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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000941-MR

CHARLES R. ROMANS — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 12-CI-00623

DOUG JOHNSON, MELVIN BROWNING,
AND KENNETH RANDOLPH — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

JONES, JUDGE: Appellant, Charles R. Romans, appeals an order of the Oldham Circuit Court dismissing his claims against Appellees, Doug Johnson, Melvin Browning, and Kenneth Randolph after finding they were immune from suit under the doctrine of qualified official immunity. Following review of the record, we AFFIRM.

I. BACKGROUND

In October of 2011, Romans sustained injuries at the Oldham County Courthouse. These injuries were allegedly caused by a bench collapsing under Romans when he attempted to stand up and used the bench to support himself. Romans filed a complaint on July 30, 2012, naming the Oldham County Fiscal Court (the "Fiscal Court") and the Kentucky Administrative Office of the Courts (the "AOC") as defendants. Romans's complaint alleged that his injuries directly resulted from the negligence of the Fiscal Court and the AOC. Romans based this contention on statements a courthouse maintenance worker allegedly made to him shortly after his accident, which suggested that the bench had collapsed due to improper installation. The Fiscal Court filed a motion to dismiss on August 10, 2012, asserting that Romans's claims against it were barred by the doctrine of sovereign immunity. Romans amended his complaint on August 15, 2012, to add LaGrange Flooring ("Flooring") as a defendant, based on his belief that Flooring had replaced carpeting and reinstalled benches in the courthouse shortly before his accident. AOC moved to dismiss Romans's claims against it on August 17, 2012, arguing that, not only did it have immunity against Romans's claims, it owed no duty to Romans under KRS[1] 26A.130.

Romans did not respond to either of the motions to dismiss. Accordingly, both the Fiscal Court and the AOC were dismissed from the suit with prejudice on November 30, 2012. On March 21, 2013, Romans filed a CR[2] 60.02

[1] Kentucky Revised Statutes.
[2] Kentucky Rules of Civil Procedure.

motion requesting that the trial court vacate its order dismissing Fiscal Court from the action. In his memorandum, Romans alleged that he had recently received information from Flooring's counsel indicating that it had not been responsible for removing and reinstalling the benches that allegedly caused Romans's accident, but that Fiscal Court employees had supervised inmates from the Oldham County Jail as they reinstalled the benches. Romans contended that this was newly discovered information that he could not have discovered with due diligence, thereby entitling him to relief from the trial court's order dismissing Fiscal Court from the action. On August 8, 2013, Flooring moved for summary judgment on Romans's claims against it. On November 7, 2013, Romans filed a motion to amend his complaint to include the unnamed maintenance workers and inmates who had worked on the courthouse renovations.

Following significant motion practice, the trial court issued an order on March 7, 2014, by which it granted Flooring's motion for summary judgment, dismissed Flooring from the action, and granted Romans's motion to file an amended complaint. The order did not address Romans's CR 60.02 motion; however, in granting Romans's motion to amend his complaint the trial court noted that Romans sought to amend his complaint to add "Commercial Flooring Solutions (the contractor who performed the installation of the carpeting for [Flooring]), Fiscal Court, and inmates who were allegedly present and allegedly performing work during the installation of the carpeting." The amended complaint previously tendered by Romans was then deemed entered. Romans filed yet

another amended complaint on March 31, 2014. This complaint was essentially the same as the previously-entered amended complaint, except that it specifically named the following parties: Allen Zertko, Gerald Yocum, David Turner, Glenn Burch, James Stoner, and Chris Swan (hereafter, the "Inmate Defendants"); and Doug Johnson, Melvin Browning, and Kenneth Randolph (hereafter, the "Maintenance Defendants"). On April 4, 2014, Fiscal Court moved to strike Romans's amended complaint – contending that it had been filed without leave of court – and requested relief from the trial court's March 7, 2014, order – noting that, as the trial court had not yet ruled on Romans's CR 60.02 motion, Fiscal Court was not a party to the action and could not be a named party in Romans's amended complaint. The trial court eventually granted Romans's CR 60.02 motion by order dated September 22, 2014.

