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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001770-MR

DOUG PAPE, INDIVIDUALLY;
DOUG PAPE, IN HIS OFFICIAL CAPACITY AS
AN EMPLOYEE OF LEXINGTON FAYETTE
URBAN COUNTY GOVERNMENT; AND
LEXINGTON FAYETTE URBAN
COUNTY GOVERNMENT APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 18-CI-01919

CHET WHITE APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Appellants Doug Pape, both in his individual capacity and official capacity as an employee of the Lexington-Fayette Urban County Government (LFUCG), and LFUCG appeal from the Fayette Circuit Court's order

denying their motion for summary judgment on the bases of sovereign and qualified official immunity. Upon review, we affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee Chet White, a University of Kentucky (UK) Athletics Department photographer, was photographing pregame activities on the UK Wildcats football stadium's "Cat Walk" – a roped off walkway near the stadium along which fans line up to cheer on players and cheerleaders entering the locker room – when he was allegedly struck from behind by a utility all-terrain vehicle (UATV) operated by Appellant Doug Pape, Commander of Special Operations with the LFUCG Division of Police. As a result, White suffered injuries.

White filed suit in Fayette Circuit Court against Pape – both individually and in his official capacity – and his employer LFUCG,[1] alleging: negligence and gross negligence; negligence *per se*; negligent failure to properly equip police equipment; negligent entrustment; and negligent hiring, retention, and supervision. Following discovery, LFUCG and Pape filed a motion for summary judgment asserting the defenses of sovereign immunity and qualified official

[1] Pape's employer was identified as the Lexington Police Department in White's complaint. Appellants state that the LFUCG Division of Police is not an agency or entity independent of LFUCG. However, it identifies publicly as the Lexington Police Department. *About the Lexington Police Department*, https://www.lexingtonky.gov/departments/police.

immunity, respectively. The Fayette Circuit Court denied Appellants' motion. This interlocutory appeal followed.

ANALYSIS

Granting summary judgment is appropriate only if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. Circuit courts 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, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

"[U]nlike other defenses, immunity is meant to shield its possessor not simply from liability but from the costs and burdens of litigation as well." *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 888 (Ky. 2009). Finding that immunity applies "renders one immune not just from liability, but also from suit itself." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (citing *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006)). Thus, "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Prater*, 292 S.W.3d at 887.

"[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." *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018). Substantive issues should not be reviewed. *Id.*

"Appellate review of a summary judgment [ruling] involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (citations omitted). "Because summary judgment involves no fact finding, this Court will review the trial court's decision *de novo*." *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citations omitted).

From the outset, we must clarify which form of immunity might apply to which Appellant. "Counties, which predate the existence of the state and are considered direct political subdivisions of it, enjoy the same [sovereign] immunity as the state itself." *Comair, Inc. v. Lexington-Fayette Urban Cty. Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). "[U]rban county governments constitute a new classification of county government. Therefore, we hold that LFUCG is entitled to sovereign immunity . . . ." *Lexington-Fayette Urban Cty. Gov't v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004) (citations omitted).[2]

[2] White argues Kentucky Revised Statutes (KRS) 65.2001 and 65.2003 abrogate the county's immunity for its employee's negligent performance of ministerial duties. However, the General Assembly specified: "No provision of KRS 65.2002 to 65.2006 shall in any way be construed to . . . eliminate or abrogate the defense of governmental immunity for county governments." KRS 65.2001(2). Further, in addressing the same argument, the Supreme Court of Kentucky disagreed with White's claim and held in relevant part:

Similarly, even if the LFUCG Division of Police was a separate entity from LFUCG, it is "a county agency entitled to the protection of sovereign immunity" when performing "an integral function of state government [such as traffic control,]" *Comair, Inc.*, 295 S.W.3d at 102, unless the General Assembly has explicitly waived immunity through legislation.[3] "Additionally, the members of the [county agency], in their official or representative capacities, are immune." *Id.* at 104. Thus, Pape is entitled to governmental immunity in his official capacity as the LFUCG Division of Police Commander of Special Operations.

Next, we must analyze the type of immunity implicated by suit against Pape in his individual capacity, known as qualified official immunity. Whether a government official sued in his individual capacity is entitled to qualified official

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> [T]he last sentence [of KRS 65.2003] pertains only to subsection (3) because it is self-limited to "this subsection." . . . Obviously, the General Assembly knew the difference between a section and a subsection and intended the last sentence of KRS 65.2003 (section 18 of the Act) to pertain only to subsection (3), which pertains only to municipalities which, as noted *supra*, [unlike counties,] are not immune from vicarious liability for the tortious performance of ministerial duties by its employees.

Schwindel v. Meade Cty., 113 S.W.3d 159, 166 (Ky. 2003).

[3] Historically, "sovereign immunity" and "governmental immunity" were used interchangeably to define a government agency's immunity. Derived from the doctrine of sovereign immunity, "an agency of the state government enjoys what is termed 'governmental immunity' from civil damages actions." *Prater*, 292 S.W.3d at 887 (citing *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001)). "Governmental immunity" is the type sought by such agencies and their officials—in their official capacities—as they are not the sovereign itself but rather agents thereof. Whereas the sovereign's immunity is absolute, an agency must be "performing a governmental function" for immunity to apply. *See Furtula v. Univ. of Ky.*, 438 S.W.3d 303, 305 n.1 (Ky. 2014).

immunity is a question of law which we review *de novo*. *Sloas*, 201 S.W.3d at 475. The qualified official immunity defense applies to the negligent performance 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." *Ritchie v. Turner*, 559 S.W.3d 822, 831 (Ky. 2018) (quoting *Yanero*, 65 S.W.3d at 522) (citation omitted).

