

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-001287-MR

WILLIAM CHIPMAN, Administrator
of the Estate of CONNI BLACK

APPELLANT

V. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
CIVIL ACTION NO. 94-CI-000202

CITY OF FLORENCE; BOBBY JO WINCE;
JOHN DOLAN; THOMAS DUSING; RON
KENNER; ROB REUTHE; and
CHRIS ALSIP

APPELLEES

NO. 1996-CA-001318-MR

SUSAN STEMLER

APPELLANT

V. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
CIVIL ACTION NO. 94-CI-000459

CITY OF FLORENCE; BOBBY JO WINCE;
JOHN DOLAN; and THOMAS DUSING

APPELLEES

OPINION

AFFIRMING IN PART, VACATING IN PART

AND REMANDING 1996-CA-001287-MR

AND

AFFIRMING 1996-CA-001318-MR

** ** * * * * *

BEFORE: ABRAMSON¹, DYCHE and HUDDLESTON, Judges.

¹Judge Abramson concurred in this opinion prior to leaving the Court on November 22, 1998.

HUDDLESTON, JUDGE. William Chipman, Administrator of the Estate of Conni Black, and Susan Stemler appeal from summary judgments granted in favor of the several Appellees after the trial court determined that the Appellees did not owe a legal duty to Black to protect her from third-party harm, and that Stemler, as a matter of law, could not establish claims against the Appellees for various torts. Because the cases arise out of the same set of facts, they have been consolidated on appeal.

Both of the Appellants brought federal civil rights actions against some or all of the Appellees pursuant to 42 United States Code (U.S.C.) § 1983. After their complaints were dismissed by the United States District Court for the Eastern District of Kentucky, they appealed to the United States Court of Appeals for the Sixth Circuit. Many of the issues raised in these appeals were addressed by that Court in a well-reasoned opinion authored by Judge Danny Boggs. See Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997). Our recitation of the facts relevant to these appeals draws heavily on Judge Boggs's opinion. Inasmuch as the Appellants' complaints were dismissed upon the Appellees' motions for summary judgment, we view the facts at this juncture in the light most favorable to the Appellants and resolve all doubts in their favor. Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476, 480 (1991).

On the evening of February 18, 1994, Conni Black and her boyfriend, Steve Kritis, arrived at Willie's Saloon in Florence, Kentucky. Black and Kritis drank heavily at the bar. While

dancing, Black met Susan Stemler. Some three hours after arriving, Black and Stemler went to the women's restroom and discussed problems each was having with their respective boyfriend. Kritis entered the restroom and began to verbally and physically abuse Black. Black left the restroom, but quickly returned. Again, Kritis entered and physically abused her. The confrontation continued in the parking lot, and Black asked Stemler to take her home. As they were leaving, Kritis struck Stemler in the back of the head with a blunt object.

Kritis pursued Stemler and Black in his truck as they left the parking lot at approximately 2:15 a.m. At one point during the chase, Kritis rear-ended Stemler's car with his truck. Terry Barker witnessed the incident in the bar's parking lot and followed the two vehicles. According to Barker, the vehicles eventually came to the driveway of William Minnick, a retired Florence police officer, where they stopped with Kritis's truck blocking Stemler's exit. Minnick's wife saw Kritis hitting Stemler's car window and yelling. Stemler was able to back around Kritis's truck and on to the street. She drove from the scene with Kritis in pursuit. Barker followed the vehicles and, after calling 911, so did Minnick.

After the vehicles reentered U.S. Highway 42, Lieutenant Thomas Dusing of the Florence Police Department, responding to Barker's plea, pulled his vehicle in front of Stemler's car and Kritis's truck as they were stopped at a traffic signal. Stemler exited her automobile and approached Lieutenant Dusing telling him

that Kritis was drunk, that he had assaulted both her and Black, that he had threatened to kill her, and that he had pursued her automobile at a high rate of speed. Shortly thereafter, several other officers arrived, including Bobby Joe Wince and John Dolan of the Florence Police Department and Rob Reuthe and Chris Alsip of the Boone County Sheriff's Department.

