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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001503-MR

ESTATE OF MEGAN MORRIS; DIANE MOBLEY, PERSONAL REPRESENTATIVE; DIANE MOBLEY, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 08-CI-00319

TONY SMITH, IN HIS INDIVIDUAL CAPACITY; ROMEY HOLMES, IN HIS INDIVIDUAL CAPACITY; JEFFREY HOWARD, IN HIS INDIVIDUAL CAPACITY; CHARLES REEVES, IN HIS INDIVIDUAL CAPACITY; DANNY TRAVIS, IN HIS INDIVIDUAL CAPACITY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: The Estate of Megan Morris, by and through her personal representative, Diane Mobley (the Estate), and Diane Mobley, individually, appeal the August 15, 2012 order of the Graves Circuit Court granting summary judgment to each member of the Graves County Fiscal Court, including the county judge executive, individually, and Danny Travis, the road foreman, individually. The circuit court concluded the Appellees are each cloaked with, and protected by, official immunity. We agree and affirm.

This negligence dispute returns to this Court after remand. *Mobley v. Graves County*, 2009-CA-001074-MR, 2010 WL 4137297, at *1 (Ky. App. Oct. 22, 2010). *Mobley I* accurately recounted the facts pertinent to this appeal, those facts being that in June 2007, Megan was one of seven teenagers riding in a car. She was a passenger. It was dark and raining, and the driver failed to negotiate a sharp curve on Dooms Chapel Road. The car struck a tree; Megan died from her injuries. Her estate sued alleging Graves County, the Graves County Fiscal Court, and the Graves County officials listed above were negligent in not providing warning signs at the curve, thus causing Megan's death. In May 2009, the Graves Circuit Court granted summary judgment to Graves County, the Fiscal Court and its members, and Travis, finding they were cloaked with sovereign and official immunity. The Estate appealed.

In *Mobley I*, this Court affirmed the circuit court's finding that Graves County, the Fiscal Court, and its officers, in their *official* capacities, and Travis, in his *official* capacity, were entitled to sovereign immunity, but reversed the circuit

court's decision to grant qualified official immunity to the Fiscal Court's members, in their *individual* capacities, and Travis, in his *individual* capacity. *Mobley I*, 2010 WL 4137297, at *1. Of concern was the circuit court's failure to "undertake any analysis of the duties under the *Yanero* [*v. Davis*, 65 S.W.3d 510 (Ky. 2001)] model of discretionary *versus* ministerial functions." *Id.* at *2. In its review, this Court also found, as a matter of law, that the "implementation of the [Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD)] by local officials is [a] ministerial [duty] – removing the protection of qualified official immunity for the exercise of the duty." *Id.* at *3. The MUTCD "[p]rovide[s] the standards, guidance, and options for the design and application of traffic control devices" on Kentucky highways, streets, and roads. 603 KAR[1] 5:050, Section 2(2)(a).

Upon remand, the parties undertook additional discovery. In July 2012, the defendants moved for summary judgment, and the Estate responded with a cross-motion for partial summary judgment. A hearing was held on the parties' competing motions. The circuit court ultimately concluded that the Fiscal Court members and Travis were entitled to official immunity because the decision to place a sign on the disputed road was discretionary, and the officials acted in good faith, and within the scope of their employment. The Estate promptly appealed.

I. Standard of Review

[1] Kentucky Administrative Regulation

We review a circuit court's decision to grant summary judgment *de novo*. *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky. App. 2011). In conducting our review, we must ascertain "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03.

Likewise, whether a person is entitled to official immunity is a question of law reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

II. Analysis

The Estate claims the circuit court erred in concluding the Fiscal Court members and Travis are entitled to the protections of qualified official immunity because, in the Estate's view, the acts in question are ministerial, not discretionary, in nature. The Estate also contends that if this Court deems the functions at issue to be discretionary, summary judgment was still improper because a genuine issue of material fact exists concerning whether the officials exercised their discretion in good faith.[2] We are unpersuaded.