"[A]nalysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature." *Haney*, 311 S.W.3d at 240 (citing *Yanero*, 65 S.W.3d at 521). In contrast, a government official is not entitled to immunity 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." *Ritchie*, 559 S.W.3d at 831 (quoting *Yanero*, 65 S.W.3d at 522) (citation omitted).

"Application of the defense, therefore, 'rests not on the status or title of the officer or employee, but on the [act or] function performed.'" *Haney*, 311 S.W.3d at 240 (citing *Yanero*, 65 S.W.3d at 521). "[T]he question of whether a

particular act or function is discretionary or ministerial in nature is . . . inherently fact-sensitive." *Id.* at 246.

Here, Pape was assigned to oversee the flow of street traffic for the UK football game. While riding the UATV across UK's campus to his command post, his path was blocked by a crowd. To bypass it, Pape took a detour down the Cat Walk where he saw White photographing the pregame festivities. Pape attempted to pass White but ended up hitting him.

Now we must turn to the dispositive question: was the act of driving the UATV to his command post discretionary or ministerial? "In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act." *Id.* at 240.

In holding that a police officer driving in response to an emergency call is a ministerial act, the Supreme Court of Kentucky stated "the act of safely driving a police cruiser, even in an emergency, is not an act that typically requires any deliberation or the exercise of judgment. Rather, driving a police cruiser requires reactive decisions based on duty, training, and overall consideration of public safety." *Jones v. Lathram*, 150 S.W.3d 50, 53 (Ky. 2004). The Court concluded that determining whether the state trooper was negligent in the ministerial act of driving the cruiser "is a question for resolution by the trier of fact." *Id.* at 54.

Pape attempts to distinguish this case from the ministerial act in *Jones* by citing *Prater v. Catt*, 443 S.W.3d 6 (Ky. App. 2014). *Catt* involved a mounted patrolwoman assigned to crowd control at a UK football game. We held that the officer's act of "deftly maneuvering her mount among the participants required an independent and fluid deliberation" and was, therefore, discretionary. *Id.* at 10.

However, the case at bar is clearly distinguishable from *Catt* and is more akin to *Jones*. For one, Lathram and Pape were both responsible for operating motorized vehicles in a reasonable manner. Although Pape was driving a UATV off-road rather than a police cruiser on the streets "governed by discrete and absolute rules of the road," he was nonetheless operating a "mechanical means of transportation" which, unlike Prater's horse, allots its driver total operative control. *Id*. at 9.[4]

Further, unlike Prater, Pape was not "deftly maneuvering . . . among the participants [in pregame festivities]," *id.* at 10, as part of a crowd-monitoring assignment; instead, Pape was taking a shortcut down a pedestrian walkway to

[4] We pause to recognize two unpublished cases for persuasive reasons. First, *Pugh v. Randolph*, No. 2009-CA-000755-MR, 2010 WL 5018184 (Ky. App. Dec. 10, 2010), at *4, is illustrative on the point that both *Jones* and the present case "involved the officer's adherence to the standards of driving[,]"and both involved the officer's collision with the plaintiff. Second, as in the present case, "Trooper Lathram undertook a ministerial act—decisions 'were required in the course of driving,' but those decisions were not 'truly discretionary acts.' . . . The act of driving, regardless of speed, is ministerial— it is [] a legally []certain environment." *Jones v. Bennett*, No. 2014-SC-000425-DG, 2016 WL 4487189 (Ky. Aug. 25, 2016), at *4. Just because Pape was driving the UATV off-road rather than in a police cruiser on the street does not destroy the fact he was "governed by discrete and absolute rules" of safe, reasonable driving.

bypass the crowd *en route* to his traffic monitoring command post. Here, the crowd was not an assignment—it was an obstacle.

Notably, Pape was not involved in a police pursuit, crowd control, or an emergency response. He was merely driving from point A to B to perform his work duties. This crucial fact distinguishes the case at bar from *Catt*, *Walker v. Davis*, 643 F. Supp. 2d 921, 932 (W.D. Ky. 2009), and other cases cited by Pape in support of his argument.

In the case before us, Pape was engaged in the ministerial act of driving the UATV to reach his designated command post for traffic duty and is therefore not entitled to qualified official immunity. Whether his performance was negligent is a genuine issue of fact to be resolved by the trier of fact. Thus, the circuit court did not err in denying summary judgment in favor of Pape in his individual capacity.

CONCLUSION

For the foregoing reasons, we reverse the Fayette Circuit Court's order in part and affirm it in part. We reverse insofar as the order denied summary judgment in favor of LFUCG and Pape in his official capacity. Those entities are cloaked by sovereign and governmental immunity, respectively.

However, we affirm the Fayette Circuit Court's order insofar as it denied summary judgment in favor of Pape in his individual capacity. Qualified

official immunity does not apply to Pape's ministerial act of driving a UATV down the Cat Walk to reach his command post. Thus, we remand this case to the circuit court for further proceedings consistent with this opinion.

ALL CONCUR.

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