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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000515-MR

ANTHONY MABREY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 16-CI-001343

MAVERICK SIMPSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: Anthony Mabrey, an officer with the Louisville Metro Police Department (“LMPD”), appeals from an order of the Jefferson Circuit Court denying his motion for summary judgment based upon qualified official immunity. For the reasons set forth below, we affirm.

I. BACKGROUND

On March 17, 2012, Maverick Simpson's mother called 911 to report that her son had stolen his grandmother's vehicle. She reported to the dispatcher that Simpson was fourteen years old and suffering from depression. She also stated that Simpson might be under the influence of drugs, but that he was not armed with a weapon. Later that day, Simpson's father contacted police dispatch to report the theft. Officer Mabrey was dispatched to meet with Simpson's father at a gas station. While Simpson's father was describing Simpson's history of drug abuse to Office Mabrey, a vehicle drove by and Simpson's father identified the driver as Simpson. Due to an unidentified issue with his vehicle, Officer Mabrey was unable to pursue Simpson at that time.

Subsequently, Officer Mabrey received information that Simpson might be located at 1108 Fairfield Drive in Louisville, Kentucky. Officer Mabrey drove to the address and spotted a vehicle matching the description of the vehicle Simpson had stolen. He then parked his cruiser and began approaching the residence on foot to investigate. When he did so, Simpson drove around Officer Mabrey and pulled out of the driveway. Officer Mabrey returned to his cruiser, activated his emergency lights, and began following Simpson. As the vehicle merged onto the Gene Snyder Freeway, Officer Mabrey activated his siren and continued his pursuit. Officer Mabrey remained approximately two minutes

behind Simpson at all times during the pursuit. Within minutes, Simpson hit a guardrail and collided with an embankment while attempting to exit the freeway. No other vehicles were involved in the collision. Simpson sustained serious, but non-fatal, injuries.

On March 22, 2016, Simpson filed suit against Officer Mabrey alleging that Officer Mabrey had been negligent in initiating, maintaining, and failing to terminate the pursuit. Simpson alleged that these acts were in direct violation of the LMPD Standard Operating Procedures (“SOPs”). On October 24, 2017, Officer Mabrey filed a motion for summary judgment on the basis that he was entitled to qualified official immunity. In his response to Mabrey’s motion for summary judgment Simpson cited to the following sections of SOPs 12.1¹ as those Mabrey violated during the March 2012 pursuit:

12.1.1 POLICY

It shall be the policy of the Louisville Metro Police Department that the pursuit operation of a police vehicle is justified only when the necessity of immediate apprehension outweighs the dangers created by:

- The operation of the pursuing police vehicle, or;
- The responding police vehicle, or;
- The offender being pursued.

¹ The version of the SOPs that is relevant to this matter became effective on June 10, 2011. The SOPs have been revised at least once since this incident occurred. The June 10, 2011 version of SOPs 12.1 was presented to this Court as part of Simpson’s brief.

The officer must have a reason to believe that the violator being pursued is a felon or suspected felon.

...

12.1.3 RESPONSIBILITIES OF PRIMARY UNIT

The decision to initiate a pursuit must be based on the pursuing officer's reasonable belief that the suspect is a felon or suspected felon. The officer must weigh the immediate danger or potential danger to the public, should the suspect be allowed to remain at large, against the danger or potential danger created by the pursuit itself.

...

The officer initiating a pursuit shall, as soon as practical, provide the following information by radio:

- Car number
- Location
- Direction of travel
- Approximate speed
- Reason for pursuit
- Vehicle description
- License number, if known
- Number and description of occupants
- Traffic conditions

Failure to provide this information to MetroSafe shall result in immediate termination of the pursuit by a commanding officer.

...

12.1.9 NON-INITIATION OF PURSUITS

Officers shall not initiate or participate in pursuits when:

- The offense is a traffic infraction or misdemeanor.
- The offense is a non-violent felony, wherein the suspect is known.

...

12.1.10 TERMINATION

Pursuits shall be terminated when the risks created by continuing the pursuit outweigh the need for immediate apprehension.

...

Pursuits shall be terminated immediately when the following occur:

...

- The officer loses visual contact and the likelihood for apprehension is decreased[.]

In an order entered on March 15, 2018, the circuit court denied Officer Mabrey's motion, finding that because the LMPD's SOPs for vehicular pursuit are ministerial in nature, Officer Mabrey was not entitled to qualified official immunity.

This interlocutory appeal followed.

II. STANDARD OF REVIEW

The sole issue in this appeal is whether the circuit court erred in determining that Officer Mabrey is not entitled to the protections of qualified immunity. "An order denying a claim of qualified official immunity is subject to immediate appeal[,]" even in the absence of a final judgment. *Mattingly v.*

Mitchell, 425 S.W.3d 85, 89 (Ky. App. 2013) (citing *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886-87 (Ky. 2009)). Because “whether a particular defendant is protected by official immunity is a question of law[,]” our review is *de novo*. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

III. ANALYSIS

“[W]hen 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.” *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (citing 63C AM. JUR. 2D., *Public Officers and Employees* § 309 (1997)). “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, decisions and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.” *Id.* (internal citations omitted). Discretionary acts “are those involving quasi-judicial or policy-making decisions.” *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014). However, “[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.” *Yanero*, 65 S.W.3d at 522 (citing *Franklin Cty. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997)).

