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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000773-MR

JAMES W. BEWARD AND
GARY EMBERTON — APPELLANTS

ON REMAND FROM THE SUPREME COURT OF KENTUCKY

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-01410

CODY WHITAKER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND STUMBO, JUDGES.

J. LAMBERT, JUDGE: James W. Beward and Gary Emberton, former Bullitt Central High School principals, have appealed from the April 4, 2013, summary judgment of the Bullitt Circuit Court ruling that they were not entitled to qualified

official immunity for injuries student Cody Whitaker sustained in an unsupervised hallway prior to the start of the school day. The circuit court held that the school's 2008 Spring Student Supervision Schedule gave Beward and Emberton ministerial duties to supervise the Freshman Hall End station in the absence of the person assigned to supervise that station. This Court affirmed the circuit court's summary judgment in an opinion rendered January 23, 2013. Beward and Emberton sought discretionary review from the Supreme Court of Kentucky, which granted discretionary review, vacated this Court's decision, and remanded for further consideration in light of *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014). Having now reconsidered the original opinion as well as reviewed the parties' supplemental briefs, we hold that Beward and Emberton were entitled to qualified official immunity. Therefore, we reverse the circuit court's interlocutory ruling.

On February 7, 2008, Bullitt Central freshman student Cody Whitaker was injured in the school hallway just prior to the beginning of his first class by fellow student Joseph Seay. Seay put Whitaker into a chokehold until he passed out. Seay let go of Whitaker, and he fell to the ground, hitting his head on the floor and incurring severe head trauma. No teachers or administrators were in the hallway at that time to supervise the students.

At the time of the attack, Bullitt Central had in place a Code of Student Behavior and Discipline pursuant to Kentucky Revised Statutes (KRS) 158.148(4).[1] The Introduction states:

[1] KRS 158.148 provides in relevant part:

The Bullitt County Board of Education requires high standards of personal conduct from each student to promote respect for the rights of others and to accomplish the purposes of the schools. The Board also requires compliance with established standards and rules of the district and the laws of the community, state and nation.

The central purpose of the school system is to educate each student to the highest level possible. To support the success of the educational program, the Board directs employees to hold each student accountable to the Code standards in a fair manner: Compliance with the **standards is necessary to provide**:

* Orderly operation of the schools[,]
* A safe environment for students, district employees and visitors to the schools,
* Opportunities for students to achieve at a high academic level in a productive learning environment,
* Assistance for students at risk of failure or of engaging in disruptive behavior,
* Regular attendance of students,
* Protection of property.

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(4) Each local board of education shall be responsible for formulating a code of acceptable behavior and discipline to apply to the students in each school operated by the board. The code shall be updated no less frequently than every two (2) years, with the first update being completed by November 30, 2008.

(a) The superintendent, or designee, shall be responsible for overall implementation and supervision, and each school principal shall be responsible for administration and implementation within each school. Each school council shall select and implement the appropriate discipline and classroom management techniques necessary to carry out the code. The board shall establish a process for a two-way communication system for teachers and other employees to notify a principal, supervisor, or other administrator of an existing emergency.

> This code applies to all students in the District while at school, on their way to and from school, while on the bus or other District vehicle, and while they are participating in school-sponsored trips and activities. The Superintendent/designee is responsible for its implementation and application throughout the District. The Principal is responsible for administration and implementation of this Code within his/her school in a uniform and fair manner without partiality or discrimination. Each school/council must select and implement appropriate discipline and classroom management techniques necessary to carry out this Code and shall provide a list of the school's rules and discipline procedures in the school handbook. Teachers and other instructional personnel are responsible for administering Code standards in the classroom, halls, and other duty assignment locations. [Emphasis in original.][2]

Rule 09.426 provided that "[b]ehavior that materially or substantially disrupts the educational process, whether on school property or at school-sponsored events and activities, shall not be tolerated and shall subject the offending pupil to appropriate disciplinary action." In addition, the Code expressed a zero tolerance policy:

> The Bullitt County Public School District is committed to providing a safe and secure learning environment for all students and staff. In order to achieve this environment, the District has established a zero-tolerance approach that assures parents and communities that schools will strive to be free of alcohol and other illicit drugs, free of firearms and other deadly weapons, assaultive behavior, free of vandalism and theft.
>
> As part of this concept, there will be fair and progressive discipline, early prevention programs, violence

[2] The Code was promulgated in compliance with KRS 161.180(1), which provides that, "[e]ach teacher and administrator in the public schools shall in accordance with the rules, regulations, and bylaws of the board of education made and adopted pursuant to KRS 160.290 for the conduct of pupils, hold pupils to a strict account for their conduct on school premises, on the way to and from school, and on school sponsored trips and activities."

