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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000825-MR

BRANDI DAMRON — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 16-CI-00257

GARY GARRETT, INDIVIDUALLY,
AND IN HIS OFFICIAL CAPACITY;
BEN HALE, INDIVIDUALLY, AND
IN HIS OFFICIAL CAPACITY; AND
FLOYD COUNTY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, NICKELL AND L. THOMPSON, JUDGES.

NICKELL, JUDGE: Brandi Damron claims she was seriously injured when the vehicle she was driving left Ligon Camp Road in Floyd County and landed upside down in a creek. Alleging negligent road upkeep and violation of Kentucky's

Open Records Act,[1] Damron filed suit against Floyd County, its County Judge Executive Hale, and County Road Supervisor[2] Gary Garrett. All defendants jointly moved for dismissal on grounds of sovereign immunity, official immunity, and qualified official immunity. On August 12, 2016, the trial court dismissed all official capacity claims against Garrett and some claims against Hale and Floyd County, leaving only the alleged open records violation against the county and Hale and all other claims against Hale and Garrett in their individual capacities. On December 21, 2018, the trial court granted a joint motion filed by Hale, Garrett and Floyd County seeking summary judgment on all remaining claims. Finding Damron had not shown the injuries from her single vehicle accident to have been proximately caused by a defective road condition, breached duty of care, or negligence by any defendant; road improvement is a discretionary act;[3] and the lack of a timely response to the open records request was not due to bad faith, the trial court granted all appellees summary judgment on all remaining claims.

[1] Kentucky Revised Statutes (KRS) 61.870 *et seq*. Damron claims she mailed an open records request to Floyd County via County Judge Executive Ben Hale on November 9, 2015, but neither timely responded.

[2] In her complaint, Damron identifies Garrett as the "County Road Supervisor of Floyd County." However, when deposed, Garrett identified himself as Floyd County road foreman, noting Floyd County does not have a county road supervisor. Damron maintains Garrett failed to obey KRS 179.070 which recites the general powers and duties of the "county engineer" or in lieu thereof, the county supervisor.

[3] *Madison Fiscal Court v. Edester*, 301 Ky. 1, 190 S.W.2d 695, 696 (1945).

Damron now challenges the grant of immunity to Garrett and the award of summary judgment to all appellees alleging road maintenance is a ministerial act; Floyd County has no road maintenance plan; and a jury must decide whether the open records request was received. Having reviewed the record, briefs and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Around 10:00 a.m. on October 18, 2015, Damron was driving to Ligon Community Church with her mother as her sole passenger. Being unfamiliar with Ligon Camp Road and the church they were to visit, Damron missed the turn into the church driveway. According to her complaint, she backed up to correct her mistake, and "as a result of the condition of the roadway, [her] car fell from the roadway, overturned and landed upside down in the creek." She goes on to allege, "[i]n the area where [her] vehicle fell from the roadway, the road had been eroded by the creek resulting in a missing portion of the roadway and no shoulder which left a vertical drop from the roadway to the creek."

Damron admits the day of the accident was the first time she traveled on Ligon Camp Road. She noticed a creek beside the road but noticed no issues with the road itself. When deposed, Garrett said he had never received any complaint about Ligon Camp Road—not before and not after Damron's accident.

Damron maintained Shannon Hall, a Floyd County school bus driver and first responder who worked the accident, told her at the scene he had reported unsafe road conditions on Ligon Camp Road multiple times—but did not say to whom he had reported these concerns. In an affidavit, however, Hall denied making such a statement to Damron or her mother but acknowledged great familiarity with the road because it is part of the school bus route he drives twice daily during the school year. In relevant part he wrote:

> 3. That on or about October 18, 2015, as a member of the Left Beaver Fire and Rescue Squad, I responded to an accident on Ligon Camp Road.
>
> 4. That upon arriving at the scene of the accident, it appeared that the operator of the vehicle, Brandi Damron, had missed a turn into the Ligon Community Church driveway and had backed over into a ditch.
>
> 5. That I am familiar with Ligon Camp Road, as I travel it on my bus route.
>
> 6. That I travel that roadway in a school bus that is in excess of 40 feet in length, twice a day during the school year, and I have done so without any incident or concern about the safety of that roadway.
>
> 8. [sic] That on the date of the [sic] Ms. Damron's accident, I did not tell her, nor did I tell her mother, that I have made any report or complaint regarding the condition of Ligon Camp Road.
>
> 9. Further, I have never had any issues with the condition of Ligon Camp Road and have never made any complaints, formal or informal, regarding the condition of the roadway.