In contrast, if a public officer or employee performs a ministerial act negligently, he is not entitled to claim qualified official immunity. *Id.* An act is considered ministerial when it “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 designated facts.” *Id.* (citing *Franklin Cty.*, 957 S.W.2d at 201). “Because few acts are purely discretionary or purely ministerial, the courts must look for the ‘dominant nature of the act.’” *Mattingly*, 425 S.W.3d at 89-90 (quoting *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010)). “Whether the employee’s act is discretionary, and not ministerial, is the qualifier that must be determined before qualified immunity is granted to the governmental employee.” *Marson*, 438 S.W.3d at 296.

In finding that Officer Mabrey was not entitled to qualified immunity, the circuit court relied upon this Court’s opinion in *Mattingly* to conclude that Officer Mabrey’s actions were ministerial in nature. *Mattingly* is strikingly similar to the facts and legal question presented in this case. In *Mattingly*, Mattingly, an officer with the LMPD, observed a vehicle speeding and activated his emergency lights. When the vehicle did not pull over, Mattingly initiated a high-speed pursuit. *Mattingly*, 425 S.W.3d at 86-87. Shortly after Mattingly terminated the pursuit, the vehicle he had been pursuing crashed into another vehicle, killing one of its occupants. *Id.* at 87. The decedent’s estate filed suit against Mattingly,

alleging negligence and substantive due process violations. Mattingly moved for summary judgment, claiming that he was entitled to the protection of qualified official immunity. *Id.* at 88. The trial court denied Mattingly’s motion. It determined that Mattingly’s operation of a police vehicle was a ministerial act, precluding him from the protections of qualified official immunity, and that genuine issues of material fact remained as to whether Mattingly’s pursuit was the proximate cause of the collision. *Id.* On appeal, this Court affirmed.

In concluding that the trial court had properly classified Mattingly’s actions as ministerial, this Court noted that the SOPs “provide specific directives to its officers when initiating or engaging in a pursuit.” *Id.* at 90. Accordingly, the Court concluded that “[w]hatever discretion Mattingly may have had in initiating and continuing a pursuit, it was limited by the Louisville Metro Police Department’s Standard Operating Procedures.” *Id.* The *Mattingly* court concluded that the repeated use of the word “shall” in the relevant SOPs established that compliance with those provisions required mere “execution [or nonperformance] of a specific act arising from fixed and designated facts.” *Id.* (quoting *Yanero*, 65 S.W.3d at 522). “Shall” is mandatory language indicating a duty that is “ministerial in character.” *Upchurch v. Clinton Cty.*, 330 S.W.2d 428, 430 (Ky. App. 1959).

The primary difference between this case and *Mattingly* is that Officer Mabrey disputes the allegations that he violated the SOPs when pursuing Simpson, whereas it was undisputed that Mattingly had done so. However, “whether a ministerial act was performed properly, i.e., non-negligently, is a separate question from whether the act is ministerial, and is usually reserved for a jury. Qualified immunity applies only to discretionary acts.” *Marson*, 438 S.W.3d at 297-98. Accordingly, we must only determine whether Mabrey’s acts were discretionary or ministerial in nature, not whether he performed those acts negligently.

Simpson argues that Mabrey violated sections 12.1.1, 12.1.3, 12.1.9, and 12.1.10 of the SOPs when he initiated, maintained, and did not terminate his pursuit of Simpson. Like the *Mattingly* court, we are convinced that the SOPs contain specific directives that LMPD officers are required to follow when initiating, continuing, and terminating vehicular pursuits. The repeated use of “shall” indicates that these directives are mandatory and not at the discretion of the officer. *Mattingly*, 425 S.W.3d at 90. While Officer Mabrey may have had some discretion as to the means and method of pursuit, that discretion “was limited by the Louisville Metro Police Department’s Standard Operating Procedures.” *Id.* The “dominant nature” of the acts described in the relevant sections of SOPs 12.1 is ministerial. Officer Mabrey “either violated the procedures or he did not.” *Id.*

Because Mabrey's acts were ministerial in nature, the circuit court's denial of summary judgment based upon qualified official immunity was proper.

Officer Mabrey argues that this Court should consider the issues of whether he owed a legal duty to Simpson and whether his pursuit of Simpson was the legal cause of Simpson's collision with the embankment. "[T]he purpose of allowing an immunity issue to be raised by interlocutory appeal is 'to address substantial claims of right which would be rendered moot by litigation and thus are not subject to meaningful review in the ordinary course following a final judgment.'" *Baker v. Fields*, 543 S.W.3d 575, 577 (Ky. 2018) (quoting *Prater*, 292 S.W.3d at 886). "[A]n appellate court reviewing an interlocutory appeal of a trial court's determination of a defendant's immunity from suit is limited to the specific issue of whether immunity was properly denied, nothing more." *Id.* at 578 (quoting *Prater*, 292 S.W.3d at 886). "Otherwise, interlocutory appeals would be used as vehicles for bypassing the structured appellate process." *Id.* Just as this Court did not have jurisdiction to determine the issue of proximate causation in *Mattingly*, we do not have jurisdiction to consider the additional issues presented by Officer Mabrey. Substantive claims of negligence must be left to determination by the factfinder. *Id.*

IV. CONCLUSION

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court's order denying Officer Mabrey's motion for summary judgment.

ALL CONCUR.

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