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OPINION OF MARCH 20, 2020, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001210-MR

MARK EDWARD PORTWOOD,
BY AND THROUGH HIS GUARDIAN
AND MOTHER, LAUREN SCHMELZ — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 17-CI-03892

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT; DOWELL HOSKINS-SQUIER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS AN EMPLOYEE, SERVANT, AND/OR AGENT OF LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT; DEREK PAULSEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE, SERVANT, AND/OR AGENT OF LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT; JEFFREY NEAL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE, SERVANT, AND/OR AGENT OF LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT; DOUGLAS BURTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE, SERVANT, AND/OR AGENT OF LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT; ALBERT MILLER, INDIVIDUALLY AND IN

HIS OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT;
ROGER T. MULVANEY, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT;
CASEY KAUCHER, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT;
WALTER HALL, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT;
ROBERT BAYERT, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT;
MARK FEIBES, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT;
AND KEITH LOVAN, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE,
SERVANT, AND/OR AGENT OF LEXINGTON
FAYETTE URBAN COUNTY GOVERNMENT APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: Mark Edward Portwood, by and through his guardian and mother, Lauren Schmelz ("Portwood"), appeals the order dismissing his claims

against the Lexington Fayette Urban County Government ("LFUCG"); Dowell Hoskins-Squier, individually and in her official capacity as an employee, servant, and/or agent of LFUCG; Derek Paulsen, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Jeffrey Neal, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Douglas Burton, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Albert Miller, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Roger T. Mulvaney, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Casey Kaucher, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Walter Hall, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Robert Bayert, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; Mark Feibes, individually and in his official capacity as an employee, servant, and/or agent of LFUCG; and Keith Lovan, individually and in his official capacity as an employee, servant, and/or agent of LFUCG (collectively, "LFUCG employees") entered by the Fayette Circuit Court on March 28, 2018, as well as the order denying Portwood's motion to alter, amend, or vacate said order entered on July 16, 2018.

Initially, this Court affirmed via opinion rendered on March 20, 2020. Thereafter, Portwood filed a petition for rehearing, to which none of the appellees

responded. By prior order of the Court, Portwood's unopposed petition for rehearing was granted.[1] The Court narrows the substance of its review on rehearing to the issue raised in Portwood's unrebutted petition relating to discovery. Upon further review, we hereby withdraw the previous opinion in this case; we adopt and restate the facts and appropriate standard of review as recited therein; we agree with our prior opinion affirming the trial court's grant of summary judgment to LFUCG on the basis of sovereign immunity; we agree with our prior opinion affirming the trial court's grant of summary judgment to the LFUCG employees acting in their official capacities on the basis of official immunity; however, we reverse the trial court's grant of summary judgment to the LFUCG employees acting in their individual capacities based on arguments supported by the record raised in Portwood's unrebutted petition for rehearing which challenged our prior opinion regarding the opportunity to conduct discovery. Accordingly, we remand the matter to the trial court for the purpose of allowing limited discovery regarding whether the LFUCG employees, acting in their individual capacities, are entitled to qualified official immunity pursuant to *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), and for further proceedings following the trial court's resolution of that issue.

[1] Judge Dixon dissented regarding the granting of the petition.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On October 31, 2016, Portwood—a pedestrian—was crossing Clays Mill Road at its intersection with Blue Ash Drive when he was struck by a motorist. On October 30, 2017, Portwood sued LFUCG and its employees for negligence, negligence *per se*, gross negligence, and/or recklessness. Portwood alleged that "[d]espite determining that pedestrian crosswalks, pedestrian signals, crosswalk markings and/or support poles were necessary at or near the area where the Collision occurred, Defendants failed to install them" and "Defendants' failure to provide adequate, proper, and safe pedestrian facilities at or near the area where the Collision occurred was ministerial in nature."