> 10. That I do not believe the condition of Ligon Camp Road was unsafe at the time of Ms. Damron's accident nor any time before or after her accident.

Damron mustered no proof of Ligon Camp Road being defective, the creek having eroded the roadbed, or a portion of the road being missing. She also offered no proof of the county having received a complaint about the road's safety prior to or after her accident.

Damron claims she "mailed" an open records request to the county in care of Hale on November 9, 2015, and "sent" a follow-up letter to Hale at the same address dated January 11, 2016. Both letters referenced a request for information about road complaints concerning Ligon Camp Road and repairs to the road to which she received no timely response. As a result, Damron alleged violation of the Open Records Act. Sharon May, Hale's executive assistant, signed an affidavit stating she opens all mail received in Hale's office and no open records request from Damron or her attorney was received in November 2015. No copy of the request, nor proof of its receipt by Hale's office, was attached to the complaint. However, during discovery, Damron produced a letter dated November 9, 2015, and a follow-up letter dated January 11, 2016.[4] Neither letter appeared to have been sent to Hale via certified mail, nor was it shown either letter was received by the intended recipient. Floyd County and Hale maintain the records request was

[4] Both letters were attached to the summary judgment motion filed by appellees.

not denied, rather it was not received, and the desired information was provided to Damron upon learning of her request. Floyd County and Hale further argue neither bad faith nor willfulness was shown to be the reason for the late response. Considering the foregoing, we consider whether claims were properly dismissed against Garrett due to official qualified immunity and whether the trial court erroneously awarded summary judgment to all appellees.

ANALYSIS

We begin by noting an incomplete record has been certified to this Court. In its findings of fact, conclusions of law and judgment, the trial court states this matter was heard May 4, 2018. No hearing is included in our record. Additionally, no designation of record was filed specifying the hearing be included in the certified record on appeal. We remind litigants the appellant bears responsibility "for ensuring the appellate court receive[s] a complete record." *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016) (citing *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007), *abrogated by Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012)). Neither party cited to the hearing in this matter, but access to it may have been helpful to the panel.

> Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is deemed to be a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky.

> 1991). In Kentucky, the movant must prove no genuine issue of material fact exists, and he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*. The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *Id*. On appeal, our standard of review is "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). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.3d 188, 189 (Ky. App. 2006).

Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 542 (Ky. App. 2013).

Damron alleged a portion of Ligon Camp Road was eroded by a creek leaving part of the road missing with no shoulder—just a vertical drop from the road to the creek. However, she offered no proof in support of her position. "[C]onclusory allegations based on suspicion and conjecture" are insufficient to defeat a summary judgment motion. *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63, 69 (Ky. App. 2006).

Damron's view of Ligon Camp Road being dangerous was contradicted by Hall's affidavit wherein he stated he drives the road twice a day during the school year and has never noticed or reported any problem with the

road's condition. In Hall's opinion, it appeared Damron simply "missed a turn into the Ligon Community Church driveway and had backed over into a ditch." When deposed, Damron herself admitted she saw no problem with the road prior to the accident.

In his deposition, Garrett testified Ligon Camp Road is a single lane county road, not a "2 lane asphalt roadway" as reflected in the police report documenting the accident. Garrett stated road complaints may be reported to the county judge, any magistrate, any road crew member, or directly to Garrett. He testified no matter how a complaint is initiated, it is usually forwarded to him as county road foreman. He confirmed since being appointed on January 5, 2015, he had received no complaints about Ligon Camp Road—not before and not after Damron's accident. He also confirmed he had not visited the scene prior to the accident. While he had personally received no complaints about the road after the accident, he was aware a county road crew had placed riprap at the scene "to maybe prevent any future erosion." He stated he understood the riprap was added after someone contacted Magistrate Michael Tackett.

Garrett further testified he has four road crews working daily. When he visits a job site he checks on other nearby reported issues and independently looks around the vicinity to "see what I can find." Daily work logs confirm whether a complaint has been addressed and where work has occurred. Garrett

agreed part of his responsibility is "to make sure the roads are maintained in Floyd County."

"In any negligence case, a plaintiff must prove the existence of a duty, breach of that duty, [and] causation between the breach of duty and the plaintiffs [sic] injury and damages." *Hayes v. D.C.I. Properties-D KY, LLC*, 563 S.W.3d 619, 622 (Ky. 2018). "The absence of proof on any one of the required elements is fatal to a negligence claim." *Keaton*, 436 S.W.3d at 542 (citing *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky. 1974)).