On October 15, 2014, Fiscal Court and the Maintenance Defendants filed a joint motion to dismiss. The motion asserted that: Fiscal Court was entitled to sovereign immunity from Romans's claims; the Maintenance Defendants, as named in their official capacities, were entitled to official immunity from Romans's claims; and the Maintenance Defendants, as named in their individual capacities, were entitled to qualified official immunity. On Romans's motion, the motion to dismiss was held in abeyance until completion of discovery. At oral arguments on the motion to dismiss, Romans conceded that his claims against Fiscal Court and the Maintenance Defendants in their official capacity were barred by sovereign immunity and official immunity, respectfully. Therefore, the trial

court only heard arguments concerning the immunity of the Maintenance Defendants in their individual capacities. The trial court granted the motion to dismiss by order dated August 25, 2015. Therein, the trial court found that the Maintenance Defendants had been performing a discretionary duty when supervising the work of the Inmate Defendants and that there was no evidence that they had acted outside the requirements of good faith or outside the scope of their authority in so doing. Further, the trial court rejected Romans's contention that the Maintenance Defendants had been negligent in selecting which inmates to perform the work, as Romans had presented no affirmative evidence to this point. The order additionally noted that the order was not yet final and appealable, as Romans's claims against the Inmate Defendants and Commercial Flooring Solutions were still pending before the court.

Romans filed a motion requesting that the trial court certify its August 25, 2015, order as final and appealable on November 11, 2015. The court granted the motion, and Romans filed a notice of appeal with this Court on December 22, 2015. On motion of the Fiscal Court and the Maintenance Defendants, the trial court vacated its order certifying the August 25, 2015, order as final and appealable. A panel of this Court then dismissed Romans's appeal for failure to appeal from a final and appealable order. Thereafter, on August 29, 2016, Romans moved to dismiss the Inmate Defendants and Commercial Flooring Solutions from the action, and again requested that the trial court make its August 25, 2015, order final and appealable. The trial court granted Romans's motion on June 3, 2016.

This appeal followed.

II. Analysis

As a preliminary matter, we must address the Maintenance Defendants' argument that this Court's consideration of Romans's appeal is limited by his prehearing statement to the question of whether Douglas Johnson, not all the Maintenance Defendants, is entitled to qualified immunity. The prehearing statement Romans filed with this Court on January 7, 2016, describes the issue to be raised on appeal as "[t]he court improperly held that the maintenance supervisor Doug Johnson was entitled to qualified official immunity dismissing the case against him." There was nothing in the prehearing statement mentioning the other Maintenance Defendants – Melvin Browning and Kenneth Randolph. CR 76.03(8) dictates that "[a] party shall be limited on appeal to issues in the prehearing statement . . . ." Therefore, the Maintenance Defendants contend that this Court can only consider Romans's claims as related to Johnson. We disagree.

"The prehearing statement is part of the prehearing conference rule (CR 76.03), which is an informal procedure added to the appellate process in an effort to settle cases, or otherwise dispose of them, without the need of a full-blown appeal." *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 196-97 (Ky. 1994). In looking at an appellant's prehearing statement, "the question is one of substantial compliance . . . ." *Id.* at 197. In the instant case, Romans's argument as to each of the Maintenance Defendants is the same – that the trial court erred in

finding that each was entitled to qualified official immunity. Accordingly, Romans's failure to name each Maintenance Defendant individually in his prehearing statement did not prejudice the Maintenance Defendants in any way, as they were still able to substantively address Romans's argument. Because we find that Romans substantially complied with CR 76.03, we will consider his entire argument as part of this appeal.

Romans's only contention of error is that the trial court erred in finding that the Maintenance Defendants were entitled to qualified official immunity. Whether a defendant is entitled to immunity is a question of law, which we review *de novo*. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (citing *Jefferson Cty. Fiscal Court v. Peerce*, 132 S.W.3d 824, 825 (Ky. 2004); *Estate of Clark ex rel. Mitchell v. Daviess Cty.*, 105 S.W.3d 841, 844 (Ky. App. 2003)).

When sued in their individual capacities, "public officers and employees enjoy . . . qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Qualified immunity is only applicable when a public officer or employee, acting in good faith, negligently performs a discretionary act or function that is within the scope of his authority. *See id.* Discretionary acts are "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* "An act is not necessarily 'discretionary' just because the officer performing it has some discretion with respect to the means or method to be employed." *Id.* (quoting

Franklin Cty. v. Malone, 957 S.W.2d 195, 201 (Ky. 1996)). In contrast, an officer or employee who negligently performs a ministerial act is afforded no immunity from liability. *Id.* Ministerial acts include acts "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.* (quoting *Franklin Cty.*, 957 S.W.2d at 201).

