

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001224-MR

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

APPELLANTS

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE PHIL PATTON, JUDGE  
ACTION NO. 01-CI-00493

BARNEY JONES, INDIVIDUALLY AND AS SHERIFF OF  
BARREN COUNTY; GULF INSURANCE COMPANY; AND  
UNKNOWN INSURANCE CARRIER OF BARNEY JONES

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jason H. Cross, Mitzi R. Cross, and Christopher A. Spradlin bring this appeal from April 10, 2003, and May 9, 2003, orders of the Barren Circuit Court dismissing negligence claims asserted against Sheriff Barney Jones in his official capacity on the basis of sovereign immunity. We reverse and remand.

On September 3, 2000, Kentucky State Police Troopers Cross and Spradlin were on duty in Barren County. Leland E.

Cox, Deputy Sheriff of Barren County, requested the troopers' assistance in the execution of an arrest warrant against David Price. While attempting to effectuate the arrest, Price fled into a grassy field. The troopers pursued Price on foot, and Deputy Cox drove his police cruiser in the field to join the pursuit. Unfortunately, Deputy Cox's cruiser hit both Trooper Cross and Trooper Spradlin.

Consequently, Cross and Spradlin (collectively referred to as appellants)<sup>1</sup> filed a complaint in the Barren Circuit Court against Deputy Cox, in his individual and official capacities; against Sheriff Barney Jones, in his individual and official capacities; against Gulf Insurance Company, as the liability insurance carrier of Cox and Jones; and against Unknown Insurance Carriers of Cox and Jones. Deputy Cox and Sheriff Jones (collectively referred to as appellees) filed an answer and thereafter, filed a motion to dismiss under Ky. R. Civ. P. (CR) 12.02. Therein, appellees claimed to be entitled to sovereign immunity upon the official capacity claims and to qualified official immunity upon the individual capacity claims. By orders entered April 10, 2003, and May 9, 2003, the circuit court concluded the claim against Sheriff Jones in his official capacity was barred by the doctrine of sovereign immunity. The court also concluded that additional facts were needed upon

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<sup>1</sup> Mitzi R. Cross is also an appellant but merely asserts claims for "lost wages" and loss of consortium.

whether the claim against Sheriff Jones in his individual capacity was barred by the doctrine of qualified official immunity and thus, did not dismiss the claim. The court further held the claim against Deputy Cox in his official capacity was barred by the doctrine of sovereign immunity<sup>2</sup> but determined that additional facts were needed upon whether the claim against Deputy Cox in his individual capacity was barred by qualified official immunity. This appeal follows.<sup>3</sup>

Upon review of a dismissal under CR 12.02, all factual allegations contained in the complaint must be taken as true, and there must exist no set of facts upon which relief could be based. Pari-Mutuel Clerks' Union, Local 541 v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977). In this appeal, we are presented with the following legal questions: (1) whether a sheriff is generally clothed with sovereign immunity when sued in his official capacity; and specifically, (2) whether a sheriff in his official capacity is liable for the negligence of his deputy? We address these questions seriatim.

The office of the sheriff has deep historical roots at common law and even predates the Magna Carta. See Wisconsin Prof'l Police Ass'n v. County of Dane, 106 Wis.2d 303, 316

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<sup>2</sup> On appeal, appellants do not raise as error the dismissal of their claim against Deputy Leland E. Cox in his official capacity.

<sup>3</sup> The orders were made final and appealable by inclusion of Ky. R. Civ. P. 54.02 language.

N.W.2d 656 (1982)(recognizing that the office of the sheriff originated prior to the Magna Carta). In this Commonwealth, the office of the sheriff is a constitutional office and elected from each county. Ky. Const. §§ 99 and 100; and Shipp v. Rodes, 196 Ky. 523, 245 S.W. 157 (1922). The sheriff is not an officer of the state but is, instead, recognized as the chief law enforcement officer of the county. Shipp, 245 S.W. 157. Indeed, the office of the sheriff receives most of its funding from the county and its residents. See Kentucky Revised Statutes (KRS) 64.121; KRS 70.036.

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 v. Davis, 65 S.W.3d 510 (Ky. 2001). It is an equally well-recognized tenet that sovereign immunity extends to an official sued in his official capacity. Id. When sued in an official capacity, the public official is said to be sued as a representative of the sovereign, and the sovereign is viewed as the real party in interest. Id.

