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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001074-MR

DIANE MOBLEY, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MEGAN MORRIS — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 08-CI-00319

GRAVES COUNTY, KENTUCKY; GRAVES COUNTY FISCAL COURT; TONY SMITH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE EXECUTIVE; ROMEY HOLMES, CHARLES REEVES, AND JEFFREY HOWARD, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE FISCAL COURT; AND DANNY TRAVIS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GRAVES COUNTY ROAD FOREMAN — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND COMBS, JUDGES.

COMBS, JUDGE: The Estate of Megan Morris, by and through her personal representative, Diane Mobley (the Estate), and Diane Mobley, individually, appeal

the order of the Graves Circuit Court granting summary judgment to Graves County; the Graves County Fiscal Court; each member of the Fiscal Court, including the county judge executive, individually and in his official capacity; and Danny Travis, the road foreman, individually and in his official capacity. After our review, we affirm in part, vacate in part, and remand.

In June 2007, Megan was one of seven teenagers riding in a car. She was a passenger. It was dark and raining, and the driver failed an attempt to negotiate a sharp curve. The car struck a tree; Megan died from her injuries. Her estate filed a lawsuit against the defendants, the Graves County officials listed above, and alleged that they were negligent in not providing warning signs at the curve, thus causing Megan's death. In May 2009, the Graves Circuit Court granted summary judgment to the defendants. The Estate[1] now appeals.

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 applied stringently 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 that no genuine issue of material fact exists; the movant likely "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

[1] We are using the term "The Estate" collectively to refer to the appellants -- both Diane Mobley as personal representative of Megan's estate, and Diane Mobley in her individual capacity.

The trial court must view the evidence in favor of the non-moving party, who must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). 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). Because summary judgments do not involve fact finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

In the case before us, the order granting summary judgment held that the defendants were entitled to immunity and that there was no genuine issue as to any material fact. We agree in part and disagree in part.

In its order granting summary judgment, the trial court has applied the broad concept of immunity without distinguishing between the different types of immunity involved. We are persuaded that it is necessary to examine the nuances and categories of immunity applicable to this case and how they relate to it.

First, sovereign immunity embraces the notion that one may not sue the government unless "the state has given its consent or otherwise waived its immunity" by statutory provision. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). The concept is "a bedrock component" in our governmental structure. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc*., 286 S.W.3d 790, 799 (Ky. 2009). Counties are protected by sovereign immunity. *Lexington-*

Fayette Urban County Gov't v. Smolcic, 142 S.W.3d 128, 132 (Ky. 2004). When sovereign immunity extends to public officials who are sued in their individual capacities, it is known as qualified official immunity. *Yanero v. Davis*, 65 S.W.3d at 518.

The trial court's order also mentioned governmental immunity. Our Supreme Court has recognized that courts often interchange the terms *sovereign immunity* and *governmental immunity*, but they are actually two different principles. *Id*. at 519. Governmental immunity applies to government **agencies**. It arose from sovereign immunity and serves to balance the underlying public policy upholding sovereign immunity *versus* the right of injured citizens to be remedied. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage Inc*., 286 S.W.3d at 800. Applicability of governmental immunity depends on the function of the entity being sued and its parent body. *Comair, Inc., v. Lexington-Fayette Urban County Airport Corp*., 295 S.W.3d 91 (Ky. 2009). Since Graves County and the Fiscal Court are not agencies, governmental immunity is not involved. Thus, sovereign immunity applies.

The Estate has not cited a statute that authorizes claims against a county government concerning road management, and we have not discovered one in the course of our research. Therefore, summary judgment for Graves County, the Fiscal Court, and its officers in their **official** capacities was proper. We affirm on this issue.

However, we must also examine whether summary judgment for the officials **individually** was appropriate. As noted earlier, officials sued in their individual capacities may be entitled to a qualified official immunity. *Yanero v. Davis*, 65 S.W.3d at 522. More limited than sovereign or governmental 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. . . . Conversely, an officer or employee is afforded no immunity from tort liability for 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 the execution of a specific act arising from fixed and designated facts.

