

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002090-MR

PHILLIP CHAMPION AND
RHETT GIBSON

APPELLANTS

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIMBERLY CHILDERS, JUDGE
ACTION NO. 08-CI-00038

ANGIE AND CHRISTOPHER WAUGH,
AS PARENTS AND NEXT FRIEND OF
DYLAN CHRISTOPHER WAUGH AND
K & K MUSIC CO. OF BLUEFIELD, INC.

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** *

BEFORE: DIXON AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Phillip Champion and Rhett Gibson appeal from an interlocutory order denying their motion for summary judgment against Angie and Christopher Waugh, as parents and next friend of Dylan Christopher Waugh.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Appellants argue they were entitled to qualified official immunity. We affirm in part, reverse in part, and remand.

Knott County operates a Sports Complex, which contains an arcade of electronic games. Gibson is the manager and director of the Sports Complex and is employed by the Knott County Fiscal Court. Champion is employed by Knott County as Deputy Judge Executive and has authority over the general administration of all programs and departments of the Knott County Government including the Sports Complex in the absence of the Judge Executive.

The Sports Complex contained a machine weighing 285 pounds, which was designed to dispense tokens for the arcade games in exchange for coins and dollar bills. A few days prior to the incident, Champion assisted his great-nephew, 11-year old, Dylan Waugh, in recovering jammed tokens from the machine, which had not been functioning properly. Champion tried to shake the machine, but this effort was fruitless and he recovered the tokens after sharply rapping the machine with the edge of his hand. He then instructed Dylan and two other children not to shake or use the machine, but to purchase tokens from the front desk. On October 17, 2008, Dylan attempted to shake the machine to recover jammed tokens and the machine tipped over and fell on top of him causing injuries. Champion was not present at the time of the accident. K&K Music Co. of Bluefield, Inc. had been contracted by Knott County to install the machine and admittedly failed to properly install the machine by failing to bolt it to the floor.

The Waughs, as Dylan's next friends, filed a negligence action in Knott Circuit Court against the Knott County Youth Foundation, the Knott County Sports Complex, and Phillip Champion and Rhett Gibson, in their individual capacities. K&K Music Co. was added as a party upon the motion of Champion and Gibson. The Youth Foundation and Sports Complex were dismissed as parties by the trial court. Following a period of discovery, Champion and Gibson filed a motion for summary judgment asserting that they were entitled to qualified official immunity. The trial court denied the motion. This appeal followed.

The sole issue in this appeal is whether the Appellants are entitled to qualified official immunity.

Summary judgment is proper "where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is de novo. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

The doctrine of sovereign immunity provides that one may not sue the government unless "the state has given its consent or otherwise waived its immunity" by statutory provision. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). Counties are protected by sovereign immunity. *Lexington-Fayette Urban County Gov't v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004). By contrast, the doctrine of governmental immunity is derived from sovereign immunity and the

governmental/proprietary function analysis is only applicable to state agencies.

Yanero, 65 S.W.3d at 519. When sovereign immunity extends to public officials who are sued in their individual capacities, it is known as qualified official immunity. *Id.* at 518. In *Rowan County v. Sloats*, 201 S.W.3d 469, 475-76 (Ky. 2006), the Supreme Court of Kentucky set forth the factors to determine whether an individual is entitled to qualified official immunity:

public officers and employees are entitled to “qualified official immunity” for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, that (2) were made in good faith (i.e. were not made in “bad faith”), and (3) were within the scope of the employee's authority. Conversely, no immunity is afforded for the negligent performance or omissions of a ministerial act, or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive, i.e., again the “bad faith” element. And “[o]nce the officer or employee has shown prima facie that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act [was in bad faith].”

(Internal citations omitted). Recently, in *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010), our Supreme Court explained the difference between discretionary and ministerial acts as follows:

Discretionary acts are, generally speaking, “those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of 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. On the other hand, ministerial acts or functions-for which there are no immunity-are those that require “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.”

(Internal citations omitted). In *Yanero, supra*, the Court defined bad faith as:

[B]ad faith can be predicated on a violation of a [causally related] constitutional, statutory, or other clearly established right which a person in a public employee's position presumptively would have known was afforded to a person in the plaintiff's position ... or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

In their complaint, Appellees alleged that Champion and Gibson were negligent by allowing the defective machine to remain in service and encouraging Dylan to use the machine in a defective condition thereby causing his injuries. Gibson, as director of the Sports Complex, has “an affirmative duty to exercise reasonable care to inspect for hazardous conditions.” *Lanier v. Walmart Stores, Inc.*, 99 S.W.3d 431, 433 (Ky. 2003). The Court also stated:

The occupier must not only use care not to injure the visitor by negligent activities, and warn him of hidden dangers known to the occupier, but he must also act reasonably to inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property.

Id. While the duty to reasonably inspect the premises is affirmative, we conclude that under these circumstances, the act of inspection itself is discretionary because

the act is necessarily comprised of personal judgment and deliberation. Gibson testified that he inspected the premises for hazards before the Sports Complex opened and there is no indication that he had any reason to question the stability of the machine or the means to ascertain whether K& K Music Co. had properly installed the machine. Any question regarding his notice of the defective condition of the machine concerned whether the machine was in working order as a token dispenser and not toward the actual latent nature of the hazard, which was that the machine was not properly bolted to the floor. Further, there is no evidence of bad faith on the part of Gibson and his actions were clearly within the scope of his authority.

Appellees also argue that Gibson was negligent in his allegedly undertaken duty to supervise children at the Sports Complex. In *Haney*, 311 S.W.3d at 245, the Court stated that outside of the public school setting, “we have found that supervising the conduct of others is a duty often left to a large degree - and necessarily so - to the independent discretion and judgment of the individual supervisor.”

Appellees further argue in their brief that while the manner of supervision is discretionary, the act of supervision itself is ministerial. However, Appellees failed to allege a complete lack of supervision in their complaint or amended complaint. The complaint alleged that Gibson and others “chose to leave the token machine in service and allowed and encouraged the children to use the machine in a defective condition which the Defendants... possessed actual knowledge of.”

The complaint further alleged that Gibson and others “demonstrated to the children a method of rocking and shaking the token machine to free up a jamming of the mechanism of the token machine thereby resulting in the machine dispensing the appropriate number of tokens.” It is a longstanding rule that judgments must conform to the pleadings. *Williamson v. Romans*, 258 S.W.2d 455, 457 (Ky. 1973). “It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover.” *Id.* at 458. (Internal quotation omitted). The allegations against Gibson only extended to the manner of his supervision, which Appellees concede is discretionary. Therefore, we conclude that Gibson was entitled to qualified official immunity under *Haney, supra*.

Next, the question regarding Champion’s immunity can be briefly disposed of because there is clearly a question of fact regarding whether his actions were taken in the scope of his authority as Deputy County Judge Executive. Champion stated in his deposition that his involvement with the Sports Complex was that of a parent and citizen. He also stated that when he told Dylan not to use the machine he was acting as a parent. These statements contrast with the affidavits claiming that any actions were taken within the scope of his authority. As there is sufficient evidence for the court to find Champion's actions were not taken in the scope of his authority as Deputy County Judge Executive, the trial court properly denied summary judgment on the issue of immunity.

Accordingly, the order of the Knott Circuit Court is affirmed in part,
reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R.W. Dyche, III
London, Kentucky

BRIEF FOR APPELLEE:

Adam P. Collins
Hindman, Kentucky