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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000925-MR

GREG HICKS, SR;
ESTATE OF MARK WHITE;
DAN O'DEA; AND
PAT JOHNSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 13-CI-005945

GEORGE YOUNG AND
ESTATE OF DARLENE YOUNG — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT,[1] AND J. LAMBERT, JUDGES.

[1] Judge Debra Hembree Lambert concurred in this opinion prior to her accepting election to the Kentucky Supreme Court effective January 7, 2019.

J. LAMBERT, JUDGE: This is an interlocutory appeal by several defendants seeking our review of the portion of the Jefferson Circuit Court's May 16, 2017, order denying their motion for summary judgment after finding there existed genuine issues of material fact as to whether they were entitled to qualified official immunity. We affirm.

Because we hold that the circuit court properly denied the motion for summary judgment as to the appellants in this case and because the court's order contains an excellent recitation of the factual background and analysis of the legal issues, we shall adopt the following relevant portions as our own.[2]

> This case is before the Court on a motion for summary judgment filed on behalf of Defendants Vanessa Burns, Greg Hicks, Dan O'Dea, Patrick Johnson, and the Estate of Mark White. The Court took the motion under submission on April 26, 2017. Both Defendants and Plaintiff George Young, who is a party to this litigation both in his individual capacity and in his capacity as the administrator of the Estate of Darlene Young, have filed written briefs in support of their respective positions on the issues raised by the motion.
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> **Factual Background**
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> On September 27, 2013, Juan Perez Gonzalez was driving down Seventeenth Street in Louisville, Kentucky when his vehicle proceeded into the intersection with Muhammad Ali Boulevard and collided with a vehicle

[2] The court granted summary judgment in favor of Vanessa Burns, the Director of Public Works and Assets, and found that she had qualified immunity from suit. That ruling has not been appealed, and therefore we shall not include the portion of the ruling addressing her status in the suit.

driven by George and Darlene Young. The collision caused both of the Youngs to sustain serious physical injuries. None of the parties to this litigation dispute that Mr. Gonzalez was at fault in causing the collision, although there is no direct evidence to explain why he drove into the intersection. The Youngs have already settled their personal injury claims against Mr. Gonzalez, who is not a party to this action and is now incarcerated in federal custody on unrelated charges.

On the theory that overgrown trees had obstructed Mr. Gonzalez's view of a stop sign located at the corner of Seventeenth Street and Muhammad Ali Boulevard, the Youngs initially filed this action on November 13, 2013 against the Portland Shawnee Congregation of Jehovah's Witnesses (the "Portland Congregation"), the owner of the property adjacent to the intersection. The Youngs asserted negligence claims against the Portland Congregation for failing to maintain its premises in a safe and reasonable manner and in failing to warn them about hazardous conditions on its premises. On June 24, 2014, the Youngs amended their complaint with leave of the Court to assert claims against Louisville/Jefferson County Metro Government ("Louisville Metro"), Louisville Metro's Department of Public Works and Assets ("Public Works"), and several Louisville Metro employees in their individual and official capacities. In their amended complaint, the Youngs allege that Louisville Metro, Public Works, and the Louisville Metro employees were negligent in failing to maintain the trees and signage at the intersection in a safe and reasonable manner, in failing to warn them about the hazardous conditions at the intersection created by overgrown trees blocking the view of the stop sign from Seventeenth Street, and in failing to supervise and train employees and other agents on how to identify, report, and counteract hazardous roadway conditions "to ensure compliance with Kentucky Law, local ordinances, guidelines and/or other requirements." The Youngs seek to recover damages for past and future pain and

suffering, lost wages, permanent impairment of Ms. Young's ability to work and earn money, past and future medical expenses, and attorney's fees.

In an agreed order entered on July 20, 2015, the Court dismissed all of the Youngs' claims against Louisville Metro, Public Works, and the Louisville Metro employees in their official capacities. On January 27, 2016, the Court granted summary judgment in favor of the Portland Congregation on the grounds that it had no duty to prevent the trees, which a survey showed were in the public right-of-way, from obscuring the view of the stop sign at the intersection of Seventeenth Street and Muhammad Ali Boulevard. After those two orders, the Youngs' only remaining claims are those against the Louisville Metro employees in their individual capacities. Those individuals include . . . Greg Hicks, Dan O'Dea, Mark White, and Patrick Johnson (collectively, "Defendants"). Mark White unfortunately passed away while this case has been pending before the Court, and his estate is now a party to this litigation. Ms. Young has also unfortunately passed away, and Mr. Young now serves as the administrator of her estate, which has been made a party to this litigation.