Id. (internal citations omitted).

The Estate contends that the trial court did not properly apply this analysis. Although the trial court discussed ministerial and discretionary duties in its order, it simply concluded that the duties at issue were discretionary without undertaking any analysis of the duties under the *Yanero* model of discretionary *versus* ministerial functions. It neglected to apply the *Yanero* test to all named defendants based on the analysis pertinent to each category, failing to differentiate among the defendants as governmental entities, governmental representatives, and individuals. Thus, we are persuaded that summary judgment for the defendants

individually was premature since issues of fact remained and needed to be explored in order to determine the proper application of the law.

Although we are remanding because of the trial court's incomplete immunity analysis, we shall also address the Estate's second argument: that the trial court granted summary judgment before all pertinent discovery concluded. The scope of permissible discovery as a prelude to entry of summary judgment has been a concern inherent in the issue of when summary judgment can be granted.

As pointed out above, governmental officers and employees are potentially liable for negligence in carrying out ministerial acts or in performing discretionary acts in a manner lacking good faith or beyond the scope of their authority. The Estate contends that the Fiscal Court officials had the ministerial duty to implement certain safety guidelines or procedures but that the Estate did not have adequate opportunity to conduct proper discovery regarding the duties before summary judgment was granted.

We agree that as a threshold matter, summary judgment should not be granted unless "a party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth of Kentucky Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (*citing Hartford Ins. Group v. Citizens Fid. Bank & Trust Co*., 579 S.W.2d 628 (Ky. App. 1979)). This reasoning has recently been reiterated by our Supreme Court, cautioning "trial courts not to take up these motions prematurely." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

The Estate contends that the defendants had a mandatory ministerial duty to implement the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) as a matter of policy in determining placement of road signs. Kentucky Revised Statute[s] (KRS) 189.337(2) requires the Department of Highways to "promulgate and adopt a manual of standards" for control of traffic devices.[2] It applies to all state, county, and incorporated city roads.

In conjunction with implementing this statute, the Department of Highways has issued a Kentucky Administrative Regulation, 603 KAR 5:050. Section 1 of the regulation directs that "[t]he standards and specifications set forth in the [MUTCD] *shall* apply to all traffic control devices . . . in Kentucky." (Emphasis added.) Maintenance and control of county roads are the responsibility of the county engineer. KRS 179.070. If a county does not employ an engineer, it may hire a county road supervisor to carry out the duties of a county engineer. KRS 179.020(1). The General Assembly has determined that one must meet specific qualifications in order to be a county road supervisor. KRS 179.020(2).

As the Estate correctly acknowledges, promulgation of rules (creating a policy) is discretionary. However, enforcement of the rules, once in place, is ministerial. *Williams v. Kentucky Dept. of Education*, 113 S.W.3d 145, 150 (Ky. 2003). The Department of Highways has promulgated the rule that counties must implement the MUTCD in their road maintenance policies. Therefore,

[2] KRS 189.337(1) includes road signs in the definition of "official traffic control devices."

implementation of the MUTCD by local officials is ministerial – removing the protection of qualified immunity for the exercise of the duty.

The trial court found that placement of road signs is *per se* a discretionary function, relying on *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841 (Ky. App. 2003), and *Bolin v. Davis*, 283 S.W.3d 752 (Ky. App. 2009). However, we are persuaded that both cases are highly distinguishable from the case before us. In both cases cited, the local governments had presented their road maintenance policies and had even shown proof that additional precautions had been considered but rejected at the locations in question. The decisions concerning the signs and guardrails were revealed to be discretionary as a result of the deliberative decisions made with regard to application of their policies. Contrary to the trial court's interpretation, neither *Clark* nor *Bolin* adopted a broad holding that road sign placement is a discretionary act.

In this case, the defendants did not show that they had complied with the mandate of the Department of Highways. In an interrogatory in February 2009, the Estate requested the policy as to local roads. Instead of answering the interrogatory, the defendants filed a motion for summary judgment in March, which led to this appeal. The defendants also had not answered the Estate's interrogatories regarding their duties and qualifications. These are genuine issues of material facts that were still pending when the trial court granted summary judgment, which we hold to have been premature.