Reuthe approached Kritis, who was seated in his truck, at which point Kritis told him that Stemler was a lesbian and was kidnapping his girlfriend. Lieutenant Dusing later testified that Reuthe told him that Stemler was a lesbian. Reuthe also told Lieutenant Dusing that Kritis smelled of alcohol, but that he had not tested Kritis for intoxication. Dusing later submitted a police report claiming that he did not smell alcohol on Kritis's breath. This assertion was contrary to his contemporaneous statements to Wince and Minnick that Kritis smelled of alcohol. A blood test taken over two hours later revealed that Kritis had a blood alcohol level of .115.² Subsequent observers would also testify that, over an hour after Stemler and Kritis were stopped, it was immediately apparent that Kritis was drunk. Nevertheless, neither Dusing nor any other officer tested Kritis for intoxication or asked him to step out of his truck.

² Ky. Rev. Stat. (KRS) 189A.010(1) provides that "[a] person shall not operate or be in physical control of a motor vehicle anywhere in this state: (a) While the alcohol concentration in his blood or breath is 0.10 or more" "Alcohol concentration" is defined in KRS 189A.005(1) as "either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath"

Lieutenant Dusing asked Wince to test Stemler for intoxication, and although Stemler passed all but one of the field tests, she was later determined to have a blood alcohol level of .105. Lieutenant Dusing decided that Stemler should be arrested for driving under the influence, and the other officers agreed. Stemler urged the officers to test Kritis for alcohol intoxication to no avail.

As Stemler was being arrested, two unidentified officers, one from the City of Florence and the other from Boone County, approached Barker, who related the complete story of the chase. Upon learning that Stemler was being placed under arrest, Barker told the officers that they were arresting the wrong person and that Kritis was obviously "crazy." The officers allegedly became "arrogant," and told Barker that he didn't "know what's going on" and that he could "go on about [his] business." Officer Wince failed to list Barker as a witness at the scene, and Barker was never contacted to be a witness at Stemler's trial. While Wince was testing Stemler, Minnick arrived at the scene and was told by Alsip and Wince that Stemler was a lesbian.

Lieutenant Dusing ordered Dolan to approach Black, who was still in the passenger seat of Stemler's car and very intoxicated, and to inform her that she would be arrested for public intoxication "if she didn't want to leave with the male." Alsip and Dolan lifted her out of Stemler's car and assisted her to Kritis's truck. Black stumbled as she walked to the truck. Alsip physically placed Black on the passenger seat of the truck, but did

not fasten her seat belt. Alsip later admitted that he never heard Black say that she wanted to leave with Kritis. Alsip also conceded that had he known of the events that preceded his action, he would not have placed Black in the truck, but would have instead arrested Kritis.

As soon as Black was in his truck, Kritis drove away, eventually entering Interstate Highway 75. Within minutes, according to Kritis, Black woke up and "went haywire." She began hitting him, which lead to Kistis hitting her back and losing control of his truck. The truck swerved to the right and collided with a guardrail. The impact threw Black partially out of the passenger side window. Black's arm was completely severed from her body and her head was split into two parts. Although the truck was severely damaged, Kritis continued to drive slowly north on I-75 and then east on I-275 until the truck struggled to a stop.

A passing motorist stopped to render assistance and Kritis admitted to him that he was drunk, something the motorist had already concluded. Officer Stephen Johnson of the Lakeside Park-Crestview Police Department arrived at the scene and was immediately convinced that Kritis was drunk. Kritis was arrested for driving under the influence.³

* * *

³ Kritis later pled guilty to manslaughter in the second degree and wanton endangerment in the first degree and was sentenced to imprisonment for five years.

The administrator of Black's estate filed a wrongful death action under Kentucky law against the City of Florence and Boone County officers mentioned above, the City of Florence, and against Ron Kenner, the Sheriff of Boone County. Sheriff Kenner, who was sued in his official capacity, died on May 11, 1997. His successor has not been joined in the suit filed by Black's estate. Summary judgment was granted in favor of all of the Appellees when the circuit court determined, as a matter of law, that the Appellees did not owe a duty to protect Black because no "special relationship" existed between the parties. Stemler's complaint seeking damages for malicious prosecution, false arrest, abuse of process, false imprisonment and negligent or intentional infliction of emotional distress was also summarily dismissed. Stemler voluntarily dismissed her claim for assault and battery.

