

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000637-MR

TOM ARNZEN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE MARTIN J. SHEEHAN, JUDGE  
ACTION NO. 12-CI-01224

STEPHANIE SMITH AND  
CHAD SMITH

APPELLEES

OPINION  
REVERSING AND REMANDING

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

TAYLOR, JUDGE: Tom Arnzen brings this appeal from a March 17, 2014, Order of the Kenton Circuit Court denying Arzen's motion for summary judgment seeking qualified official immunity. We reverse and remand.

On May 25, 2011, Stephanie Smith attended a high school and middle school band concert held in the newly constructed gymnasium of Turkey Foot

Middle School. Before the concert, several tarpaulins were placed on top of the gymnasium floor for protection. After the concert ended, Smith walked toward the concert stage in an effort to take photographs. While so doing, Smith fell on the gymnasium floor and sustained physical injuries.

Smith and her husband, Chad Smith, (collectively referred to as the Smiths) instituted an action in Kenton Circuit Court against, *inter alios*, the Kenton County Board of Education, David Lloyd, and Arnzen (collectively referred to as defendants).<sup>1</sup> Lloyd is the school district's Facility Systems Director while Arnzen is the school's Principal. Both were in attendance at the concert when the accident occurred. The Smiths claimed that defendants negligently placed the tarpaulins upon the gymnasium floor in an unsafe manner, thus causing her foot to be "entrapped underneath the unsecured intersection of two tarpaulins, resulting in her falling." Smith's Complaint at 4. As to Arnzen, the Smith's particularly asserted:

Defendant Arnzen owed Plaintiffs, and the general public, a duty to properly maintain the school facilities for students and invitees in a safe and hazardous free condition and to place and install the tarpaulins on the floor of the gymnasium at Turkey Foot Middle School.

Defendant Arnzen was negligent by breaching the duties owed to the Plaintiff, Stephanie Smith, in the following ways: (a) failing to properly inspect the tarpaulins covering the gymnasium floor; (b) failing to properly warn of the dangers presented by the tarpaulins covering the gymnasium floor; (c) failing to exercise due care with respect to all matters pertaining to the tarpaulins covering the gymnasium floor; and (d) failing to maintain the

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<sup>1</sup> Victoria Hodges and Alexis Hodges were the daughters of Stephanie Smith. In the complaint, they raised loss of consortium claims. These claims were dismissed by the circuit court, and the dismissal was not appealed.

school facilities for students and invitees in a safe, hazardous-free condition and in failing to do so, causing Plaintiff to fall and sustain injuries and damages.

....

As Principal of Turkey Foot Middle School, Defendant Arnzen had a duty to oversee and supervise the event that occurred on or about May 25, 2012, and the ordering of the floor coverings by Defendant Lloyd and the work performed by Defendant Does by virtue of his employment and/or agency.

Due to lack of supervision, Defendant Arnzen caused an unsafe facility for students and invitees and permitted the ordering of the incorrect floor covering.

Arnzen filed a motion for summary judgment claiming entitlement to qualified official immunity. Arnzen argued that his acts were discretionary and performed in good faith, thus mandating dismissal of the Smith's negligence claims. By order entered March 17, 2014, the circuit court denied Arnzen's motion for summary judgment. The circuit court concluded that Arnzen's alleged negligent acts were ministerial and that he was not entitled to the protection of qualified official immunity:

With regard to Arnzen, the Turkeyfoot [sic] Middle School principal, by his own admission, he was responsible for inspecting the gymnasium on May 25, 2011[,] for the band event, and supervising the setup. Specifically his duty was to make sure the premises were rendered safe during the course of the event, which included making sure the tarpaulins were laid safely. Rob Haney, the requisitioner who oversaw the entire building process of the school, chose which tarpaulins to order for the gymnasium floor, not Arnzen. The tarpaulins were ordered through the building contractor. They were provided to the school upon the school's

construction to be used for events in the gymnasium to protect the new floor. Arnzen was under the general instruction by “central office” to have those tarpaulins placed on the gymnasium floor for events. The custodians laid the tarpaulins and Arnzen inspected them, as was part of his general duty to render the premises safe.

No doubt Arnzen’s decisions as to how to fulfill such duty clearly involved the use of judgment and discretion. For example, Arnzen had to exercise discretion regarding the number of chairs, the placement and configuration of chairs, and number and size of points of ingress and egress to the chairs. Should the tarpaulins be laid on the floor vertically or horizontally? Should the entire gymnasium floor be covered by tarpaulins or only a portion thereof? Should the tarpaulins be laid side by side or should they be overlapped? If overlapped, should they be overlapped one inch, six inches or some other distance? Should the seams where the tarpaulins join together be taped? These are decisions Arnzen was required to make, to carry out his general duty of rendering the premises safe, which clearly implicate discretion.

Arnzen’s task of overseeing the placement of the tarpaulins and rendering the premises safe, however, does not become discretionary simply because he had some discretion in the manner of carrying out such task. In distinguishing between discretionary and ministerial tasks, the focus of the Court’s analysis must look at the dominant nature of the act.

Here, the dominant nature of Arnzen’s duty with respect to the tarpaulins on the evening in question was absolute, certain and imperative, involving merely execution of a specific act arising from fixed and designated facts. For these reasons this Court finds that Arnzen’s duties in this case were ministerial in nature and he is, therefore, not entitled to qualified official immunity.

