

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001782-MR

SIRRETHIA FOX

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-00517

RONALD BRUMBACK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Sirrethia Fox appeals an order of the Franklin Circuit Court denying her motion for summary judgment based upon sovereign immunity from suit. After our review, we affirm.

Fox is a Franklin County deputy sheriff. On July 5, 2015, she responded to a 911 call placed by Anaca Paige, who reported that her neighbor was

waving about a pistol. After a tense encounter with the man, Fox arrested Ronald Brumback. Brumback was charged with first-degree wanton endangerment, menacing, and resisting arrest. He was indicted on July 14, 2015. On February 27, 2017, Brumback reached an agreement with the Commonwealth's Attorney dismissing the case.

On May 10, 2017, Brumback filed a civil action asserting claims of malicious prosecution against: Robert Solomon, the complaining witness who accused Brumback of pointing a gun at him; Paige, who placed the call for assistance; and Fox, in her official capacity. Fox filed a motion to dismiss, arguing that Brumback's claim against her was barred by sovereign immunity.

On July 26, 2017, Brumback filed an amended complaint asserting a claim against Fox in her individual capacity. Fox filed a motion to dismiss the amended complaint, arguing again that Brumback's claim against her in her official capacity was barred by sovereign immunity. She also argued that the amended complaint failed to state a claim against her in her individual capacity for which relief could be granted. The trial court's order denying the motion to dismiss was entered on September 20, 2017. Thereafter, Fox answered the complaint and denied the allegations made against her.

After a period of discovery, Fox filed a motion for summary judgment with respect to the malicious prosecution claim asserted against her in both her

individual and official capacities. She argued that the claim was barred by sovereign immunity and qualified official immunity. By its order entered on November 21, 2018, the trial court denied the motion. Fox filed a notice of appeal.

On December 11, 2018, this court ordered Fox to show cause why the appeal should not be dismissed for her failure to appeal from a final and appealable order. Fox filed a timely response.

In our order entered February 8, 2019, we found sufficient cause to allow the appeal of the denial of sovereign immunity to proceed. We found insufficient cause to allow the issue of Fox's qualified official immunity to be reviewed on appeal. Consequently, we ordered that the appeal would be limited to the issue of the trial court's denial of sovereign immunity. Upon our own motion, the appeal was ordered expedited. We ordered that extensions of time for briefing "**SHALL NOT** be granted absent compelling circumstances supported by an affidavit."

On February 18, 2019, Fox filed a motion to reconsider our order. Brumback filed a timely response. We denied the motion in an order entered March 26, 2019. Fox's motion for discretionary review filed with the Supreme Court of Kentucky was subsequently denied.

Fox timely filed her brief on March 29, 2019. Brumback tendered a brief on May 15, 2019, outside the briefing period established by our order of

February 8, 2019. We denied Brumback’s motion for additional time to file the brief, and it was returned to him. The appeal was then submitted to this three-judge panel for consideration.

On appeal, Fox claims that she is entitled to judgment as a matter of law. She argues that the trial court erred by failing to conclude that she is entitled to sovereign immunity with respect to Brumback’s claim against her in her official capacity. We disagree.

Summary judgment is proper where there exists no material issue of fact, and the movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Whether Fox is entitled to assert sovereign immunity against the claims asserted against her in her capacity as a deputy sheriff is a question of law. *See Jefferson County Fiscal Court v. Pierce*, 132 S.W.3d 824 (Ky. 2004).

Sovereign immunity is a common law principle “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). Governmental immunity is derived from sovereign immunity and applies to the tort liability of governmental agencies. *Jones v. Cross*, 260 S.W.3d 343 (Ky. 2008). The immunity of our county governments extends to public officials sued in their official capacity. *Id.*

While governmental immunity normally shields county employees from tort liability, it may be waived by legislative action. *Commonwealth, Dep't of Highways v. Davidson*, 383 S.W.2d 346 (Ky. 1964). The provisions of KRS¹ 70.040 waive immunity as applied to the office of the sheriff for acts committed by its deputies. The statute provides that: “[t]he 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.” KRS 70.040. The Supreme Court of Kentucky has held that this statute waives immunity for the office of the sheriff for acts committed by its deputies. *See Jones*, 260 S.W.3d at 346.

To the extent that Fox is shielded from suit in her official capacity by governmental immunity, such immunity is derived from that which is granted to the county office where she is employed — the office of the sheriff. Therefore, the governmental immunity extending to Fox for acts she commits as a deputy sheriff is also waived by the provisions of KRS 70.040. *See Harlan County v. Browning*, No. 2012-CA-000148-MR, 2013 WL 657880, at 3-4 (Ky. App. Feb.22, 2013) (finding that KRS 70.040 waives sovereign immunity for deputy sheriffs sued in their official capacity).

The trial court did not err by concluding that the claim of malicious prosecution brought against Fox in her official capacity as a Franklin County

¹ Kentucky Revised Statutes.

deputy sheriff is not barred by sovereign immunity. Consequently, the order of the trial court denying summary judgment on this basis is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

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