

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001753-MR

JOSH BROUGHTON, MICHAEL ADCOCK
AND KIMBERLY WHITLEY

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-01004

TOMMY RUSSELL

APPELLEE

OPINION
DISMISSING

** ** * * * * *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Josh Broughton, Michael Adcock and Kimberly

Whitley (Appellants) appeal the denial of their motion to dismiss Tommy Russell's
negligence action. Appellants argue: (1) they are entitled to qualified immunity

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

from suit; and (2) the trial court lacked subject matter jurisdiction. After reviewing the record and briefs, we have determined that this appeal is interlocutory and, therefore, must be dismissed.

At all times pertinent to this case, Russell was a state inmate at the Frankfort Career Development Center. Whitley was the warden of the facility. Adcock was a supervisor at the facility and Broughton was an employee who had immediate training and supervisory control of Russell. Russell participated in a work release program at the National Guard Boone Center Headquarters in Frankfort, Kentucky, on August 18, 2008. Adcock instructed Broughton to have a tree cut down and to have Russell assist him. Broughton in turn told Russell to cut down the tree. When felled, the tree landed on Russell's left leg. The resulting injury ultimately required amputation of that limb below the knee. Russell filed an action against Appellants in their individual capacities alleging that their negligence caused his injuries.

Appellants filed a motion to dismiss Russell's action. For purposes of the motion, they accepted the facts as stated in the complaint as true. They argued they were immune from suit based on a theory of qualified immunity. The trial court found "the inquiry goes beyond a mere question of law and involves facts at hand, namely, whether Defendants acted in good faith[.]" With that factual issue unresolved by the pleadings, the trial court then ordered the case to proceed with

limited discovery on the issue of qualified immunity. The trial court's opinion and order recited Kentucky Rules of Civil Procedure (CR) 54.02 finality language.

This appeal followed.

Appellants first argue they are entitled to qualified immunity from suit. However, the trial court did not adjudicate the issue of qualified immunity one way or the other. It merely denied the motion to dismiss and ordered that limited discovery be taken on the issue.

Where an order is by its very nature interlocutory, the recital of CR 54.02 finality language does not make it appealable. *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1978). In most instances an order denying dismissal of an action is interlocutory and non-appealable. *Gooden v. Gresham*, 6 Ky. Op. 560, 1873 WL 11234 (Ky. Mar. 13, 1873); *see also Parton v. Robinson*, 574 S.W.2d 679 (Ky. App. 1978). In order to be immediately appealable, a qualified immunity issue must not involve a genuine factual dispute, but must be “a purely legal one.” *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995). In *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), the Supreme Court of Kentucky held that “good faith” is at times a fact-dependent issue in the context of qualified immunity. “Ultimately, however, once the material facts are resolved, whether a particular defendant is protected by official immunity is a question of law. . . .” *Id.* The Supreme Court noted “the trial court here properly waited on the necessary limited discovery before making its final ruling on the question.” *Id.* at fn 4.

The trial court did not make a final ruling on the issue of qualified immunity nor did it dispose of any claims. It merely reserved its ruling following limited discovery. Under the authority cited above, we conclude that the trial court's order was interlocutory. Therefore, the appeal must be dismissed.

Appellants also argue the trial court lacks jurisdiction over Russell's claims because exclusive jurisdiction rests with the Board of Claims. However, this argument is premised on a request that this Court overrule *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). As an intermediate appellate court, this Court is bound by established precedents of the Supreme Court of Kentucky. Rules of the Supreme Court (SCR) 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

Accordingly, Appeal No. 2009-CA-001753-MR is dismissed as being taken from an interlocutory order.

ALL CONCUR.

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