* * *

To prevail on a negligence claim, a plaintiff, such as the administrator of Black's estate, is required to establish: (1) the existence of an actionable duty; (2) the breach of that duty; and, (3) consequent injury. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992). The question of duty presents an issue of law. Id. at 248. Thus, we must determine whether Black and officers from the City of Florence and Boone County had a sufficiently direct relationship such that the officers owed her a duty not to subject her to danger.

In Ashby v. City of Louisville, Ky. App., 841 S.W.2d 184 (1992), Betty Ashby obtained a protective order against her

cohabitant, Carl Branch. After Branch violated the order, an arrest warrant was issued. Branch was not arrested until a week later, and only after he had brutally murdered Ashby. Ashby's administratrix sued alleging that the police officers failed to utilize due care to protect her daughter when they failed to execute the warrant. The trial court granted summary judgment for the officers dismissing Ashby's complaint. On appeal, this Court said that in the absence of a "special relationship," a law enforcement agency does not owe individual citizens a duty to protect them from criminal activity. Rather, the duty owed is to the public as a whole. *Id.* at 189. The Ashby court, relying on the United States Supreme Court's decision in DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), said that no "special relationship" will be found to exist for purposes of due process "unless it is shown, in a given situation, that the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor." Ashby, 841 S.W.2d at 190. Finding that no "special relationship" existed between the parties, this Court affirmed the judgment dismissing Ashby's complaint.

Six years later, in Fryman v. Harrison, Ky., 896 S.W.2d 908 (1995), the Kentucky Supreme Court adopted the "special relationship" approach enunciated in Ashby, not just for actions brought pursuant to 42 U.S.C § 1983, but for ordinary tort cases. Although the Court held that no "special relationship" existed

where the victim of an assault claimed that his assailant was negligently released from jail, the Court emphasized the fact that the plaintiff would be victimized was not reasonably foreseeable. In distinguishing Evans v. Morehead Clinic, Ky. App., 749 S.W.2d 696 (1988), the Fryman Court stated that the duty to protect is limited to "reasonably foreseeable victims of a particular danger." The Court continued:

In this case, the Court of Appeals went beyond the holding of Evans, to create a duty to protect a victim who was not known or identifiable or foreseeable. Evans is not controlling of this case because neither Davis [the Bourbon Circuit Clerk] nor Fryman [the Bourbon County Jailer] knew that Custard would injure Harrison as opposed to any other member of the public. In Evans, the victim was identifiable.

Fryman, 896 S.W.2d at 911. See, to the same effect, Commonwealth, Corrections Cabinet v. Vester, Ky., 956 S.W.2d 204, 206 (1997).

The first requirement from Ashby, to establish liability against the Appellees, is that Black must have been "in state custody or . . . otherwise restrained by the state at the time in question" Ashby, 841 S.W.2d at 190. We disagree with Appellees' contention that we are confined to the definition of custody as used in the Miranda line of cases.⁴ In Berkemer v.

⁴ In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the U.S. Supreme Court held that constitutional (continued...)

McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Supreme Court held that persons temporarily detained pursuant to ordinary traffic stops are not in "custody" for the purposes of Miranda. However, Ashby requires that Black have been in custody or "otherwise restrained by the state."

In Stemler, which addressed Black's federal claim, the Court determined that Black was in custody:

In the present case, Black's complaint alleges -- and the record evidence could reasonably be read to show -- that the officers threatened to arrest her if she did not leave in Kritis's truck, and they physically lifted her out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the 'affirmative act of restraining [Black's] freedom to act on her [own] behalf,' and consequently imposed upon themselves a duty to ensure that they were not placing her in danger. Their actions were, in the words of DeShaney [supra], a restraint on Black's personal liberty, not a failure to act on her behalf.

Stemler, 126 F.3d at 867-68.

