RENDERED: AUGUST 19, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000868-MR

MARCIE WALKER — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 11-CI-00267

VALERIE BROCK, AS NATURAL PARENTS AND NEXT FRIENDS OF CHRISTOPHER BROCK, A MINOR AND GEORGE BROCK, AS NATURAL PARENTS AND NEXT FRIENDS OF CHRISTOPHER BROCK, A MINOR — APPELLEES

AND

NO. 2014-CA-000953-MR

VALERIE BROCK, AS NATURAL PARENTS AND NEXT FRIENDS OF CHRISTOPHER BROCK, A MINOR AND GEORGE BROCK, AS NATURAL PARENTS AND NEXT FRIENDS OF CHRISTOPHER BROCK, A MINOR — CROSS-APPELLANTS

v.

CROSS-APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 11-CI-00267

CLARENCE BROWN; KENNY CRAWFORD;
CARLA JORDAN; MARTY SMITH;
SAM WATTS; ROBIN BROWN;
WALTER T. HULETT AND MARCIE WALKER CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Marcie Walker, principal of Dewitt Elementary School, appeals from an order of the Knox Circuit Court denying in part her motion for summary judgment based on qualified official immunity. Her motion was also denied based on her alternative claims of immunity under the Kentucky's recreational use statute and the Paul D. Coverdell Teacher Protection Act (Teacher Protection Act). Valerie Brock and George Brock, as natural parents and next friends of Christopher Brock, cross-appealed from the same order which granted summary judgment to Knox County School Board members Clarence Brown, Kenny Crawford, Carla Jordan, Marty Smith and Sam Watts, teacher Robin Brown and Knox County School superintendent Walter T. Hulett in their individual capacities based on qualified official immunity.

The Brocks filed this negligence action after Christopher fell from the rear side of an inflatable slide at Dewitt Elementary School. The inflatable event was held during school hours in the school gymnasium as a reward for the previous school year's test results and for children who participated in the afterschool

program. The inflatables were rented and paid for by the Parent Teacher Organization, the school, and the after-school program.

Discovery commenced. Walker testified that she assigned a group of Dewitt employees to supervise the event. She supervised the set-up of the inflatables in the gymnasium and she, along with two supervising adults, met with a representative from the inflatable company to receive safety instructions. Walker then met with the remaining supervising adults regarding the safety instructions. There was conflicting evidence as to how many adults Walker assigned to each inflatable and whether Brown was one of those assigned to supervise the event.

After Christopher fell, an ambulance was not called because Walker believed his injury was not serious enough to be an emergency. She called Christopher's parents and Christopher's father transported him to the hospital. At the hospital, Christopher was diagnosed with a skull fracture.

Walker admitted that she did not comply with Board policy 09:221 AP.1 entitled "Supervision of Students" requiring that she submit a supervision plan prior to the commencement of the school year. That policy states:

> Principals shall develop and implement a plan of supervision for their schools to address the following areas:
> 1. Bus loading and unloading;
> 2. Meals;
> 3. Halls, restrooms, and playgrounds;
> 4. Time before and after the school day; and
> 5. Field trips and other school activities.

The claims against the Board and the individuals in their official capacitates were dismissed on the basis of governmental immunity. The Brocks' claim against all defendants in their individual capacities remained.

Subsequently, the remaining defendants in their individual capacities filed a motion for summary judgment based on qualified official immunity, the Teacher Protection Act and Kentucky's recreational use statute. The circuit court concluded the board members and Brown were entitled to qualified official immunity and granted their motion for summary judgment. However, Walker was denied immunity on the claims that she failed to submit a plan of supervision and negligence per se. The circuit court ruled Walker was not protected from liability under the Teacher Protection Act or Kentucky's recreational use statute.

The circuit court concluded its order by stating that it was interlocutory and claims remained to be litigated. Nevertheless, Walker appealed. She presents the following arguments: (1) she is entitled to qualified official immunity; (2) she is entitled to protection from liability under the Teacher Protection Act; (3) the circuit court erred when it did not apply Kentucky's recreational use statute; (4) her failure to submit a supervision plan was not a substantial factor in causing Christopher's injury; and (5) the claim for negligence per se cannot be based on a violation of the Board's policy.

The Brocks cross-appealed. Their claim of error pertains to the circuit court's ruling that Walker was entitled to qualified official immunity on certain

claims and the remaining defendants were entitled to qualified official immunity on all claims against them.

Generally, the denial of a summary judgment is not appealable because it is interlocutory in nature and Kentucky Rules of Civil Procedure (CR) 54.01 limits this Court's jurisdiction to final orders or judgments. "An order denying a motion for summary judgment ordinarily does not finally adjudicate anything, as the party whose motion was denied may still prevail at trial." *Bell v. Harmon,* 284 S.W.2d 812, 814 (Ky. 1955). The order "can in no sense prejudice the substantive rights of the party making the motion since he still has the right to establish the merits of his motion upon the trial of the cause." *Id.* Although not an issue presented by any of the parties, "appellate jurisdiction cannot be conferred by consent of the parties" and "this Court must determine for itself whether it has jurisdiction." *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009) (quoting *Wilson v. Russell,* 162 S.W.3d 911, 913 (Ky. 2005)).