On March 15, 2017, Defendants moved for summary judgment on the grounds that they are entitled to qualified official immunity. Mr. Young responded on April 4, 201[7], arguing that the doctrine of qualified immunity does not protect Defendants because they either were negligent in the performance of their ministerial duties or acted in bad faith while conducting their discretionary functions. Defendants replied to Mr. Young's response on April 19, 2017, reiterating its position that they are entitled to qualified official immunity.

Issues of Law

The sole issue for the Court to decide is whether Defendants have met their burden of demonstrating that they are entitled to summary judgment on the grounds of qualified official immunity.

Analysis

Defendants argue that they are entitled to summary judgment under the doctrine of qualified official immunity because the maintenance and removal of trees in public right-of-ways is a discretionary function, and because the record lacks evidence showing that they acted in bad faith while exercising their discretion. In support of that position, Defendants rely on characterizations of their work duties contained in their own deposition testimony, in an affidavit from Pat Johnson, and in Mark White's official job description. According to them, that evidence shows that none of them had a duty to investigate or remove trees obstructing stop signs near the intersection of public streets and therefore the decision to perform either of those functions was discretionary rather than ministerial. Mr. Young responds by arguing that Defendants are not entitled to summary judgment because Defendants negligently performed their ministerial duties "to remove trees and other vegetation when it is a hazard to traffic" imposed by "federal regulations, Kentucky statutes, Jefferson County ordinances and our appellate case law." In making that argument, Mr. Young relies on [Kentucky Revised Statutes (KRS)] 179.070, which imposes a series of duties on the "county engineer" with respect to maintenance of local roadways, on federal regulations requiring the states to adopt and follow the Manual of Uniform Traffic Devices, and on various municipal ordinances related to the maintenance of "cross-visibility" at intersections and to the "[p]lacment and [o]peration of [t]raffic [c]ontrol [d]evices," including stop signs. Finally, Mr. Young also argues that, even if Defendants' functions were discretionary, they "did not

act 'in good faith' and [therefore] are not entitled to qualified official immunity."

Under the Kentucky Rules of Civil Procedure [(CR)], a movant is entitled to summary judgment where evidence shows "that there is no genuine issue [as to any] material fact and that the moving party is entitled to [a] judgment as a matter of law." CR 56.03. Summary judgment is proper only "to terminate litigation, when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor against the movant." *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). An order granting summary judgment is appropriate "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. "[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992).

. . . .

Currently, Kentucky's leading case on the doctrine of "official immunity" is *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). In providing what would become in Kentucky the standard, modern formulation of the doctrine, the Court in *Yanero* stated as follows:

> "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the

umbrella of sovereign immunity . . . . Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled. . . . But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. 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. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed. Qualified official immunity is an affirmative defense that must be specifically pled.

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 execution of a specific act arising from fixed and designated facts. That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one [discretionary in nature.]

Yanero, 65 S.W.3d at 521-22 (internal quotation marks and citations omitted). The Court also sets forth in *Yanero* the following analytical framework for lower courts to use in determining whether a public officer or employee has acted in bad faith in the exercise of his or her discretionary functions and therefore lost the protections of official immunity:

> [I]n the context of qualified official immunity, "bad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive. 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, 65 S.W.3d at 523 (internal citations omitted).

. . . .

II. Greg Hicks, Dan O'Dea, Mark White, and Patrick Johnson

With respect to the remaining Defendants, the Court finds that genuine issues of material fact exist as to whether they are entitled to qualified official immunity and therefore denies their request for summary judgment in their favor.

KRS 179.070 imposes the following duties on a "county engineer" employed by a local government:

> (1) The county engineer shall:
>
> > (a) Have general charge of all county roads and bridges within the county;
> >
> > (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 . . . .[3]

[3] Defendants argue in their reply brief that KRS 179.070(j) only creates a duty to remove "trees or other obstacles from the right-of-way" when they are actually physically "on" the roadway. Because the trees at issue allegedly only "obscured the stop sign for the driver" and had not actually fallen into the road, Defendants contend that they could not have had a duty to remove it because they would not have known it existed. The Court first notes that a survey has in fact shown that the trees were part of the public right-of-way, making them the responsibility of Louisville Metro. The Court further rejects Defendants' interpretation of the statutory provision in question as far too narrow. Consistent with public policy behind the statute of providing safe local roads for motorists, a far more natural reading would extend the duty to remove any tree or obstacle within the areas under the public's control, including the area around road signs, which presents a hazard to traffic on the local roadways, regardless of whether the hazard is actually "on" the roadway. A situation in which overgrown trees are obstructing a stop sign from the view of motorists can be just as dangerous as one in which an obstacle is physically blocking the flow of traffic on the roadways. The statutory language is broad enough to encompass both