[2] The Estate presents a third argument: summary judgment was improper because genuine issues of material fact exist as to whether the Appellees' breach of their duties under the MUTCD caused or contributed to Megan's injury. This inquiry focuses on the Appellees' ultimate negligence liability. However, "in the context of a trial court's view of the material facts in consideration of a motion for summary judgment on the grounds of 'qualified official immunity,' it is necessary to separate out the material issues of fact which apply only to the plaintiff's claims (should they survive summary judgment), from those that are pertinent to the determination of "qualified official immunity.'" *Sloas*, 201 S.W.3d at 483. Only the Appellees' entitlement to qualified official immunity was before the trial court and, in turn, now before this Court. We decline to entertain the Estate's argument pertaining to the Appellees' negligence liability.

"'Official immunity' is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions[.]" *Yanero*, 65 S.W.3d at 521. If a public officer "is acting in a discretionary manner, in good faith, and within the scope of his employment," then he or she is entitled to the protections of qualified official immunity. *Nelson Co. Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011).

> [W]hen an officer or employee of the state or county (or one of its agencies) is sued in his or her individual capacity, that officer or employee enjoys qualified official immunity, which affords protections from damages liability for good faith judgment calls made in a legally uncertain environment. Application of the defense, therefore, rests not on the status or the title of the officer or employee, but on the [act or] function performed.

Haney v. Monsky, 311 S.W.3d 235, 240 (Ky. 2010) (alteration in original) (citations omitted). Because "qualified official immunity applies only where the act performed by the official or employee" is in its nature discretionary, we must first classify "the particular acts or functions in question" as either discretionary or ministerial. *Id.*

Discretionary acts involve "the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Yanero*, 65 S.W.3d at 522. These acts "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." *Haney*, 311 S.W.3d at 240.

Conversely, "ministerial acts or functions – for which there are no 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.'" *Id.* (citing *Yanero*, 65 S.W.3d at 522). The official's burden to ascertain those fixed and designated facts does not convert a ministerial act into a discretionary one. *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959).

Classifying an act or function as discretionary or ministerial is an inherently fact-intensive inquiry necessitating a "probing analysis[.]" *Haney*, 311 S.W.3d at 240. It must not be made in haste for "few acts are ever purely discretionary or purely ministerial." *Id.* Indeed, in carrying out his or her daily tasks, an official often engages in numerous acts, any of which may be classified as ministerial or discretionary depending on "the *dominant* nature of the act" or function in question. *Id.* (emphasis in original). With these standards as our guide, we turn to the specific case before us.

The Estate claims resolving this matter is simple. In the Estate's view, *Mobley I* declared the officials at issue had a ministerial duty to implement the MUTCD, the record conclusively establishes they failed to implement the MUTCD, and, therefore, they are not entitled to official immunity. We do not perceive the issue as simply as does the Estate.

We agree there is no genuine issue that the Fiscal Court members and Travis failed to embrace and implement the MUTCD. In his deposition, Travis

admitted the Graves County Road Department utilized no policy for implementing road signs, the road department did not retain a copy of the MUTCD, and he was unfamiliar with the purpose and provisions of the MUTCD. Likewise, Appellee Tony Smith, the Graves County Judge Executive, testified he had heard of the MUTCD, but the Fiscal Court had never consulted it and did not use it when making road-sign decisions. Instead, according to Travis and Smith, a sign – whether a stop, hazard, warning, or guide sign – is installed when a request is made by a constituent, user of the roadway, or the general public, or when the Fiscal Court or county road foreman deems a sign necessary.

In this case, proof that the Appellees failed to implement the MUTCD, however, is insufficient to create a jury question or for the Estate to defeat summary judgment because such proof is not *material* to the issue at hand. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) ("[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."). To succeed on a claim of negligence, the Estate must prove: (1) the officials owed a duty; (2) the officials breached that duty; and (3) the breach caused an injury to the claimant. *See Commonwealth, Transp. Cabinet, Dep't of Highways v. Guffey*, 244 S.W.3d 79, 81 (Ky. 2008). As referenced, "the immunity of public employees [depends] upon the nature of the action or function *on which liability [is] based.*" *Bolin v. Davis*, 283 S.W.3d 752, 757 (Ky. App. 2008) (citation omitted) (emphasis added). Our Supreme Court

cautions that "a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act." *Haney*, 311 S.W.3d at 241. Here, a careful review of the Estate's complaint reveals liability is *not* based on the officials' failure to implement the MUTCD, but instead is based on the officials' failure to place a sign warning of a curve on Dooms Chapel Road.[3] While the former may be ministerial, the latter is discretionary.

