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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001730-MR

RANDY THOMPSON, INDIVIDUALLY
AND GREG MULLINS, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 12-CI-00093

LOU JEAN MARTIN — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Randy Thompson, individually, and Greg Mullins, individually, appeal the order of the Knott Circuit Court denying their motion for summary judgment. Following a careful review of the record, we vacate and remand because Thompson and Mullins are protected from suit in this case by the doctrine of qualified official immunity.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to her deposition testimony, Lou Jean Martin was attending the Knott County Trail Ride when she was injured. Martin attested that on the October evening in question, she walked through an area of grass that was not mowed on the trail ride property, where the grass was approximately eleven to twelve inches tall, at approximately nine o'clock at night. She then fell up to her waste into a hole in the ground in that area[1] and broke her leg. Two people who were walking near her had to help her out of the hole.

Martin's complaint was initially filed against the Knott County Fiscal Court and Randy Thompson, in his individual and official capacities as the Knott County Judge Executive. In her complaint, Martin alleged that she was injured from falling into the hole while she was a business invitee upon the premises of the Knott County Trail Ride. Martin contended that the hole was negligently created and/or hidden by Thompson and the Knott County Fiscal Court while preparing the site for the Knott County Trail Ride,[2] and that the defendants knew or should have known of the dangerous condition, yet they failed to remedy the condition and failed to warn Martin of it. Martin claimed that as a result, she suffered permanent bodily injuries, pain and suffering, a loss of enjoyment of life, lost wages,

[1] The Knott County Trail Ride was held on property that was a reclaimed mine site.

[2] The land where the Knott County Trail Ride occurred was not owned by Knott County; rather, the county leased the property from two different landowners for the purpose of developing horse trails on the property for use by the public during the Knott County Trail Ride, which was held once or twice a year.

impairment of ability to earn money in the future, medical expenses, travel expenses and other miscellaneous expenses all past and future.

The defendants moved to dismiss, arguing that sovereign immunity protected the Knott County Fiscal Court from lawsuits and that official immunity protected Thompson when he was sued in his official capacity. They also contended that because Thompson was entitled to official immunity, he could not "be held vicariously liable for the negligence of those employed by [him], if [he's] employed persons of suitable skill." They further asserted that Thompson was protected from the claims against him in his individual capacity by qualified official immunity, which provides protection for good faith decisions made in a legally uncertain environment. The defendants argued that KRS[3] 411.190 barred the action, as well, because the statute provides that land owners owe "no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes."

The circuit court partially granted the motion to dismiss, *i.e.*, it dismissed the claims against the Knott County Fiscal Court and against Thompson in his official capacity. As for the claims against Thompson in his individual capacity, the court gave Thompson ten days to reply to Martin's response to Thompson's motion to dismiss those claims. Subsequently, the court denied Thompson's motion to dismiss the claims against him in his individual capacity.

[3] Kentucky Revised Statute.

Martin then moved to amend the complaint, seeking to add claims against Greg Mullins in his individual capacity, alleging that the hole Martin fell in "had been negligently created and/or hidden by [Mullins and Thompson] during preparation of the site for the Knott County Trail Ride" because the hole was "located in a walking path that was not properly lit." The circuit court granted Martin's motion to amend the complaint.

Thompson and Mullins moved for summary judgment alleging, *inter alia*, that the claims against them were barred by the doctrine of qualified official immunity. The circuit court denied their motion for summary judgment without explanation.

Thompson and Mullins now appeal. Upon review, we vacate the circuit court's order.

II. STANDARD OF REVIEW

We pause to note that this is an interlocutory appeal from an order denying the appellants' claim of immunity. Pursuant to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009), "orders denying claims of immunity . . . should be subject to prompt appellate review." In *Prater*, the Kentucky Supreme Court explained its reasoning for this holding:

> [I]mmunity entitles its possessor to be free from the burdens of defending the action, not merely . . . from liability. . . . Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action. For this reason, the United States Supreme Court has recognized in immunity

> cases an exception to the federal final judgment rule codified at 28 U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court reiterated its position that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment." . . . We find the Supreme Court's reasoning persuasive, and thus agree with the Court of Appeals that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.

Prater, 292 S.W.3d at 886-87 (internal quotation marks omitted).

Therefore, the appellants are entitled to bring this interlocutory appeal concerning the denial of their claim of qualified official immunity.

III. ANALYSIS

Appellants first allege that the circuit court erred in failing to find that they were immune from suit in their individual capacities under the doctrine of qualified official immunity. In *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010), the Kentucky Supreme Court explained under what conditions a public official is entitled to qualified immunity:

> [W]hen an officer or employee of the state or county (or one of its agencies) is sued in his or her individual capacity, that officer or employee enjoys qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Application of the defense, therefore, rests not on the status or title of the officer or employee, but on the [act or] function performed.
>
> Indeed, the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the

> official or employee is one that is discretionary in nature. 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.
>
> In spite of these often quoted guidelines, determining 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. For this reason, [the Kentucky Supreme Court] has observed that an act is not necessarily taken out of the class styled "ministerial" because the officer performing it is vested with a discretion respecting the means or method to be employed. Similarly, that a necessity may exist for the ascertainment of those [fixed and designated] facts does not operate to convert the [ministerial] act into one discretionary in its nature. Moreover, a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act.

