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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001398-MR

NANCY JACKSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 12-CI-000700

TED PULLEN AND
DANIEL HYLTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND JONES, JUDGES.

DIXON, JUDGE: Appellant, Nancy Jackson, appeals from an order of the Jefferson Circuit Court granting summary judgment in favor of Appellee, Ted Pullen, on qualified official immunity grounds, as well as from an order granting Appellee, Daniel Hylton's, motion to dismiss her second amended complaint as

being barred by the statute of limitations. For the reasons set forth herein, we affirm.

On July 27, 2011, Jackson was injured as a result of tripping and falling over a signpost base plate that was protruding from a sidewalk located near the intersection of Liberty and Fourth Streets in downtown Louisville. On February 6, 2012, Jackson filed an action in the Jefferson Circuit Court against Pullen, who was at that time the Director of the Louisville/Jefferson County Metro Government Department of Public Works and Assets ("Public Works"). Jackson asserted in her complaint that Pullen negligently breached his duty to maintain the sidewalk in a safe condition, thereby allowing a dangerous condition to remain on the sidewalk causing her to fall and sustain serious injuries.

On February 21, 2012, Pullen moved to dismiss the complaint to the extent that the allegations against him were in his official capacity and as such would be barred under the doctrine of official immunity. Initially, the trial court granted the motion. However, following additional arguments and memorandums, Jackson established that her claim was against Pullen solely in his individual capacity. As a result, on July 17, 2012, the trial court vacated its earlier order dismissing Jackson's complaint.

On March 6, 2013, Jackson moved the trial court for leave to amend her complaint to add Hylton, an employee in the public works sign department, as an additional defendant. Jackson's motion was granted and her complaint was filed of record on March 11, 2013.

Subsequently, in May 2013, Pullen filed a motion for summary judgment arguing that he owed no duty to Jackson in his individual capacity and, even if he did, he was protected by qualified immunity. The trial court granted summary judgment finding that Jackson's claims against Pullen were barred by the doctrine of qualified sovereign immunity:

> As the Jefferson County Metro Director of the Public Works Department, it was Pullen's responsibility to ensure that the department's overall goals, budgets and initiatives were met. . . . As the record indicates, Pullen's position required him to apply funds throughout the department, to direct the use of personnel as he saw fit, and to reorganize various interdepartmental systems as needed. The Court finds that the direction of a system as broad and intricate as the Public Works Department is not a "ministerial" task. Rather, Pullen's post required the exercise of reason and utilization of personal judgment in the attainment of the department's comprehensive goals. Accordingly, the Court finds that Pullen's acts or functions as they relate to the claims brought against him are best categorized as discretionary.

Thereafter, on June 20, 2013, Hylton moved the trial court to dismiss Jackson's second amended complaint as being barred by the statute of limitations because it did not "relate back" to the original complaint. On July 26, 2013, the trial court granted Hylton's motion, ruling that the requirements of Kentucky Rules of Civil Procedure (CR) 15.03(1) were not met:

> Jackson attempted to hold Hylton's boss liable for her injuries. Further, she sued Hylton's boss **in his individual capacity** and quite distinctly not in his official capacity. There can be no imputation of knowledge to Hylton regarding a lawsuit against Pullen in his individual capacity. Much like *Schwindel* and assuming Jackson's allegations to be true, Jackson had to

> know that Pullen did not personally leave a sign base in a sidewalk to cause her injuries. She had to know that someone who worked for the Department of Public Works, and not Pullen himself, allegedly left the sign base in the sidewalk. Absent mistake, the "identity of interest" exception to [CR 15.03(2)(b)'s] requirement of actual notice does not apply. (Emphasis in original).

Jackson thereafter appealed to this Court.

