

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001899-MR

CITY OF BOWLING GREEN,
KENTUCKY; AND CHARLES
“RICK” MAXWELL

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 07-CI-01581

LOWE’S FEED AND GRAIN, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: City of Bowling Green, Kentucky, (City) and Charles “Rick” Maxwell (Maxwell) bring this appeal from a July 25, 2012, Judgment of the Warren Circuit Court upon a jury verdict awarding a total of \$970,000 in damages to Lowe’s Feed and Grain, Inc. (Lowe’s Feed). We reverse and remand.

The genesis of this dispute began with the loss of electrical power to Lowe's Feed. On September 27, 2002, an 800 amp breaker in the mill building of Lowe's Feed¹ malfunctioned during a storm leaving the building without power. Don Lowe of Lowe's Feed contacted an electrical contractor, Patterson Westbrook, to perform the needed electrical repairs to the mill building. Westbrook, in turn, contacted Maxwell, an electrical inspector for the City. Westbrook and Maxwell arrived at Lowe's Feed on the afternoon of September 27, 2002. Maxwell concluded that the building was unsafe due to numerous electrical code violations and ordered the electricity to be disconnected and/or not restored to the mill building until the electrical system was in compliance with current electrical code standards.

The subsequent facts of this case are vigorously disputed by the parties. However, it is clear that City Attorney Eugene Harmon mailed a letter dated October 30, 2002, to the attorney for Lowe's Feed, David Broderick. In that letter, Harmon informed Broderick that the City was proceeding to condemn the mill building for various violations of the International Property Maintenance Code (IPMC), unless immediate repairs were made. Under a permit obtained from the City in January 2003 by Frank Tabor of Brothers Electric on behalf of Lowe's Feed, electrical repairs were made to the mill building during 2003 and early 2004.

¹ The business premises of Lowe's Feed and Grain, Inc., was comprised of several buildings, including a mill building, a chicken hatchery, and several grain bins. The only structure to suffer a loss of electricity on September 27, 2002, was the mill building.

These electrical repairs were inspected by Maxwell and approved in February 2004. Electricity was restored to the mill building at that time.

On September 27, 2007, Lowe's Feed filed a complaint in Warren Circuit Court against Maxwell, in his individual capacity and in his official capacity, and against the City.² Lowe's Feed asserted that Maxwell improperly terminated electricity to the mill building on September 27, 2002, and then engaged in a conspiracy with the City to wrongfully deny the mill building electricity until February 12, 2004. Specifically, Lowe's Feed asserted, *inter alia*, the claims of fraudulent misrepresentation and negligent misrepresentation against Maxwell and the City.

Maxwell and the City filed an answer and eventually filed a motion for summary judgment. Kentucky Rules of Civil Procedure (CR) 56. Therein, they argued that the City was entitled to statutory immunity under the Claims Against Local Government Act and that Maxwell was entitled to qualified official immunity. By partial summary judgment entered January 6, 2012, the circuit court concluded that neither the City nor Maxwell was entitled to immunity upon the claim of fraudulent misrepresentation. As to the claim of negligent misrepresentation, the circuit court determined that the City and Maxwell were entitled to immunity for the discretionary acts of "inspecting and cutting off power at the mill" but were not entitled to immunity for the ministerial acts of "alleged

² An action against a government official in his official capacity is in reality an action against the governmental entity. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

failure to communicate promptly and efficiently.” Additionally, the circuit court held that KRS 65.2002 barred recovery of punitive damages against the City.

The remaining claims were eventually tried by a jury in the Warren Circuit Court in June 2012. The jury found in favor of Maxwell upon the claim of fraudulent misrepresentation. However, the jury returned a verdict in favor of Lowe’s Feed upon its claim of negligent misrepresentation against Maxwell and the City. The jury also found in favor of Lowe’s Feed upon the claim of fraudulent misrepresentation by the City. As for compensatory damages, the jury awarded Lowe’s Feed the sum of \$850,000 jointly against the City and Maxwell and also awarded Lowe’s Feed punitive damages of \$120,000 against Maxwell. This appeal follows.

The City and Maxwell raise numerous allegations of error. We shall initially address whether the City possessed immunity as set forth in the Claims Against Local Government Act upon the claims of fraudulent misrepresentation and negligent misrepresentation and then whether Maxwell possessed qualified official immunity.

City of Bowling Green

The Claims Against Local Government Act is found in KRS 65.200-65.2006 and is recognized as a codification of common law immunity principles. KRS 65.2001(2); *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. App. 1992).

