RENDERED: MARCH 25, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001261-MR

AMANDA BARNETT AND
RHONDA IVEY — APPELLANTS

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 12-CI-00056

DEBRA A. CONATSER, ADMINISTRATRIX OF THE ESTATE OF HEATHER DAWN KOGER, DECEASED; AND LARRY R. CORDELL, II, NATURAL GUARDIAN AND NEXT FRIEND OF LINZIE RUTH CORDELL AND TYLER DRAKE CORDELL, MINORS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Amanda Barnett and Rhonda Ivey bring this interlocutory appeal from a July 11, 2014, Order of the McCreary Circuit Court denying their

motion for summary judgment based upon qualified official immunity. For the reasons stated, we reverse and remand.

Barnett and Ivey were employees of the McCreary County Ambulance Service. Barnett was a paramedic, and Ivey was an ambulance driver. On February 10, 2011, Barnett and Ivey were on duty and were dispatched to the home of Heather Koger in Whitley City after she had been found unconscious in her bathroom. Upon arriving at Koger's residence, Koger was conscious and sitting on a couch. Koger initially insisted that she did not wish to go by ambulance to the hospital. While at the scene, Barnett and Ivey recorded Koger's vitals; Koger's blood pressure was 160/100, her pupils were dilated but responsive, and she received a Glasgow Coma Scale Score of 14 out of a possible 15. Koger eventually agreed to be transported and was placed on a stretcher with a cervical collar around her neck. However, before she was loaded into the ambulance, Koger sat up on the stretcher, removed the cervical collar, and refused to be transported by ambulance to the hospital. Rather, Koger walked back inside her residence. At that time, Koger signed a "run sheet" indicating that she refused to be transported by ambulance to the hospital.

On that same day, Koger was taken by private vehicle to the Scott County Hospital. At the hospital, Koger was diagnosed with a subarachnoid hemorrhage due to a ruptured brain aneurysm. She was then transported to the University of Tennessee Medical Center and eventually died on February 18, 2011, as a result of the aneurysm.

Debra A. Conatser, Koger's mother and Administratrix of the Estate of Heather Dawn Koger, Deceased, and Larry R. Cordell, II, natural guardian and next friend of Linzie Ruth Cordell and Tyler Drake Cordell, minors (collectively referred to as the Estate) filed complaints in the McCreary Circuit Court against Barnett and Ivey. Therein, the Estate claimed that Barnett and Ivey negligently "failed to transport [Koger] for emergency medical treatment," and as a result, Koger did not receive "timely medical treatment for her survival." Complaint at 2.

Barnett and Ivey filed an answer and subsequently filed a motion for summary judgment. In the motion, they argued that qualified official immunity barred the Estate's negligence claims against them and that the complaints should be dismissed in their entirety. The Estate responded that Barnett and Ivey were not entitled to qualified official immunity, asserting that their negligent acts were ministerial, for which there was no immunity. By order entered July 11, 2014, the circuit court denied the motion for summary judgment without legal analysis or explanation. This interlocutory appeal follows.[1]

Barnett and Ivey contend that the circuit court erroneously denied their motion for summary judgment. Specifically, Barnett and Ivey maintain that they were employed by McCreary County and that their acts in relation to Koger were discretionary. As the acts were discretionary, Barnett and Ivey claim to be entitled to the defense of qualified official immunity and believe that the circuit court erred by concluding otherwise. For the following reasons, we agree.

[1] An order denying a claim of immunity may be appealed although interlocutory. *Breathitt Cnty. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

Summary judgment is proper where there exist no material issues of fact, and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). In this case, the material facts are undisputed, and resolution of the qualified immunity issue presents a question of law. *Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003).

Qualified official immunity operates to bar an action against an employee or official of a governmental entity for the negligent performance of a discretionary act.[2] *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). Thus, to be entitled to the shield of qualified official immunity, the official must be performing a discretionary act as opposed to a ministerial act. A ministerial act is "absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Yanero*, 65 S.W.3d at 522. There is no qualified official immunity for the negligent performance of a ministerial act. Conversely, a discretionary act involves "the exercise of discretion and judgment, or personal deliberation, decision, and judgment[.]" *Yanero*, 65 S.W.3d at 522. There may be qualified official immunity for the negligent performance of a discretionary act. To be entitled to qualified official immunity, the official must demonstrate that the negligent act was a discretionary act, performed in good faith, and within the scope of employment. *Id.*

[2] The employee or public official must be sued in his or her individual capacity to trigger qualified official immunity.

