

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000424-MR

ROGER DALE BARLOW,
INDIVIDUALLY AND IN HIS
CAPACITY AS SHERIFF OF
MONROE COUNTY, KENTUCKY
AND BILLY PICKERELL

APPELLANTS

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 14-CI-00053

JIMMY EVANS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND GOODWINE, JUDGES.

GOODWINE, JUDGE: Jimmy Evans (“Evans”) sued Roger Dale Barlow

(“Barlow”), individually and in his official capacity as sheriff of Monroe County,

Kentucky and Billy Pickerell (“Pickerell”) for injuries sustained in a motor vehicle

accident. Evans alleged Barlow negligently allowed Pickerell to operate a Monroe County Sheriff's vehicle. Barlow moved for summary judgment, arguing he was entitled to official immunity, which the Monroe Circuit Court denied. After careful review, we reverse and remand.

On May 28, 2012, Evans was driving his motorcycle on James Lyons Road in Tompkinsville when he was in an accident with a sheriff's vehicle driven by Pickerell. Evans stopped behind the sheriff's vehicle, and Pickerell backed into Evans's motorcycle. Evans drove his motorcycle home and sought medical treatment the next day.

Pickerell served as a fill-in dispatcher and performed vehicle maintenance for Sheriff Barlow, but he was not compensated for his services. On the day of the accident, Pickerell had been working on the lights and brakes of the sheriff's vehicle. Pickerell drove the sheriff's vehicle from his shop to James Lyons Road to test the vehicle's brakes. He hit the brakes a few times to listen for the "brake to creak." Then, after not seeing anyone behind him, he reversed the vehicle, again listening for the "brake to creak," and collided with Evans's motorcycle.

Evans sued Sheriff Barlow and Pickerell for the injuries he sustained in the accident. Sheriff Barlow moved for summary judgment, arguing he was entitled to official immunity. The circuit court denied Sheriff Barlow's motion,

finding he was not immune from suit. The court reasoned that the act of entrusting vehicle maintenance to Pickerell was a ministerial act because patrol car maintenance is a required duty of a sheriff. This appeal followed.

On appeal, Barlow argues the trial court erred in failing to find he was entitled to immunity. We review *de novo* a trial court's ruling on a motion for summary judgment. *Ashland Hospital Corporation v. Lewis*, 581 S.W.3d 572, 577 (Ky. 2019).

“‘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.” *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). When an officer is sued in his representative capacity, the officer's “actions are afforded the same immunity, if any, to which the agency, itself, would be entitled[.]” *Id.* at 522. However, when sued in his individual capacity, “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.” *Id.* (citation omitted).

A public official sued in his individual capacity is entitled to qualified immunity for his negligent acts when he performs: “(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 [his] authority.” *Id.* (citations omitted). However, “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.” *Id.* (citation omitted).

In *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), our Supreme Court provided further guidance on whether an act is ministerial or discretionary in nature. There, a middle school student was injured when he fell from bleachers in a gymnasium that had not been fully extended by the custodian. *Id.* at 295. The Court opined that the duty of extending the bleachers was routine and “regularly performed by the custodian on duty, and is thus ministerial in nature to the person charged with that job.” *Id.* at 298. Whether the custodian was liable or immune from suit was not before the Court. *Id.* at 299. Instead, the question was whether the principals of the school were entitled to qualified immunity. *Id.*

As discussed above, government officials, sued in their individual capacities, are entitled to qualified immunity when they perform a discretionary act. “[A] discretionary act is usually described as one calling for a ‘good faith judgment call[] made in a legally uncertain environment.’” *Id.* at 297 (quoting

Yanero, 65 S.W.3d at 522). The discretionary category encompasses “the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level.” *Id.* (quoting 63C AM.JUR.2D *Public Officers and Employees* § 318 (updated through Feb. 2014)). The Court held the principals were entitled to qualified immunity based on the following reasoning:

[O]versight and direction of the morning bus routine was a matter of her discretionary decision-making, not a specific directive from the school board. As such, she had to evaluate and exercise discretion in determining how that job was to be done. She assigned the specific duty of preparing the gym to the custodians, and the duty of coordinating the children’s movement from the buses into the school and ultimately to the gym to the teachers on duty. Her general responsibility for students’ safety was discretionary. She is therefore entitled to qualified official immunity.

Id. at 300.

We pause to note that the trial court’s order did not rule separately on whether Sheriff Barlow was entitled to immunity for claims against him in his individual capacity and his representative capacity. Instead, the trial court made a blanket ruling that Sheriff Barlow was not entitled to qualified immunity because the duty performed was ministerial.

First, we address whether Sheriff Barlow’s act of hiring Pickerell to service the brakes of his official patrol vehicle was discretionary or ministerial. Maintaining patrol vehicles is a function necessary to the operation of a sheriff’s

office. However, Sheriff Barlow was not required to and did not perform the duty himself. Instead, he assigned the specific duty of vehicle maintenance to Pickerell. Sheriff Barlow's general responsibility for maintaining his official patrol vehicle was discretionary. He had the discretion to evaluate when vehicle maintenance was needed and to decide who to assign that duty. Sheriff Barlow clearly performed a discretionary act when he hired Pickerell to service the brakes of his official patrol car.

However, we cannot determine whether Sheriff Barlow is entitled to qualified immunity from suit in his individual capacity. He would be entitled to qualified immunity if he performed: (1) a discretionary act, (2) in good faith, and (3) within the scope of his authority. *Yanero*, 65 S.W.3d at 522. The trial court found Sheriff Barlow's act was ministerial. Therefore, it did not consider whether Sheriff Barlow acted in good faith and within the scope of his authority.

There appears to be no question that Sheriff Barlow acted within the scope of his authority. Evans does not dispute that Sheriff Barlow could hire someone to maintain the official patrol vehicle. However, Evans seems to dispute whether Sheriff Barlow acted in good faith in entrusting vehicle maintenance to Pickerell. The "good faith" element of qualified immunity has "both an objective and subjective aspect." *Id.*

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. . . .”

Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S. Ct. 2727, 2736-37, 73 L. Ed. 2d 396 (1982).

Since this Court found Sheriff Barlow’s act of hiring Pickerell was discretionary and not ministerial, on remand, the trial court must determine whether he acted in good faith and in the scope of his authority. If the trial court finds these elements are satisfied, then Sheriff Barlow, in his individual capacity, is entitled to qualified immunity.

Next, the trial court did not specifically address whether Sheriff Barlow was entitled to official immunity for the claims against him in his representative capacity. It is clear that “official immunity is absolute when an official’s or an employee’s actions are subject to suit in his official capacity” unless immunity has been waived. *Jones v. Cross*, 260 S.W.3d 343, 345 (Ky. 2008) (citation omitted). Generally, a sheriff “has absolute official immunity at

common law for torts . . . when sued in his official capacity.” *Id.* (see *Yanero*, 65 S.W.3d at 517). The main exception to this general rule is that KRS¹ 70.040 waives a “sheriff’s official immunity . . . for the tortious acts or omissions of his deputies.” *Id.* at 346. Here, there is no dispute that Pickerell was not a deputy. On remand, the trial court must determine whether there was any waiver of absolute official immunity for Sheriff Barlow, in his official capacity. If there was no waiver, Sheriff Barlow is entitled to official immunity in his official capacity.

For the foregoing reasons, we reverse the order of the Monroe Circuit Court and remand the case with instructions to enter an order consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Harold M. Johns
Elkton, Kentucky

BRIEF FOR APPELLEE:

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¹ Kentucky Revised Statutes.