

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002074-MR

GLEN AVERY BRYANT

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 07-CI-00346

PULASKI COUNTY DETENTION
CENTER; BRIAN BISHOP

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Glen Bryant (“Bryant”) appeals the Pulaski Circuit Court’s dismissal of his personal injury claim against the Pulaski County Detention Center (“PCDC”) and its employee, Brian Bishop (“Bishop”). We agree with the trial court that PCDC and Bishop are entitled to immunity. Therefore, we affirm.

Bryant was an inmate at PCDC at all times relevant to this action.

Bryant had been on inmate work release detail for approximately one month. On work release, Bryant was usually supervised by Bishop. Bishop's crew performed groundskeeping work at graveyards, including removing debris and trash. On June 5, 2005, Bryant was assigned to a work detail outside PCDC under the supervision of Bishop. Bryant claims Bishop began to engage in horseplay during the crew's lunch break. Specifically, Bryant testified that Bishop took a pop bottle, some gas, and a wick and made a gas bomb which he lit on fire. Bryant further alleges that Bishop later started dousing the fire with a cup of gas. Bryant testified that just as he was walking past the fire, Bishop threw the cup on the fire. The flames flared up and caught Bryant's pants on fire. Bryant testified another inmate tried to extinguish the fire before Bishop was able to intervene by putting the fire out with ice and water from the crew's water cooler. Bryant suffered burns and scarring.

On the other hand, Bishop testified that he started the fire that day for the purpose of burning debris and trash that the crew collected from the graveyards where they were working. Bishop stated that he and the inmates would sometimes pour two-cycle oil and/or diesel fuel into pop bottles so that the fuel could be easily poured into the chainsaws they used to clear the graveyards. When asked why he thought the accident occurred, he opined that one of those types of bottles may have been inadvertently thrown into the fire with other debris and trash in the back of the pickup truck that day and then popped under the fire's heat.

On March 12, 2007, Bryant filed a complaint against PCDC and Bishop, individually. Bryant sought damages from PCDC and Bishop in his capacity as an employee of the detention center. PCDC filed a motion to dismiss the complaint arguing it was entitled to sovereign immunity. After the parties briefed and orally argued the issues, the trial court treated PCDC's motion to dismiss as a summary judgment motion pursuant to Kentucky Rules of Civil Procedure ("CR") 12.02. On August 10, 2007, the trial court granted summary judgment to PCDC.

Thereafter, Bishop filed a motion to alter or amend the court's August 10 order to dismiss the claims asserted against him individually. Bishop then filed a motion for summary judgment asserting he was entitled to qualified official immunity. Bryant also filed a motion to alter or amend the court's August 10 order, requesting the court overrule its prior decision granting PCDC's motion. The trial court entered an order dated October 3, 2007, granting Bishop's motion for summary judgment, holding that Bishop's motion to alter or amend was moot, and denying Bryant's motion to alter or amend the court's August 10, 2007, order. This appeal followed.

On appeal, Bryant first argues the trial court erred in granting PCDC's motion for summary judgment based on sovereign immunity. He further asserts that it was an abuse of discretion when the trial court failed to allow him to amend his complaint against PCDC, to include Pulaski County Detention Center, Inc. We disagree with both of these assertions.

Kentucky counties are cloaked with sovereign immunity. *Monroe County v. Rouse*, 274 S.W.2d 477, 478 (Ky. 1954). This immunity flows from the Commonwealth's inherent immunity by virtue of a Kentucky county's status as an arm or political subdivision of the Commonwealth. *Id.* Here, PCDC is merely a building owned and operated by Pulaski County, Kentucky. *Smith v. Franklin County*, 227 F. Supp. 2d 667, 675 (E.D. Ky. 2002). The Pulaski County Detention Center, Inc. is a fund-raising entity that does not appear to have had anything to do with the hiring or supervising of employees who work at the PCDC. Therefore, neither entity would be appropriate to sue under these facts. *See Smith, supra*. Whether a party may amend his complaint is discretionary with the circuit court, and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000). "An abuse of discretion occurs when a trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (internal quotation omitted). We find no abuse of discretion in the trial court's decision to grant PCDC's motion for summary judgment based on sovereign immunity or its decision not to allow Bryant to amend his complaint.