In *Prater,* our Supreme Court had its first "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." *Id.* at 884. Relying on *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), and *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), the Court applied the collateral order doctrine to interlocutory appeals of government officials claiming immunity and held orders denying such immunity is "appealable

even in the absence of a final judgment." *Prater,* 292 S.W.3d at 887. The Court's reasoning focused on the purpose of the common law grant of immunity to government officials noting that its purpose is to free its possessor "from the burdens of defending the action, not merely . . . from liability." *Id*. at 886 (quoting *Rowan Cty. v. Sloas*, 201 S.W.3d 469 (Ky. 2006)).

As emphasized in *Commonwealth v. Samaritan All., LLC*, 439 S.W.3d 757, 760 (Ky.App. 2014), the exception to the finality rule in CR 54.01 is limited to immunity defenses that shield the possessor from liability. "[M]ost other substantive defenses must wait for adjudication by a final order." *Id*. In other words, if a defense is to liability only rather than immunity from suit, it can be vindicated after a final judgment. Immunity from suit derives from "an *explicit* statutory or constitutional guarantee that trial will not occur[.]" *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801, 109 S.Ct. 1494, 1499, 103 L.Ed.2d 879 (1989) (emphasis added).

Under *Prater*, this Court has jurisdiction to consider Walker's appeal of the trial court's partial denial of qualified official immunity. We do so under the applicable summary judgment standard of review.

Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476. 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion

. . . and all doubts are to be resolved in his favor." *Id.* Summary judgments in the context of qualified official immunity, "play an especially important role" because the defense is viewed "as an immunity from suit, that is, from the burdens of defending the action, not merely just an immunity from liability." *Rowan Cty.*, 201 S.W.3d at 474. "[O]nce the material facts are resolved, whether a particular defendant is protected by official immunity is a question of law[.]" *Id*. at 475.

School boards and their employees are considered agencies of the state and enjoy governmental immunity. *James v. Wilson,* 95 S.W.3d 875, 904 (Ky.App. 2002). "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).

Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001), is often quoted when attempting to explain the doctrine of qualified official immunity and stands for the facially simplistic legal proposition that 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. Negligently performing or negligently failing to perform ministerial duties is not shielded by the doctrine of qualified official immunity. *Id*. at 522.

In *Yanero*, the Court explained that 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.* The *Yanero* Court elaborated: "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." *Id.*

Despite the effort in *Yanero* to create a bright line between discretionary and ministerial acts, perhaps no other area in the law has remained as confused as qualified official immunity. As noted in *Haney v. Monsky,* 311 S.W.3d 235, 240 (Ky. 2010), the distinction between a discretionary act and ministerial act is one not easily made because "few acts are purely discretionary or purely ministerial." Consequently, determining "when a task is ministerial versus discretionary has long plagued litigants and the courts." *Marson v. Thomason*, 438 S.W.3d 292, 296 (Ky. 2014).

In *Marson*, the parents of a child who was injured when he fell from bleachers in a school gym filed litigation. They alleged the bleachers were not fully extended, causing their legally-blind son to walk off the retracted portion of the bleachers.

The Court reaffirmed the principles espoused in *Yanero*, and noted that "at their core, discretionary acts are those involving quasi-judicial or policy-making decisions." *Marson*, 438 S.W.3d at 297. The Court continued and attempted to simplify the distinction between discretionary acts and mandatory acts:

> The distinction between discretionary and mandatory act is essentially the difference between making higher-level decisions and giving orders to effectuate those decisions, and simply following orders. Or, as we have stated,

> promulgation of rules is a discretionary function;
> enforcement of those rules is a ministerial function.

Id. (quoting *Williams v. Kentucky Dept. of Educ.,* 113 S.W.3d 145, 150 (Ky. 2003)). In an attempt to bring simplicity to qualified official immunity, the Court summarized the rule as follows: "In other words, if the employee has no choice but to do the act, it is ministerial." *Id*.

The Court held "extending the bleachers was a routine duty, regularly performed by the custodian on duty, and [was] thus ministerial in nature to the person charged with that job." *Id*. at 298. However, the principals of the school who were not assigned the task of extending the bleachers were entitled to immunity because their task was to provide a safe school environment which was a discretionary task "exercised most often by establishing and implementing safety policies and procedures." *Id*. at 299.

Walker's task to submit a supervision plan is not akin to the principals' task in *Marson* to provide a safe environment. Her task was specific and mandatory. The facts in *Yanero* are analogous.

In *Yanero,* the "enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice" was held to be ministerial. *Yanero*, 65 S.W.3d at 529. Likewise, Walker was required to submit a supervision plan. She either did it or she did not. "[T]here [was] no factual determination required for its application." *Turner v. Nelson*, 342 S.W.3d 866, 876

(Ky. 2011). On the claim of negligence for failing to submit a supervision plan, she is not entitled to qualified official immunity.

