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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001780-MR

MATT AND LORIE JONES — APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 10-CI-00267

LARRY BENNETT, RUSSELL COUNTY SHERIFF; AND NICK BERTRAM, RUSSELL COUNTY DEPUTY SHERIFF — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CLAYTON, JUDGE: This comes before us as an appeal from the granting of summary judgment to the Appellees, Larry Bennett, Nick Bertram, and Russell County, Kentucky, by the Russell Circuit Court. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellant Matt Jones was injured in an automobile accident which occurred on May 3, 2009, when Bertram, a Deputy Sheriff for Russell County was performing his duties and pursuing Ricky Lawless whom he suspected of drunk driving. Appellant Lorie Jones joined in the action with a loss of consortium claim.

The Appellants brought suit in the trial court asserting that Bertram was negligent in chasing Lawless's vehicle and in waiting for Lawless to resume operating his motor vehicle while knowing he was intoxicated. Bertram and Bennett, the Russell County Sheriff, and Russell County filed for summary judgment in the trial court arguing that they were shielded under the doctrine of qualified immunity. The trial court agreed with their argument and entered summary judgment in their favor. The Appellants then brought this appeal against Bertram and Bennett only.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found "that there [were] no genuine issue as to any material fact and that the moving party [was] entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears

impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Community Trust Bancorp v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the granting of summary judgment by the trial court.

DISCUSSION

The Appellants first argue that the Appellees are not immune from suit. In determining that the Appellees were afforded qualified immunity, the trial court held as follows:

> …[A] law enforcement officers'[sic] determination whether to arrest, and thus how to arrest, is a discretionary act. *Jeffers v. Heavrin*, 10 F. 3d 380 (6th cir. 1993). The Defendants have not identified any ministerial duty whatsoever. The Defendants have not alleged that Deputy Bertram's actions were outside of the course and scope of his employment. The Plaintiffs have not alleged bad faith. Accordingly, Deputy Bertram is entitled to qualified immunity as a matter of law. E.g., *Rowan Co. v. Sloas*, 201 S.W. 3d 469 (Ky. 2006); *Yanero v. Davis*, 65 S.W. 3d 510 (Ky. 2001).

> It follows that neither Sheriff Bennett nor Russell County have no liability, both because there was no wrongful conduct and thus no *respondeat superior* liability, and also because they are entitled to sovereign immunity/governmental immunity. *Id.*

Order Granting Summary Judgment of October 5, 2012, pp. 1-2.

Immunity from suit is not only available to a state, but "…also extends to public officials sued in their representative (official) capacities…" *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001). Qualified official immunity is an affirmative defense that must be specifically pled. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

> 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… 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… But when 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. 63C Am.Jur.2d, Public Officers and Employees, § 309 (1997). 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, *Id.* § 322; (2) in good faith; and (3) within the scope of the employee's authority. *Id.* § 309; Restatement (Second) Torts, *supra*, § 895D cmt. g.

Yanero, supra, at p. 521.

In determining whether a government official is entitled to qualified immunity, a court must look at the alleged facts to see whether the defendant's actions are discretionary or ministerial. "[W]e have continued to recognize the distinction between discretionary and ministerial acts and have held that the wrongful performance of a ministerial act can subject the officer or employee to liability for damages. *Kea–Ham Contracting, Inc. v. Floyd County Dev. Auth., Ky.*, 37 S.W.3d 703 (Ky. 2000)." *Yanero, supra* at pp. 523.

> [A]n act is not necessarily taken out of the class styled "ministerial" because the officer performing it is vested with a discretion respecting the means or method to be employed.

Franklin County, Kentucky v. Malone, 957 S.W.2d 195, 201 (Ky. 1997) (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959)). "[I]n the final analysis, the decision as to whether a public official's acts are discretionary or ministerial must be determined by the facts of each particular case…" *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009).

In *Fryman v Harrison*, 896 S.W.2d 908, 910 (Ky. 1995), the Kentucky Supreme Court held that:

> To establish a negligence claim against a public official, the complaint must allege a violation of a special duty owed to a specific identifiable person and not merely the breach of a general duty owed to the public at large.

In the present case, the trial court is correct that the actions of Deputy Bennett were within the course and scope of his employment. Bennett was

actively within his law enforcement duties in pursuing an individual whom he suspected of driving under the influence. Thus, his actions were discretionary acts and he is, therefore, subject to qualified immunity. It also follows that the Russell County Sheriff's Office is also shielded under the doctrine.

Appellants next assert that the actions of Lawless were not an intervening cause, however, given our holding regarding the qualified immunity, this argument is moot. For the above reasons, we affirm the decision of the trial court.

ALL CONCUR.

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