Damron argues Floyd County, Garrett—as "road supervisor"—and Hale, as County Judge Executive, should have adopted a road maintenance plan. She further alleges the county, Garrett and Hale ignored complaints about Ligon Camp Road and she was injured because of unspecified dangerous road conditions. In essence, Damron—who drove off the road the first time she travelled it—claims Floyd County had a duty to fix a road that according to a school bus driver who drives the road twice a day, five days a week during the school year without incident, was not in need of repair. In short, Damron established no breach of any duty owed to her, nor that a supposed breach or negligent act caused her injuries. Quite simply, Damron presented no evidence of any negligence or wrongdoing by the county or anyone affiliated with the county.

> Granting a motion for summary judgment is an extraordinary remedy and should only be used "to

> terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists. This review requires the facts be viewed in the light most favorable to the party opposing summary judgment.

Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901, 905 (Ky. 2013), *as corrected* (Nov. 25, 2013) (footnotes omitted). In the foregoing quote, the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Based on the record before us, it was impossible for Damron to prevail because she established no breach of any duty and no proof any action or inaction—other than her own—caused her to sustain injuries. There were no genuine issues of material fact and all appellees were entitled to judgment as a matter of law. *Scifres*, 916 S.W.2d at 781.

While Damron could not prevail on her negligence claim due to a complete failure of proof on two required elements (breach and causation), we must comment on whether Garrett was properly dismissed from suit in his official capacity on grounds of qualified official immunity. Damron maintains immunity was wrongly applied to Garrett because road maintenance, under KRS 179.070, is a ministerial function, not a discretionary one.

While some aspects of road maintenance are ministerial, *Storm v. Martin*, 540 S.W.3d 795, 798 (Ky. 2017), *reh'g denied* (Mar. 22, 2018), the

question in this case is not nearly as cut and dried as Damron suggests. "[F]ew acts are ever purely discretionary or purely ministerial." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010), *as corrected* (May 7, 2010). Instead, "the *dominant* nature of the act[]" must be considered. *Id.* An act may be ministerial—and therefore, not subject to immunity—even though "the officer performing it is vested with a discretion respecting the means or method to be employed." *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959) (quoting 43 Am.Jur., Public Officers, § 258, p. 75)). In other words, an officer may have choices in how to complete a mandatory task.

KRS 179.070 specifies the "general powers and duties" of the county road engineer. KRS 179.020(2) specifies statutory duties assigned to the county road engineer may be performed by the county road supervisor when the fiscal court has not hired a county road engineer.

We agree with Damron's basic argument—KRS 179.070 gives the county engineer "general charge of all county roads and bridges" and requires him to ensure enumerated tasks are performed as discussed in *Storm*, 540 S.W.3d at 801. *Storm* dealt specifically with KRS 179.070(1)(j)—removal of hazardous trees and other obstacles from roadways. *Storm* holds duties listed in KRS 179.070 are ministerial—meaning a road engineer or road supervisor cannot claim immunity when listed tasks are not performed.

We have a fundamental issue with applying KRS 179.070 to Garrett for a reason addressed by neither party nor the trial court. Perhaps they know something we do not, but we are restricted to the record before us. We are not foreclosed "from deciding an issue not presented by the parties" when necessary to avoid misapplying the law. *Priestley v. Priestley*, 949 S.W.2d 594, 596 (Ky. 1997) (citing *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991)).

In her complaint, Damron labeled Garrett "the County Road Supervisor of Floyd County." Damron deposed Garrett. He identified himself as the appointed road foreman for Floyd County. Damron did not prove Garrett to be otherwise. Damron's counsel even asked Garrett, "Is there somebody else in Floyd County who is the county road supervisor?" Garrett responded, "No. There is no supervisor. Well, the judge would be the, the head of the county. Anything over the road department is the county judge."

To be employed as a county road engineer, a person must be a licensed civil or highway engineer or pass the county road engineer examination and qualify to serve as such. KRS 179.020(1). If a county does not hire a county road engineer, it may hire a county road supervisor. KRS 179.020(2). To be employed as a county road supervisor, a person must have a minimum of three years' practical road building experience accepted by the Kentucky Department of Highways; pass an examination; and, hold a certificate of qualification. *Id.*

Neither KRS 179.020 nor 179.070, nor any other statute we have located, mentions hiring a county road foreman, lists the qualifications for such a position, or defines its title and responsibilities, but we are aware other Kentucky counties have a county road foreman. *Bolin v. Davis*, 283 S.W.3d 752, 758 (Ky. App. 2008), *as modified* (Jan. 23, 2009).

