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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001673-MR

LYNN FIELDS AND BO RAINS — APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 13-CI-01000

KAMRYN BAKER — APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

CLAYTON, JUDGE: Winter precipitation comes in many forms. As Yukon Cornelius so aptly perceived, "Terrible weather we've been havin' . . . snow, *and ice*!" *Rudolph, the Red-Nosed Reindeer* (NBC, 1964). How you treat that snow and ice in parking lots can mean the difference between a treacherous path and a safe one.

In the instant case, a high school student was injured when she slipped on a patch of non-visible, black ice in the middle of a student parking lot. She sued various school officials and employees, both in their official capacities and individual capacities, seeking compensation for her injuries. All of the defendants were dismissed in their official capacities, and all but two of the defendants were dismissed in their individual capacities. Thus, the instant appeal places a narrow question before us: whether two grounds crew workers of the Laurel County Board of Education are entitled to immunity from suit in their individual capacities for failing to remove ice from a student parking lot. The trial court found the employees were not entitled to immunity because the act of removing ice is a ministerial function. Before we analyze the immunity issue, we begin with a recitation of the relevant facts.

On February 12, 2010, Kamryn Baker was driven to school by her brother. It had previously snowed, and the student parking lot had already been plowed by the grounds crew. Baker exited her vehicle and proceeded across the parking lot toward the building. While still in the parking lot, Baker slipped on "black ice" and injured her leg and ankle. During her deposition, Baker admitted she was paying attention to the other cars driving in the parking lot while she was walking, but had she been looking at the ground, the "black ice" would not have been visible:

> A. Not necessarily, because it was the color of the road. It was black.

> Q. Okay.
>
> A. And everything looked wet, sort of, that day, so it blended in.

Depo. at 18.

Baker then went to the hospital. She would later undergo multiple operations and have screws inserted in her leg to correct the damages she apparently received from the fall. The alleged damages stemmed from the alleged negligence of the grounds crew in their efforts to plow the snow and remove the ice from the parking lot. The two grounds crew members who performed the snow plowing and ice removal tasks were Lynn Fields and Bo Rains. They were supervised by James Kennedy.

To perform the snow and ice removal tasks, the school district provided certain equipment to Fields and Rains. Three vehicles were given for plowing snow – two, three-quarter-ton pickups, and one large dump truck. These vehicles would not remove ice:

> Q. Okay. And your equipment that you have is designed primarily for removing the snow off of the parking lot?
>
> A. That'd be correct, yes.
>
> Q. It is not designed for purposes of removing any underlying ice?
>
> A. That is correct. I don't really know of any that is designed to move ice, because the blade tends to ride on the ice.

Kennedy Deposition, p. 20.

To remove ice, one small salt spreader was available to go on the tailgate of a three-quarter-ton pickup truck. The salt spreader was not used to put salt on the parking lots at the district's seventeen schools. It was only used for the district's administrative offices and, on occasion, for a high school parking lot when Kennedy told Fields and Rains to apply salt due to a ball game. Those occasional uses were at the express request of the superintendent or the assistant superintendent:

> Q. So it could be – the salt spreader could be utilized at a school location whenever someone from the school requested, and primarily that was done when some type of school event was going on, on days that school was not in session; is that correct?
>
> A. That'd be correct. And that's very infrequent, because it's a small – such a small spreader.
>
> Q. Okay. For – just lack of better terminology, for normal snow and ice closing days, did – was the salt spreader ever utilized?
>
> A. No.

Id., pp. 11-12.

As Kennedy testified, because they were in a rural county where the roads were not quickly cleared of snow, they only needed to plow the snow off of the parking lots when it snowed. In the time it took the county to clear off the roads, the sun would heat up the asphalt in the parking lots and melt away any ice that had been underneath the snow. Though some ice may reform through the melting process, the lots were cleared off to the best of the district's ability.

Kennedy did not expect Fields and Rains to completely clear the parking lot of snow and ice:

> A. Completely free and clear [of snow and ice], no, sir, I wouldn't expect that. That's – that's not been my experience in any parking lot or any roadway, for that matter. Temperatures change, moisture on the ground, things change in an instant. So to say that I would expect it to be 100 percent clear, no, sir, I would not.

Id. at 13. In fact, Kennedy, as their supervisor, only required them to scrape the snow off the high school parking lot:

> Q. Okay. When you have your personnel out at, for example, North Laurel High School, that has a student parking lot, do you expect them to scrape the entire parking lot?
>
> A. I expect them, yes, to get the snow off, you know, the – the equipment is just not equipped to take ice. If there's ice that adhered to the blacktop, our equipment cannot remove that ice.

Id. at 18-19.

