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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001492-MR

JOHNNY J. SHOUPE — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 10-CI-00995

LISA SIBERT, PRINCIPLE OF BUSH ELEMENTARY SCHOOL, OFFICIALLY AND IN HER INDIVIDUAL CAPACITY; DAVID M. YOUNG, SUPERINTENDENT OF LAUREL COUNTY SCHOOL, OFFICIALLY AND IN HIS INDIVIDUAL CAPACITY; AND UNKNOWN CONTRACTOR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND LAMBERT, D., JUDGES.

CLAYTON, JUDGE: Johnny Shoupe appeals the Laurel Circuit Court's orders granting Lisa Sibert and David Young's motion for summary judgment and

denying Shoupe's motion to alter, amend, or vacate. After careful consideration, we affirm the decision to grant the summary judgment but for a different reason than that of the trial court. We conclude that the appellants were entitled to qualified official immunity, and therefore, not potentially liable for Shoupe's injury after his fall on school property.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 2009, Shoupe went to Bush Elementary School to pick up his son. After entering the school, he realized that he had forgotten his cell phone and went back to his vehicle to retrieve it. As Shoupe stepped off the sidewalk onto the school's parking lot, rather than stepping onto a solid surface, he stepped onto loose gravel. Shoupe injured himself and later underwent surgery. On the day of his injury, the parking lot was being repaved. When the accident occurred, a large area of the old blacktop had been removed, and was filled with gravel. After Shoupe fell, barriers were placed over the area to prevent anyone from walking or parking there.

Shoupe filed a complaint on September 2, 2010, and named as defendants, Lisa Sibert, the principal of Bush Elementary School; David Young, Superintendent of Laurel County Schools; and an unknown contractor. Shoupe sued Sibert and Young in both their official and individual capacities.

During the pendency of the lower court action while Shoupe was receiving medical treatment, the parties worked with an insurance adjuster and attempted to reach a settlement. They, however, were unable to do so. Sibert and

Young then filed a motion to dismiss or in the alternate a motion for summary judgment. Ultimately, the trial court on May 21, 2012, granted Sibert and Young's motion for summary judgment.

In its order granting summary judgment, the trial court determined that Sibert and Young were protected in their official capacity by the doctrine of absolute official immunity. Nevertheless, the trial court decided differently with regard to their liability as individuals. The trial court held that Sibert and Young were not entitled to qualified official immunity.

Once the trial court ascertained that Sibert and Young did not have qualified official immunity, it reasoned that for Shoupe to defeat the summary judgment motion, he had to establish that the defendants acted negligently. The trial court observed that Sibert and Young had a duty to warn invitees of known dangerous conditions on the property. Relying on *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 392 (Ky. 2010), the trial court quoted that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Based on this legal axiom, the trial court opined that *McIntosh* places a heightened duty on a plaintiff (Shoupe) to pay reasonable attention and look out for his or her safety. *Id.*

Hence, notwithstanding a landowner's duty to warn invitees of known dangerous conditions on the property and in light of Shoupe's heightened duty of

awareness, the trial court found that Sibert and Young did not act negligently, and consequently, Shoupe would be unable to produce any evidence that would allow a fact-finder to rule in his favor. Accordingly, the trial court granted Sibert and Young's motion for summary judgment.

On May 31, 2012, Shoupe filed a motion to alter, amend, or vacate the summary judgment. The trial court denied the motion on July 13, 2012. Shoupe now appeals from these orders.

Initially, when the appeal was filed, our Court determined that it was premature because nothing had been resolved regarding the other defendant, an unknown contractor. Subsequently, Shoupe withdrew the claim against the unknown contractor, and the case is now before us.

STANDARD OF REVIEW

Our standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any 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). The trial court 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). And summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. Finally, the moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the

burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). Because summary judgments involve no fact-finding, we review the trial court's decision *de novo*. *3D Enterprises Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005).

ANALYSIS

On appeal, Shoupe argues that summary judgment was premature because discovery had not begun; issues of material fact existed; and, the trial court erred in finding that Sibert and Young did not act negligently. Further, Shoupe contends that, specifically with reference to Shoupe's slip and fall, the area where he fell was not "open and obvious," and further, the duty to warn is not obviated even when the danger is alleged to be "open and obvious."

Sibert and Young respond that in their official capacity, they are entitled to the same governmental immunity as the Laurel County Board of Education. Moreover, they contend that they are also protected by qualified official immunity in their individual capacity. Additionally, Sibert and Young argue that the area where Shoupe fell was an "open and obvious" condition, and as such, they did not have a duty to warn. We begin our analysis with a discussion of sovereign immunity.

The Commonwealth of Kentucky has sovereign immunity from actions for its torts. No one can sue the state unless the state consents to be sued.

Beshear v. Haydon Bridge Company, Inc., 416 S.W.3d 280 (Ky. 2013). Because a school board is an arm of the state, it is covered by sovereign immunity. *Clevinger v. Board of Educ. of Pike County*, 789 S.W.2d 5, 10 (Ky. 1990).

Here, the Laurel County Board of Education was not named a party in this action. Under Kentucky Revised Statutes (KRS) 160.290, a local school board has control of all school property. Clearly, a school parking lot is classified as school property. Nothing in the record indicates that the school board delegated control of the school property over to the principal and or superintendent. Thus, it was the authority of the school board that permitted the paving of the parking lot on that day.

