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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002131-MR

ANGELA MCCOY; MARSHA SUMMITT;
AVA DOUGLAS; BILLIE FAULKNER;
BRIAN WILSON; DEANA ROY;
GAIL CONNELL; KIMBERLY JESSIE;
LESLIE HUGHES AND BECKY KAELIN APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCCAY CHAUVIN, JUDGE
ACTION NO. 12-CI-003584

LAVERNE BEASLEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Laverne Beasley filed this action after she slipped and fell on a floor at the Bowman Field branch of the Jefferson Circuit Court Clerk's Driver's Licensing Office. The appellants, Angela McCoy, Marsha Summit, Ava

Douglas, Billie Faulkner, Brian Wilson, Deana Roy, Gail Connell, Kimberly Jessie and Leslie Hughes, were employed as deputy circuit clerks and working on the date of Laverne's fall. Appellant, Becky Kaelin, was the chief deputy of drivers' licensing.[1]

On July 10, 2011, Purvis Professional Cleaning Services Inc. applied wax to the floors of the Bowman Field office. In her complaint, Laverne alleges that on July 11, 2011, the air conditioning units at the office malfunctioned and, as a result of wax on the floor, the malfunctioning air conditioning units, or both, the floors became slick causing her to slip and fall. She alleges the appellants were aware of the dangerous condition, failed to correct the dangerous condition, warn of the condition or close the area to the public. The complaint sought damages against the appellants, jointly and severally.

Pursuant to Kentucky Rules of Civil Procedure (CR) 12, the appellants filed a motion to dismiss based on failure to state a claim upon which relief can be granted arguing they did not have a duty to maintain the premises. Additionally, they asserted absolute immunity in their official capacities and qualified official immunity in their individual capacities. Finally, the appellants argued to the extent Laverne asserted claims against them for negligence committed during the course of their employment, she must seek relief in the

[1] Elizabeth Braden, a deputy circuit clerk, was also named as a defendant. However, Laverne had no objection to her dismissal as a party after it was known she was not present at Bowman Field on the date of Laverne's fall. The complaint was amended and Purvis Professional Cleaning Services, Inc. and Kenneth Cooke were also named as defendants. Neither is a party to this appeal.

Board of Claims. Laverne responded that although the appellants did not own the premises, they could be liable for the dangerous condition of the premises. Regarding immunity and the contention she was required to file her action in the Board of Claims, Laverne argued because the appellants were not named in their official capacity, all were entitled to only qualified official immunity, an issue not properly considered on a motion to dismiss.

The circuit court denied the motion but emphasized its ruling was subject to further review. Specifically, it stated:

> The issues raised by the [appellants] in the instant motion are compelling. Accordingly, the Court very much appreciates their desire to see this matter disposed of as soon as practicable[.] Be that as it may, the Court is unable, or at least unwilling, at this time to find that it would not be *possible* for Ms. Beasley to prevail on her claims against the Defendants who were on site on the day of the incident. In so doing, the court remains cognizant of the significant factual and legal impediments she must overcome in order to do so and anticipates revisiting these issues by way of motion for summary judgment at the appropriate time.

The circuit court denied the appellants' motion for additional findings filed pursuant to CR 52.01 and CR 52.02, again stating it anticipated revisiting the issues presented on a motion for summary judgment.

As a threshold matter, we consider whether the appellants have appealed from a final order. Generally, an order denying a motion to dismiss is interlocutory and not appealable. *Transportation Cabinet Bureau of Highways v. Leneave*, 751 S.W.2d 36, 37 (Ky.App. 1988). However, in *Breathitt County Bd. of*

Educ. v. Prater, 292 S.W.3d 883, 884 (Ky. 2009), our Supreme Court was presented with an "opportunity to address whether Kentucky's appellate courts have jurisdiction to consider an appeal from an interlocutory order denying a motion to dismiss or motion for summary judgment premised on the movant's claim of absolute immunity." Holding such orders are appealable, the Court explained the reason for the exception to the requirement that an order appealed finally adjudicated the rights of the parties.