Less than a month after Portwood's complaint was filed (November 17, 2017), LFUCG and its employees answered Portwood's complaint and moved the trial court to dismiss, as a matter of law, the action "on grounds of sovereign immunity, official immunity, qualified immunity, and failure to state a claim based upon no duty." On December 12, 2017, Portwood responded in opposition to the motion to dismiss. On January 4, 2018, Portwood filed 542 pages of exhibits, received via open records requests, as evidence in support of his claims. The record confirms that Portwood asked the trial court for additional discovery but was denied the opportunity to do so.

On March 28, 2018, the trial court entered its order granting the motion to dismiss. On April 7, 2018, Portwood moved the trial court to alter, amend, or vacate its order dismissing his claims, attaching 134 pages of new exhibits. On May 17, 2018, LFUCG and its employees objected to Portwood's motion to alter, amend, or vacate the order of dismissal. On June 28, 2018, Portwood filed supplemental open records request response documents in support of his claims via a disc because the 236 sets of documents "are too large to file electronically." Thereafter, the trial court entered its order denying Portwood's motion to alter, amend, or vacate the order of dismissal. Portwood subsequently filed a timely notice of appeal.

STANDARD OF REVIEW

"It is well settled in this jurisdiction when considering a motion to dismiss under [CR[2] 12.02] that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). "[Because] a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Fox v.*

[2] Kentucky Rules of Civil Procedure.

Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (citations and internal quotation marks omitted).

However, "[i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" CR 12.02. Consequently, we treat the trial court's order of dismissal as one for summary judgment because matters outside the pleadings were clearly presented to, and considered by, the trial court in arriving at its decision to dismiss. *See Waddle v. Galen of Kentucky, Inc*., 131 S.W.3d 361, 364 (Ky. App. 2004) (Court of Appeals would treat hospital's motion to dismiss patient's claim as one for summary judgment, where trial court considered matters outside of the pleadings in arriving at its decision to grant the motion).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show 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. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)).

It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation omitted). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242

S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (citations and internal quotation marks omitted). "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Id.* at 480.

ANALYSIS

Portwood seeks recovery from the LFUCG and its employees by way of a suit in tort. To succeed, however, he must first overcome the barriers imposed by the various forms of immunity afforded to the government and the officials acting on its behalf.

> [S]overeign immunity is a concept that arose from the common law of England and was embraced by our courts at an early stage in our nation's history. It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity. This principle was recognized as applicable to the Commonwealth of Kentucky as early as 1828.

Yanero, 65 S.W.3d at 517 (citations omitted).

A review of our law plainly demonstrates a suit against LFUCG itself cannot succeed under these facts. "LFUCG is a county government." *Lexington-Fayette Urban County Gov't v. Smolcic*, 142 S.W.3d 128, 133 (Ky. 2004). "Kentucky counties are cloaked with sovereign immunity[,]" and this immunity has not been waived. *Id*. at 132-33. In the case *sub judice*, the trial court correctly quoted *Smolcic* for the proposition that "fault cannot be apportioned against LFUCG because its inherent sovereign immunity renders it absolutely immune from suit[.]" *Id*. at 136. Accordingly, the trial court did not err in granting summary judgment to LFUCG.

Similarly, Kentucky law indicates Portwood's suit against the LFUCG employees in their official capacities is barred by the doctrine of official immunity. "The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." *Yanero*, 65 S.W.3d at 518 (citations omitted). The Supreme Court went on to explain:

> "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[.]

Id. at 521 (citation omitted); *see also Autry v. Western Kentucky University*, 219 S.W.3d 713, 718 (Ky. 2007) ("State agency officials or employees, when sued in their official capacity, have the same immunity as their employer."). Therefore, the trial court did not err in granting summary judgment to the LFUCG employees in their official capacities.

The only remaining immunity issue is whether Portwood may maintain his suit against the LFUCG employees acting in their individual capacities. The Kentucky Supreme Court has explained that such suits *may* be barred by qualified official immunity:

> [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.

Yanero, 65 S.W.3d at 522 (citations omitted). Qualified official immunity does not apply "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*. "[D]etermining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In

reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (emphasis original).