Our standard of review on appeal of a summary judgment 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). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

As it relates to an assertion of sovereign immunity and other related claims of immunity, Kentucky has recognized that resolution of such claims is a matter of judicial determination via summary judgment. *Estate of Clark v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003); *Withers v. University of Kentucky*, 939

S.W.2d 340, 342 (Ky. 1997). Finally, since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

On appeal, Jackson first argues that the trial court erred in finding that Pullen was entitled to qualified official immunity. Jackson contends that removing the base plate from the city sidewalk was a ministerial act. Although she concedes that it was not Pullen's specific duty to remove the base plate, she nevertheless claims "he negligently supervised or negligently failed to insure that his underlings such as Appellee Hylton were not [sic] performing their job correctly." Thus, Jackson argues that while there are some aspects of Pullen's job that are discretionary, her claims of negligence herein concern a ministerial act for which there is no immunity. We must disagree.

In Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001), our Supreme Court engaged in a thorough analysis of sovereign immunity in Kentucky. As is relevant herein, the Court explained that public officers and employees sued in their individual capacities are entitled to "qualified official immunity" for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, i.e., those that involve the "exercise of discretion and judgment, or personal deliberation, decision, and judgment;" (2) that were made in good faith; and (3) were within the scope of the employee's authority. *Id.* at 522. The doctrine is designed to protect officials for their "good faith judgment calls made in a

legally uncertain environment." *Haney v. Monskey*, 311 S.W.3d 235, 240 (Ky. 2010). On the other hand, no immunity is afforded for the negligent performance or omissions of a ministerial act,[1] or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive. *Yanero*, at 522.

Jackson has not alleged that Pullen acted in bad faith or outside the scope of his authority. Rather, she claims that the negligent acts at issue, Pullen's failure to supervise his workers and/or his failure to ensure that the base plate was removed from the sidewalk, were ministerial rather than discretionary in nature. Jackson relies on the *Yanero* decision for the proposition that negligent supervision is a type of ministerial act for which immunity is not afforded. In *Yanero*, a minor who engaged in batting practice without a helmet and was later injured when struck in the head with an errant pitch asserted a claim of negligent supervision against his school's assistant junior varsity baseball coach. Our Supreme Court held that the coach was not entitled to the defense of qualified official immunity because the performance of his supervisory duties "in this instance" were ministerial in nature "in that it involved only the enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice." *Id.* at 529.

[1] A ministerial act is "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.

However, outside of the school setting, "supervising the conduct of others is a duty often left to a large degree—and necessarily so—to the independent discretion and judgment of the individual supervisor." *Haney v. Monsky*, 311 S.W.3d at 244. In fact, Kentucky courts have repeatedly held that supervising employees is a discretionary function subject to the defense of qualified official immunity. *Id.*; *see also Waldrop v. Corder*, 638 F.Supp. 21, 22 (W.D. Ky. 1985) (supervising employees was a discretionary function entitling defendant to qualified immunity). In *Rowan County v. Sloas,* 201 S.W.3d 469 (Ky. 2006), the Kentucky Supreme Court held that a deputy jailer's act of supervising inmates was "as discretionary a task as one could envision":

> One man . . . is in charge of this crew. He has to watch them, and try as best he can to anticipate what they might do, correct them as necessary, determine their capabilities, sometimes by asking them forthright whether they can or can't do the job, assign the duties and see that the work is performed.

Id. at 480.

The record herein indicates that Public Works has over 800 employees assigned to several divisions, each division having its own assistant director or manager who reports to Pullen. In his affidavit, Pullen stated that, "[i]n order to best utilize the funds allotted by Louisville Metro Government to Public Works, [he] was required to use executive judgment and discretion in prioritizing projects and other work to be done by Public Works, which included . . . street inspections and repairs, and sidewalk inspections and repair." Notably, Pullen acted in a supervisory capacity and did not have a personal duty to inspect, maintain or repair

the sidewalks. Nor was there any statute, regulation, policy or procedure requiring him to do so. In fact, Pullen stated that until Jackson filed her lawsuit, he had no personal knowledge of any dangerous or defective condition at the location in question.