> prevention/conflict resolution programs, ongoing programs that will reinforce these ideas, opportunities for staff development, crisis prevention, and early intervention and referral services.
>
> This approach provides a fair and equitable means of achieving a safe, disciplined, and drug-free learning environment.

In relation to implementing the Code, Bullitt Central adopted a 2008 Spring Student Supervision Schedule, in which teachers and administrators were assigned specific locations to supervise throughout the school day. Teacher Joshua Durham was assigned to supervise and monitor the Freshman Hall End from 7:05 to 7:20 each morning. Mr. Durham was not present at school on the day of the attack, and no other teacher or administrative staff member had taken his assigned place. Other members of the administrative staff, including Beward and Emberton, as well as all available teachers, were assigned to hall sweeps during that same time period every day.

On October 28, 2008, Whitaker, through his conservator, Donald Cundiff, filed a complaint alleging causes of action for negligence and for negligent supervision, training, and control, as a result of injuries he sustained in the attack.[3] As defendants, he named Keith Davis, the Superintendent of the Bullitt County Board of Education, Principal Beward, Assistant Principal Emberton, and several other teachers and administrators, in both their official and individual capacities. Whitaker alleged that the named defendants failed to meet their duty to

[3] By order entered December 8, 2011, Whitaker was substituted as the plaintiff because he had reached the age of eighteen.

keep the students safe, monitor the hallways, and maintain control of the students at the time he was attacked and therefore breached their duty of care to him. He alleged that the defendants knew or should have known of the previous bullying and violent behavior of the student who attacked him. In addition, Whitaker alleged that Davis, Beward, Emberton, and the other assistant principals named in the complaint failed to meet their duty to train, supervise, and control Bullitt Central's teachers and that this failure was a substantial factor in causing his injuries. Davis and the other defendants, excluding Beward and Emberton, filed an answer stating that they were entitled to qualified official immunity, governmental immunity, sovereign immunity, or official immunity for their actions pursuant to § 231 of the Kentucky Constitution.[4] In their separate answer, Beward and Emberton similarly claimed that Whitaker's claims were barred against them by various immunities.

Whitaker moved for leave to file a first amended complaint in early 2011, seeking to add three defendants in both their official and individual capacities: assistant principals Laura Allgeier and Andrew Pohlman, and teacher Joshua Durham. The court granted the motion, and the amended complaint was filed on February 14, 2011.

Beward and Emberton filed a motion for summary judgment on September 25, 2012, arguing that they were entitled to absolute governmental

[4] Defendants Stephanie Lewis and Roger Hayes were dismissed by order entered September 13, 2010, on Whitaker's motion. Defendants Davis, Angela Cunningham, and Angela Moore were also dismissed on Whitaker's motion on November 19, 2012.

immunity in their official capacities and to qualified official immunity in their individual capacities. Related to their qualified official immunity argument, they argued that their duties to supervise were discretionary, not ministerial, and as such they were entitled to immunity. In his response, Whitaker conceded that Beward and Emberton were entitled to immunity in their official capacities, but objected to their claim that they were entitled to qualified official immunity because their actions in failing to supervise the students and failing to enforce the Code and the Student Supervision Schedule were ministerial.

On April 4, 2013, the circuit court entered an order ruling on Beward and Emberton's motion for summary judgment. While the court agreed that they were entitled to governmental immunity in their official capacities, the court held that Beward and Emberton were not entitled to qualified official immunity in their individual capacities, determining that their failure to enforce the Code and the Student Supervision Schedule was ministerial. These were "rules which required supervision of students to prevent student behavior that harmed other students and which put in place a supervision schedule for specific location and times. The Court notes that promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function." The Court stated that the performance of their duty to exercise the degree of care that ordinarily prudent school administrators, engaged in the supervision of students, would exercise under similar circumstances, was ministerial, not discretionary, "because it involved only the enforcement of (a) a known rule requiring students not to behave in a manner

that could harm other students and (b) a known supervision schedule[.]" In support of its holding, the circuit court cited *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003), among other cases. The court permitted the case to proceed for a factual determination of whether Beward and Emberton were negligent in the performance of their ministerial duties. This interlocutory appeal, taken by Beward and Emberton pursuant to *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), now follows.

