*, 2010-CA-001511-MR, 2012 WL 512575, at *3 (Ky. App. Feb. 17, 2012). That opinion stated that the matter was remanded "for a decision on the pending motion to amend the complaint and proceedings not inconsistent with this opinion." *Id.*

On November 4, 2013, the Barren Circuit Court entered its order granting the appellees' motion to amend the complaint. On November 22, 2016, the circuit court entered its order granting the appellees' motion to vacate summary judgment and denying the appellants' motion to dismiss the amended complaint. By vacating summary judgment, the circuit court held that Deputy Cox in his individual capacity and Sheriff Jones in his official capacity remained as defendants in the action and ordered that discovery begin as to the former

defendant's alleged negligence (discovery involving Sheriff Jones having already been completed). Cox and Jones appeal.

The appellants first argue that the circuit court improperly denied Deputy Cox qualified official immunity, an issue which appellants insist that the circuit court determined *sua sponte* on remand. First[1] Deputy Cox argues that he was effectuating an arrest at the time of the accident – a generally discretionary act – and therefore he is entitled to qualified official immunity.

> Under the qualified immunity doctrine, public officers and employees are shielded from liability for the negligent performance of discretionary acts in good faith and within the scope of their authority. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). The distinction between a discretionary act and a ministerial act is pivotal to the immunity determination. A discretionary act involves the exercise of discretion and judgment or personal deliberation. *Id.* A ministerial act is one that is "absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* The *Yanero* Court elaborated: "An act is not necessarily 'discretionary' just because the officer performing it has some discretion with respect to the means or method to be employed." *Id.* Quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959), the Court emphasized "[t]hat a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." *Id.* Because few acts are purely discretionary or purely ministerial, the courts must look for the "dominant nature

[1] Appellees do not contest Cox's right to an immediate appeal of this issue. Kentucky Rule of Civil Procedure (CR) 54.01; *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009); *Mattingly v. Mitchell*, 425 S.W.3d 85, 89 (Ky. App. 2013). Thus, there need be no discussion of that initial assertion by Cox.

> of the act." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

Mattingly v. Mitchell, 425 S.W.3d 85, 89-90 (Ky. App. 2013).

Furthermore, "[a]n officer has discretion to decide whether to begin, continue, or end the emergency pursuit, **but not for the way he or she operates the police vehicle during the emergency pursuit**. Driving is a matter of duty and training, and it is not subject to deliberation or judgment." *City of Brooksville v. Warner*, 533 S.W.3d 688, 694-95 (Ky. App. 2017) (emphasis added). Under the present circumstances, Cox was performing a discretionary act when he commenced the pursuit to effectuate the arrest. But he veered from that discretion when he went off road into an open field and struck Officers Cross and Price. *Id.* The "dominant nature of the act" became ministerial at that point. *Mattingly*, 425 S.W.3d at 90 (citation omitted). The issue of his alleged negligence and whether there were standard operating procedures in place to address the situation are issues of fact for the jury to decide. The circuit court properly vacated the motion for summary judgment on the issue of Cox's entitlement to qualified official immunity for his alleged negligent driving.

The appellants next argue that the circuit court abused its discretion in granting the fourth renewed motion to vacate summary judgment because it failed to comply with the law of the case. In this regard, Cox maintains that the amount of time and the number of presiding circuit court judges have prejudiced his

defense of the allegations against him. But as the appellees aptly point out, these factors prejudice them equally if not more so. We decline to assign error for this allegation.

Appellants thirdly argue that, because the Kentucky Supreme Court, in its 2009 opinion, *supra*, ruled that only the sheriff can be held liable under KRS 70.040, the circuit court erred in vacating the summary judgment which dismissed Cox in his individual capacity. Appellants insist that KRS 70.040 "effectively mandates that an injured party's exclusive remedy is to sue the office of the sheriff," citing the following language in that statute: "the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission."

Indeed, Sheriff Jones is putatively liable under KRS 70.040, and he could in turn seek redress from Deputy Cox for those acts which Cox performed in his official capacity. But Cox's possible liability in his individual capacity has no bearing on the sheriff's putative liability under the statute. Those are two independent theories of liability, albeit the factual underpinnings are intertwined. We find no error in this regard.

Appellants next complain that the Kentucky Supreme Court's opinion barred liability from anyone other than the sheriff. *Jones*, 260 S.W.3d at 345. Yet

the Court of Appeals opinion of 2012 is also part of the case history. This Court stated:

> We pause to clarify the record in the first appeal regarding confusion surrounding the status of Deputy Cox's individual liability upon remand. 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." Upon a review of the entire trial court record and the Court of Appeals' record in the first appeal, **the issue of the individual liability of Deputy Cox was never properly before the Court during the first appeal**.

Cross v. Cox, 2012 WL 512575, at *3 (footnotes omitted) (emphasis added). The opinion further states: "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 of the case." *Id.* at *4. The issue of Cox's individual liability was properly before the circuit court; accordingly, it was not precluded from ruling on it.

Appellants next contend that the 2012 remand "expressly limited the charge of the trial court." Again, we cannot agree. If this were so, the opinion would not contain the language cited in the previous paragraph, nor would it order that the circuit court conduct "proceedings not inconsistent with this opinion." *Id.* at *3. The circuit court was within its province to make such a ruling.

The sixth argument for our consideration is whether the circuit court properly denied the appellants' motion to dismiss the appellees' amended complaint. We hold that it did. The appellees' claims of putative liability are viable under statutory and case law, and they should be properly put before a jury. KRS 70.040; *Yanero v. Davis*, *supra*; *City of Brooksville v. Warner*, *supra*; *Mattingly v. Mitchell*, *supra*.

The last issue was also addressed by this Court's 2012 opinion when it dismissed that appeal and ordered the matter remanded "for a ruling on the pending **motions**." (Our emphasis). *Cross*, 2012 WL 512575 at *1. This Court recognized the circuit court's jurisdiction to rule on the motions or it would have held otherwise. We decline to discuss it further.

The interlocutory order of the Barren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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