

RENDERED: SEPTEMBER 17, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-002186-MR

CABINET FOR HEALTH AND FAMILY  
SERVICES; STEVE EVERIDGE, IN HIS  
OFFICIAL CAPACITY AS A SOCIAL  
WORKER FOR THE CABINET; AND  
CARLA GIBSON, IN HER OFFICIAL  
CAPACITY AS A SOCIAL WORKER  
FOR THE CABINET.

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE WILLIAM ENGLE, III, JUDGE  
ACTION NO. 08-CI-00553

DONNA K. HICKS; KENTUCKY PAIN  
PHYSICIANS; CHARLOTTE CRAWFORD;  
BILLY CRAWFORD; BILLY WILLIAMS;  
AND PENNY FORD.

APPELLEES

### OPINION REVERSING AND REMANDING

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BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes

CLAYTON, JUDGE: The Cabinet for Health and Family Services, Commonwealth of Kentucky, Steve Everidge and Carla Gibson, in their official capacities only, appeal from an order of the Perry Circuit Court that recognized the sovereign immunity of the state agency but did not extend the defense of sovereign immunity to the state employees in their official capacities. Thus, the circuit court did not dismiss Donna K. Hicks' suit against the state social workers in their official capacities. Because we agree with the Cabinet that official immunity claims fall under the umbrella of sovereign immunity, we reverse and remand.

#### FACTUAL AND PROCEDURAL BACKGROUND

On October 9, 2008, Donna Hicks filed a lawsuit in Perry Circuit Court against Penny R. Ford, Billy R. Crawford, Billy R. Williams, Charlotte Crawford, the Cabinet for Health and Family Services (hereinafter "Cabinet"), James East (Hazard police officer), the Hazard City Police Department, Steve Everidge (employee of the Cabinet), Carla Gibson (employee of the Cabinet) and unknown defendants. East, Everidge, and Gibson were sued in their "individual and official capacities." In her complaint, Hicks alleged that she had been held captive and physically abused and neglected by her former companions and housemates, Ford, Williams, and the Crawfords during the months May 2007 through November 2007. She sued them for assault, intentional infliction of emotional distress, negligent infliction of emotional distress, and battery.

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(KRS) 21.580.

Furthermore, Hicks claimed in the suit against the Cabinet and its employees that, despite notice of a duty to investigate, the Cabinet and its employees failed to respond to and/or investigate Hicks' situation. Accordingly, she sued the Cabinet and its employees for negligence, gross negligence, violation of a statute, and negligence per se.

The individuals that held her captive were indicted and eventually pled guilty. They were all sentenced to prison terms for the crimes. None has responded to the civil action and their liability is not an issue on appeal. But, on November 3, 2008, the Cabinet, with Everidge and Gibson in their official capacities only, replied to Hicks' complaint and said that the Perry Court lacked jurisdiction and preserved the affirmative defense of sovereign immunity. Moreover, the Cabinet maintained that the complaint against the Cabinet employees in their official capacities is also barred by sovereign immunity because suing the Cabinet and the Cabinet's social workers in their official capacities is redundant. According to the Cabinet's reasoning, both claims are tantamount to suing the state itself.

Shortly thereafter, on November 10, 2008, Hicks filed a motion in Perry Circuit Court to amend the complaint and add the City of Hazard, Kentucky, as a defendant. And on November 10, 2008, she filed another complaint against Kentucky Pain Physicians alleging that, because they provided her medical treatment during the time of her captivity, it knew or should have known the abuse that was taking place and should have reported it. By court order, entered on

February 20, 2009, the two separate actions were consolidated.

With regard to this appeal, the next significant action occurred on August 27, 2009, when the Cabinet, along with its social workers, defendants Everidge and Gibson in their official capacities, made a motion to the circuit court for a judgment on the pleadings or dismissal for lack of jurisdiction based on sovereign immunity and the Perry Circuit Court's lack of jurisdiction. They argued in a joint memorandum of law that the Cabinet and its employees, when named in their representative capacities, are immune from suit under the doctrine of sovereign immunity. In a memorandum entered on September 25, 2009, Hicks countered that while sovereign immunity is a defense in most cases involving negligent state actors, Kentucky courts have made it clear that the defense will only shield the state when the act is discretionary. Hicks further suggested in the memorandum that the actions here were clearly ministerial and, therefore, the sovereign immunity defense is inapplicable and the Cabinet's motion should be overruled.

After a hearing and the submission of trial memorandums, the circuit court entered an order on November 20, 2009, where, in the relevant portion of the order, it granted the Cabinet's motion insofar as it requested the dismissal of the Commonwealth of Kentucky, Cabinet for Health and Family Services, but denied the motion to dismiss the state employees from the action in either their personal or official capacities. At the hearing, the judge agreed that the Commonwealth of

Kentucky and the Cabinet had sovereign immunity but held that state employees sued in their official capacities do not share in that immunity because a jury must ascertain as a question of fact whether the state actor's actions were ministerial or discretionary.

Meanwhile, on November 5, 2009, prior to the entry of the above-cited court order, Hicks gave notice for the depositions of Everidge and Gibson. The Cabinet and the social workers filed a motion to quash the notice of deposition citing their immunity and intention to file an interlocutory appeal. After the motion was heard on November 13, 2009, it was denied.