Here, the officers affirmatively restrained Black's freedom and liberty when they physically moved her from Stemler's vehicle to Kritis's truck, threatening to arrest her if she did not

⁴(...continued)
warnings must be given to a suspect prior to custodial interrogation.

leave with him. Had the officers simply driven past the scene and refused to stop, there would not have been a restraint on Black's freedom. However, once the officers began the investigation and physically placed Black in Kritis's truck, her liberty and freedom were undeniably restrained. "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, . . . it transgresses the substantive limits on state action set by . . . the Due Process Clause." DeShaney, 489 U.S. at 200, 109 S.Ct. at ____, 103 L.Ed.2d at 261. Clearly, Black was restrained by the police officers to the extent that she was not able to care for herself. She was given the option of going with Kritis or being arrested, and was not afforded the opportunity to seek another means of transportation. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." DeShaney, 489 U.S. at 200, 109 S.Ct. at ____, 103 L.Ed.2d at 262.

Foy v. City of Berea, 58 F.3d 227 (6th Cir. 1995), cited by the Appellees, is distinguishable. In Foy, the plaintiff and his friend were told by police officers to leave a dormitory after they had been drinking. Foy and his friend embarked on a long drive back to Ohio. Within forty-five minutes, the friend lost control of his vehicle and crashed, killing Foy. The United States Court of Appeals for the Sixth Circuit ruled that the officers had not violated Foy's right to substantive due process, since there

was no restraint on his liberty that had caused him to keep driving. The difference in the case at hand and Foy is apparent. Foy was only told to leave the premises, whereas Black was physically placed in Kritis's truck while she was incapacitated. In Foy, the decedent had the choice to continue driving with his friend. Black, on the other hand, was deprived of a truly meaningful choice.

In Stemler, the Court recognized that there may be situations where the state may owe a duty to someone despite the fact that the person may not be in custody. In Gazette v. Pontiac, 41 F.3d 1061 (6th Cir. 1994), the Court, while referencing DeShaney, stated that "a duty to protect can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." Gazette, 41 F.3d at 1065. Nonetheless, we need not reach a decision on this point because Black was in the police officer's custody at the time she was forced into Kritis's truck.

The second requirement of Ashby is that Black must establish that the "violence or other offensive conduct was perpetrated by a state actor." Ashby, 841 S.W.2d at 190. Based upon several recent Kentucky Supreme Court decisions, we do not take this requirement to mean that the police officers must have been the ones who killed Black; rather, the offensive conduct was perpetrated by state actors when the officers physically removed Black from one vehicle and placed her into the truck driven by Kritis. In Commonwealth v. Vester, supra, the Court held that the

Corrections Cabinet did not owe a duty to persons who lived fifty miles from a penitentiary and who were killed by convicts six days after they had escaped. While recognizing that the decision in Fryman controlled, the Court said that "since the victim[s] of the injury [were] not readily identifiable to the governmental officials, they were under no duty to protect [them] from harm." Vester, 956 S.W.2d at 206.

Although foreseeability, which is a critical element of proximate cause, cannot create the duty, the state must act responsibly toward individuals who are in custody. "[T]he core principle that the state must not act with deliberate indifference to the risk of injury to persons in its custody is well-established." Stemler, 126 F.3d at 870. As the Supreme Court said in DeShaney, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney, 489 U.S. at 199-200, 109 S.Ct. at ____, 103 L.Ed.2d at 261. If Fryman were to be read as strictly as the Appellees propose, a jailer who negligently permitted a prisoner in his custody to injure a fellow prisoner would be free from legal responsibility. Such an application of Fryman is contrary to established Kentucky law. See Glover v. Hazelwood, Ky., 387 S.W.2d 600 (1964). See also Sanders v. City of Belle Glade, 510 So.2d 962, 964-65 (Fla. Dist. Ct. App. 1987) (recognizing that the cases are legion in which a governmental body has been held negligent and thus liable to a prisoner for injuries sustained

at the hands of other inmates or guards). The standard that applies to inmates also applies to other persons in the custody of the state.

In the present case, the evidence viewed in the light most favorable to Black supports a claim for wrongful death against the Appellees. As the Stemler court said:

The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society.

Stemler, 126 F.3d at 870. Because a special relationship did exist between the parties which created a legal duty, we cannot say that it would be impossible for the Appellant to produce evidence at trial warranting a judgment in her favor. Accordingly, it was improper for the trial court to grant summary judgment in favor of Appellees. Steelvest, Inc., supra.