Although school boards and their employees do not actually have sovereign immunity, as agencies of the state, under the law they enjoy governmental immunity. *James v. Wilson*, 95 S.W.3d 875, 903 (Ky. App. 2002). The Kentucky Supreme court explained that "'[g]overnmental immunity' is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency." *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001), *quoting* 57 Am.Jur.2d, *Municipal, County, School and State Tort Liability*, § 10 (2001). And state agencies are entitled to governmental immunity in the performance of governmental functions. *Id*.

Moreover, individuals who are sued in their official capacities as government employees are also entitled to governmental immunity. *Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007). Therefore, Sibert and

Young, in their official capacity, are protected from liability by governmental immunity.

Shoupe also sued Sibert and Young in their individual capacities. The trial court judge held that in their individual capacities, they were not entitled to qualified official immunity. We disagree. "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. *Yanero, supra* at 521. As noted above, official immunity can be absolute. For example, when an officer or employee of the state is sued in his/her representative capacity, then his/her actions are included under the umbrella of sovereign immunity or when an officer or employee of a governmental agency is sued in his/her representative capacity, the actions of the officer or employee are afforded the same immunity for which the agency itself is afforded. *Yanero, supra* at 521-522.

But when sued, an officer or employee is sued in his/her individual capacity, he/she is only entitled to qualified official immunity. Qualified official immunity affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. *Id*. Further, qualified official immunity applies to the negligent performance by a public officer or employee of discretionary acts or functions, but not to the performance of ministerial acts. *Id.*

The distinction between a discretionary act and a ministerial act is pivotal to the immunity determination. Public officers and employees are shielded from liability for the negligent performance of discretionary acts in good faith and

within the scope of their authority. *Id*. A discretionary act involves the exercise of discretion and judgment or personal deliberation. *Id*. In contrast, a ministerial act is an act that requires only obedience to the orders of others and/or a duty that is absolute, certain, and involves the execution of a specific act arising from fixed and designated facts. *Jenkins Independent Schools v. Doe*, 379 S.W.3d 808, 812 (Ky. App. 2012). Significantly, 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. *Mucker v. Brown,*---S.W.3d---, 2013 WL 2450491, 2 (Ky. App. 2013)(discretionary review granted). Because "few acts are purely discretionary or purely ministerial," the courts must look for the "dominant nature of the act." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

Turning to the facts herein, we observe that within the purview of qualified official immunity, public officers and employees are shielded from liability for the negligent performance of discretionary acts which are performed in good faith and within the scope of the officer's authority. Sibert, as principal of Bush Elementary, and Young, as superintendent of the Laurel County Schools, acted within the scope of their authority and in good faith in overseeing the maintenance of school property. Given that a discretionary act involves the exercise of personal judgment and that no specific statute or directive existed to direct the supervision of the parking lot's repaving, we conclude that Sibert and Young's actions were discretionary, and as such, entitled to qualified official

immunity. Thus, even if the actions of Sibert and Young were negligent, their actions are protected by qualified official immunity and not subject to suit.

Our decision is contrary to the trial court's reasoning that since Sibert and Young had the authority to make decisions to update the parking lot on the school's property, their actions were not discretionary. Sibert and Young were responsible for overseeing and facilitating the upgrade of the Bush Elementary School parking lot. This oversight encompasses acts that fall with the definition of discretionary acts. In addition, no statute or specific directive governed their actions in supervising the maintenance of the property, and thus, the school officials' actions could not be classified as ministerial.

Because qualified official immunity protects school officers from liability for possible negligence, summary judgment is appropriate. Shoupe cannot establish any genuine issues as to any material fact, and consequently, Sibert and Young are entitled to judgment as a matter of law.

With regard to the efficacy of Shoupe's claim of liability for Sibert and Young's failure to warn him as an invitee of an open and obvious danger, the issue is moot since the school officers are protected by qualified official immunity. We, however, observe that the trial court found that they did not act negligently. The standard on summary judgment is whether a genuine issue of material fact exists. A trial court at this juncture does not make findings but instead evaluates whether any issue exists to allow a case to proceed before a fact-finder, that is, a jury or a judge, to make a determination. Additionally, we point out that a recent

Kentucky Supreme Court case, *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), is highly relevant to the correct evaluation of whether "slip and fall" cases involving "open and obvious" dangers to invitees of landowners allow for summary judgment. A consideration of this case is paramount to the grant of summary judgment in cases implicating these factors.

Lastly, with regard to Shoupe's argument that summary judgment was premature because no discovery had been conducted, since the actions of the school employees were protected by qualified official immunity, this argument is without merit. Shoupe also alleged that the trial court erred because it only "reviewed" the motion to alter, amend, or vacate. Besides providing no statutory or case law authority for this proposition, a trial court is not obligated to explicate every decision it makes. The trial court's order stating that it reviewed the motion and the response is sufficient.

CONCLUSION

Although the trial court did not err in granting summary judgment in this case, we affirm the decision because Sibert and Young are entitled to official and qualified official immunity. Thus, there are no genuine issues as to any material fact and they are entitled to judgment as a matter of law. The decision of the Laurel Circuit Court is affirmed.

LAMBERT, D., JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

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BRIEF FOR APPELLEES LISA SIBERT AND DAVID M. YOUNG:

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