Bryant also argues the trial court erred in finding that his claims against Bishop should be dismissed based on qualified official immunity. If a state agency is deemed to have governmental immunity, its officers or employees have official immunity when they are sued in their official or representative capacity.

The immunity that an agency enjoys is extended to the official acts of its officers and employees. However, when such officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity. *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007).

The controlling case on qualified immunity is *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). *Yanero* dealt with a school board, an athletics director, coaches and others being sued by a teenager who suffered a head injury when he was hit by a pitch during batting drills at baseball practice. Overruling some previous Kentucky decisions, *Yanero* set forth a test for determining whether a public actor's actions are discretionary or ministerial and therefore whether qualified immunity attaches. *Yanero* describes discretionary acts which require qualified official immunity and ministerial acts for which there is no immunity as follows:

[W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. An act is not necessarily "discretionary" just because the officer [or employee] performing it has some discretion with respect to the means or method to be employed. . . .

Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires

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. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature."

Id. at 522 (internal citations omitted).

In *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), the Kentucky Supreme Court recognized that the supervision of state prisoners is a discretionary act or function. In *Sloas*, as in this case, a deputy jailer was supervising six inmates on work detail who were using chainsaws to clear brush from roadsides in Rowan County. *Id.* at 473. Inmate Sloas's leg was broken when a falling tree, that had been cut by another inmate, struck him. *Id.* Sloas brought suit against Rowan County, its jailer and the supervising deputy jailer, alleging negligent supervision and training of the staff and prisoners without implementation of adequate safety procedures. *Id.* The Supreme Court held that the managing of six state prisoners "is as discretionary a task as one could envision." *Id.* at 480. In *Sloas*, the Court ultimately upheld the trial court's granting of summary judgment to the jailer and deputy jailer in their individual capacities on the grounds of qualified official immunity.

Since Bishop was performing a discretionary function, he is entitled to qualified official immunity if it is shown that he was acting within the scope of his duties and in good faith. Bishop's duties involved supervising inmates on work detail. Bryant alleges that Bishop, while engaged in those duties, acted

inappropriately by engaging in horseplay, constructing a bomb which he threw in the fire, and then intentionally dousing the fire with gasoline. Thus, Bryant contends that Bishop's actions were not in good faith. However, Bryant concedes that Bishop did not intend to hurt him and the injury was an accident. Specifically, Bryant testified in his deposition, "It was just an accident, it was an accident." According to *Yanero, supra*, this Court must determine if Bishop "willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive." *Yanero*, 65 S.W.3d at 523. While Bryant attempts to equate bad faith with horseplay, he fails to cite any Kentucky case or case law from any foreign jurisdiction to support his position. Even Bryant admits that Bishop was not trying to hurt him and that any injury Bryant sustained was just an accident. Therefore, we cannot conclude that the element of bad faith is met.

On a motion for summary judgment, the record must be viewed in the light most favorable to the party opposing the motion. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Viewing the facts of this case, Bishop's actions were discretionary and Bryant fails to show that Bishop was acting outside the scope of his duties or that he acted in bad faith.

Accordingly, the court's order granting summary judgment to both the Pulaski County Detention Center and Bishop is affirmed.

TAYLOR, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE

OPINION.

CAPERTON, JUDGE, CONCURRING: I concur with the well-reasoned opinion of the majority and write separately only to further illuminate the issue before our Court.

In *Sloas*, our Supreme Court found that the supervision of prisoners is a discretionary function. While true, that does not preclude a ministerial duty from arising during the exercise of that discretion. See KRS 71.040 (stating that “[the jailer] shall treat them humanely.”) More to the point, merely because the supervision of a work detail outside the jail is a discretionary function, this in and of itself does not allow the discretion to abrogate ministerial duties.

In *Sloas*, our Supreme Court cited to *Lamb v. Clark*, 138 S.W.2d 350, 352 (1940) and stated “[t]he law imposes the duty on a jailer to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, but he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate.”

The issues of whether the acts of Bishop in dosing the fire with a mixture of oil and gas violated a ministerial duty or whether Bishop was acting within the scope of his discretionary authority are not before our Court. The sole issue presented to us was whether Bishop was acting in bad faith. In considering the good faith or bad faith of Bishop’s actions, the parties agreed that the injury to Bryant was an accident. Onerous is the burden to show that an accident is tantamount to bad faith.

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