Circuit Court's Order at 5-7 (citations omitted). Arnzen brings this interlocutory appeal.<sup>2</sup>

To begin, summary judgment is proper where there are no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Resolution of this appeal involves an issue of law – whether Arnzen's acts were ministerial or discretionary. *See Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014).

Arnzen contends that the circuit court erred by determining that his alleged negligent acts were ministerial and that he was not entitled to qualified official immunity. Arnzen maintains that his duty as a school principal to provide a safe school environment was discretionary for which he is entitled to qualified official immunity. Arnzen points out that he assigned the duty of properly installing the tarpaulins over the gymnasium floor to the custodial school staff. Arnzen emphasizes that he did not personally install the tarpaulins for the band concert. Arnzen also cites this Court to the recent Kentucky Supreme Court opinion of *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), in support of his argument.<sup>3</sup>

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<sup>2</sup> In *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), our Supreme Court determined that an order denying the absolute defense of immunity is immediately appealable.

<sup>3</sup> *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014) was rendered April 17, 2014. The circuit court's order denying summary judgment in the case *sub judice* was entered March 17, 2014.

We view *Marson*, 438 S.W.3d 292 as dispositive. In *Marson*, a legally blind student at a middle school fell six to eight feet from bleachers that had not been fully extended. The student's parents, individually and on his behalf, instituted a negligence action against, *inter alios*, the middle school principal for failing to properly supervise the student and for failing to provide him a safe environment. The Supreme Court held that the principal was entitled to qualified official immunity:

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.

*Marson v. Thomason*, 438 S.W.3d 292, 299-300 (Ky. App. 2014) (citations omitted).

In *Marson*, the Supreme Court concluded that a school principal performs the general duties of providing a safe school environment, regularly assigning job duties to employees, and supervising employees at the school. The Court held that these general duties were discretionary. And, the Supreme Court observed that “[t]here is a qualitative difference in actually extending the bleachers and assigning someone to [routinely] fulfill that task.” *Id.* at 299. The former constitutes a ministerial act while the latter is discretionary.

Likewise, in this case, the facts clearly establish that Arnzen assigned the custodial staff the routine duty of installing the tarpaulins upon the gymnasium floor. Arnzen did not personally install tarpaulins upon the floor. As with the principal in *Marson*, Arnzen merely performed the general duties of providing for school safety, assigning job duties and supervising school employees both before and during the band concert. *See Marson*, 438 S.W.3d 292. These general duties are discretionary. Arnzen’s “inspection” of the gymnasium floor prior to the band concert was also a discretionary function, as it was performed in furtherance of his discretionary duty to generally supervise the school custodians. We thus believe that Arnzen’s negligent acts were discretionary. However, our analysis does not



end here. To be entitled to qualified official immunity, the discretionary act must have been performed in good faith.

In this Commonwealth, the law provides that “[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 not performed in good faith.” *Yanero*, 65 S.W.3d at 523. Herein, we are unable to determine whether Arnzen acted in good faith, since the circuit court did not reach the issue, finding that Arnzen’s duties were ministerial in nature and thus not entitled to qualified official immunity. Good faith has both objective and subjective components, and a lack of subjective good faith may “be predicated on whether the public employee ‘willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.’” *Bryant v. Pulaski County Det. Ctr.*, 330 S.W.3d 461, 466 (Ky. 2011) (quoting *Yanero*, 65 S.W.3d at 523). As the issue of subjective good faith is often fact specific, the circuit court is in the best position to initially determine whether Arnzen acted in good faith:

“[S]ubjective intent or good faith, is a factual question that so rarely can be decided by summary judgment ... and may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues, and normally requires a trial to resolve[.]” 201 S.W.3d at 474 (brackets omitted). Because whether an officer or employee acted in good faith is a question of fact, we remand to afford the circuit court an opportunity to receive evidence on this issue. *See Sloas*, 201 S.W.3d at 474.

*Coleman v. Smith*, 405 S.W.3d 487, 495 (Ky. App. 2012).

Consequently, we remand for the circuit court to specifically determine whether Arnzen acted in good faith in carrying out his duties as principal on May 25, 2012. We cite the circuit court to the following erudite analysis in *Coleman*, 405 S.W.3d at 495, of the court's role in determining the issue of good faith upon remand:

On remand, Smith must put forth affirmative evidence that Cantrell failed to exercise good faith. If Smith is unable to sustain his burden, summary judgment in Cantrell's favor may be proper. Ultimately, once the material facts are fleshed out in discovery, the circuit court will then be prepared to determine, as a matter of law, whether Cantrell is protected by official immunity. *Id.* at 475. Of course, if genuine issues of material fact regarding Cantrell's good faith remain, those factual issues will be for the jury to determine.

In sum, we conclude that Arnzen's alleged negligent acts were discretionary and that the circuit court committed an error of law by concluding otherwise. We, thus, reverse the circuit court's summary judgment and remand. Upon remand, the circuit court shall determine whether Arnzen acted in good faith for qualified official immunity purposes.

For the foregoing reasons, the Order of the Kenton Circuit Court is reversed and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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