Under the Act, a municipality is generally liable for its own torts and for certain torts committed by its employees. KRS 65.2005. There are narrow exceptions to a city's general liability, and these exceptions are expressed in KRS 65.2003, which reads:

Notwithstanding [KRS 65.2001](#), a local government shall not be liable for injuries or losses resulting from:

(1) Any claim by an employee of the local government which is covered by the Kentucky workers' compensation law;

(2) Any claim in connection with the assessment or collection of taxes;

(3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

(a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;

(b) The failure to enforce any law;

(c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

(d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources;
or

(e) Failure to make an inspection.

Nothing contained in this subsection shall be construed to exempt a local government from liability for

negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Relevant to this appeal is the exception to municipal tort liability found in KRS 65.2003(3). Under KRS 65.2003(3), acts that qualify as judicial, quasi-judicial, legislative, and quasi-legislative are nonactionable and may not subject the municipality to tort liability. Our Supreme Court has defined the terms quasi-judicial and quasi-legislative as utilized in KRS 65.2003(3):

“Quasi–Judicial—A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature.”

....

“Quasi–Legislative Power—The power of an administrative agency to engage in rule-making.”

Bolden v. City of Covington, 803 S.W.2d 577, 581 (Ky. 1991).

Common types of quasi-judicial and/or quasi-legislative acts are set forth in KRS 65.2003(3)(a) – (e). Particularly, subsection (c) involves the quasi-judicial act of the revocation of or failure to issue permits, licenses, certificates, or similar authorizations.³

³ We also observe that the General Assembly added a sentence at the end of KRS 65.2003(3) to clarify that a municipality is still liable for an employee’s tortious performance of a ministerial act. *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003). The added sentence merely recognizes that qualified official immunity never shields an employee from the tortious performance of a ministerial act and that a municipality is liable for such when the employee is acting within the scope of his employment per KRS 65.2005(1). *Schwindel*, 113 S.W.3d 159.

In the case *sub judice*, the City's alleged acts of negligent misrepresentation and fraudulent misrepresentation were intrinsically related to the decision to disconnect or not restore power to the mill building and the decision that buildings on the property violated numerous code provisions, including the International Property Maintenance Code (IPMC) and the electrical code. These communications included, but were not limited to, the communications by Maxwell concerning the disconnecting of electricity to the mill building, an October 30, 2002, letter from Harmon to Broderick threatening to condemn the mill building, a letter from Alex Colovos, Building Inspector, to the Code Enforcement Board setting forth violations of the IPMC, an October 29, 2002, letter from Maxwell setting forth that the mill building was unsafe and in violation of the 2002 National Electrical Code, statement that a new feed mill building was needed, a statement that the mill building was a fire hazard due to dust and moisture, and a statement that there was a major rodent infestation.

To determine whether these communications by the City were entitled to immunity under KRS 65.2003, we must initially determine whether the City's actions that gave rise to these communications were entitled to immunity. As set forth above, the City's communications directly concerned the City's decisions to disconnect or reconnect power to the mill building, violation of certain building code provisions, and necessary repairs to the mill building.

We believe the City's actions surrounding disconnecting and/or reconnecting power to the mill building, the decision that the mill building violated

myriad code provision, and the amount of repairs needed to the mill building are quintessentially quasi-judicial acts. These quasi-judicial acts come specifically within the ambit of KRS 65.2003(3)(c) as such revolve around the issuance of permits or “similar authorization.” In deciding whether to terminate power to the mill building, whether Lowe’s Feed complied with various codes, and whether proper repairs were made to the mill building, the City necessarily investigated facts and then weighed those facts to make its decisions.

Having determined that the City’s actions surrounding disconnecting or reconnecting power, the necessary repairs, and the various code violations are quasi-judicial, we, likewise, conclude the City’s alleged failure to timely, fully, and accurately communicate such actions to Lowe’s Feed are *a fortiori* quasi-judicial. In so concluding, we view the City’s communications concerning or related to quasi-judicial functions as being intrinsically interwoven with those functions and, as such, qualify as quasi-judicial acts within the meaning of KRS 65.2003(3).

Accordingly, we hold that the City’s communications or lack thereof concerning the disconnecting or reconnecting power, the necessary repairs, and the various code violations are quasi-judicial acts under KRS 65.2003(3). Consequently, we are of the opinion that the City is imbued with immunity and not answerable in tort (negligent or fraudulent misrepresentation) for such communications.