The sole purpose of the MUTCD is to make uniform all traffic control devices across the various jurisdictions within the United States, for reasons obvious to any inter-jurisdictional traveler. *See* 23 C.F.R. § 655.603 (2010). However, the "Manual describes the *application* of traffic control devices, but *shall not be a legal requirement for their installation*." MUTCD Section 1A.09 (emphasis added).

Kentucky's own regulation is consistent, stating the MUTCD applies to traffic control devices that are "installed on any publicly used" roadway. 603 KAR 5:050, Section 1. Use of the past tense certainly presumes a previous decision by the proper authority to install a traffic control device. Once again, the MUTCD itself says as much.

> Traffic control devices, advertisements, announcements, and other signs or messages within the highway right-of-way shall be placed only as authorized by a public authority or the official having jurisdiction, for the purpose of regulating, warning, or guiding traffic.

[3] Despite subsequent discussion in *Mobley I* concerning the officials' duty to implement the MUTCD, the Court in *Mobley I* recognized that the duty upon which the Estate based its claim was the officials' negligence "in not providing warning signs at the curve" at which the accident occurred. *Mobley I*, 2010 WL 4137297, at *1.

MUTCD, Section 1A.08 (emphasis added). Neither the MUTCD nor the regulation incorporating it creates a duty requiring installation of a traffic control device at any particular location. Instead, Kentucky law, and the MUTCD, leaves that decision to the discretion of the proper authority.

Kentucky law is clear that a fiscal court's acts regarding improvement of county roads are discretionary. *Madison Fiscal Court v. Edester*, 301 Ky. 1, 190 S.W.2d 695, 696 (1945) ("[I]t is within the discretion of the fiscal court to determine the road or roads which shall be improved and the time and method of such improvements."); *see* KRS 67.080(2)(b)("[F]iscal court shall . . . , *[a]s needed*, cause the construction, operation, and maintenance of all county . . . structures, grounds, roads and other property." (emphasis added)).

Likewise, a fair and comprehensive reading of the MUTCD also evinces the need for discretion. The MUTCD warns that "Regulatory and warning signs [including speed limit postings and "curve ahead" warnings, respectively,] should be used conservatively because these signs, if used to excess, tend to lose their effectiveness." MUTCD, Section 2A.04 Excessive Use of Signs; MUTCD, Section 2B.13 Speed Limit Sign (speed limit sign is a regulatory sign); MUTCD, Section 2C.06 Horizontal Alignment Signs ("curve ahead" signs, known as horizontal alignment signs, are warning signs). The MUTCD thus urges discretion when considering whether to install a traffic control device at all.

Judicial reasoning cannot turn a blind eye to the practicalities of a fiscal court's decision-making. There is a cost attributable to the installation of signs and guardrails; discretion in the allocation of taxpayer/road-fund dollars is imperative. Kentucky has long recognized this:

> The fiscal court of every county is, in effect, a legislative board, invested with the power by law of making appropriations in cases where the needs of the county require it; and while they may neglect their duties, or omit to improve the roads, or to make other appropriations necessary for that purpose, it is beyond the power of a judicial tribunal to interfere and determine what improvements should be made, and the extent of the expenditure necessary for that purpose.

Madison Fiscal Court v. Edester, 301 Ky. 1, 190 S.W.2d at 696 (quoting *Highbaught v. Hardin County*, 99 Ky. 16, 34 S.W. 706, 707 (Ky. 1896)).

If we adopted the Estate's argument, we would be fashioning a rule whereby every fiscal court or governing authority in Kentucky would have to conduct an engineering study and implement an engineering judgment as to every curve on every mile of every road in every county in the Commonwealth. And, if the engineering study or judgment found the placement of a warning sign warranted, the fiscal court would have no choice but to comply with that recommendation, regardless of policy considerations, fiscal concerns, and alternate safeguards. Such cannot possibly be the intent of the Department of Highways when it issued 603 KAR 5:050 directing the MUTCD be the guiding standard for the placement and maintenance of traffic control devices in Kentucky.