Haney, 311 S.W.3d at 240-41 (internal quotation marks and citations omitted; emphasis removed).

Recently, the Supreme Court of Kentucky expounded on the distinction between discretionary acts and mandatory acts, stating that the difference is essentially "between making higher-level decisions and giving orders to effectuate those decisions and simply following orders." *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014). "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.* (quoting *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959))). "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.'" *Id.* (quoting 63C Am.Jur.2d *Public Officers and Employees* §318 (updated through Feb. 2014)). Consequently, "if the employee has no choice but to do the act, it is ministerial." *Id.*

The present case is a sound example of "making higher-level decisions and giving orders to effectuate those decisions," *i.e.,* a discretionary act. *Id.* Thompson, as the Knott County Judge Executive, was involved in the selection of the site of the trail ride and related activities. However, he did not engage in the hands-on site preparation, and specifically he was not involved in mowing the paths through the site himself; rather, he directed some county employees to use the county's only operable tractor to mow the paths. Because the one tractor was insufficient to finish the job in time for the trail ride, he rented Mullins's tractor to

assist with the mowing. Thompson exercised his discretion in having county employees mow paths and in renting Mullins's tractor to assist with the mowing. There has been no evidence that Thompson acted in bad faith in doing so.

Regarding Mullins, who was the Knott County Emergency Management Director and a county employee at the time of the events in question, he rented his personal tractor to the county to assist with the mowing. Mullins allowed the county to use his tractor on the condition that it be operated only by his brother-in-law. Mullins's affidavit stated as follows:

> The Knott County trail ride is a county sponsored event. In the weeks prior to the fall 2011 Knott County trail ride one of the county tractors was not working and the county judge [executive] asked if I would loan the county my personal tractor to mow the area where the trail ride festivities were taking place. To help ensure the success of the trail ride I reluctantly agreed due to concerns that the large area could not be otherwise mowed by the start date of the event because of one of the county tractors being inoperable at the time. My tractor, along with county equipment, was used to mow several hundred acres. The county reimbursed my fuel expense and the cost of having someone operate my tractor. I did not personally mow any of the grass, oversee any of the mowing, nor was I in charge or responsible for the placing of the lighting for the event. I did attend the event and the grounds were mowed from what I observed.
>
> I did not observe any holes or other dangerous conditions while at the site. To my knowledge Randy Thompson did not mow any grass in preparation for the trail ride and he did not place any of the lighting for the event. I believe that the lighting was placed by the company the county rented the stand alone generators and lights from.

> There were no dangerous holes or other hazardous conditions reported to me during the 2011 fall trail ride events. If reports had been made, I would have taken steps to warn attendees to avoid any hazardous areas. All traffic entering the site entered through one road that had a warning sign that they were entering at their own risk and all attendees paid a fee for admission, obtained a wrist band, and signed a sign in sheet acknowledging that they accepted the risks associated with the events and that the county was not responsible for any accidents.

Thus, the county paid Mullins for the use of his tractor, which Thompson testified Mullins rented to the county inexpensively, and Mullins in turn hired his brother-in-law to assist with mowing the area using Mullins's tractor. Consequently, Mullins exercised his discretion in deciding who would mow the area using his tractor. There has been no evidence introduced that Mullins acted in bad faith in doing so.

Thompson testified that he did not instruct the county employees "about what they were to do, where they were to mow or anything like that." Just as in *Haney*, where Haney's duties of leading children on a path during a Night Hike activity was deemed discretionary by the Kentucky Supreme Court, so, too were the acts of those who mowed the paths in this case: there is no appreciable difference between leading people on a path where they were supposed to walk, as in *Haney*, and mowing a path upon which people were expected to walk, as in this case. Rather, mowing the paths was a way for the county to direct people where they should walk (on the mowed grass paths) as opposed to where they should not

walk (on the grass that was not mowed). Therefore, those who mowed the area exercised their discretion in determining where to mow and where not to mow.

Consequently, both Thompson and Mullins exercised their discretion in deciding who to hire to do the mowing, and those who did the mowing exercised their discretion regarding where to mow as a means of showing the public where the preferred areas for walking were located. Martin has not demonstrated that either Thompson or Mullins acted in bad faith in making their judgment calls, or that those judgment calls were made in a legally certain environment. Therefore, Thompson and Mullins are entitled to qualified official immunity in this case, and the circuit court erred in failing to grant them immunity. Moreover, because we are vacating the circuit court's decision on this basis, we decline to review the remainder of appellants' claims.

Accordingly, the order of the Knott Circuit Court is vacated and the case is remanded with instruction for the circuit court to dismiss the claims against the appellants in their individual capacities based upon qualified official immunity.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jonathan C. Shaw
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BRIEF FOR APPELLEE:

Adam P. Collins
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