

RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000450-MR

TED PULLEN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CI-002426

JOSEPH CONDER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Ted Pullen (Pullen), Director of Louisville/Jefferson County Metro Government Public Works Department (the Department), appeals the trial court's denial of his motion for summary judgment on the issue of immunity. On appeal, Pullen argues that his failure to ensure that repairs were made to a sidewalk

was discretionary, not ministerial, entitling him to qualified immunity. For the following reasons, we affirm.

FACTS

The facts are not in dispute. On May 26, 2007, Joseph Conder (Conder) was riding his bicycle on the sidewalk along Browns Lane. Conder's bicycle hit an uneven place in the sidewalk and he fell, suffering physical injuries. At the time of the accident, Pullen was director of the Department.

On March 2, 2008, Conder filed suit against Pullen and others alleging that his accident was the result of their negligence. As to Pullen, Conder specifically alleged that he had breached a duty to maintain the sidewalk, resulting in Conder's injury. Pullen timely filed a response, asserting the affirmative defense of qualified immunity.

On July 11, 2008, Pullen filed a motion for summary judgment. In his motion, Pullen argued that Conder violated an ordinance by riding his bicycle on the sidewalk and that Conder's violation of that ordinance was the proximate cause of his injury. The court denied Pullen's motion, finding that any negligence on Conder's part would not act as a bar to his claims of negligence against Pullen and the other defendants.

On December 9, 2008, Pullen filed a motion to dismiss and/or for summary judgment arguing that he is entitled to qualified immunity. In support of his motion, Pullen offered his Affidavit. Because the contents of the affidavit are crucial to our opinion, we set forth the pertinent parts in their entirety below.

1. That he [Pullen] is the Director of Public Works for Louisville/Jefferson County Metro Government, having become such on January 1, 2007.
2. That he did not become aware of an accident involving plaintiff Conder until long after the occurrence of May 26, 2007, from which said plaintiff's present claims arise, nor was he made aware of any condition of the sidewalk at or near 2811 Brown's Lane in Louisville, Kentucky, prior to the date of said occurrence.
3. That he has caused a search to be made of the records of the Metro Works Department, with the resulting information being that only two (2) calls have been made to the Metro Works Department, namely Service Request No. 2735355, dated May 4, 2004, dealing specifically with the sidewalk in the 4206 block of Brown's Lane, and Service Request No. 3150709, dated September 29, 2006, dealing with a raised sidewalk adjacent to the Walgreen's Drugstore located near the intersection of Taylorsville Road, Yorkshire Blvd., and Brown's Lane. No requests or notices of defects in the 2800 block of Brown's Lane are known to exist.
4. Affiant's duties as Director of the Metro Works Department consist of decision and policy-making decisions relevant to oversight of construction projects and plans, personnel decisions, and consideration of sites requiring maintenance, remodeling, and repair, as well as participating, with others in Metro Government, in the overall decision-making process relating to Metro property. Affiant is guided by Metro ordinances having relevance to such projects; the Metro ordinance known to bear on plaintiff's claims is, by copy, attached hereto.
5. The Metro Works Department responds to calls by residents, made through 311 MetroCall, or directly to the Works Department with respect to uneven, or otherwise questionable sidewalk conditions; as previously stated herein, there have been no reports of any sidewalk defect in the immediate area of 2811 Browns [sic] Lane (please see paragraph 3 hereof).

We note that the ordinance referred to in paragraph four of Pullen's affidavit is not in the record before us.

Conder filed a response arguing that, because Pullen's duties were ministerial, he was not entitled to immunity. We note that Conder did not file any affidavits with his response but did make reference to the Department's web site. As noted by Conder, that web site indicates that the Department is responsible for "maintain[ing] the city's streets and road system . . . and maintain[ing] public streets, right of ways and alleys within Metro Louisville." The court summarily denied Pullen's motion. It is from this denial that Pullen appeals.

STANDARD OF REVIEW

Because Pullen offered evidence outside the pleadings, his motion to dismiss and/or for summary judgment was, in fact, a motion for summary judgment. Kentucky Rule of Civil Procedure (CR) 12.02. Therefore we review the trial court's denial of Pullen's motion using the summary judgment standard of review.

Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will

disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481. Whether or not a defendant is protected by official immunity is a question of law, which we review *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003).

ANALYSIS

At the outset we note that, unless this Court holds otherwise, an appellant is limited to arguing only those issues raised in his prehearing statement. CR 76.03(8). The only issue Pullen identified in his prehearing statement is whether he is entitled to qualified immunity. However, in his brief, Pullen also appears to argue that he cannot be deemed negligent because he had no knowledge, either actual or imputed, of the defective sidewalk. In support of this argument, Pullen cites to one Sixth Circuit Court of Appeals case and two state court cases: *Collins v. U.S.*, 621 F.2d 832 (6th Cir. 1980); *City of Dayton v. Thompson*, 372 S.W.2d 407 (Ky. 1963); and *Bowlin v. General Tire & Rubber Co.*, 445 S.W.2d 693 (Ky. 1969). Those cases do address the requirement for an actor to have knowledge of a defect. However, they do so in the context of determining the actor's negligence, not in the context of determining entitlement to immunity. In fact, none of the cases even contains the word immunity. Furthermore, Pullen does not state in his brief how knowledge of a defect or the cited cases relate to the issue

of immunity. Therefore, his argument regarding lack of knowledge is without merit.

Next, we address whether the trial court properly denied summary judgment on the issue of immunity. Although there are various types of immunity, we agree with the parties that the only type of immunity at issue herein is what is generally referred to as “qualified official immunity” (qualified immunity). Therefore, we limit our analysis to that type of immunity.

While performing discretionary acts or functions, public officers or employees are shielded from liability for negligence by the doctrine of qualified immunity. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Discretionary acts involve the exercise of judgment by an official acting within the scope of his office. Qualified immunity does not extend to negligent performance of ministerial duties which consist of routine acts or functions. *Id.*, see also *Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122, 126 (Ky. 1999).

We believe *Yanero* to be most instructive herein. In *Yanero*, a high school baseball player was injured when struck by a baseball during batting practice. At the time, the player was not wearing a helmet, which was mandated by school rule. The player sued, among others, his coaches and the school’s athletic director. Testimony indicated that the athletic director’s job entailed promulgating rules and that the coaches either did or did not uniformly enforce the batting helmet rule. The Supreme Court of Kentucky held that the school’s athletic

director had qualified immunity because determining what rules to adopt is discretionary, not ministerial. However, the Court determined that the coaches, who were responsible for enforcing the rules, were not entitled to qualified immunity, because enforcing rules is ministerial, not discretionary. *Yanero*, 65 S.W.3d at 528-29.

In his complaint, Conder alleged that Pullen had a duty to maintain the sidewalk. In his answer, Pullen denied any such duty. Therefore, at this stage of the litigation, the question before the court was: did Pullen have a duty to repair defective sidewalks? In his affidavit, Pullen stated that he makes decisions regarding a number of things, including what “sites requir[e] maintenance, remodeling, and repair.” Furthermore, Pullen stated that his Department responds to citizen complaints about sidewalk defects. Pullen did not state that he or the Department can choose not to repair a sidewalk. Therefore, Pullen admitted that the Department has responsibility for repairing sidewalks, an admission confirmed by the Department’s website. Because repairing sidewalks is mandatory, doing so is a ministerial function of Pullen’s office. How to make repairs and, possibly, when to make those repairs, would be discretionary functions of Pullen’s office, but, on the record as it currently exists, making repairs is ministerial. Just as the coaches in *Yanero* were required to enforce the rule regarding the use of batting helmets, the Department and Pullen, as its head, are required to maintain sidewalks. Because that function is not discretionary but ministerial, the trial court

correctly denied Pullen's motion for summary judgment on the issue of qualified immunity.

The parties and the trial court should note that we are not foreclosing the possibility that Pullen may be able to establish at a later date that he is entitled to qualified immunity. We are simply holding that he has not done so to date. Furthermore, we make no determination about what liability, if any, Pullen may have for negligence.

CONCLUSION

Because Pullen has failed to establish that the duty of maintaining sidewalks is discretionary rather than ministerial, we affirm the trial court's denial of Pullen's motion for summary judgment on the issue of qualified immunity.

ALL CONCUR.

BRIEF FOR APPELLANT:

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