In summary, we affirm entry of summary judgment as to Graves County, its Fiscal Court, and its officers in their official capacity. We vacate the order of summary judgment as to the officials in their individual capacities and remand the case to the Graves Circuit Court for immunity analysis pertinent to those named defendants.

TAYLOR, CHIEF JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. In my view of the law, placing signs and guardrails on county roads, or not placing them, is a discretionary act undertaken by a fiscal court. Because the estate never made a genuine issue either of the fiscal court's good faith exercise of that discretion or of its authority to exercise it, summary judgment was appropriate.

The majority determined that placing signs and guardrails on county roads is a ministerial act. To quote the majority, because "[t]he standards and specifications set forth in the [MUTCD] *shall* apply to all traffic control devices[,] . . . counties must implement the MUTCD in their road maintenance policies. Therefore, implementation of the MUTCD by local officials is ministerial – removing the protection of qualified immunity for the exercise of the duty." (Emphasis supplied by majority). I believe this reasoning is flawed because no duty related to the MUTCD was at issue here.

While I agree "the duty" imposed by 603 KAR 5:050 to follow the MUTCD is ministerial, that duty (to conform traffic control devices to a national

standard) arises only *after* a fiscal court exercises its discretion in determining that a traffic control device *should* be installed. The fiscal court did not and could not fail to undertake the ministerial act of assuring compliance with the MUTCD because, as alleged in the complaint, there were no traffic control devices to make uniform with that manual.

Before addressing the fiscal court's discretionary acts regarding county roads, a closer look at the MUTCD is appropriate.

The MUTCD is "the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel[.]" 23 C.F.R. § 655.603 (2010).[3] As its title indicates, the sole purpose of the Manual on Uniform Traffic Control Devices is to make uniform all traffic control devices[4] across the various jurisdictions within the United States, for reasons obvious to any inter-jurisdictional traveler. However, "[t]his Manual describes the *application* of traffic control devices, but *shall not be a legal requirement for their installation*." MUTCD Section 1A.09 (emphasis supplied). Kentucky's own regulation is consistent, stating that the MUTCD applies to traffic control devices that are "*installed* on any publicly used" roadway. 603 KAR 5:050 Section 1. Use of the

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[3] The MUTCD is readily accessible; 603 KAR 5:050, Section 2 requires that "The Manual on Uniform Traffic Control Devices and all amendments and supplements shall be maintained both at the cabinet Web site, www.transportation.ky.gov, and in hard copy at the Transportation Cabinet."

[4] A traffic control device is "a sign, signal, marking, or other device used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, or shared-use path by authority of a public agency having jurisdiction." MUTCD, Section 1A.13, [§] 87.

past tense certainly presumes a previous decision by the proper authority to install a traffic control device. Once again, the MUTCD itself says as much.

> Traffic control devices, advertisements, announcements, and other signs or messages within the highway right-of-way shall be placed *only as authorized by a public authority or the official having jurisdiction*, for the purpose of regulating, warning, or guiding traffic.

MUTCD Section 1A.08 (Emphasis supplied). Contrary to the majority's conclusion, neither the MUTCD nor the regulation incorporating it creates a duty requiring installation of a traffic control device at any particular location.

Kentucky law is clear that a fiscal court's acts regarding improvement of county roads are discretionary. *Madison Fiscal Court v. Edester*, 301 Ky. 1, 190 S.W.2d 695, 696 (1945) ("[I]t is within the discretion of the fiscal court to determine the road or roads which shall be improved and the time and method of such improvements."); *see* KRS 67.080(2)(b)("fiscal court shall . . . , [*a*]*s needed*, cause the construction, operation, and maintenance of all county . . . structures, grounds, roads and other property"; emphasis supplied). In exercising its discretion, the fiscal court should properly consider a variety of factors. Here are three examples of such factors.