> [U]nlike other defenses, immunity is meant to shield its possessor not simply from liability but from the costs and burdens of litigation as well. An order denying a substantial claim of immunity is not meaningfully reviewable, therefore, at the close of litigation, and that fact leads us to conclude, as has the Supreme Court of the United States, that an interlocutory appeal is necessary in such cases notwithstanding the general rule limiting appellate jurisdiction to 'final' judgments.

Id. at 888. Because immunity protects a defendant from the burdens of discovery, like a denial of a motion for summary judgment based on immunity, interlocutory orders denying motions to dismiss based on immunity are immediately appealable. *South Woodford Water Dist. v. Byrd,* 352 S.W.3d 340, 342 (Ky.App. 2011).

Under the appropriate standard when reviewing a motion to dismiss, the pleading must be construed in a light most favorable to plaintiff and all allegations taken as true. *Mims v. Western–Southern Agency, Inc.,* 226 S.W.3d 833, 835 (Ky.App. 2007). A motion to dismiss should not be granted "unless it appears the pleading party would not be entitled to relief under any set of facts which could be

proved[.]" *Fox v. Grayson,* 317 S.W.3d 1, 7 (Ky. 2010). Our Supreme Court noted it is an "exacting standard of review" and "the question is purely a matter of law." *Id*. Consequently, our standard of review is *de novo*. *Id*.

Sovereign immunity "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." *Yanero v. Davis,* 65 S.W.3d 510, 517 (Ky. 2001). "The immunity that an agency enjoys is extended to the official acts of its officers and employees…. However, when such officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity." *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007). Thus, any claims against the appellants in their official capacity would be subject to dismissal based on absolute immunity. In this appeal, the appellants are claiming qualified immunity and, therefore, we turn our attention to that claim alone.

Public officers and employees are shielded from liability for the negligent performance of discretionary acts in good faith and within the scope of the employee's authority. *Yanero*, 65 S.W.3d at 522. The distinction between a discretionary act and a ministerial act is pivotal to the immunity determination. A discretionary act involves the exercise of discretion and judgment or personal deliberation. *Id*. A ministerial act is one that is "absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* "That a necessity may exist for the ascertainment of those facts does

not operate to convert the act into one discretionary in nature." *Id*. (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959). 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)

The determination whether an act is discretionary or ministerial in nature is a fact-intensive inquiry that cannot be readily resolved on the pleadings. Although we are unwilling to say dismissal pursuant to CR 12 based on qualified immunity would never be appropriate, in this case, the trial court properly denied the appellant's motion to dismiss until Laverne had an opportunity to conduct discovery on the issue. It is not impossible that one, some, or all the appellants had an "absolute, certain and imperative" duty to maintain the drivers' license branch premises and, therefore, not entitled to qualified immunity. *Yanero*, 65 S.W.3d at 522. Because no discovery was conducted, the lower court was unable to analyze whether the alleged negligent acts were discretionary or ministerial in nature. We agree with the trial court Laverne should be provided the opportunity for discovery on the limited issue of qualified official immunity after which, the trial court may consider any motions for summary judgment filed on the basis of immunity.

On appeal, the appellants argue alternative theories to their immunity claim contending that under the law of premises liability, they did not have a duty to maintain the premises and, as a matter of law, did not act negligently or unreasonably. The appellants' alternative arguments go beyond the immunity exception to the prohibition against hearing interlocutory appeals and made in an

attempt to have this Court decide issues not properly presented. Consequently, our decision is limited only to the qualified immunity issue.

We affirm the Jefferson Circuit Court's order denying the appellants CR 12 motion to dismiss based on qualified official immunity until a reasonable opportunity is allowed for discovery. As indicated by the trial court, at that time any motions for summary judgment may be properly considered.

ALL CONCUR.

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