In this case, the Estate claims that Barnett and Ivey negligently failed to transport Kroger by ambulance to the hospital. In particular, the Estate maintains that Barnett and Ivey possessed a ministerial duty to transport Kroger as only a "totally responsive" patient may validly refuse transport, and Koger was not totally responsive. Estate's Brief at 7. The Estate specifically argues:

> [T]ransporting a patient from the scene is a ministerial act. The act of Appellants, Barnett and [Ivey] in failing to transport Kroger from the scene, despite her elevated blood pressure, dilated pupils, diminished Glasgow coma scale value and information regarding her unresponsiveness and foaming at the mouth prior to their arrival render their actions ministerial in nature and do not immunize them from suit. Moreover, the Appellant's own Policy and Procedure permits a patient to decline transport only if that patient is totally responsive. Clearly, Heather Koger was not totally responsive as evidenced by the vital signs and other information that the Appellants were aware of at the scene.
>
> The Appellants, in their Brief, have attached the very document that destroys their argument. In order for the Appellants actions to have been discretionary, the Decedent must have been totally responsive. According to the EMS Run Sheet marked as Exhibit 2 to the Appellant's Brief, it is confirmed in the Notes Section of that Report that Koger was "unresponsive/syncope episode[.]" The Appellants actions in failing to transport Koger at this point became ministerial and not discretionary.

Estate's Brief at 7.

The Estate points to "Policy and Procedure" of the ambulance service as the basis for its legal position that it is a ministerial duty of the employees to

transport a patient who is not totally responsive. In support thereof, the Estate refers to Barnett's depositional testimony, which was as follows:

> Q. Is it your understanding that in having a patient refuse transport they must be totally responsive?
>
> A. Yes.
>
> Q. If a patient is not totally responsive, is it your understanding based upon your standard operating procedure that the patient can decline transport?
>
> A. Ask that in a different way.
>
> Q. I'll do my best.
>
> A. Okay.
>
> Q. If a patient is anything other than totally responsive, can they decline transport?
>
> A. If a patient is awake, alert and oriented, they can refuse transport at any time.
>
> Q. Okay. And we can characterize awake, alert and oriented as totally responsive?
>
> A. Yes.

Barnett's Deposition at 15. According to Barnett, the determination of whether a patient is totally responsive is based upon a multitude of factors, which look to whether the patient is alert, oriented, and awake. To make such determination of Koger, Barnett and Ivey utilized their professional expertise and judgment after observing and evaluating Koger for approximately twenty minutes.

More precisely, Barnett and Ivey testified that they administered the Glasgow Coma Scale and that Koger scored the highest on all tests except one, eye movement. Barnett and Ivey also stated that Koger conversed freely and without problem, could ambulate normally, and appeared not to be in distress. Based upon Kroger's test scores and their observations of Koger, both Barnett and Ivey determined Koger to be totally responsive and judged that Koger could validly refuse transport to the hospital.

From the facts of this case, it is clear that the determination of whether a patient is totally responsive and can validly refuse transport is not a ministerial task; rather, it is discretionary. Barnett and Ivey were required to evaluate the behavior and actions of Koger and to exercise professional expertise and deliberation in deciding whether Koger was totally responsive and capable of refusing transport. In so doing, their actions were inherently discretionary in nature. *Jerauld ex rel. Robinson v. Kroger*, 353 S.W.3d 636 (Ky. App. 2011). Consequently, Barnett and Ivey were performing discretionary acts when they determined that Koger could refuse transport.

To be entitled to qualified official immunity, Barnett's and Ivey's discretionary acts must have been performed in good faith and within the scope of their employment. There is no dispute that Barnett and Ivey were acting within the scope of employment, and the Estate has not alleged, in its brief or in its response to the motion for summary judgment, that either Barnett or Ivey acted in bad faith.[3]

[3] In *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001), the Supreme Court held that "[o]nce the officer or employee has shown *prima facie* that the act was performed within the scope of his/her

Accordingly, we hold that Barnett and Ivey were entitled to qualified official immunity, and the circuit court erred by denying their motion for summary judgment. Upon remand, the circuit court shall dismiss the complaints against Barnett and Ivey.

For the foregoing reasons, the Order of the McCreary Circuit Court is reversed and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Martha L. Brown
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BRIEF FOR APPELLEES:

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discretionary authority, the burden shifts to the plaintiff to establish . . . that the discretionary act was not performed in good faith."