

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002113-MR

NOVELLIA MOSLEY, ADMINISTRATRIX OF  
THE ESTATE OF BILLIE JO MITCHELL

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE KELLEY ASBURY, SPECIAL JUDGE  
ACTION NO. 98-CI-00005

PAUL HUNT THOMPSON, SHERIFF  
OF FLOYD COUNTY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, CHIEF JUDGE, BUCKINGHAM, AND KNOX, JUDGES.

KNOX, JUDGE: On December 29, 1996, Andy Mitchell was arrested for assaulting his estranged wife, Billie Jo. Shortly thereafter, on January 6, 1997, Billie Jo obtained a Domestic Violence Order (DVO) against Andy. It appears that Andy violated the terms of the DVO more than once over the course of the year. On October 28, 1997, while Billie Jo and a police officer were attempting to retrieve Billie Jo's belongings from the couple's

house, Andy became violent. Although he was arrested for disorderly conduct, he was released on bond that same day.

The next day, October 29, 1997, Andy again violated the terms of the DVO, in response to which the district court issued a warrant for Andy's arrest, forthwith. The order recited the court's belief that Andy was armed and dangerous. The warrant was placed in the hands of appellee sheriff, Paul Hunt Thompson, for service. The warrant, however, was never served, and Andy remained at-large over the next several days. On November 2, 1997, Andy shot and killed Billie Jo.

In January 1998, appellant, after having been appointed administratrix of Billie Jo's estate, filed this wrongful death action against appellee in his capacity as sheriff. Appellant alleged several counts of negligence on appellee's part for his failure to arrest Andy Mitchell prior to Billie Jo's death. In response, appellee moved the circuit court to dismiss the action for failure to state a claim upon which relief can be granted. Specifically, appellee argued that appellant had sued him in his official capacity only, rather than in both his official and individual capacities, in which case, appellee maintained, he was immune from suit under the doctrine of sovereign immunity.

Alternatively, he argued in his motion to dismiss, even had appellant sued him in his individual capacity, he did not owe a duty to Billie Jo Mitchell of protecting her from harm and, thus, could not be held liable for negligence. Appellee further argued that the service of arrest warrants constitutes a discretionary function within the scope of his authority and

that, as such, pursuant to case law, he could not be held liable for the failure to arrest Andy Mitchell. Finally, appellee maintained, even if his failure to act were negligent, Andy's intentional and criminal conduct constituted an intervening and superseding cause of Billie Jo's death. Thus, he argued, any negligence on his part for failure to arrest Andy could not possibly be the proximate cause of death, and he would not be liable in any event.

Appellant filed a motion to amend her complaint to add appellee in his individual capacity as a party to the lawsuit. The Floyd Circuit Court heard both motions, appellee's to dismiss and appellant's to amend, on the same day. Shortly thereafter, the court granted appellee's motion to dismiss and entered judgment in his favor, finding that: (1) appellee owed no duty to Billie Jo to arrest Andy Mitchell; and, (2) appellee's failure to arrest Andy was not the proximate cause of the fatal injuries suffered by Billie Jo. The court denied appellant's motion to amend the complaint.<sup>1</sup>

On appeal, appellant argues that the act of serving an arrest warrant is a ministerial function, not discretionary in nature, and that, as such, sovereign immunity does not necessarily protect appellee from exposure to liability for negligence. Further, appellant argues that appellee did, in fact, owe Billie Jo the duty of protecting her, given that Billie

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<sup>1</sup>Appellant has not appealed that portion of the judgment denying appellant's motion to amend the complaint, and we do not address that issue herein.

Jo had been previously victimized by Andy and was an identifiable individual clearly in danger.

In essence, appellant argues that Billie Jo's death was foreseeable, given the circumstances, and that, as such, appellee did, in fact, owe Billie Jo the duty of protection. This argument, however, is one which is applicable only when a government official, such as the sheriff in this case, has been sued for negligence in his individual capacity. See Corrections Cabinet v. Vester, Ky., 956 S.W.2d 204, 206 (1997) ("If the ultimate injuries were not foreseeable to the governmental officials in their individual capacity, and if the victim of the injury was not identifiable, there was no duty to prevent such an injury." (Quoting Fryman v. Harrison, Ky., 896 S.W.2d 908, 909 (1995) (emphasis added))).

Appellant did not sue appellee in his individual capacity, but rather in his official capacity as sheriff. In fact, appellee, individually, was never made a party to this lawsuit, the court's having denied appellant's motion to do so. Yet, by way of its notice of appeal, appellant named appellee, in his individual capacity, as a party to this appeal, and proceeded to advance before this Court the argument that there is evidence establishing individual liability on appellee's part. However, appellant did not appeal the issue of whether the trial court improperly denied the opportunity to add appellee to the lawsuit, in his individual capacity. Thus, the issue of appellee's liability in such capacity is not before us, and appellant's arguments, all of which are designed to persuade this Court that

this case should proceed on the basis that the evidence establishes individual liability, must fail.

It appears the circuit court did not address the issue of sovereign immunity, when it should have done so prior to addressing the substantive issues, e.g. duty and proximate cause, which presume appellee's status in the lawsuit as an individual. However, we believe that although the court omitted this important step, its conclusion that appellant failed to state a claim upon which relief can be granted was correct, albeit for a different reason, i.e. appellee, in his official capacity as sheriff, is protected under the doctrine of sovereign immunity. See Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195 (1997).

For the foregoing reasons, we affirm the judgment of the Floyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John David Preston  
Phil A. Stalnaker  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Marshall R. Hixson  
Lexington, Kentucky