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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002362-MR

ESTATE OF ERICA BROWN, BY
AND THROUGH BRIAN BROWN,
ADMINISTRATOR OF HER ESTATE;
MELINDA LEMASTER, PERSONAL
REPRESENTATIVE OF CHRISTA
DAWN BURCHETT, DECEASED; AND
OLIVIA DAWN BURCHETT, A MINOR,
BY AND THROUGH HER LAWFUL
CO-GUARDIANS, MELINDA LEMASTER
AND CLIFFORD BURCHETT — APPELLANTS

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NOS. 08-CI-00050 AND
08-CI-00176

JAMES D. PRESTON;
WILLIAM D. WITTEN, JOHNSON
COUNTY SHERIFF; AND JOHNSON
COUNTY SHERIFF'S DEPARTMENT,
OFFICE OF THE SHERIFF — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: The Estate of Erica Brown, by and through Brian Brown, the Administrator of her estate; Melinda Lemaster, personal representative of Christa Dawn Burchett, deceased; and Olivia Dawn Burchett, a minor, by and through her lawful co-guardians, Melinda Lemaster and Clifford Burchett (collectively, "Appellants"), appeal the Johnson Circuit Court's order granting the motion for summary judgment filed by James D. Preston; William D. Witten, Johnson County Sheriff; and the Johnson County Sheriff's Department, Office of the Sheriff (collectively, "Appellees"). After a careful review of the record, we affirm because the Appellees are immune from liability in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the day in question, Erica Brown was involved in a single car traffic accident. James D. Preston, a Johnson County Deputy Sheriff, received a radio dispatch concerning the accident. After responding to the dispatch, he activated his emergency equipment and followed an ambulance to the scene of the accident. Preston testified that the road was slippery because there had been snow and sleet earlier that morning.

After arriving at the accident scene, the ambulance and Preston drove past the scene, turned around, and the ambulance parked behind Brown's car, which was on the shoulder of the road, while Preston parked behind the ambulance. Preston testified that he looked in his rearview mirror to see "what [his] view would have been or what oncoming traffic's view would have been," and all he

saw was the road. He did not see any traffic coming toward him. Both Preston's emergency lights and the ambulance's emergency lights were on, and while the two EMS personnel, Christa Burchett and Brian Moore, were getting Brown out of her car, Preston began "running" Brown's license plate. Preston got out of his cruiser and began walking toward Brown, Burchett and Moore, who were walking in his direction, toward the ambulance. Preston heard what he believed was a "jake brake" from a coal truck. He then saw a coal truck "coming right at [them]," so he yelled for everybody to run. The coal truck slid onto the shoulder of the road and tragically killed Brown and Burchett. The circuit court noted, and the Appellants do not dispute, that Preston was on the scene of Brown's initial accident only approximately three minutes before the subsequent accident involving the coal truck occurred.

Appellants filed their complaint against Appellees and other parties who are not parties to this appeal. Appellants alleged that Preston was negligent in failing to direct and control traffic around the scene of the initial Brown accident, thereby allowing traffic "with limited visibility and adverse road conditions" near the Brown accident scene, and as a result of Preston's alleged negligence, the coal truck struck and killed Brown and Burchett. Appellants also filed their complaint against William D. Witten, who was the Johnson County Sheriff, and the Johnson County Sheriff's Department, Office of the Sheriff. Appellants contended that the Johnson County Sheriff was vicariously liable for the alleged negligence of Preston because Preston was a "deputy, employee, agent, servant and/or representative" of

the Office of the Johnson County Sheriff, and Preston "was acting within the course and scope of his duty, employment, agency and/or representative capacity of the Sheriff's Office" at the time the coal truck hit Brown and Burchett.

Appellees moved for summary judgment, contending that they were immune from liability. The circuit court granted their motion for summary judgment. Appellants now appeal, alleging as follows: (a) the circuit court erred in concluding that Deputy Preston's actions were discretionary and, consequently, that he was entitled to qualified official immunity; (b) Deputy Preston's duty at the scene was absolute, certain and imperative, therefore negating any cloak of immunity; and (c) the circuit court erred in extending the immunity granted to Deputy Preston to his employer, the Office of the Sheriff.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment 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).

III. ANALYSIS

A. CLAIM REGARDING CIRCUIT COURT'S DETERMINATION THAT DEPUTY PRESTON WAS ENTITLED TO QUALIFIED OFFICIAL IMMUNITY

Appellants first contend that the circuit court erred in concluding that Deputy Preston's actions were discretionary and, consequently, that he was entitled to qualified official immunity. "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 . . . ; (2) in good faith; and (3) within the scope of the employee's authority." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001).

> [W]hen an officer or employee of the state or county (or one of its agencies) is sued in his or her individual capacity, that officer or employee enjoys qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Application of the defense, therefore, rests not on the status or title of the officer or employee, but on the [act or] function performed.
>
> Indeed, the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. Discretionary acts are, generally speaking, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment. It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. On the other hand, ministerial acts or functions – for which there are no immunity – are those 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.