We believe there is a significant difference in personally inspecting and repairing the sidewalk and assigning someone else to fulfill that task. The actual repair falls within the definition of a ministerial act as it is a certain and required task for the employee to whom it is assigned. However, as director of Public Works, Pullen is responsible for overseeing the department, not personally performing each and every task that must be done in the course of a day. In other words, he is responsible for directing department employees in their job performance by assigning job duties and to generally supervise them. Pullen's responsibility to oversee and coordinate the projects of Public Works was a general rather than a specific duty, requiring him to act in a discretionary manner by devising procedures, assigning specific tasks to other employees, and providing general supervision of those employees. As noted in *Haney*, "discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." 311 S.W.3d at 240. We are of the opinion that Pullen's duties as the director of Public Works are best categorized as discretionary and, as such, the trial court properly found that he was entitled to qualified official immunity herein.

Jackson next argues that the trial court erred in dismissing her amended complaint adding Hylton as a defendant on the grounds that it did not "relate back" to the original complaint as required by CR 15.03. Jackson contends that Pullen and Hylton share an identity of interest because they are both employed by Louisville Metro Government and because Pullen is Hylton's superior in the Public Works department. Thus, Jackson argues that the notice provision of the rule is satisfied. Again, we must disagree.

Generally speaking, "[a] new party cannot be brought into a lawsuit by amended complaint when the statute of limitations governing the claim against that party has already expired." *Combs v. Albert Kahn & Associates, Inc*., 183 S.W.3d 190, 194 (Ky. App. 2006) (internal footnote omitted). *See also Phillips v. Lexington-Fayette Urban County Government*, 331 S.W.3d 629, 634 (Ky. App. 2010). Because Jackson alleges negligence, the applicable statute of limitations is one year pursuant to Kentucky Revised Statutes 413.140(1)(a). Thus, her cause of action accrued at the time of the alleged injury, July 27, 2011. She filed her original complaint on February 6, 2012, naming only Pullen as a defendant. On March 11, 2013, Jackson filed her amended complaint adding Hylton as a defendant. Unless Jackson's claim against Hylton relates back under CR 15.03, it is time-barred as it was filed outside of the limitations period.

CR 15.03 provides in relevant part:

> 1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be

> set forth in the original pleading, the amendment relates back to the date of the original pleading.
>
> (2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Under the plain language of the rule, a party seeking to add a defendant after the limitations period has expired must satisfy three requirements: (1) the claim asserted in the amended complaint must arise out of the same conduct, transaction or occurrence set forth in the original complaint; (2) the newly added party must have had notice of the action within the limitations period; and (3) the newly added party must have known or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him. All three requirements of CR 15.03 must be strictly construed. *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395, 397 (Ky. App. 2004). Further, "[t]he condition that an added defendant not only must have known about the suit within the normal period for service of process, but also must have had reason to know that he escaped suit only because of a mistake, minimizes the possibility that the application of the Rule will disturb any truly legitimate sense of repose . . . ." *Id.* at

397-398 (quoting 19 Wright, Miller & Cooper, *Federal Practice & Procedure* § 4509, at 274 (2d ed. 1996))

There is no dispute that CR 15.03(1) was satisfied since the claims asserted in the amended complaint arose from the same occurrence as set forth in the original complaint. However, we agree with the trial court that Jackson failed to satisfy either prong of CR 15.03(2). There is no evidence of record that Hylton had notice of the lawsuit filed against Pullen within the limitations period as required by CR 15.03(2)(a). In fact, Hylton testified that he did not become aware of the lawsuit until he learned that his deposition was to be taken. As such, the earliest date upon which Hylton could be charged with having notice of Jackson's lawsuit would be the certificate of service date on the deposition notice, October 8, 2012, which was well outside of the limitations period.

