

RENDERED: FEBRUARY 19, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001293-MR

JAMES SIZEMORE; SHANNON
TURNER; AND KENNY SMITH

APPELLANTS

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CI-00091

CRYSTAL MAGGARD; HILDA
BROCK; AND KENTUCKY SCHOOL
BOARDS INSURANCE TRUST

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

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

TAYLOR, JUDGE: James Sizemore, Shannon Turner, and Kenny Smith bring
this appeal from a July 9, 2014, Order of the Leslie Circuit Court denying their

motion for summary judgment upon grounds of qualified official immunity. We affirm in part, reverse in part, and remand.

Crystal Maggard was a school bus driver and Hilda Brock was a bus monitor employed by the Leslie County Board of Education. On April 26, 2011, Maggard was driving a school bus along Stone Coal Branch Road (Stone Road) in Leslie County. At the time, Brock, the bus monitor, and a student were the only passengers on the bus. According to Maggard, she attempted to avoid a large pothole in Stone Road when the road on the opposite side “gave way, causing the bus to eventually flip down into a ravine.” Appellees’ Brief at 3. Both Maggard and Brock sustained physical injuries as a result of the accident.¹

Consequently, Maggard and Brock filed complaints against Sizemore, Leslie County Judge Executive; Turner, Road Foreman for the Leslie County Road Department; and Smith, Magistrate² for Leslie County (collectively referred to as appellants). Maggard and Brock claimed that appellants were negligent by failing to maintain Stone Road, thus causing the bus accident. Maggard and Brock also asserted that Sizemore, Turner, and Smith received numerous complaints concerning the disrepair of Stone Road but failed to act upon these complaints. Maggard and Brock brought the personal injury action against appellees in their individual capacities.

¹ The student passenger on the bus was not injured.

² Kenny Smith was the magistrate for the district that includes Stone Coal Branch Road.

Appellants filed a motion for summary judgment seeking dismissal of the action upon qualified official immunity grounds. Appellants argued that their allegedly negligent failure to maintain Stone Road was a discretionary act performed in good faith, thus entitling them to the shield of qualified official immunity. By order entered July 9, 2014, the circuit court denied appellants' motion for summary judgment. This interlocutory appeal follows.³

Appellants contend that the circuit court erroneously denied their motion for summary judgment. They maintain that Maggard's and Brock's personal injury action is barred by qualified official immunity. Appellants believe that the maintenance of Stone Road constituted a discretionary act and not a ministerial act. As appellants performed such discretionary act in good faith, they assert that summary judgment should have been rendered dismissing the action upon immunity grounds.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Steelvest*, 807 S.W.2d 476. Our review proceeds accordingly.

Public officials and employees may be shielded from tort liability when sued in their individual capacities by qualified official immunity. Qualified

³ An interlocutory appeal may be taken from an order denying summary judgment upon the ground of immunity. *Breathitt Co. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

official immunity is applicable to a discretionary act negligently performed by a public official when performed in good faith and within the scope of the official's authority or employment. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). To be entitled to qualified official immunity, the public official must be performing a discretionary act as opposed to a ministerial act. The distinction between a discretionary act and a ministerial act is pivotal to determining entitlement to qualified official immunity.

A ministerial act generally “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.* at 522. Whereas, a discretionary act involves “the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” *Id.*

In this case, Maggard and Brock argue that appellants negligently maintained Stone Road by failing to repair potholes and by failing to grade and gravel said road. We are, thus, presented with the legal issue of whether a discretionary or ministerial duty exists as to Judge Executive Sizemore, County Road Foreman Turner, and/or Magistrate Smith to maintain or repair Stone Road. We will address each public official *seriatim*.

JUDGE EXECUTIVE SIZEMORE

As County Judge Executive, Sizemore was the Chief Executive of Leslie County. KRS 67.710. In such role, Sizemore was responsible for “[p]roviding for the execution of all ordinances and resolutions of the fiscal court”

and for supervising county personnel with the approval of the Fiscal Court. KRS 67.710(1) and (7). While Sizemore possessed a general duty to supervise employees of the Leslie County Road Department, he did not possess a specific duty as to the repair or maintenance of county roads. Rather, Sizemore, as Chief Executive of Leslie County, was merely required to provide general direction and supervision to the employees of the Leslie County Road Department per KRS 67.710(7). In fact, it was Sizemore's testimony that if he received a complaint concerning a county road, Sizemore ordinarily would inform the Leslie County Road Foreman, Turner. Under these facts, we believe that Sizemore's duty to supervise the employees of the Leslie County Road Department is quintessentially discretionary. *See Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014).

As to a discretionary duty, Sizemore is entitled to qualified official immunity if such duty was performed within the scope of his authority and was performed in good faith. It is clear that Sizemore's duty to supervise employees of the road department is within the scope of his employment as judge executive. However, as an appellate court and based upon the facts herein viewed in a light most favorable to Maggard and Brock, we cannot conclude whether Sizemore acted in good faith in his supervision of road department employees. *See Coleman v. Smith*, 405 S.W.3d 487 (Ky. App. 2012).

