

SUPREME COURT OF KENTUCKY

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CLERK
SUPREME COURT

BARNEY JONES, individually and as)
Sheriff of Barren County, and UNKNOWN)
INSURANCE CARRIER OF BARNEY)
JONES,)

Appellants/Cross-Appellees,)

versus)

JASON H. CROSS, MITZI R. CROSS, and)
CHRISTOPHER A. SPRADLIN,)

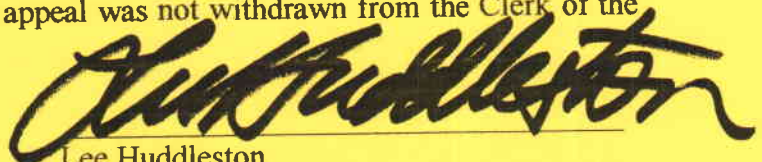
Appellees/Cross-Appellants.)

Nos. 2005-SC-000854 and
2006-SC-164-D

REPLY BRIEF FOR CROSS-APPELLANTS

**On discretionary review of Kentucky Court of Appeals No. 2003-CA-001224
and Civil Action No. 01-CI-00493, Barren Circuit Court, Division I**

Service of this Reply Brief was effected by mailing copies to the Honorable Phillip Patton, Judge of Barren Circuit Court, Division I, 300 Courthouse Square, Glasgow, Kentucky 42141; Mr. George E. Fowler, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229, Mr. Marc A. Lovel, Harlin Parker, Post Office Box 390, Bowling Green, Kentucky 42102-0390; Kentucky Attorney General Greg Stumbo, 118 State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601; and Mr. Walter L. Sales and Mr. Timothy J. Eifler, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202; this 15th day of November 2006. The record on appeal was not withdrawn from the Clerk of the Barren Circuit Court.



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THE 1972 AMENDMENTS TO KRS 70.040 DID NOT ELIMINATE A SHERIFF'S INDIVIDUAL LIABILITY

A. Personal Liability Unchallenged:

Rather than addressing the substance of Cross-Appellants' argument that sheriffs have always been and remain personally liable for the actions of their deputies (Brief For Appellees/Cross-Appellants, pp. 24-31), Cross-Appellees only argued in their Brief about process. [Reply Brief/Cross-Appellees' Brief And Response To Amicus Curiae Brief, pp. 12-14] Cross-Appellees did not challenge the assertion that under Kentucky common law sheriffs have always been personally liable, not just liable in their official capacity. No argument was presented to question that the original version of KRS 70.040 was simply a codification of the common law liability of sheriffs. Cross-Appellees did not disagree that the 1972 amendments to KRS 70.040 only proposed to eliminate sheriffs' statutory liability, not sheriffs' common law liability. The General Assembly could have abrogated the common law in 1972 but did not do so. [Ky. Const. § 233; *Ruby Lumber Co. v. K.V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449 (1945)] The intention to abrogate the common law is not presumed and the intention to repeal must be clearly apparent. [*Spirko v. Commonwealth*, 480 S.W.2d 169, 172 (Ky. 1972)] ("The intention to abrogate the common law will not be presumed and the intention to repeal it by statute must be clearly apparent."); *Benjamin v. Goff*, 236 S.W.2d 905 (Ky. 1951)] Common law cannot be repealed by implication. [*Ruby Lumber* at p. 453] Cross-Appellees did not contest these points of law.

B. The Possible Constitutional Issue is Properly Before The Court

If the Court recognizes that sheriffs have always been liable under the common law and that the 1972 amendments to KRS 70.040 were merely limitations on the parallel statutory codification of the common law, it will not be necessary for the Court to deal with the constitutionality of the 1972 amendments. The 1972 amendments are only unconstitutional if they are deemed to have tried to abrogate sheriffs' common law liability. In Opinion OAG 80-1 the Attorney General opined that the 1972 amendments were unconstitutional because they proposed to diminish the jural rights of injured parties in abrogation of the common law in violation of Sections 14 and 54 of the Kentucky Constitution. This Opinion is correct only if the amendments can be construed to actually limit sheriffs' liability rather than just eliminating a portion of statutory liability.

Cross-Appellees spent the bulk of their argument asserting that Cross-Appellants did not raise the issue of unconstitutionality of the 1972 amendments. Nothing could be further from the truth. Practically in every pleading, starting with the compliant, Cross-Appellants asserted the individual liability of the Sheriff and argued that the 1972 amendments were unconstitutional. [See, e.g., Plaintiffs' Response To Motion To Dismiss, pp. 4-5]

Cross-Appellees also argued that the trial court did not have an opportunity to address the unconstitutionality of the 1972 amendments. Judge Patton had

the opportunity but when he issued his Opinion And Order on April 10, 2003, and again on May 9, 2003, he ruled that KRS 70.040 was virtually a nullity, that it did not waive immunity or do anything else. This rendered Cross-Appellants' argument about the 1972 amendments moot. Judge Patton dealt with the issue by declaring the entire statute null and void.

Finally Cross-Appellees argued that the Attorney General did not received sufficient notice of the possible constitutional question. In accordance with *Ready v. Jaminson*, 705 S.W.2d 479 (Ky. 1986) and CR 73.02(2) Cross-Appellants substantially complied with CR 24.03. The Attorney General was served with a copy of the "... paper first raising the challenge...." Cross-Appellants' brief to the Court of Appeals and a letter calling attention to the constitutional question were sent to the Attorney General. The Attorney General clearly received the brief and letter since he officially declined in writing to intervene. There was plenty of time for the Attorney General to respond. The Attorney General did not object to the Court of Appeals addressing the issue. Nor did the Attorney General request an extension of time to intervene in the appeal. The purpose of notifying the Attorney General is to give him/her a reasonable opportunity to get involved in an appeal. If that purpose is accomplished, the specific method should not be controlling.

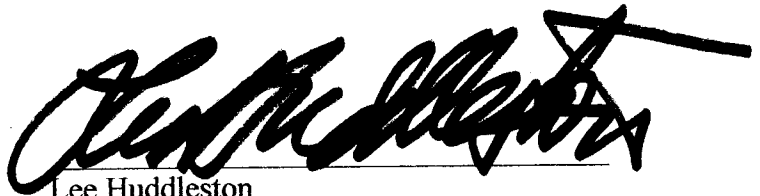
If there is a question about the constitutionality of the 1972 amendments to KRS 70.040, that question is properly before the Court. More likely, the 1972

amendments were constitutional but effective only in reducing the statutory provision, not in diminishing the common law personal liability of sheriffs.

CONCLUSION

Sheriffs are not only liable in their official capacity and on their bonds and insurance. They are personally liable for the negligence of their deputies. Cross-Appellees' arguments about process to the contrary notwithstanding.

Respectfully submitted to the Court this 15th day of November 2006.



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