On appeal, Beward and Emberton argue that the circuit court erred in failing to afford them qualified official immunity because their duties and actions were discretionary, performed in good faith, and within the scope of their official duties for the Bullitt County Board of Education. Whitaker disputes this claim, arguing that the enforcement of the rules was a ministerial function.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for 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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); Kentucky Rules of Civil Procedure 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer

to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). With this standard in mind, we shall review the judgment on appeal. There are no disputed issues of material fact related to whether Beward and Emberton were entitled to immunity in this action, and therefore we shall review the circuit court's ruling of law *de novo*.[5]

The Supreme Court's opinion in *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), is the seminal case on sovereign immunity in the Commonwealth. On the issue of official immunity, the Court instructs:

> "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. *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989). 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 as discussed in Part I of this opinion, *supra*. Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled, as discussed in Part II of this opinion, *supra*. But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from

[5] We do not agree with Whitaker that the circuit court found that there were any disputed issues of material fact related to the immunity issue on page 7 of its order. Rather, the court was suggesting that there were issues of fact relating to whether Beward and Emberton were negligent in failing to follow procedures that might have prevented the incident from occurring.

> damages liability for good faith judgment calls made in a legally uncertain environment. 63C Am.Jur.2d, *Public Officers and Employees*, § 309 (1997). 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, *id.* § 322; (2) in good faith; and (3) within the scope of the employee's authority. *Id*. § 309; Restatement (Second) Torts, *supra*, § 895D cmt. g. 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. *Franklin County v. Malone*, *supra*, at 201 (quoting *Upchurch v. Clinton County*, Ky., 330 S.W.2d 428, 430 (1959)). Qualified official immunity is an affirmative defense that must be specifically pled. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).
>
> 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. *Franklin County v. Malone*, *supra*, at 201. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." *Upchurch v. Clinton County*, *supra*, at 430. *See also* Restatement (Second) Torts, *supra*, § 895D cmt. h; 63C Am.Jur.2d, *Public Officers and Employees*, §§ 324, 325 (1997).

Yanero, 65 S.W.3d at 521-22. "Ultimately, however, once the material facts are resolved, whether a particular defendant is protected by official immunity is a question of law, *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 825 (Ky. 2004), which we review *de novo*. *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003)." *Rowan County v. Sloas*, 201

S.W.3d 469, 475 (Ky. 2006). There is no dispute that Beward and Emberton were acting in good faith and within the scope of their duties. Therefore, the only issue to decide is whether the act of supervision was discretionary or ministerial under the circumstances of this case. We hold that Beward's and Emberton's actions were discretionary, and thus we disagree with the circuit court and hold that they were entitled to qualified immunity in their individual capacities.

Beward and Emberton cite several reported and unreported cases in support of their position. In *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011), the Supreme Court of Kentucky extensively reviewed the qualified official immunity doctrine. Turner was a kindergarten teacher in the Fayette County school system who was sued by the parent of one of her five-year-old students. The student had allegedly been sexually abused by another student in the classroom. Nelson claimed that Turner failed to exercise ordinary care to supervise her students or report the assault to law enforcement officials. The Supreme Court detailed Turner's actions related to the incident, including separating the students and explaining that the behavior was inappropriate, among other actions. The Court ultimately held as follows:

> Relying upon our rationale in *Stratton* and *Haney*, we consider Turner's actions in supervising the children to have been discretionary. While there may be legitimate disagreement as to the approach taken by Turner, the consequences of liability under such circumstances would injuriously "deter independent action and impair the effective performance of [teaching] duties." *Id*. at 245.