> Like other maintenance duties, courts have interpreted KRS 179.070(j) to be a "clear statutory mandate" and "ministerial duty" imposed upon the "county engineer" to remove trees that are hazardous to the public roadways. [*Wales v. Pullen*, 390 S.W.3d 160, 166 (Ky. 2012)] ("We agree that the statutory language and use of the word 'shall' indicates that [the county engineer's] duty was not discretionary, and was in fact ministerial."). *See also Faulkner v. Greenwald*, 358 S.W.3d 1, [4] (Ky. App. 2011) (holding that a statutory duty to maintain a concession stand in a safe condition was ministerial in nature). And those duties exist even if the "county engineer" has no notice of them. *See Wales*, 390 S.W.3d at 166 ("There is no notice requirement in sovereign immunity law or any safe harbor for a government employee who does not know the duties of his or her job.").
>
> Defendants seem to take the position that none of them could have possessed the ministerial duties of the "county engineer" with respect to trimming back and, if necessary, removing hazardous trees from public right-of-ways because Louisville Metro did not employ anyone in that position at the time of the collision. The Court disagrees. For purposes of determining whether a particular official is entitled to qualified official immunity, though KRS 179.070 uses the term "county engineer," the Court interprets that particular provision to impose the duties of that position on any official who performs the same functions. *See Yanero*, 65 S.W.3d at 521 ("[O]fficial immunity] rests not on the status or title of the officer or employee but on the function performed."). KRS 179.020 authorizes local

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situations. Finally, the issue of whether Defendants had notice of the obstruction is irrelevant to an inquiry into whether they are entitled to qualified official immunity. Defendants are confusing what they have to prove to prevail on their claim of qualified official immunity with what Mr. Young has to prove to prevail on his underlying negligence claims. (Footnote 1 in original.)

governments to employ a number of officials, not just a "county engineer," but also a "road supervisor," a "road surveyor," and, in some cases, an unqualified "temporary supervisor," to provide "supervision over the construction and maintenance of roads," or to grant those powers to existing offices of its own, such as the "county judge/executive" or "committees of the fiscal court." *See* KRS 179.020(1)-(5). The Court is skeptical that the statute dispenses with the duties listed in KRS 179.070 merely because a local government places the functions of a "county engineer" under the responsibility of an official who does not don that title, and, despite having the burden of proof, Defendants do not cite any authority in support of that proposition.[4] Such a simple ruse seems to conflict with the intent behind the statute of placing the "management of road construction and maintenance in the control of [local officials]," while also specifying how they are to exercise that authority to achieve the public policy of providing safe roads for motorists in the state. *Bristow v. Shrout*, 94 S.W.2d 352, 354 (Ky. 1936) (interpreting the statutes at issue to provide that "in counties where no provision was made for the office of county engineer then the duties thereof would devolve upon the county surveyor or 'some other person designated by the county court'"). With the control of

[4] Defendants rely on *Commonwealth Trans. Cabinet [Dept.] of Highways v. Sexton*, 256 S.W.3d 29 (Ky. 200[8]) in support of their argument that they did not have a general duty to inspect or remove trees bordering public roadways "which might create a hazard." That case, however, involved the responsibility of the highway department, an agency of the state government, to inspect and remove dead trees on its own property so as to prevent damage to the property of neighboring landowners, and did not address local government officials' duties to trim back and, if necessary, remove trees presenting hazards to motorists on local roadways. For that reason, it is not helpful in resolving the issues before the Court. Likewise, the Court rejects Defendants' argument that KRS 65.2003(3), which defines the "[f]ailure to make an inspection" as a "claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority" for purposes of the Claims Against Local Government[s Act], is an attempt to limit their responsibility for maintaining the vegetation surrounding local roadways. By its own terms, the provision limits the liability of "local government[s]" which are not otherwise immune from suit under the doctrine of sovereign immunity. It says nothing about the liability of public officials negligently performing their ministerial duties. For that reason, it does not apply to the issues before the Court. (Footnote 2 in original.)

local roadways should come the duties and responsibilities of maintaining them in the manner specified by the General Assembly in the statute, including removing trees from public right-of-ways which are hazardous to traffic. *See id*. Thus, even though Louisville Metro did not have a "county engineer" at the time of the collision, the Court holds that the duties of that position extended to those officials whom it designated to perform the same functions for purposes of determining whether they are entitled to qualified official immunity.