RICK MAXWELL

Maxwell contends, *inter alia*, that the circuit court erred by holding that he was not entitled to qualified official immunity and by failing to set aside the punitive damage award. We address each *seriatim*.

Maxwell asserts that he was entitled to qualified official immunity for communications connected with his duties as the City's electrical inspector. Thus, he contends that the jury's verdict against him upon negligent misrepresentation must be set aside.

Maxwell was an employee of the City of Bowling Green and entitled to assert the defense of qualified official immunity when sued in his individual capacity. *See Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2010). Under qualified official immunity, a public official sued in his or her individual capacity may be entitled to immunity. To be entitled to the shield of qualified official immunity, the public official must be performing a discretionary act as opposed to a ministerial act. A ministerial act is generally "one that 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." *Yanero*, 65 S.W.3d at 522. Conversely, a discretionary act is one "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* Qualified official immunity is applicable to a discretionary act performed by a public official when made in good faith and within the scope of the official's authority. *Yanero*, 65 S.W.3d 510.

In this Commonwealth, the good faith requirement of qualified official immunity has two components – objective and subjective. The Kentucky Supreme Court has defined objective and subjective good faith as follows:

The objective element involves a presumptive knowledge of and respect for “basic, unquestioned constitutional rights.” *Wood v. Strickland*, 420 U.S. 308, 322, 95 S. Ct. 992, 1001, 43 L. Ed. 2d 214 (1975). The subjective component refers to “permissible intentions.” *Ibid*. Characteristically, the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official “*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. . . .” *Ibid*. (emphasis added).

Yanero v. Davis, 65 S.W.3d at 523 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 2736-37, 73 L. Ed. 2d 396 (1982)).

The jury found that Maxwell committed the tort of negligent misrepresentation in his communications concerning the “mill’s electrical, building, and maintenance issues.” In particular, the communications made or not made by Maxwell directly related to violations of myriad code provisions and necessary repairs of those code violations.

In its partial summary judgment, the circuit court recognized that Maxwell was entitled to official immunity for any actions directly associated with his decisions concerning code violations at Lowe’s Feed. In so doing, the circuit

court expressly held that Maxwell's decisions and actions concerning code violations at Lowe's Feed constituted discretionary acts. Yet, the circuit court also concluded that Maxwell's communications to Lowe's Feed concerning those violations were not discretionary acts. In reaching this decision, the circuit court believed that Maxwell's actions of finding code violations and of communicating such violations were separate and distinct. In so doing, we conclude that the circuit court committed an error of law.

Maxwell's decisions regarding code violations and his communications regarding such violations are intrinsically interwoven and incapable of separation. Simply stated, we believe that Maxwell's communications concerning the electrical, building, and maintenance issues at Lowe's Feed constitute discretionary acts. However, our analysis does not end here. We must now determine whether Maxwell is entitled to qualified official immunity. To be entitled to qualified official immunity, Maxwell must have performed the acts in good faith and within the scope of his authority.

In Kentucky, the law provides that "[o]nce 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*, 65 S.W.3d at 523. Here, the evidence demonstrates that Maxwell was acting within the scope of his employment in his communications concerning the electrical, building, and maintenance issues at Lowe's Feed. But, we are unable to

determine whether Maxwell acted in good faith. Good faith has both objective and subjective components, and a lack of subjective 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).

As the issue of subjective good faith is often fact specific, the circuit court is in the best position to determine whether Maxwell acted in 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).

Consequently, we remand for the circuit court to specifically determine whether Maxwell acted in good faith as to his communications to Lowe’s Feed concerning electrical, building, and maintenance issues at Lowe’s Feed. We cite the circuit court to the following erudite analysis in *Coleman*, 405 S.W.3d at 495 of the court’s role in determining the issue of good faith upon remand:

On remand, Smith must put forth affirmative evidence that Cantrell failed to exercise good faith. If Smith is unable to sustain his burden, summary judgment in Cantrell's favor may be proper. Ultimately, once the

material facts are fleshed out in discovery, the circuit court will then be prepared to determine, as a matter of law, whether Cantrell is protected by official immunity. *Id.* at 475. Of course, if genuine issues of material fact regarding Cantrell's good faith remain, those factual issues will be for the jury to determine.

Next, Maxwell contends that the circuit court erred by failing to set aside the jury verdict upon punitive damages. For the following reasons, we agree.