> It is imperative that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom. To do this, they must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions (based on facts not always known) as to what actually happened, and ultimately to determine an appropriate course of action, which may, at times, involve reporting the conduct of a child to the appropriate authorities. In fact, protection of the discretionary powers of our public officials and employees, exercised in good faith, is the very foundation of our doctrine of "qualified official immunity."

Id. at 876.

Whitaker also relies upon several reported and nonreported cases to support his position. In particular, Whitaker cites to *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997), *overruled on other grounds by Commonwealth v. Harris*, 59 S.W.3d 896 (Ky. 2001), and *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), as did Beward and Emberton, for this proposition: "The adoption of rules providing for the proper treatment of prisoners is a discretionary policy determination and thus a discretionary function." Here, Whitaker contends that while the enactment of the Student Supervision Schedule was discretionary, its enforcement was ministerial, and its enforcement would necessarily include knowledge of a teacher's absence.

In our original opinion, we agreed with Whitaker that Beward and Emberton were engaged in ministerial actions in enforcing the Code via the Student Supervision Schedule. We held that enforcement of the Student

Supervision Schedule did not require either Beward or Emberton to use discretion; they were tasked with enforcing the schedule, a ministerial function, and they failed to do so. We further held that this was not a matter such as in *Turner*, *supra*, or *Brown v. S.F.*, No. 2011-CA-001898-MR (2013 WL 1697766) (Ky. App. April 19, 2013), which addressed the means of supervision as opposed to a failure to supervise. Accordingly, we held that the circuit court had not erred as a matter of law in concluding that Beward and Emberton were not protected by qualified official immunity in their individual capacities and in denying their motion for summary judgment.

We shall now reconsider our original holding in light of *Marson v. Thomason*, *supra*. In *Marson*, the Supreme Court reviewed this Court's holding that school principals and a teacher "were not entitled to qualified governmental immunity in their individual capacities because the alleged negligence (failing to ensure the bleachers were properly extended, and inadequate supervision) consisted of a fixed, routine duty and were therefore ministerial in nature." *Marson*, 438 S.W.3d at 296. More specifically, both this Court and the trial court "found that the negligent acts or omissions in this case were failing to properly extend the bleachers to the proper length to be safe for use by the students, and failing to provide adequate supervision of the students as they arrived and were held in the gym before school started." *Id*. The Supreme Court ultimately concluded that the acts of the principals were discretionary, and thus they were

entitled to qualified immunity, while the acts of the teacher were ministerial. *Id*. at 300, 301.

In its analysis, the Court discussed the difference between discretionary and ministerial acts. Discussing ministerial acts, to which no immunity applies, the Court explained:

> At its most basic, a ministerial act is "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*. at 522. "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)). And an act is not necessarily outside the ministerial realm "just because the officer performing it has some discretion with respect to the means or method to be employed." *Id*; *see also* 63C Am.Jur.2d *Public Officers and Employees* § 319 (updated through Feb. 2014) ("Even a ministerial act requires some discretion in its performance."). In reality, a ministerial act or function is one that the government employee must do "without regard to his or her own judgment or opinion concerning the propriety of the act to be performed." 63C Am.Jur.2d *Public Officers and Employees* § 318 (updated through Feb. 2014). In other words, if the employee has no choice but to do the act, it is ministerial.

Id. at 297.

Turning to discretionary acts, to which immunity does apply, the Court described such an act as "one calling for a 'good faith judgment call[ ] made in a legally uncertain environment.' *Yanero*, 65 S.W.3d at 522. It is an act 'involving the exercise of discretion and judgment, or personal deliberation,

decision, and judgment.' *Id*." *Id*. The Court went on to recognize that "at their core, discretionary acts are those involving quasi-judicial or policy-making decisions[,]" *id*., and encompass "'the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level.' 63C Am.Jur.2d *Public Officers and Employees* § 318 (updated through Feb. 2014). The operational level, of course, is not direct service or 'ground' level." *Id*. Finally, the Court stated:

> [A] ministerial act is a direct and mandatory act, and if it is properly performed there simply is no tort. But if such an act is omitted, or performed negligently, then that governmental employee has *no* immunity, and can be sued individually for his failure to act, or negligence in acting that causes harm. Of course, whether a ministerial act was performed properly, i.e., non-negligently, is a separate question from whether the act is ministerial, and is usually reserved for a jury. Qualified immunity applies only to discretionary acts. And that immunity is more than just a defense; it alleviates the employee's or officer's need even to defend the suit, which is to be dismissed. [Emphasis in original.]