The Maintenance Defendants were charged with the task of supervising the Inmate Defendants while they removed benches from the courtroom and then reinstalled those benches. Romans contends that, contrary to the trial court's findings, such supervision was a ministerial duty. In support of this argument, Romans cites *Yanero v. Davis*, in which the Kentucky Supreme Court held that a teacher's duty to supervise students during school-sponsored or extracurricular activities is ministerial, "in that it involved only the enforcement of a known rule" – in that case, that students wear helmets during batting practice. 65 S.W.3d at 529. Romans contends that the analysis in *Yanero* is directly applicable to the present case because the Maintenance Defendants had a clear duty to supervise the Inmate Defendants during their work and ensure that the Inmate Defendants had proper training to complete their assigned tasks.

Romans's reliance on *Yanero* is misplaced. In *Yanero*, the supervising teacher had a clear directive – to ensure that the children under his supervision wore helmets during batting practice. Here, the Maintenance Defendants had no such binary directive. Rather, they had a general, continuous

duty to supervise the Inmate Defendants while they did their work. "In general, supervising the physical activity of others is often a passive function in that an individual is broadly charged with ensuring the safety of the participants." *Haney v. Monsky*, 311 S.W.3d 235, 244 (Ky. 2010). "[S]upervising the conduct of others is a duty often left to a large degree – and necessarily so – to the independent discretion and judgment of the individual supervisor." *Id.*

The facts of this case are far more similar to those of *Rowan Cty. v. Sloas*, *supra*, than those of *Yanero*. In *Sloas*, the Kentucky Supreme Court examined the issue of qualified official immunity as it applied to a jailer who had been supervising a group of inmates as they cleared brush along a road. Therein, the Court noted that a supervisor of prisoners must "watch them, and try as best he can to anticipate what they might do, correct them as necessary, determine their capabilities, sometimes by asking them forthright whether they can or can't do the job, assign the duties and see that the work is performed." *Sloas*, 201 S.W.3d at 480. It is not a situation where the supervisor has clear mandates and must execute specific tasks. "[The supervision of prisoners] is as discretionary a task as one could envision." *Id.*

Additionally, Romans contends that the Maintenance Defendants failed to select the proper inmates to ensure that the courtroom benches would be safely installed. Romans again points to *Yanero*, in which the Court stated that:

> [T]here is . . . a ministerial aspect to the hiring process in that the person or persons to whom the hiring of subordinates is entrusted must at least attempt to hire

> someone who is not incompetent. Thus, there is authority for the proposition that a public officer can be subject to personal liability in tort for hiring an employee known to that officer to be incompetent to perform the task for which he/she was hired.

Yanero, 65 S.W.3d at 528. Romans contends that the Maintenance Defendants failed in this duty. However, he has not put forth any evidence suggesting that the Maintenance Defendants selected which inmates were to assist in the work. To support his assertion that the Maintenance Defendants selected incompetent inmates to assist with installation of the benches, Romans has only offered an excerpt from an Oldham County Jail manual, and notes that "inmates are grouped based on risk level, not proficiency to perform certain tasks [in the work detail program]." This is an issue with the Oldham County jail policy, not with anything over which the Maintenance Defendants have control. A review of the record indicates that when a government agency seeks to request labor from the Oldham County Jail, the agency simply calls the jail to request inmate labor and the jail handles the process of selecting inmates based on the agency's needs. Dep. of Michael R. Simpson, pp. 10-11. With no evidence that the Maintenance Defendants selected certain inmates to assist with the bench installation, or had any knowledge that the inmates provided to them were "incompetent" to do their assigned work, we cannot find that the trial court erred in its conclusion that the Maintenance Defendants are protected from liability under the doctrine of qualified immunity.

The Maintenance Defendants have additionally argued that the trial court abused its discretion in granting Romans's CR 60.02 motion, which allowed Romans to re-insert Fiscal Court and its employees into this suit. As we affirm the trial court's order dismissing those defendants from this action, that argument is moot. Therefore, we do not address it in this opinion.

III. CONCLUSION

Based on the above analysis, we AFFIRM the order of the Oldham County Circuit Court.

ALL CONCUR.

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