Again, a ministerial rule "must, at least, be sufficiently specific to restrict significant discretion in its enforcement. That cannot be said here." *Haney*, 311 S.W.3d at 243. We are firmly convinced that the act of placing or not placing signs or a guardrail on county roads is a discretionary act on the part of the fiscal court, not a ministerial one.

Such discretion, of course, is not without limitation. One "qualification" of qualified immunity is that the discretionary act be one within the official's authority. *Forte*, 337 S.W.3d at 621 (official must be acting "within the scope of his employment" to be entitled to official immunity). The Estate has never made an issue of the Fiscal Court's authority; in fact, the Estate conceded it.

The only other qualification is that the official will not be immune from prosecution if he fails to act in good faith, including his willful failure to act at all. "Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith." *Yanero*, 65 S.W.3d at 523. The Estate has not met that burden.

The term "good faith" "is somewhat of a misnomer, as the proof is really of 'bad faith.' In fact, in most cases, 'good faith' is just a presumption that exists absent evidence of 'bad faith.'" *Sloas*, 201 S.W.3d at 475. Bad faith encompasses both an objective and subjective component, and can be shown in one of two ways: (1) that the official "willfully or maliciously intended to harm the

plaintiff or acted with a corrupt motive, which requires a subjective analysis[,]" or (2) upon proof that a clearly-established right of the plaintiff was violated, which requires an objective analysis. *Bryant v. Pulaski County Detention Center*, 330 S.W.3d 461, 466 (Ky. 2011) (quoting *Yanero*, 65 S.W.3d at 523).

Here, the Estate has never alleged that any defendant willfully or intentionally intended to injury Megan, or that they "acted with a corrupt motive." *Id.* The focus, then, is necessarily on objective bad faith.

The Estate contends objective bad faith is evident in the officials' failure to exercise *any* discretion; they merely did nothing. The members of the Fiscal Court, so goes the argument, despite being on notice of the clear and unambiguous dictates of Kentucky statutes and regulations, chose not to undertake any deliberative process and wholly disregarded their duty to apply the MUTCD or otherwise evaluate Dooms Chapel Road to determine whether placement of a warning sign prior to a particular curve on the road was needed and appropriate.

"Objectively, a court must ask whether the behavior demonstrates 'a presumptive knowledge of and respect for basic, unquestioned . . . rights.'" *Id.* (citation omitted). Bad faith "can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded a person in the plaintiff's position, *i.e.*, objective unreasonableness." *Yanero*, 65 S.W.3d at 523.

> At the heart of either good or bad faith is the element of belief or knowledge. Black's Law Dictionary defines good faith as used in the context of this case as "[a] state

> of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation. . . ." Black's Law Dictionary 713 (8th ed.2004).

Bryant, 330 S.W.3d at 467.

Here, viewing the facts in a light most favorable to the Estate, as we must do,[4] those facts fail to establish that any of the Appellees acted objectively unreasonably. We agree with the Estate that a fiscal court may not sit idly by or abandon its statutorily-defined duties. But what triggers the need for a fiscal court to evaluate a particular road to ascertain whether new or additional traffic control devices are needed? The MUTCD does not supply the answer. We are also cognizant that a fiscal court must ceaselessly and relentlessly balance, often precariously, a host of issues, only one of which is the need for traffic control devices. The record indicates there were never any accidents and never any complaints about this stretch of country road prior to the accident in question. There was simply nothing to alert the members of the Fiscal Court that further evaluation of Dooms Chapel Road was needed. In light of this, we cannot say the Fiscal Court's failure to act constitutes objective bad faith. Sadly, even in hindsight, we cannot know whether Megan's life might have been spared had the Appellees undertaken the steps the Estate says they should have. What we can conclude, however, is that there is no evidence in this record of objective bad faith by any of the individual Appellees.

[4] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest,* 807 S.W.2d at 480.

Accordingly, we affirm the Graves Circuit Court's August 15, 2012 order finding the Appellees are entitled to the protections of qualified official immunity.

ALL CONCUR.

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