Id. at 297-98.

After clarifying the law related to whether an act is discretionary or ministerial in nature, the Court applied that law to the facts of the case before it. Based on those facts, the Court concluded that "extending the bleachers was a routine duty, regularly performed by the custodian on duty, and is thus ministerial in nature to the person charged with that job." *Id*. at 298. However, the question of whether the custodian was liable or immune was not before the Court. Rather, the Court was considering whether the principals and the teacher had any liability

or were immune. Analyzing the role of Principal Martin, who served as the principle of the middle school the injured student attended, the Court observed:

> Principal Martin herself never performed the specific task of pulling out the bleachers. As a principal, she is hired to administer the running of the school, not to personally perform each and every task that must be done in the course of a day. One of her tasks is to direct various school employees in their job performance by assigning job duties and to generally supervise them. She testified that she did so in regard to getting the gym prepared for the students in the mornings. The acts required by her job do not include actually performing tasks that she has assigned to others. Nor is she required to follow behind the custodians every time they extend the bleachers to see that the bleachers are properly extended, even though she has general supervision duties. That is the kind of job detail a supervisor cannot be responsible for.
>
> There is a qualitative difference in actually extending the bleachers and assigning someone to fulfill that task. Actually extending the bleachers is a certain and required task for the custodians to whom the task is assigned, and is thus ministerial to them. It is not a task that is assigned to the principals, and is not a ministerial task as to them. Principals do have a duty to provide a safe school environment, but they are not insurers of children's safety. They must only be reasonably diligent in this task. Because that task is so situation specific, and because it requires judgment rather than a fixed, routine performance, looking out for children's safety is a discretionary function for a principal, exercised most often by establishing and implementing safety policies and procedures.
>
> Martin's responsibility to look out for the students' safety was a general rather than a specific duty, requiring her to act in a discretionary manner by devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees. Her actions were at least at an operational level, if not a

> policy- or rule-setting level. Indeed, the principal ordered the custodians to prepare the gym and the teachers to watch the children and to move them around as needed in the morning.
>
> As a principal, she did not have the specific duty to extend the bleachers properly, nor did she choose to undertake that duty. Indeed, principals are not generally required to do maintenance duties, although specific instructions could make such duties required and thus ministerial. *Whitt v. Reed*, 239 S.W.2d 489 (Ky. 1951). Instead, Martin assigned the specific duty to prepare the gym to the custodians by requiring them to get the gym ready for students. She had no specific duty to do a daily inspection of the bleachers to see if they were properly extended, but only a duty to reasonably determine if the custodians were doing their jobs. What is required by the job assigned to the governmental employee defines the nature of the acts the employee performs.
>
> Similarly, she assigned teachers to direct and lead students getting off the buses before school. This too was discretionary decision-making at an operational level. There is no proof that Martin herself ever undertook to direct children coming off the buses or to lead them to the gym.
>
> Martin's oversight and direction of the morning bus routine was a matter of her discretionary decision-making, not a specific directive from the school board. As such, she had to evaluate and exercise discretion in determining how that job was to be done. She assigned the specific duty of preparing the gym to the custodians, and the duty of coordinating the children's movement from the buses into the school and ultimately to the gym to the teachers on duty. Her general responsibility for students' safety was discretionary. She is therefore entitled to qualified official immunity.

Id. at 299-300 (footnote omitted). Similarly, the high school principal, Marson, had a "general duty to look out for the safety of the students" that, like Martin's

duty, was discretionary in nature, also entitling him to qualified official immunity. *Id*. at 300.

With regard to the teacher assigned to bus duty that morning, the Court found his duty to be ministerial:

> What Hamilton has described is a set, specific routine for coordinating the children and looking out for their safety that he was specifically assigned to follow on the day in question. While the rules may not have been written down, it was clear that there was a standard procedure, similar to the unwritten rule in *Yanero*. Hamilton was given a specific task to do bus duty, which included looking out for safety issues and taking the routine steps that were the established practice for bus duty at that school. As such, his job required him to perform specific acts that were not discretionary in nature. Indeed, this Court has repeatedly stated that a teacher's duty to supervise students is ministerial, as it requires enforcement of known rules. On that morning, the governmental act Hamilton was required to do was to perform bus duty in the established and routine manner. This was a ministerial function.

