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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001388-MR

TERRA CROUCH, BY HER NEXT FRIEND, KELLY CROUCH — APPELLANTS

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 04-CI-00027

JOBE DARNELL AND LONNIE PAGE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: On the afternoon of September 23, 2003, Terra Crouch was operating her automobile on Beechtop Road in Adair County when she encountered an accumulation of debris and mud on the road which an Adair County road maintenance employee, Lonnie Page, acting under the direction of his supervisor, Jobe Darnell, had covered with a layer of loose gravel.

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

She filed this action against Page and Darnell in their individual capacities alleging that they negligently failed to remove the dirt, mud and debris from the road and then covered the road with gravel thereby causing her accident. She also alleged that Darnell and Page negligently failed to warn her of the dangerous condition of the road.[2] The circuit court held that the actions of Page and Darnell were discretionary and, as a result, they were immune from liability and granted summary judgment.

Darnell learned from county magistrate, Joe Rogers, that there was a considerable amount of mud on Beechtop Road. The following day, Darnell sent Page to scrape the mud from the road with a grader. Although he was able to push most of the mud to the shoulder of the road, some remained on the surface. He then spread approximately four tons of round pea-sized gravel over the surface. No warning signs were posted to indicate any potential danger posed by the gravel. While traveling on the road, Crouch lost control of her automobile, left the roadway, and struck a tree.

Our standard of review of a summary judgment is whether the trial court correctly found that there were no genuine issue of 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). Whether an immunity defense applies is purely a question of law. *Estate of Clark v. Daviess County*, 105 S.W.3d 841 (Ky.App. 2003).

This action was filed against Page and Darnell in their individual capacities. Had they been named in their official capacity both would be cloaked in absolute

[2] The complaint also named as defendants John Derksen and Amos Tackett. Derksen was performing work on Tackett's private driveway which allegedly was the cause of the accumulation of the debris. Neither Derksen or Tackett are parties to this appeal.

immunity. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). The immunity of public employees acting within the scope of their employment, however, is not absolute and "rests not on the status or title of the officer or employee, but on the function performed." *Id*. at 521. An employee is not liable for discretionary acts performed in good faith but is exposed to liability for those considered to be ministerial.

> [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. 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. (Citations and internal quotations omitted).

Id. at 522. The trial court found that there was no absolute duty to take any particular action with regard to a warning sign at the location and that the decision not to erect a sign was a discretionary act. It made no specific finding in regard to whether the placement of the gravel on the road was a ministerial or discretionary act.

Although Crouch complains that the trial court made no findings of fact as to whether the removal of the debris and the act of covering the road with gravel was a discretionary or ministerial act, she did not request that the trial court make such findings. CR 52.04 requires that a judgment not be reversed or remanded because of the failure to make findings of fact unless such failure is brought to the attention of the circuit court either by written request or motion. Since Crouch made no request, the failure to make specific findings in regard to the allegation of negligence in the repair of the roadway was waived. We proceed with our discussion of whether summary judgment was properly granted.

We agree with Crouch that the county has a duty to exercise some degree of care and diligence to keep the road in repair. *Shearer v. Hall*, 399 S.W.2d 701 (Ky. 1966). However, there is no statute, regulation or policy mandating how mud must be removed from a county roadway or which prohibits the placement of gravel on a mud-slickened roadway. In such instances, the decision as to how to remedy a potential road hazard is left to the discretion of the road supervisor.

Accordingly, Darnell testified that he exercised his discretion when he decided the method of removing the mud and made the decision that no warning sign was required. He testified that different methods are used to remove debris depending upon the circumstances and available resources. He and Page testified that placing gravel on a roadway after the removal of a slippery substance was a procedure used but that other

procedures have been used in the past. For instance, mud can be washed or swept from the roadway.

We find that the trial court properly relied on the law as recited in *Estate of Clark*, wherein the court considered whether county officials had immunity when they decided not to place a guardrail in a particular section of a roadway. Applying *Yaner*o, the conclusion was reached that the decision not to install the guardrail was the result of contemplation and a balance of public policy factors and budgetary concerns. *Id*. at 845. Therefore, the court concluded, they made a discretionary decision and were immune from liability. *Id*. at 846.

The decision to grade the road and place gravel over the remaining mud was not the subject of prolonged contemplation; it was, however, a decision made in response to an immediate problem and a result of Darnell's and Page's judgment as to how to remedy the road condition.

> Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. *Rowan County v. Sloas*, 201 S.W.3d 469, 477 (Ky. 2006).

The circuit court did not err in granting summary judgment to Darnell and Page with respect to the placement of the gravel on the road.

The circuit court specifically found that the decision not to erect a warning sign was a discretionary act. For the same reason we have found that the decision as to the repair of the roadway was discretionary, we likewise find that the decision regarding a warning sign was discretionary. In *Estate of Clark*, the court held that the failure to replace a warning sign on a roadway was ministerial in nature. *Id*. at 846. The decision that the warning sign was necessary had been made; the replacement of the sign involved, therefore, required only the execution of a "specific act arising from fixed and designated facts." *Id*. In this case, there was no mandate that a warning sign be erected and no prior decision made that a warning sign was necessary.

The summary judgment is affirmed.

ALL CONCUR.

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