

RENDERED: AUGUST 9, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000378-MR

RICHARD STORM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 09-CI-006073

LOUIS MARTIN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Richard Storm filed this interlocutory appeal after the Jefferson Circuit Court denied his motion for summary judgment based on qualified official immunity. We affirm.

On September 14, 2008, a significant windstorm resulted in downed power lines and trees across the Louisville area. On September 17, 2008, Louis

Martin was driving his motorcycle on Phillips Lane in Louisville when he collided with a downed tree in the roadway and was injured. At the time, Storm was the Metro Louisville County Engineer and an Assistant Director of Public Works who supervised approximately fifty employees. He reported directly to Ted Pullen, the Director of Public Works.

Martin filed this action against multiple defendants including Pullen, in his individual capacity, and in his official capacity, as Director of the Louisville Metro Government Department of Public Works. Subsequently, he amended his complaint to name Storm, in his individual capacity, and in his official capacity, as Jefferson County Engineer. Following discovery, Pullen and Storm filed a joint motion for summary judgment on the basis that they did not owe Martin a duty to remove the downed tree and were entitled to qualified official immunity. The trial court held that Pullen was entitled to qualified immunity and dismissed the claims against him. However, it denied the motion with respect to Storm who appealed.¹

As a threshold matter, we reiterate what is now well established. An order denying a claim of immunity is subject to immediate appeal. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886-887 (Ky. 2009). The rule and its logic were explained in *Prater*:

Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action. For this reason, the United States Supreme Court has recognized in immunity cases an exception to the federal final judgment rule codified at 28

¹ The only issue in this appeal is the denial of qualified official immunity to Storm individually.

U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court reiterated its position that “the denial of a substantial claim of absolute immunity is an order appealable before final judgment.” *Id.* at 525, 105 S.Ct. 2806, *citing Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). We find the Supreme Court’s reasoning persuasive, and thus agree with the Court of Appeals that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.

Id.

Summary judgment is only proper when “it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steevest, Inc. v. Scansteel Serv. Ctr., 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.*

“The immunity that an agency enjoys is extended to the official acts of its officers and employees. However, when such officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity.” *Atry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007).

Public officers and employees are shielded from liability by qualified official immunity for the negligent performance of discretionary acts in good faith and within the scope of their authority. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). There is no qualified official immunity for the performance of ministerial acts. *Id.* A discretionary act involves the exercise of discretion and judgment or

personal deliberation. *Id.* A ministerial act is one that is “absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Id.* The *Yanero* Court elaborated: “[a]n act is not necessarily discretionary just because the officer performing it has some discretion with respect to the means or method to be employed.” *Id.* (internal quotations omitted). Quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959), the Court emphasized “[t]hat a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature.” *Id.* Because few acts are purely discretionary or purely ministerial, the courts must look for the “dominant nature of the act.” *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

Martin argues that the circuit court correctly ruled that Storm’s actions were ministerial in nature. KRS 179.070 sets forth the powers and duties of a County Engineer. It includes explicit directives and states:

(1) The county engineer shall:

....

(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[.]

Despite the statutory mandate, Storm contends that he did not have a duty to remove trees from roadways when they became a hazard because the Louisville Metro Government Department of Public Works was responsible for tree removal. He testified that he was not aware of KRS 179.070 and not told that removing trees was part of his job duties.

During the pendency of this appeal, this Court rendered its decision in *Wales v. Pullen*, 390 S.W.3d 160 (Ky.App. 2012), where a motorcyclist was injured when a downed tree allegedly caused him to crash on September 20, 2008, in Louisville. The motorcyclist filed an action against Storm in his individual capacity and, as here, Storm asserted qualified official immunity and argued that he was not responsible for removing trees from the roadways. This Court rejected his contention and held despite that the Louisville Metro Government Department of Public Works may have chosen to structure its department differently, “based on the statutes as written, a member of the public... would expect the County Engineer to remove trees, as evidenced by the clear statutory mandate and power to do so.” *Id.* at 166. Storm’s ignorance of his statutory duty was inconsequential. *Id.* at 167. The statutory language and the use of the word “shall” rendered his duty ministerial and, therefore, this Court held he was liable for any negligence in failing to remove the trees or improperly removing the trees. *Id.*

We are compelled to reach the same conclusion in this case. Storm's compliance with his statutory duties involved "merely execution of a specific act arising from fixed and designated facts." *Yanero*, 65 S.W.3d at 522. He either complied with KRS 179.070, or he did not. The circuit court properly ruled that Storm owed a duty to Martin, and that duty was ministerial.

Storm contends that Martin had the burden to establish that he acted in bad faith. Although Storm would be correct if his actions were discretionary in nature, we have concluded that his duty to remove the tree in the roadway was ministerial. Whether he acted in good faith is not an issue. *Bryant v. Pulaski County Detention Center*, 330 S.W.3d 461, 466 (Ky. 2011).

We have not overlooked Storm's final argument that he cannot be liable because he did not have notice of the downed tree on Phillips Lane but conclude that the issue is not properly before this Court. Our determination in this interlocutory appeal is limited to the qualified immunity issue. The notice issue concerns Storm's negligence, not his entitlement to immunity.

Based on the foregoing, the denial of summary judgment to Storm on the basis that he had a ministerial duty to remove the downed tree and, therefore, is not entitled to qualified official immunity is affirmed.

ALL CONCUR.

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