Lastly, with regard to Black, it is clear that in Kentucky county governments, which are a subdivision of the state, are entitled to sovereign immunity. Hempel v. Lexington-Fayette Urban County Gov't, Ky. App., 641 S.W.2d 51, 53 (1982). However, when a county employee is sued in his individual capacity, he is not afforded immunity for his negligence merely because of his status as a county employee. Speck v. Bowling, Ky. App., 892 S.W.2d 309, 311 (1995). The key to determining the applicability of immunity for individuals turns on whether the function performed

by the individual was discretionary or ministerial. Franklin County, Ky. v. Malone, Ky., 957 S.W.2d 195, 201 (1997). County officials and employees are not immune from suit in their individual capacities for neglect involving their ministerial duties. Ashby, 841 S.W.2d at 188. In Upchurch v. Clinton County, Ky., 330 S.W.2d 428 (1959), Kentucky's highest court described the difference between the duties:

Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. However, an act is not necessarily taken out of the class styled 'ministerial' because the officer performing it is vested with a discretion respecting the means or method to be employed.

Id. at 430.

It has consistently been recognized that many functions performed by police officers are ministerial rather than discretionary, at least in the legal sense of the terms. This Court has held that an officer operating his cruiser on the highway is performing a ministerial function and, therefore, is not entitled to assert qualified immunity. Speck, 892 S.W.2d at 311-12. The

Kentucky Supreme Court has held that searching an individual taken into custody is a ministerial function. Franklin County, Ky., 957 S.W.2d at 202. Although the officers involved in this case may have used a degree of discretion throughout the police stop, their duties clearly became ministerial once Black was in custody. Discretionary functions are usually attributed to those involved in actual policy-making decisions, rather than to those implementing the policy, such as police officers. Id. at 201-02.

Even assuming, arguendo, that the individual Appellees were performing a discretionary function, they would not be entitled to qualified immunity. Good faith is a requirement for asserting qualified immunity, and there is sufficient support in the record for the proposition that the individual Appellees did not act in good faith during their investigation. See Thompson v. Huecker, Ky. App., 599 S.W. 2d 488, 496 (1977) (holding that the individual is privileged so long as his actions are reasonable under the circumstances). Additionally, if the conduct of an individual officer violates clearly established statutory or constitutional rights of which a reasonable person would have known, qualified immunity does not attach. See McCollum v. Garrett, Ky. 880 S.W.2d 530, 534 (1994) (citing Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)).

In Stemler, the United States Court of Appeals held that the individual officers were not entitled to assert qualified immunity as a defense to Black's substantive due process claim because the officers should have known that their actions did not

conform to constitutional mandates. The Court recognized that it was the responsibility of the individual Appellees to know Black's constitutional rights:

The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation. Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known in February 1994 that their actions violated that right.

Stemler, 126 F.3d at 867. Therefore, although we hold that the individual Appellees were engaged in a ministerial function, a contrary ruling would still preclude the use of qualified immunity.

Black's complaint against the late Ron Kenner was properly dismissed. He was, as earlier noted, sued only in his official capacity as sheriff of Boone County. As did the United States Court of Appeals in Stemler, supra at 864, fn. 8, we treat the claims against Kenner in his official capacity as a suit directly against Boone County subject to dismissal on sovereign immunity grounds.

* * *

Our next inquiry focuses upon whether summary judgment dismissing Susan Stemler's claims against the City of Florence and three officers, Bobby Jo Wince, John Dolan and Thomas Dusing, was properly granted. In her complaint, Stemler sought to recover damages for (1) malicious prosecution, (2) abuse of process, (3) false arrest and imprisonment, and, (4) negligent or intentional infliction of emotional distress.

Six elements must be established to prevail on a claim of malicious prosecution: (1) the institution or continuation of criminal proceedings, (2) by, or at the instance, of the defendant, (3) the termination of such proceedings in the civil plaintiff's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and, (6) damage as a result of the proceeding. Broadus v. Campbell, Ky. App., 911 S.W.2d 281, 283 (1995) (citing Raine v. Drasin, Ky., 621 S.W.2d 895, 899 (1981)).