From our review of Garrett's deposition, he could not qualify as a county road engineer or a county road supervisor. Garrett stated he graduated from high school but has no college degree. There is no indication he is a civil or highway engineer. After studying auto body repair at vocational school, Garrett operated his own body repair shop for a few years. He then ran a collision center for a Ford dealer. He stated he is a licensed Kentucky insurance adjuster and as of January 5, 2015, was appointed road foreman for Floyd County. Prior to his appointment, he had no experience constructing roads other than creating dirt and gravel roads on farms but not for pay. There is no indication he has taken or passed any examination to qualify as a county road supervisor.

Garrett testified as road foreman he works directly for the county judge and responds to complaints about roads. He was given no written description of his duties; he and Hale simply discussed the job verbally. Based on Garrett's recitation of his education and work history—neither of which was challenged nor augmented by Damron—Garrett could not statutorily qualify as a

county road engineer or supervisor. Thus, a statute requiring a county road engineer or supervisor to perform specific functions would not apply to Garrett who was neither and did not claim to be.

We located no statute requiring a county to have a road engineer or road supervisor. KRS 179.020(5) appears to recognize some counties may have neither—but anyone hired as a county road engineer or supervisor must possess specified credentials Garrett lacked.

For reasons expressed above but addressed by neither the parties nor the trial court, we hold Garrett—as county road foreman—was not statutorily responsible for maintaining all Floyd County roads and bridges under KRS 179.070. He may have overseen and coordinated the work of four road crews at the behest of the county judge and fiscal court, but he could not hold the title county road engineer or county road supervisor nor did he.

To determine whether Garrett was immune from tort liability, we look to *Ritchie v. Turner*, 559 S.W.3d 822, 831 (Ky. 2018), one of the latest pronouncements on qualified official immunity by the Supreme Court of Kentucky.

> *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), provides the framework for deciding whether a public officer or employee is afforded immunity from tort liability. When a public officer or employee is sued in his or her individual capacity, that officer or employee may enjoy qualified official immunity "which affords protection

> from damages liability for good faith judgment calls made in a legally uncertain environment." *Id*. at 522 (citing 63C Am. Jur. 2d *Public Officers and Employees* § 309 (1997)). Consequently, the type of act performed will determine if the qualified official immunity defense applies. *Id*. at 521 (citing *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989)). The defense applies to the negligent performance 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." *Id*. at 522 (internal citation omitted). It does not apply to "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." *Id*. (citing *Franklin Cty. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997)).

Based on Garrett's deposition he responded to complaints at the direction of County Judge Hale. His work was wholly ministerial. *Upchurch*, 330 S.W.2d at 430. Therefore, his actions were not covered by immunity.

While claims should not have been dismissed against Garrett on grounds of immunity, we deem the error harmless. Ultimately, Damron could not prevail. She offered no proof of a defective roadway, a negligent act, receipt of a complaint being ignored, and no proof Garrett was a county road engineer or supervisor subject to KRS 179.070. While the trial court erred in dismissing the claim against Garrett in his official capacity on grounds of qualified official immunity, the error was harmless.

Damron's other claim is Hale and Floyd County violated Kentucky's Open Records Act by failing to timely respond to a request for complaints received about Ligon Camp Road and repairs made in response thereto. Damron may have mailed inquiries to Hale as Floyd County Judge Executive, dated November 9, 2015, and January 11, 2016, but there is no indication Hale received either letter. Damron's position was refuted by Hale's executive assistant who stated in an affidavit she opens all mail and no such request was received during November 2015. There was no proof either inquiry was sent via certified mail nor was any type of receipt produced on Damron's behalf. Mailing the request is not the linchpin under these facts. Receiving the request and willfully refusing to timely respond is the critical event.

To succeed on the claim, Damron must show Floyd County and Hale received the request and willfully withheld the desired information. We review the allegation *de novo* and will reverse only if the trial court's legal conclusions are clearly erroneous. CR 52.01. Costs, attorneys' fees, and a penalty of up to $25 per day for each day a timely response was denied may be assessed only if records were willfully denied. KRS 61.882(5); *Eplion v. Burchett*, 354 S.W.3d 598, 602-04 (Ky. App. 2011).

As noted, Damron did not establish Hale's office received either request. Hale's executive assistant specifically states no such request was received

in November 2015. Moreover, on learning Damron desired information it was provided. On the record presented to us, we cannot say Floyd County and/or Hale willfully refused to respond.

For the foregoing reasons, we affirm the judgment of the Floyd Circuit Court.

ALL CONCUR.

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