The circuit court instructed the jury upon the claims of fraudulent misrepresentation and negligent misrepresentation by Maxwell. The circuit court also included a punitive damage instruction. In that instruction, the circuit court allowed the jury to award punitive damages of Maxwell if he was found liable for either fraudulent misrepresentation or negligent misrepresentation.⁴

In its verdict, the jury found in favor of Maxwell upon the claim of fraudulent misrepresentation but found in favor of Lowe's Feed on its claim of negligent misrepresentation against Maxwell. Upon finding that Maxwell committed negligent misrepresentation, the jury then awarded punitive damages of \$120,000.

It is well-established in Kentucky jurisprudence that punitive damages are not recoverable upon a claim for negligent misrepresentation. *Morton v. Bank of Bluegrass & Trust Co.*, 18 S.W.3d 353 (Ky. App. 1999); KRS 411.184(2); *see*

⁴ In Maxwell's Proposed Jury Instructions, he submitted an instruction upon punitive damages which permitted an award of punitive damages only upon a finding that Maxwell committed the tort of fraudulent misrepresentation. The instruction given to the jury, on the other hand, permitted an award of punitive damages upon a finding that Maxwell committed fraudulent misrepresentation or negligent misrepresentation.

also Ky. L. of Damages § 4:6 (2014 ed.). As the jury found that Maxwell only committed the tort of negligent misrepresentation, it is clear that punitive damages were not recoverable. *See Morton*, 18 S.W.3d 353. Hence, the circuit court erred by denying Maxwell's motion to set aside the jury's verdict awarding punitive damages of \$120,000 against Maxwell.

In sum, we hold that the City is cloaked with immunity under the Claims Against Local Government Act and is shielded from liability upon the claims of fraudulent misrepresentation and of negligent misrepresentation. As to the claim of negligent misrepresentation against Maxwell, we remand for the circuit court to specifically determine whether Maxwell acted in good faith and is entitled to qualified official immunity for his communications concerning electrical, building, and maintenance issues at Lowe's Feed. However, Lowe's Feed was not entitled to an award of punitive damages against Maxwell as punitive damages are not recoverable in Kentucky upon a claim of negligent misrepresentation.

Accordingly, the jury verdict against the City is reversed in its entirety; the compensatory damage award of \$850,000 against Maxwell upon the claim of negligent misrepresentation is remanded for a determination of Maxwell's entitlement to qualified official immunity; and the punitive damage award against Maxwell is reversed in its entirety.

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

CLAYTON, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS IN PART AND FILES SEPARATE

OPINION.

JONES, JUDGE, DISSENTING IN PART: Respectfully, I dissent in part. I disagree with the majority's conclusion that Maxwell's "communications" cannot be separated from the decisions that form the basis of those communications. I believe the circuit court correctly concluded that neither Maxwell nor the City was entitled to immunity with respect to Lowe's Feed's claims related to the "failure to completely, accurately and promptly give notice to the plaintiffs" of the alleged violations. While the decisions contained within the communications themselves may have arisen out of discretionary acts, I believe the act of communicating those decisions accurately and timely was a ministerial act.

In reaching its decision, the circuit court cited *Kea-Ham Contracting, Inc. v. Floyd County Development Authority*, 37 S.W.3d 703, 707 -708 (Ky. 2000).

I, too, find this decision illustrative in making the crucial distinction between discretionary acts and ministerial communications. As our Supreme Court explained,

Although Appellees are correct in noting that Spurlock could have responded in a variety of ways, the act giving rise to the claim of liability was not the method chosen for communication of the information, but the fact of the communication. Spurlock exercised his discretion to undertake a simple, straightforward, administrative task of conveying a positive or negative response to the important question of whether interim financing was in place. Once undertaken, this task involved no decision-

making, such as whether to award the contract to Kea-Ham or whether to develop the particular site, and the task required no policy-making. Whether Spurlock conveyed the information via personal meeting, letter, telephone, e-mail, or fax is not the act being analyzed; the act under review is the conveyance of unambiguous, concrete information, and this act was purely ministerial. It involved "execution of a specific act arising from fixed and designated facts," i.e., the communication of whether or not interim financing had been secured. Thus, Spurlock is not immune from suit for his conduct in this matter.

Id.

Insomuch as the claims against Maxwell relate to his ministerial duty to communicate properly, I do not believe that the City has immunity under KRS 65.2003 ("Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.").

For these reasons, I would affirm the jury's verdict in favor of Lowe's Feed with respect to the negligent misrepresentation claims against Maxwell and the City. I believe these claims were appropriately submitted to the jury.

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**BRIEF AND ORAL ARGUMENT
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