The issue then is which official or officials had Louisville Metro designated to perform the functions and, therefore, to assume the duties and responsibilities of the "county engineer" before the collision. With respect to that issue, Defendants have not provided sufficient evidence for the Court to discern who among them, if any, were responsible for fulfilling the ministerial duties of the "county engineer," including trimming and, if necessary, removing trees obstructing road signs on local highways. Greg Hicks, who at the time of the collision served as the assistant director of Public Works' Road Operations and Maintenance Division, testified that Dan O'Dea, the assistant director in charge of the Engineering Division, was responsible for maintaining the signs and markings of the city's local roadways and, when the need arose, for removing any overgrown vegetation from obstructing them. Mr. O'Dea, however, testified that neither he nor his division, including the signs and markings subunit, were responsible for pruning back or removing trees, and that either Mr. Hicks or Mark White, who at the time of the collision served as the city arborist, had that responsibility. Mr. Hicks even testified that Mr. White, who reported directly to him, "would order trees taken down if he thought they were a danger to the public . . . [and,] [i]f not, they might be pruned." Indeed, the description of Mr. White's official position as "Community Forestry Arborist" includes job functions

> such as "conduct[ing] field inspections of public trees (risk assessment) in response to citizen complaints or department requests . . ." and "perform[ing] tree planting, tree pruning, tree maintenance, and removal duties." But to add more confusion, Patrick Johnson describes in his affidavit his own position as "Traffic Engineering Manager" and his own responsibility for the "management and administration of the day-to-day traffic-engineering operations . . ." in such broad terms that he also could have been responsible for removing overgrown vegetation obstructing the stop sign at the intersection where the accident occurred. Because of the conflicting evidence in the record regarding the personal responsibility of each of the remaining Defendants for the removal of hazardous vegetation burdening the local highways, the Court finds that genuine issues of material fact remain as to whether they are entitled to qualified official immunity.
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> In conclusion the Court holds that the remaining Defendants are not entitled to summary judgment on the grounds of qualified official immunity.[5]

After the appellants filed their brief in this appeal, the Supreme Court of Kentucky rendered the opinion of *Storm v. Martin*, 540 S.W.3d 795 (Ky. 2017), which the appellees extensively discussed in their appellate brief. That opinion further supports the circuit court's analysis:

> Clearly the intent behind KRS 179.070(1)(j) is to ensure that trees or other obstacles do not block a public roadway. To effectuate this goal, the statute requires

[5] Defendants contend in their reply brief that they are entitled to summary judgment because the record does not contain any evidence that overgrown trees actually obscured Mr. Gonzalez's view of the stop sign before he collided with the Youngs in the intersection. That evidence, however, is irrelevant to an inquiry into whether they are entitled to qualified official immunity, but rather relates to the issue of negligence. (Footnote 3 in original).

> that, when such obstacles become hazardous, they are removed. KRS 179.070(1)(j) does not mandate that this duty is non-delegable, nor does it provide guidance for how the county engineer is to actually effectuate the removal of hazardous trees or other obstacles from a roadway. Obviously, the statute does not contemplate personal strict compliance on the part of the county engineer as the sole means to accomplish this, particularly so close in time to a severe weather event when a huge number of trees have fallen. Especially under the facts of this case, delegation of tree removal to other agencies or persons could accomplish the intent of the statute, and therefore, the statute is directory and substantial compliance may satisfy its provisions. *See* [*Knox Cnty. v. Hammons*, 129 S.W.3d 839, 843 (Ky. 2004)].
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> This duty is ministerial, meaning that Storm is not entitled to immunity, but that does not dictate the duty is absolute. "Whether Storm acted negligently by failing to perform a ministerial duty is an issue for the jury to determine." *Wales*, 390 S.W.3d at 167.

Storm v. Martin, 540 S.W.3d at 801.

For the foregoing reasons, the Jefferson Circuit Court's order denying the appellants' motion for summary judgment is affirmed.

ALL CONCUR.

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