With the foregoing in mind, we hold that a sheriff is a county official and absent a waiver thereof is clothed with sovereign immunity when sued in his official capacity. See Commonwealth 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.

We now turn to the more troublesome question of whether the sheriff is liable in his official capacity for the negligence of his deputy. Resolution of this question centers upon interpretation of KRS 70.040, which 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.

By its express terms, KRS 70.040 imposes "liability" upon the office of the sheriff for acts and omissions of deputies. It is clear that KRS 70.040 exempts the sheriff individually from its ambit;<sup>4</sup> however, it is unclear whether KRS

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<sup>4</sup> Previous versions of Kentucky Revised Statutes 70.040 read that the sheriff was responsible for the acts of deputies. Such versions were not limited to the office of sheriff. See, e.g., Ky. St. 4563 (1894).

70.040 constitutes a limited waiver of sovereign immunity enjoyed by the sheriff in his official capacity.

To constitute a waiver of sovereign immunity, a statute must do so expressly or impliedly "by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Withers v. University of Kentucky, 939 S.W.2d 340, 346 (Ky. 1997)(quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S. Ct. 458, 464-65, 53 L. Ed. 742 (1909)).

Under KRS 70.040, the office of sheriff is subject to liability for the acts or omission of deputies. As recently observed by the Kentucky Supreme Court, "[i]mmunity, however, means immunity from suit." Grayson County Board of Educ. v. Casey, 157 S.W.3d 201, 207 (Ky. 2005). By utilizing the term "liability", did the General Assembly intend to make the office of sheriff amenable to civil suit?

The interpretation of a statute is a matter of law for the court. White v. McAllister, 443 S.W.2d 541 (Ky. 1969). When interpreting statutory language, words possessing a technical legal meaning should be given such meaning. City of Worthington Hills v. Worthington Fire Protection District, 140 S.W.3d 584 (Ky.App. 2004).

The word "liability" has acquired a particular legal meaning:

The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy . . . .

BLACK'S LAW DICTIONARY 925 (7<sup>th</sup> ed. 1999). Under the above definition, liability means a legal obligation enforceable by civil remedy. Therefore, we interpret KRS 70.040 as exposing the office of sheriff to civil suit for the acts and omissions of a deputy.<sup>5</sup> By overwhelming implication, KRS 70.040 waives the sovereign immunity historically enjoyed by the sheriff when sued in his official capacity for the negligence of a deputy. In sum, we hold that Sheriff Jones in his official capacity is not entitled to the shield of sovereign immunity by operation of KRS 70.040.

Appellants also challenge the constitutionality of KRS 70.040; however, the record reveals that appellants failed to notify the attorney general of the challenge as required by KRS 418.075. KRS 418.075 mandates that the attorney general be served with a copy of the initiating document of an appeal when the constitutionality of a statute is called into question; moreover, this notice must be served before the filing of

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<sup>5</sup> Until the Kentucky Supreme Court directs otherwise, or until the General Assembly repeals this statute, we reluctantly hold, that under prevailing law, the office of sheriff is not immune from liability for the acts and omissions of a deputy.

appellant's brief. The record reveals that no such notification was served upon the attorney general. In the certificate of service to appellants' brief, appellants certified that a copy of the brief was served upon the attorney general. However, KRS 418.075 clearly requires the initiating document be served upon the attorney general before the filing of the brief. Upon these facts, we conclude that appellant failed to properly notify the attorney general of his constitutional attack upon KRS 70.040. See Maney v. Mary Chiles Hosp., 785 S.W.2d 480 (Ky. 1990).

Where the attorney general is not properly notified of a constitutional attack upon a statute, the court must decline to address the constitutionality of the statute. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky.App. 1977); Massie v. Persson, 729 S.W.2d 448 (Ky.App. 1987) *overruled on other grounds by* Conner v. George W. Whitesides Co., 834 S.W.2d 652 (Ky. 1992).

We also observe that the circuit court did not pass upon the constitutionality of KRS 70.040. It is well-established that an appellate court will only review alleged errors that were actually presented to and decided by the circuit court. See Regional Jail Authority v. Tackett, 770 S.W.2d 225 (Ky. 1989). Upon the above stated principles of law, we decline to address the constitutionality of KRS 70.040.



For the foregoing reasons, the orders of the Barren Circuit Court are reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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