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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-001964-MR

ALVERY "CRAIG" SMITH AND
TIM C. GRAYSON — APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 13-CI-00243

LORETTA MCCRACKEN, INDIVIDUALLY
AND AS MOTHER AND NEXT FRIEND OF
D.P.; AND GEORGE PICKETT, II, AS
FATHER AND NEXT FRIEND OF D.P. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, NICKELL AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants, Tim Grayson and Alvery "Craig" Smith, bring this interlocutory appeal from an order of the Grant Circuit Court denying their motions for summary judgment on qualified immunity grounds. Because we

conclude that Appellants' actions in this matter were discretionary in nature rather than ministerial, they are entitled to the defense of "qualified official immunity" as a matter of law. We, therefore, reverse and remand to the trial court for entry of an order dismissing the claims against them.

On April 19, 2013, D.P., the then twelve-year-old son of Appellees, Loretta McCracken and George Pickett II, was involved in an altercation with three other students in a bathroom at Grant County Middle School. As a result, D.P. suffered a broken leg. At the time of the incident, Appellants Grayson and Smith were Principal and Vice-Principal, respectively, at the school.

On July 11, 2013, Appellees filed an action in the Grant Circuit Court against Appellants, numerous other school personnel, as well as the other children involved in the altercation.[1] In their amended complaint, Appellees alleged that school personnel were negligent in failing to provide a safe environment and to protect D.P. from bullying. In August 2014, the defendant school personnel, including Appellants herein, filed a motion for summary judgment arguing that Appellees had failed to identify any specific actions or inactions by school personnel that caused D.P.'s injury and further that, to the extent they were sued in their individual capacities, they were entitled to qualified governmental immunity for discretionary acts performed in good faith. By orders entered on October 13 and October 20, 2014, the trial court granted summary judgment in favor of all school personnel except Appellants. The trial court ruled that, with respect to

[1] All other parties were voluntarily dismissed or granted summary judgment. Grayson and Smith are the only two remaining defendants.

Appellants, (1) there existed a genuine issue of material fact regarding whether their actions or inactions were negligent and (2) they were not entitled to qualified immunity.[2] Pursuant to our jurisprudence recognizing the immediate right of appeal from the denial of immunity, this interlocutory appeal followed. *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 885 (Ky. 2009).

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a de novo standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010). Likewise, whether an individual is entitled to official immunity is a question of law reviewed de novo. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480.

Appellants argue in this Court that the trial court erred in denying their motion for summary judgment on immunity grounds. Appellants contend

[2] We would point out that the trial court's order is devoid of any grounds for finding that Appellants were not entitled to immunity.

that the Kentucky Supreme Court's recent decision in *Marson v. Thomason*, 438 S.W.3d 292 (Ky. App. 2014), is dispositive and that they are entitled to qualified immunity from suit in their individual capacities. We agree.

Under Kentucky law, public officers and employees sued in their individual capacities enjoy qualified official immunity when they negligently perform "(1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Therefore, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (*quoting Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987)). Application of the defense, "rests not on the status or title of the officer or employee, but on the [act or] function performed." *Yanero* at 521 (*citing Salyer v. Patrick*, 874 F.2d 374 (6th Cir.1989)). Indeed, the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial.

"Discretionary acts are, generally speaking, 'those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.'" *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (*quoting Yanero*, 65 S.W.3d at 522). "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." *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959) (quoting 43 Am.Jur., *Public Officers*, § 258). In other words, 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. In contrast, "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.'" *Haney*, 311 S.W.3d at 240 (*quoting Yanero*, 65 S.W.3d at 522).

Appellees herein contend that Appellants should be held individually liable for D.P.'s injuries because they breached ministerial duties to provide him with a safe school environment, as well as to properly investigate reports of bullying and take appropriate action to insure his safety. We are of the opinion, however, that Appellants' duties as they related to the incident in question were discretionary rather than ministerial.

In *Marson*, a legally blind middle-school student was injured when he fell from bleachers in the school gymnasium 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. In holding that the principal was entitled to qualified official immunity, our Supreme Court stated:

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.
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> 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). As the above quote indicates, *Marson* clearly rejected the notion that a principal's duty to provide a safe school environment is ministerial, rather than discretionary.

With respect to principal Grayson, Appellees have never identified any specific duty beyond generally providing a safe school environment that he

owed to their son. As in *Marson*, Grayson's duty to look out for students' safety was a general rather than specific duty, requiring him to act in a discretionary manner by "devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees." *Id.* at 299. Without question, Grayson's general responsibility for student safety was discretionary rather than ministerial.

We reach the same result with respect to vice-principal Smith. It is undisputed that his duties included overseeing the discipline of students based upon reports made to him by teachers, other administrators, and parents. However, contrary to Appellees' bald assertion, there is nothing in the record to establish that he had a ministerial duty to monitor students in the bathrooms between classes. While Smith was responsible for assigning teachers to monitor hallways during class changes, such was not even a duty he performed himself.

Appellees argue that in distinguishing between ministerial and discretionary duties in a school setting, Kentucky courts have "rejected the notion that the failure of teachers and school administrators to supervise their students in the face of known and recognized behavior was a discretionary act." *Haney*, 311 S.W.3d at 244 (citing *Williams v. Kentucky Department of Education*, 113 S.W.3d 145 (Ky. 2003)). Appellees contend that Smith was aware of prior incidents involving D.P. yet failed to take appropriate measures to insure his safety. The record does not support such a conclusion.

In his uncontroverted affidavit, Smith testified that during D.P's sixth grade year, he was made aware of several instances where D.P. had instigated physical altercations with other students. Smith met with Appellees on several occasions to discuss the steps being taken to address the situation. Smith established a system with D.P.'s teachers to intervene when a problem with other students arose. In addition, Smith stated that all reports of bullying were investigated and proper action was taken to remedy the situation, including imposing discipline upon the other students involved. Contrary to Appellees' position, the matter herein clearly concerns the means of supervision rather than a failure to supervise students. *See Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2012). There simply is no evidence that Smith failed to supervise students or otherwise negligently performed a ministerial task.

The duties required of a school administrator such as a principal or vice-principal do not include actually performing tasks assigned to others, such as a teacher's duty to supervise students. Nor can they personally supervise every part of a school's premises even though they do have general supervision duties. Appellees have failed to identify any ministerial duty that either Grayson or Smith negligently performed or failed to perform. We conclude that their duties at issue herein were discretionary in nature.

To be entitled to qualified immunity however, discretionary acts must have been performed in good faith. The trial court's order does not indicate whether it believed that Appellants' duties were ministerial or whether they were

discretionary but performed in bad faith. Nevertheless, "[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. Although Appellees have not alleged in this Court that Appellants acted in bad faith, in the proceedings below they argued that Appellants' failure to investigate the claims of bullying and take appropriate action demonstrated bad faith. We conclude, however, that the record refutes Appellees' claims and that Appellants did, in fact, act in good faith in attempting to resolve D.P.'s issues. Therefore, because Appellants' duties at issue herein were discretionary in nature and performed in good faith, they are entitled to the defense of qualified immunity. The trial court erred in ruling otherwise.

The order of the Grant Circuit Court denying Appellants' motion for summary judgment is reversed. This matter is remanded for entry of an order ruling that Appellants are entitled to the defense of qualified immunity and dismissing all claims against them in their individual capacity.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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