Walker also asserted below that she was entitled to immunity under the Teacher Protection Act. Enacted in 2001 as part of the No Child Left Behind Act, the Teacher Protection Act was enacted for the stated purpose of providing "teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment." 20 U.S.C.A. § 7942. It applies to public and private schools that receive federal education funding. 20 U.S.C.A. §§ 7943(4), 7944. As relevant, 20 U.S.C.A. § 7946 (a) states the requirements for the Act's application:

> [N]o teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if--
>
> **(1)** the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;
>
> **(2)** the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;
>
> **(3)** if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

> **(4)** the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher[.]

"Teacher" is defined to include a teacher, instructor, principal, administrator, educational employee who works in a school, or individual school board member. 20 U.S.C.A. § 7943(6).

The Act provides that its immunity provisions preempt any inconsistent state law except where a state law "provides additional protection from liability relating to teachers." 20 U.S.C.A. § 7945(a). However, a state may elect not to be governed by the Act's teacher protection provisions through enacting legislation. 20 U.S.C.A. § 7945(b).

The Teacher Protection Act affords a type of immunity to teachers. For appellate jurisdictional purposes, the question is what type of immunity is granted: Immunity from suit or merely immunity from liability. Under the *Prater* rule, only immunity from suit and, therefore, immunity from the burdens of litigation, warrants an exception to CR 54.01's finality rule.

In *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 343 (Ky. App. 2011), this Court held a water district's appeal of a denial of its defense under the Claims Against Local Governments Act, Kentucky Revised Statutes (KRS) 65.200 —65.2006, was not immediately reviewable. This Court reached its conclusion based on the plain meaning of the statutory words.

> "[G]overnmental immunity frees the government agency from the burdens of litigation, not just liability. But the

> Claims Against Local Governments Act simply says "a local government shall not be *liable* for injuries or losses" except as provided by therein. KRS 65.2003 (emphasis added). As a statutory defense to liability only, its denial *can* be vindicated following a final judgment as with any other liability defense.

Id.

Like the Claims Against Local Government Act, the Teacher Protection Act does not contain "an explicit statutory . . . guarantee that a trial will not occur." *Midland Asphalt Corp.*, 489 U.S. at 801, 109 S.Ct. at 1499. The Teacher Protection Act states "no teacher in a school shall be *liable* for harm caused by an act or omission of the teacher on behalf of the school if" and then sets forth the requirements for its application. 20 U.S.C. § 7946(a) (emphasis added). We conclude that based on the plain statutory language, the Act provides an exemption from liability rather than immunity from suit. Because it is a statutory defense to liability only, "its denial can be vindicated following a final judgment as with any other liability defense." *South Woodford Water Dist.*, 352 S.W.3d at 343.

As an alternative theory of immunity, Walker relies on Kentucky's recreational use statute, KRS 411.190. The purpose of the statute is "to encourage property owners to make land and water areas available to the public for recreational purposes by *limiting their liability* toward persons entering thereon for such purposes." KRS 411.190(2) (emphasis added). The statute provides immunity from liability, not suit. Therefore, this Court does not have jurisdiction

to review Walker's claim that the inflatable event held during school hours on school property came within the purview of the recreational use statute.

Walker also presents two remaining arguments: Walker's actions or inactions were not a substantial factor in causing Christopher's injury and the claim for negligence per se cannot be based on a board policy. Both arguments are unrelated to any claim of immunity and, therefore, this Court is without jurisdiction to consider either argument.

The Brocks cross-appealed from those portions of the trial court's summary judgment granting qualified official immunity to Walker on claims other than her failure to submit a supervision plan and negligence per se and to the remaining defendants on all claims. However, as stated in the trial court's order, claims remain to be litigated. While an appeal from the grant of summary judgments is final if all claims are finally disposed of, the trial court's order was not final unless the procedure set forth in our civil rules was followed. CR 54.02 states:

> (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory

> and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

As the Court stated in *Peters v. Bd. of Ed. of Hardin Cty.*, 378 S.W.2d 638, 639 (Ky. 1964):

> The rule provides that final judgment may be granted upon one or more, but less than all, of the claims *only* upon a determination that there is no just reason for delay. The judgment which recites such determination and which recites the judgment is final is appealable. In the absence of such recitals, any order or other form of decision, however designed, which adjudicates less than all of the claim shall not terminate the action as to any of the claims and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims.

The trial court expressly stated that its order was not final and appealable and claims remain to be litigated. Thus, if this Court has jurisdiction, the grant of qualified immunity must be immediately appealable under the *Prater* rule. We conclude the rule applies only to the denial of such immunity.

The same reasons for applying the collateral order doctrine when a claim of qualified official immunity is denied do not exist when a claim of qualified official immunity is granted. As stated earlier, the exception to CR 54.01's finality rule is justified because immunity from suit cannot be vindicated after a final judgment. *Prater*, 292 S.W. 3d at 886. When qualified official immunity is granted, that concern is not present. We do not have jurisdiction to consider the arguments presented in Brocks' cross-appeal.

Based on the foregoing, the order of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE,
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BRIEF FOR APPELLEES/CROSS-
APPELLANTS, VALERIE BROCK
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