Subsequently, the Cabinet, Everidge, and Gibson - in their official capacities only - appealed from the November 20, 2009, order and the November 13, 2009, order denying the motion to quash the deposition. They filed an interlocutory appeal on the issue of immunity, pursuant to KRS 22A.020(2) and the holding in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

#### ISSUE

The first issue is whether the Perry Circuit Court erred by failing to dismiss the official capacity claims against state employees after the court held that the action against the Cabinet was barred by sovereign immunity. Also, we are to consider whether depositions of employees sued for damages in their official capacities should be quashed while the matter of sovereign immunity is under appellate review.

The Cabinet and its employees in their official capacities argue that suing state employees in their official capacities is merely another way of pleading the same claims against the state agency and, consequently, the action against the state employees in their official capacities falls under the umbrella of sovereign immunity and should have also been dismissed. Conversely, Hicks maintains that sovereign immunity does not apply to negligent performance of ministerial acts and lawsuits filed against state employees in their official capacities are not the same as suing the state agency and, therefore, the suit against them should proceed in circuit court.

#### STANDARD OF REVIEW

The applicability of sovereign or governmental immunity is a question of law. *See Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). The standard of review for questions of law is de novo. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921 (Ky.1997).

#### ANALYSIS

Before we begin our examination of sovereign immunity, we will address Hicks' argument that, because the Cabinet was dismissed from the action, it has no standing to appeal this matter. We disagree. As noted in *Commonwealth of Kentucky Board of Claims v. Harris*, 59 S.W.3d 896, 899 (Ky. 2001), quoting

*Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114, 121 (1985):

Official capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”

Simply put, Hick's claim against the social workers in their official capacities is legally indistinguishable from her claim against the Cabinet.

Sovereign immunity “is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001), citing Restatement (Second) of Torts § 895B(1) (1979). Within the ambit of sovereign immunity are numerous terms that have been discussed over and over. Here, we are concerned with the implication of whether a state employee is sued in his official/representative capacity or her individual capacity within the context of sovereign immunity.

One confusing aspect of the sovereign immunity law is the influence of the term “official immunity.” In the aforementioned case, *Yanero*, 65 S.W.3d 510, which was an influential and decisive case on the issue of sovereign immunity, the Kentucky Supreme Court discusses “official immunity:

“Official immunity” is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or

employee, but on the function performed. *Salyer v. Patrick*, 874 F.2d 374 (6th Cir.1989). Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity as discussed in Part I of this opinion, *supra*. Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled, as discussed in Part II of this opinion, *supra*.

*Id.* at 521-22. We can surmise from this reasoning that when a state employee is sued in his or her official or representative capacity, such actions are under the umbrella of sovereign immunity. *See also Autry v. Western Kentucky University*, 219 S.W.3d 713, 716-717 (Ky. 2007). Therefore, in the case at hand, Everidge and Gibson, **in their official - that is representative - capacities**, are shielded by sovereign immunity.

Continuing with the analysis, we note the thorough discourse in *Yanero* about an employee of the state or one of its agencies sued in his or her individual capacity. In such a case, see above, the employee enjoys qualified official immunity. Qualified official immunity “affords protection from damages liability for good faith judgment calls made in a legally uncertain environment.” *Yanero*, 65 S.W.3d at 522, (citing 63C Am. Jur. 2d *Public Officers and Employees* § 309 (1997)). The primary significance of this statement here is that qualified official immunity is only relevant when a state employee is sued in his or her individual capacity.



Application of the qualified official immunity defense “rests not on the status or title of the officer or employee, but on the [act or] function performed.” *Id.* at 521, (citing *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989)). To apply the defense, it is necessary to classify the particular acts or functions of the state employee in his **individual** capacity in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. *Id.* Discretionary acts are, generally speaking, “those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment[.]” *Id.* at 522, (citing 63C Am. Jur. 2d *Public Officers and Employees* § 322 (1997)). Discretion in the performance of an act occurs when the act may be performed in one or two or more ways, either of which would be lawful, and the state actor has the will or judgment to determine the performance. *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959). In contrast, ministerial acts (functions without immunity) are those that require “only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Yanero*, 65 S.W.3d at 522, (citing *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997)).

In appealing the decision of the circuit court, the Cabinet and the employees maintain that sovereign immunity is a bar to suit against state employees who are acting in an official capacity. We agree with this reasoning. And we note again that Hicks’ discussion of discretionary and ministerial acts by

employees is only pertinent when the employee is sued in his or her individual or personal capacity. Hence, the circuit court erred when it failed to dismiss the action against the social workers in their official capacities. Whether the social workers' acts were discretionary or ministerial and subject to qualified official immunity only becomes an issue in claims against the social workers' actions in their individual capacities.

Finally, regarding the issue of whether depositions of employees sued for damages in their official capacities should be quashed while the matter of sovereign immunity is under appellate review, since it has been determined that sovereign immunity bars suit against the state employees in their official capacities, the issue as to the motions to quash the depositions has been rendered moot.

#### CONCLUSION

For the foregoing reasons, the decision of the Perry Circuit Court is hereby reversed and remanded to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

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