The circuit court correctly determined that summary judgment was appropriate because probable cause for Stemler's arrest and prosecution had been established. Although Stemler's first criminal trial resulted in a mistrial when the jury was unable to reach a unanimous verdict and the second trial resulted in an acquittal, there was probable cause to believe that Stemler committed a criminal act. Even though Stemler contends that the breath test administered to her was inaccurate, there is an adequate independent evidence that gave the police officers probable cause to arrest Stemler. Stemler admitted that she had

consumed alcohol just prior to driving the automobile, she smelled of alcohol and she failed at least one field sobriety test. Furthermore, as the circuit court noted, the district judge presiding over the criminal case involving Stemler made a finding that probable cause for her arrest existed. "We believe it is axiomatic that where there is a specific finding of probable cause in the underlying criminal action, or where such a finding is made unnecessary by the defendant's agreement or acquiescence, a malicious prosecution action cannot be maintained." Broadus, 911 S.W.2d at 283.

Stemler's claim for false imprisonment fails in like manner. Because the Appellees are police officers, there is no distinction between false arrest and false imprisonment. Lexington-Fayette Urban County Gov't v. Middleton, Ky. App., 555 S.W.2d 613 (1977). "To sustain a recovery for the tort of false imprisonment, a complainant must establish that he was detained and that the detention was unlawful." Wal-Mart Stores, Inc. v. Mitchell, Ky. App., 877 S.W.2d 616, 617 (1994). Therefore, the same probable cause analysis that applies to the claim of malicious prosecution applies to the false imprisonment claim. Because there was probable cause justifying an arrest, summary judgment was appropriate.

Stemler contends that summary judgment was improperly granted with regard to her abuse of process claim. "The essential elements of the tort include (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular

conduct of the proceeding." Bonnie Braes Farms, Inc. v. Robinson, Ky. App., 598 S.W.2d 765, 766 (1980). There is no evidence of record that the Appellees used the process to gain an advantage over Stemler or employed legal process for some purpose other than that for which it was intended. See Bourbon County Joint Planning v. Simpson, Ky. App., 799 S.W.2d 42 (1990). Although the officers may have been crude during Stemler's arrest, we agree with the circuit court that Stemler cannot establish that they acted with an improper motive. Additionally, as the circuit court recognized, Assistant Attorney General Larry Fentress, the Special Prosecutor in the Stemler criminal trials, not the Appellees, controlled the cases and independently made prosecutorial decisions.

Stemler contends that, in any event, the Appellees are liable for intentional and negligent infliction of emotional distress. However, this Court has previously held that if the plaintiff raises traditional tort claims which allow recovery for emotional distress, there can be no claim for intentional or negligent infliction of emotional distress. See Rigazio v. Archdiocese of Louisville, Ky. App., 853 S.W.2d 295 (1993). In Rigazio, we said that:

[W]here an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in

those instances must be had under the appropriate traditional common law action. The tort of outrage was intended to supplement the existing forms of recovery, not swallow them up.

Id. at 299.

* * *

In 1996-CA-001287-MR, the summary judgment in favor of the late Ron Kenner is affirmed. The summary judgment in favor of the other Appellees is vacated and this case is remanded to Boone Circuit Court for further proceedings.

In 1996-CA-001318-MR, the judgment is affirmed.

ABRAMSON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS BY SEPARATE OPINION.

DYCHE, JUDGE, CONCURRING. While I agree with the majority opinion, I feel it necessary to emphasize that the issue we have decided is the propriety of the summary judgment granted by the trial court. Many of the material facts are still in dispute, such as whether Ms. Black went with Kritis at her own request or at the behest of appellees. The opinion of this Court holds that, *for the purposes of review of the summary judgment*, the facts are viewed most favorable to appellants; this is not to say that appellant will necessarily prevail at trial and recover money damages. Our opinion merely says that, *looking at the facts most favorable to appellant*, a cause of action has been stated.

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FLORENCE and OFFICERS DUSING,
DOLAN and WINCE:

David Whalin
R. Kent Westberry
LANDRUM & SHOUSE
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BRIEF FOR APPELLEE BOONE
COUNTY:

W. Kenneth Nevitt
R. Thaddeus Keal
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Louisville, Kentucky