First, the MUTCD itself warns that "Regulatory and warning signs [including speed limit postings and "curve ahead" warnings, respectively,] should be used conservatively because these signs, if used to excess, tend to lose their effectiveness." MUTCD, Section 2A.04 Excessive Use of Signs; MUTCD, Section 2B.13 Speed Limit Sign (speed limit sign is a regulatory sign); MUTCD,

Section 2C.06 Horizontal Alignment Signs ("curve ahead" signs, known as horizontal alignment signs, are warning signs). The MUTCD thus urges discretion when considering whether to install a traffic control device at all.

Second, "Signs should be used only where justified by engineering judgment or studies[.]" MUTCD, Section 2A.03, Standardization of Application. There is nothing in the record to indicate that any study indicated the need for signs or a guardrail. Additionally, discovery revealed there were never any accidents and never any complaints about this stretch of county road prior to the accident in question.

Third, because there is a cost attributable to the installation of signs and guardrails, discretion in the allocation of taxpayer/road-fund dollars is required. Kentucky has long held that such expenditures are discretionary acts.

> The fiscal court of every county is, in effect, a legislative board, invested with the power by law of making appropriations in cases where the needs of the county require it; and while they may neglect their duties, or omit to improve the roads, or to make other appropriations necessary for that purpose, it is beyond the power of a judicial tribunal to interfere and determine what improvements should be made, and the extent of the expenditure necessary for that purpose.

Madison Fiscal Court v. Edester, 301 Ky. 1, 190 S.W.2d 695, 696 (1945) (quoting *Highbaugh v. Hardin County*, 17 Ky.L.Rptr. 1313, 34 S.W. 706, 707 (Ky. 1896)).

Such discretion, of course, is not without limitation. One "qualification" of qualified immunity is that the discretionary act be one within the official's authority. In the eleven months from the filing of the complaint until the

entry of summary judgment, the estate never made an issue of the fiscal court's authority and, in fact, conceded it.

The only other qualification is that the official will not be immune from prosecution if he fails to act in good faith, including his willful failure to act at all. As our former Court of Appeals said,

> These officials are invested with the necessary discretion as to the manner of discharging the duties of their offices. But this discretion is not one that can set at naught the duty. Their discretion consists in the manner how, not in the matter of whether, the highway shall be kept in fit condition for public use, in so far as the means given to their hands by the law will suffice. . . . We are of the opinion that under the statutes above quoted [Ky.Stat. § 1834, predecessor to KRS 67.080 cited *supra*] the duty of keeping the public highways of a county in repair is primarily imposed upon the members of the fiscal court sitting as the governmental tribunal of the county. The responsibility, if any, for a *willful failure to discharge this duty*, would rest upon the members individually, and not the county.

Commonwealth v. Boyle County Fiscal Court, 24 Ky.L.Rptr. 234, 68 S.W. 116, 118 (Ky. 1902) (Emphasis supplied). The estate never alleged a willful failure to discharge any duty, only a negligent failure.

Furthermore, examination of the complaint reveals that the estate never alleged that any defendant failed to act in good faith. By the time the members of the fiscal court filed their motion for summary judgment, they had sufficiently shown *prima facie* that "The decision of the Defendants in this action was made in good faith and well within the discretionary authority of the official capacity." (Motion for Summary Judgment, p. 7). Nothing in the pleadings or

discovery contradicts that showing. "Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith." *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001). The estate never met that burden. In fact, the estate's focus in response to the motion for summary judgment was to request additional time for discovery "[t]o fully investigate the acts complained of by Plaintiffs in this matter and whether those acts were 'ministerial' or "discretionary.'" (Response to Summary Judgment Motion, p. [2]).

I am firmly convinced that the act of placing or failing to place signs or a guardrail on county roads is a discretionary act on the part of the fiscal court, not a ministerial one. During the eleven months of this case's pendency before the circuit court, the estate never made a genuine issue of the fiscal court's good faith or authority. For these reasons, the case was ripe for summary judgment. Therefore, I would affirm the circuit court.

BRIEF FOR APPELLANT:

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Nicholas D. Kafer
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BRIEF FOR APPELLEES:

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