> In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the dominant nature of the act. For this reason, [the Kentucky Supreme Court] has observed that an 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. Similarly, that a necessity may exist for the ascertainment of those [fixed and designated] facts does not operate to convert the [ministerial] act into one discretionary in its nature. Moreover, a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act.

Haney v. Monsky, 311 S.W.3d 235, 240-41 (Ky. 2010) (internal quotation marks and citations omitted; emphasis removed).

Appellants claim that Preston's actions were ministerial, rather than discretionary, because KRS[1] 70.150 "requires deputies to direct, regulate and control traffic to maintain a maximum degree of safety." (Internal quotation marks omitted). Specifically, KRS 70.150(1) provides: "The sheriff of each county and his deputies shall patrol all public roads in his county, and direct, regulate and control the traffic on such roads so as to maintain a maximum degree of safety."

In the present case, Preston attested that he parked his vehicle behind the ambulance, which was behind Brown's car. Both the ambulance and the police cruiser's emergency lights were activated. Preston testified that he could see the road behind him by looking in his rearview mirror. The circuit court noted that

[1] Kentucky Revised Statute.

approximately three minutes passed from the time that Preston parked his car at the accident scene to the time that the coal truck killed Brown and Burchett. Preston testified that after he parked his car, he began "running" Brown's license plate for purposes of the accident report. This is in accord with KRS 70.150(2), which provides that the sheriff's office is required, as soon as possible after an accident has occurred, to "ascertain, if possible, the license number of each of the vehicles connected therewith, . . . the name and address of the owner or operator of the vehicle, the name and address of each occupant of the vehicles," and other information concerning the accident, as well as the vehicles and persons involved in the accident.

Appellants do not cite to any standard operating procedure concerning securing the scene of an accident to show that a deputy's actions in securing an accident scene are ministerial. Rather, they cite to opinions by a police practices expert and an accident reconstructionist regarding actions Preston allegedly could have done to prevent the coal truck accident, and they cite to KRS 70.150(1), requiring deputies to "direct, regulate and control the traffic on [county] roads so as to maintain a maximum degree of safety." However, opinions by a police practices expert and an accident reconstructionist do not render the task of securing an accident scene ministerial, particularly under the facts of this case. "[M]ost government officials are not expected to engage in the kind of legal scholarship normally associated with law professors and academicians. . . . Thus, qualified immunity protects all but the plainly incompetent or those who knowingly violate

the law." *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (internal quotation marks omitted).

Further, KRS 70.150(1) merely states that a deputy should take measures to maintain a maximum degree of safety. Therefore, it is up to the deputy's discretion which measures to take and, in the present case, Preston exercised his discretion and determined that the activation of his cruiser's emergency lights, combined with the fact that he believed his cruiser was visible from the road behind it, were the only measures necessary. Moreover, considering that only three minutes passed between the time Preston parked his vehicle and the time that the coal truck struck Brown and Burchett, Preston's actions were reasonable, particularly considering that during that time, he began to "run" Brown's license plate to begin the process of completing the accident report as soon as possible, as required by KRS 70.150(2). Consequently, the measures that Preston took in securing the accident scene were discretionary.

However, that does not end our analysis of determining whether Preston was entitled to qualified official immunity. Pursuant to *Yanero*, we must next determine whether Preston's discretionary actions were made in good faith and within the scope of his authority. Because Appellants do not contend that Preston's actions were made in bad faith, as they were required to show once the burden of proof shifted to them after Preston showed that his actions were within his discretionary authority, *see Yanero*, 65 S.W.3d at 523, we assume that Preston's actions were in good faith. *See Rowan County*, 201 S.W.3d at 475

(stating that "'good faith' is just a presumption that exists absent evidence of 'bad faith.'"). Moreover, as discussed *supra*, Preston's actions were within the scope of his authority, pursuant to KRS 70.150. Therefore, the circuit court did not err in determining that Preston was entitled to the defense of qualified official immunity.

B. CLAIM THAT PRESTON'S DUTY WAS ABSOLUTE, CERTAIN AND IMPERATIVE

Appellants next contend that Deputy Preston's duty at the scene was absolute, certain and imperative, therefore negating any cloak of immunity. However, as discussed *supra*, the measures Preston took to secure the accident scene were discretionary, and he was entitled to the defense of qualified official immunity. Therefore, this claim lacks merit.

C. CLAIM THAT CIRCUIT COURT ERRED IN GRANTING IMMUNITY TO OFFICE OF THE SHERIFF

Finally, Appellants allege that the circuit court erred in extending the immunity granted to Deputy Preston to his employer, the Office of the Sheriff. Appellants contend that the Office of the Sheriff is vicariously liable for Preston's actions. However, "[p]ublic officers are responsible only for their own misfeasance and negligence and are not responsible for the negligence of those employed by them if they have employed persons of suitable skill." *Yanero*, 65 S.W.3d at 528. Appellants do not assert that Preston lacked suitable skill to be employed as a deputy sheriff. Therefore, the Sheriff's Office cannot be held liable for any negligence on the part of Deputy Preston. Consequently, the circuit court

did not err in finding that the claim against the Office of the Sheriff should be dismissed.

Accordingly, the order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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