Id. at 301 (internal citations omitted). Therefore, "[e]ven though this ministerial act might permit some decision-making during the process," the teacher was not entitled to qualified immunity and could be sued individually. *Id*. The Court stressed that it is "[t]he nature of the *acts* performed by the teacher, or any governmental employee, determines whether they are discretionary or ministerial." *Id*. at 302 (emphasis in original).

> Immunity is reserved for those governmental acts that are not prescribed, but are done, such as policy-making or operational decisionmaking, without clear directive. The responsibility for such acts rests on the individual who has made a decision to act based on his

> judgment, without established routine, or someone else in the process to allow burden-shifting. For this reason, and to ensure that governmental officials will exercise discretion when needed, our law allows qualified immunity from suit on the performance of discretionary acts. This is a policy decision that has long been the law of the Commonwealth.

Id. As applied to the teacher assigned to bus duty, the Court concluded:

> Here any liability for Hamilton must stem from his assigned responsibilities, which included coordinating the children's movements and looking out for their safety. That activity was within his assigned job and is ministerial in nature. Other acts, such as looking into the gym ahead of the children and possibly going before them in the event there was an unsafe condition that would require sending them back to the cafeteria are also ministerial, at least from the perspective of the act, since it is clear when looking at those acts that they are part and parcel of looking out for children under these circumstances. Whether his omission in this regard was unreasonable (and therefore negligent) cannot be determined as a matter of law, at least not on this record, and must instead be remanded to the trial court.
>
> If we do not focus on the act, we risk limiting ministerial acts to almost nothing except those acts that are directly compelled by an order or rule. In so doing, we would undermine the rule that an act can be ministerial even though it has a component of discretion.

Id.

Turning to the present case, the crux of Beward and Emberton's argument is that the Student Supervision Schedule did not include any direction or rule to address when a teacher or administrator assigned to a post was absent. Therefore, they contend that the Student Supervision Schedule did not create a ministerial duty to ensure that the station was manned in the absence of a teacher

and that it was left to their discretion as to how to proceed in such instances, entitling them to qualified immunity. Whitaker contends that the holding in *Marson* should not change this Court's original holding because the facts presented in this case concern a failure to supervise and whether Beward and Emberton were negligent in the performance of their ministerial duty to supervise was a question of fact for the jury to decide. We disagree with Whitaker's argument, and based upon the Supreme Court's holding in *Marson*, we now hold that Beward and Emberton were entitled to qualified official immunity in this case.

Like the principals in *Marson*, Beward and Emberton had the general duty of ensuring the safety of the students and staff, but not the specific task to ensure that each position of the Student Supervision Schedule was filled by the assigned teacher or administrator in case of an absence; the Student Supervision Schedule was silent on this matter. Similar to Principal Martin in *Marson*, who had assigned the duty to prepare the gym, but did not have or take on the specific duty to properly extend the bleachers, Beward and Emberton were performing their general supervisory duties by making the hallway assignments and walking the school's hallways as part of their job requirements. Whitaker's specific argument that Beward and Emberton had the duty to ensure that someone was supervising the Freshman Hall End station must fail because the method to fill an absent teacher's station was not contemplated in the Student Supervision Schedule. This cannot be considered a routine, ministerial matter, and Beward and Emberton would necessarily have been required to use their discretion to address this

situation because the Student Supervision Schedule did not include a clear directive for the particular situation faced that day. Whitaker's argument in his supplemental brief that Beward and Emberton are not entitled to immunity because they took on the task to personally oversee, or "sweep," the hallways also must fail. As Beward and Emberton argue in their supplemental brief, this did not change the fact that they had delegated the station where the attack occurred to another teacher. Accordingly, we hold that the circuit court erred as a matter of law in concluding that Beward and Emberton were not entitled to qualified official immunity, and we must reverse that decision.

For the foregoing reasons, the interlocutory judgment of the Bullitt Circuit Court is reversed, and this matter is remanded for dismissal of the action against Beward and Emberton.

ALL CONCUR.

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