In this Commonwealth, good faith for qualified official immunity has both an objective and subjective component. *Yanero*, 65 S.w.3d 510. It has been held that a lack of good faith may "be predicated on whether the public employee

‘willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.’” *Bryant v. Pulaski County Det. Ctr.*, 330 S.W.3d 461, 466 (Ky. 2011) (quoting *Yanero*, 65 S.W.3d at 523)). Our Court has recognized that the circuit court is in the best position to initially determine good faith:

“[S]ubjective intent or good faith, is a factual question that so rarely can be decided by summary judgment . . . and may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues, and normally requires a trial to resolve[.]” 201 S.W.3d at 474 (brackets omitted). Because whether an officer or employee acted in good faith is a question of fact, we remand to afford the circuit court an opportunity to receive evidence on this issue. *See Sloas*, 201 S.W.3d at 474.

Coleman v. Smith, 405 S.W.3d 487, 495 (Ky. App. 2012).

Accordingly, we conclude that Sizemore’s duty to supervise employees of the county road department was discretionary. Upon remand, the burden is upon Maggard and Brock to put forth “affirmative evidence” that Sizemore did not exercise good faith in carrying out such duty. *See Coleman*, 405 S.W.3d at 495. If Maggard and Brock cannot produce such evidence, Sizemore is entitled to summary judgment upon the basis of qualified official immunity. *See id.*

ROAD SUPERVISOR/FOREMAN TURNER

Turner was Leslie County Road Foreman. The record does not reflect that Leslie County employed a county road engineer. Under KRS 179.020, a county may forego employing a road engineer. In such instance, the county road

engineer's duties under KRS 179.070 are to be performed by the county road supervisor or foreman. KRS 179.020(2). The duties of a county road engineer/foreman are set forth in KRS 179.070 and provide in relevant part:

- (1) The county engineer shall:
 - (a) Have general charge of all county roads and bridges within the county;
 - (b) See that county roads and bridges are improved and maintained as provided by law;
 - (c) Supervise the construction and maintenance of county roads and bridges and other work of like nature undertaken by the fiscal court or a consolidated local government;
 -
 - (j) Remove trees or other obstacles from the right-of-way of any publicly dedicated road when the tree or other obstacles become a hazard to traffic[.]

Pursuant to KRS 179.070, Turner, as County Road Foreman, is specifically obligated to “see that county roads . . . are . . . maintained as provided by law” and to “supervise the . . . maintenance of county roads.” These statutory duties, to see that county roads are maintained and to supervise the maintenance of county roads, are absolute and certain. Turner enjoys no discretion as to performance of these duties; quite the opposite, we view Turner's duties as mandatory and as ministerial.

We are buttressed in our conclusion by *Wales v. Pullen*, 390 S.W.3d 160 (Ky. App. 2012). Therein, the Court of Appeals held that a county engineer

possessed a ministerial duty under KRS 179.070(1)(j) to remove trees from roadways and is not entitled to qualified official immunity

In *Wales*, the Court of Appeals interpretation looked to KRS 179.070(1)(j). Similarly, in this case our review is focused on KRS 179.070(1)(b) and (c). Consistent with the interpretation adopted in *Wales*, we also believe the General Assembly's use of the word "shall" in the opening sentence of the statute reflects the legislative intent that the duties of a county engineer outlined in KRS 179.010(b) and (c) are to be considered ministerial. *See Wales*, 390 S.W.3d 160.

Hence, we conclude Turner is not entitled to qualified official immunity and the circuit court properly rendered an order denying same to Turner.

MAGISTRATE SMITH

Smith is a magistrate for the district in which Stone Road is located and is a member of the Leslie County Fiscal Court. The Fiscal Court is "directly responsible for the implementation of the country road program." *Webb v. Carter Cnty. Fiscal Court*, 165 S.W.3d 490, 493 (Ky. App. 2005). KRS 67.080 specifically provides that the "Fiscal Court shall . . . [a]s needed, cause the construction, operation, and maintenance of all county . . . roads" However, these duties as to county roads are particularly placed upon the fiscal court as a whole body and not upon the magistrates who comprise the fiscal court. In short, we are unable to locate and the parties have not cited this Court to a single rule of law, statute, or other legal authority imposing a duty upon a magistrate to repair or maintain a county road. In the absence thereof, we are reluctant to impose one.

In this case, Smith averred that if his office received a complaint concerning the disrepair of a county road, his ordinary practice was to pass along the complaint to the road department. Smith neither performed maintenance work on county roads nor directly supervised those who did perform such work. Consequently, we hold that Smith, as a magistrate for Leslie County, owed no duty to Maggard or to Brock as to the maintenance and repair of Stone Road. We believe that Smith was entitled to summary judgment.

To summarize, we are of the opinion that summary judgment was improperly denied as to Smith, and we reverse same. As Smith possessed no duty as to the maintenance and repair of Stone Road, all claims against him should be dismissed. As to Sizemore, we conclude that his respective duty was discretionary and remand for the circuit court to determine whether he discharged such duty in good faith. As to Turner, we hold that he possessed a ministerial duty to oversee the maintenance of county roads and to supervise the maintenance of county roads. Turner is not entitled to qualified official immunity in relation to such ministerial duty, and the circuit court properly rendered an order denying Turner summary judgment upon such grounds.

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

ALL CONCUR.

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