At first glance, the facts in this case bear significant similarities to those found in *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841 (Ky. App. 2003), which determined the failure to install a traffic safety device (in that case, a guardrail) constituted a discretionary act for which the fiscal court and its employees could not be held liable. *Id*. at 845. We upheld the trial court's grant of summary judgment to the fiscal court and its employees on that issue. *Id*. at 846. However, we reversed the portion of the trial court's judgment which granted official immunity to employees who had failed to replace a missing warning sign because the failure to maintain an existing safety device was ministerial in nature. *Id*.

Before the trial court can determine if the employees' activity is discretionary or ministerial, there must be some evidence of record to support the finding. In *Estate of Clark*, we pointed to the "[e]vidence of record[,]" which included "considerable testimony" indicating "a comprehensive scheme to evaluate and to maintain county roadways." *Id*. at 845. This evidence is ordinarily supplied by the parties through discovery prior to an award of summary judgment. "A summary judgment is only proper after a party has been given ample opportunity

to complete discovery, and then fails to offer controverting evidence." *Pendleton Bros. Vending, Inc. v. Com. Fin. & Admin. Cabinet,* 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co*., 579 S.W.2d 628 (Ky. App. 1979)).

In a case involving immunity of the parties, the question becomes one of how much discovery is necessary. The Kentucky Supreme Court views "qualified official [i]mmunity as an immunity from suit, that is, from the burdens of defending the action, not merely just an immunity from liability." *Rowan County v. Sloas,* 201 S.W.3d 469, 474 (Ky. 2006) (citations omitted). "Immunity from suit includes protection against the cost of trial and the burdens of broad-reaching discovery that are peculiarly disruptive of effective government." *Smolcic,* 142 S.W.3d at 135 (citation and internal quotation marks omitted). In one recent decision, the Kentucky Supreme Court held that "broad-reaching discovery" was not appropriate "prior to an immunity determination" by the trial court. *Presbyterian Church (U.S.A.) v. Edwards,* 566 S.W.3d 175, 179 (Ky. 2018). Instead, the Supreme Court held "limited discovery [which] the trial court may deem necessary" on the question of immunity was appropriate. *Id*. at 181. This is not the first time the Supreme Court found "limited discovery" appropriate in an immunity context; *see Sloas*, 201 S.W.3d at 473 ("Following limited discovery, the Rowan Circuit Court granted summary judgment on all claims[.]").

Portwood argues the trial court inappropriately rendered summary judgment without permitting any discovery. A review of the timeline in this case shows this claim to be meritorious. Unlike *Estate of Clark*, there is no deposition testimony in this case. Portwood filed his complaint on October 30, 2017; the appellees moved to dismiss the suit on November 17, 2017; and the trial court granted the motion to dismiss on March 28, 2018. Portwood repeatedly asked the trial court to allow some time for discovery, but the trial court did not allow it. Portwood's evidence thus far consists of a vast collection of materials gathered via open records requests, some of which *may* indicate discretionary decision making. Nonetheless, without limited discovery to flesh out these materials and actions taken by the employees, we cannot say that it would be impossible for Portwood's claims to survive an immunity analysis under the facts of this case. Thus, we view the trial court's summary judgment decision as having been prematurely granted.

CONCLUSION

Based on the foregoing, we affirm the trial court's grant of summary judgment to LFUCG and the LFUCG employees acting in their official capacities. However, we reverse the trial court's grant of summary judgment against the LFUCG employees acting in their individual capacities. On remand, the trial court shall allow Portwood limited discovery sufficient to allow the trial court to resolve the issue of whether the LFUCG employees acting in their individual capacities

were entitled to qualified official immunity. Thereafter, the trial court shall conduct further proceedings not inconsistent with this opinion.

THOMPSON, K., JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS WITHOUT OPINION.

BRIEFS FOR APPELLANT:

Sandra M. Varellas
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BRIEF FOR APPELLEES:

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