Even more fatal to Jackson's argument is her failure to satisfy CR 15.03(2)(b), which requires "a mistake concerning the identity of the proper party." In *Phelps*, the appellants argued that the definition of "mistake" should include a mistake as to a proper party against which to file a suit. Disagreeing, a panel of this Court held:

> [T]he purpose of the rule was not to allow for correction of this type of mistake. The requirement that a new defendant "knew" he was not named due to a mistake concerning identity presupposes that in fact the reason for his not being named was a mistake in identity. . . .
> . . . .
>
> The Phelpses' failure to include Wehr occurred because of a lack of knowledge of Wehr's potential liability, not

> because of a misnomer or misidentification. We do not read the word "mistake" in CR 15.03(2)(b) to include a lack of knowledge. For purposes of CR 15.03(2)(b), ignorance does not equate to misnomer or misidentification.

Id. at 398 (quotations and citations omitted). *See also Reese v. General American Door Co.*, 6 S.W.3d 380, 383-384 (Ky. App. 1998) ("The mere failure to identify a potential defendant within the limitations period . . . is not the sort of mistake contemplated by part (2)(b) of CR 15.03.")

Herein, there was no mistake concerning the identity of the proper party. Rather, Jackson sought to add Hylton as a second party in addition to Pullen. In other words, Jackson initially filed suit against Pullen and thereafter sought to find a second party whose governmental immunity could be more easily defeated. Although Jackson certainly could have added Hylton, or any other employee alleged to have been responsible for her injuries, as a party within the established statute of limitations, she did not establish that there was a mistake concerning the identity of the proper party.

Nor do we find any merit in Jackson's argument that we should apply the "identity of interest exception" to the actual notice requirement of CR 15.03(2)(b). Under such exception, notice will be imputed from the original party to a new party where there exists a "sufficient identity of interest." *Halderman v. Sanderson Forklifts Co., Ltd*., 818 S.W.2d 270, 273 (Ky. App. 1991). This sufficient identity of interest arises where the "legally binding relationships between the original and added parties imposed on the first-named party a duty

promptly to apprise the other laternamed entity of the lawsuit." *Reese,* 6 S.W.3d at 382.

In *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003), the appellant was injured at an interscholastic softball tournament when a foot rail on bleachers slipped out of place causing her to fall. She filed her original complaint naming various defendants including Meade County and the Meade County Board of Education. After the expiration of the limitations period, the appellant sought to file an amended complaint naming employees of both the county and the board of education, arguing that by timely suing their employers, she put the employees on "constructive notice" of a possible action against them. *Id.* at 170. On appeal, our Supreme Court declined to apply the "identity of interest" exception because there had been no mistake as contemplated by CR 15.03(2)(b):

> [T]he implied (not constructive) "should have known" notice referred to in CR 15.03(2)(b), which gave rise to the "identity of interest" exception, applies only when the plaintiff has mistakenly sued the wrong party and the right party "knew or should have known" of that fact. Kurt A. Phillips, 6 *Kentucky Practice: Rules of Civil Procedure Annotated*, CR 15.03, cmt. 4, at 316 (West 1995).

Id. The *Schwindel* Court further refused to presume notice simply due to the nature of the relationship between the parties sought to be added in the amended complaint (employees) and those named in the original complaint (employers). *Id.* at 171.

As in *Schwindel*, there was no mistake. Jackson initially attempted to hold Hylton's supervisor, Pullen, responsible for her injuries. Furthermore, she sued Pullen only in his individual capacity. There can simply be no imputation of notice to Hylton that he was potentially liable in a lawsuit filed against his supervisor in an individual capacity. Accordingly, we conclude that the trial court properly found that Jackson's amended complaint adding Hylton as a defendant did not comply with CR 15.03 and, as such, was time-barred. Accordingly, dismissal was warranted.

For the foregoing reasons, the orders of the Jefferson Circuit Court granting summary judgment in favor of Pullen and dismissing Jackson's claims against Hylton are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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