There was no written snow-removal policy by which Fields and Rains operated. Kennedy did admit that "snow and ice" must be removed from the parking lots, however that testimony was necessarily qualified by his previous understanding of the equipment limitations he provided to Fields and Rains. With this general directive, Kennedy left Fields and Rains with the discretion to plow the snow in the manner they believed was best. Fields and Rains were only provided with sufficient equipment to plow snow, not to treat ice, at the more than

seventeen schools. Kennedy, as supervisor, expressly declined to purchase the materials necessary to treat ice at the schools:

> Q. Have you, as – in your position as a supervisor of the snow and ice removal process, have you ever considered asking for or purchasing brine to put down before snow falls.
>
> A. No.
>
> Q. Why not?
>
> A. As I stated earlier, the roadways are the critical part, and our – our side – our parking lots are – have historically been clear before we're able to go to through natural melting, before the road – before the roads permit us to go to school.
> . . .
> Q. Have you considered as an option always spreading in the parking lots, especially student parking lots, some type of salt product to assist with the melting?
>
> A. No.

Id. at pp. 21-22.

In fact, Kennedy, as supervisor of Fields and Rains, considered that ice could be underneath the plowed snow, and he still decided not to purchase ice-removal tools for Fields and Rains:

> Q. Okay. Now, in your experience as the supervisor of this process, have you found it to be more dangerous to walk on snow or more dangerous to walk on ice?
>
> A. It's my experience in living it's more dangerous to walk on ice, yes.
>
> Q. Okay. And as your – in your experience as the supervisor of this process, knowing that your equipment can only remove snow and not underlying ice, have you

> ever given any consideration to when there could be underlying ice to not scraping a parking lot?
>
> A. No. If there's snow there, and we can – we can remove that snow, that just speeds the natural melting of the ice underneath it. The snow is an insulating blanket, so we would like to get that off, expose the ice to the sun when it does come up.
>
> Q. Even though the ice may be more – underlying ice may be more dangerous to walk on than the blanket of snow?
>
> A. Yeah. That's because we're getting ready to go to school. These are not events that are taking place while we're having school. We're trying to get this parking lot ready to go to school.
>
> Q. Okay.
>
> A. So, you know, it would – just the quicker we can get the sun to the ice, the better off we are.

Id. at pp. 22-23. Kennedy was even aware that black ice was sometimes on the parking lots after the snow was plowed and had "encountered" it "from time to time, if the conditions [were] right." *Id*. at p. 23. Nonetheless, the school district did not decide to purchase any additional ice removal equipment or supplies for Fields and Rains to use on all the parking lots. What is apparent from Kennedy's testimony is that Fields and Rains were to perform thusly to remove "snow and ice": plow snow on the parking lots and let the sun melt away any ice underneath the snow; apply salt to the administrative buildings' parking lots and entrances; and apply salt to parking lots when directed to by the superintendent or assistant superintendent.

Given these general "snow and ice" removal directions, Fields and Rains each testified similarly regarding how they made the decision to effectuate their job duties. When snow was expected, one of the men would take a work truck home with him while the other would go to the maintenance garage to get his work truck. They would make the decision to plow if they saw snow on the ground. Usually if it were less than an inch of snow, they would not plow as the plow blades did not scrape such a small amount of snow.

Fields would first plow and salt the two administrative buildings and their sidewalks so the superintendent and his staff could safely get into the premises. Rains would begin plowing snow at one of the high schools, and Fields would plow at another one once he finished with the administrative buildings. They would first clear the entrance ways onto the property to allow school personnel to get into the school. They would then clear the entrances to all of the seventeen schools. They would then plow the teacher and student parking lots. As Kennedy, their supervisor, desired them to act, they simply scraped the snow off of the parking lots. They did not apply salt or brine to the parking lots.

In fact, Fields and Rains testified that the only places they ever salted were the occasional school building when they were directed to due to a ball game, and they also regularly salted the parking lots and walkways of the administrative buildings because, again, those employees did not get the day off due to inclement weather. They otherwise scraped the snow off the asphalt and allowed the sun to

melt away any ice that was underneath the snow. They did not have the equipment to salt and/or brine all of the schools.

Given this evidence, Fields and Rains moved for summary judgment claiming that they were immune from suit under the qualified official immunity doctrine. They argued that ice removal was a discretionary function, thus they were entitled to qualified official immunity. The trial court denied the summary judgment motion. The trial court found that both the snow and ice removal duties were ministerial in nature. Thus, it was up to a jury to determine whether the acts or omissions of Fields and Rains were reasonable or constituted negligent acts that resulted in Baker's injuries. Fields and Rains filed a motion to alter, amend, or vacate the trial court's order denying immunity. That motion was denied. Fields and Rains timely appealed.

STANDARD OF REVIEW

We initially note that the appeal before us is interlocutory. Though interlocutory appeals are not typically permissible, the immunity claim is one of the narrow and rare exceptions to the interlocutory appeal at bar. *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 885-887 (Ky. 2009) (absolute immunity); *see also Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010) (qualified official immunity). We review the sovereign immunity claim *de novo* as it is a legal claim. *See, e.g., Prater*, 292 S.W.3d at 885-887.

Furthermore, because we are dealing with a summary judgment motion, we must view "[t]he record . . . 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, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Mfg. Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Soc'y, Inc*., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

When an officer or employee of the state or county or one of their agencies is sued in his 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*.'" *Haney*, 311

S.W.3d at 240 (quoting *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001)) (emphasis in original). It is not the title or status of the officer or employee that controls whether he or she is entitled to qualified official immunity. Instead, it is the act or function the officer or employee performs that controls the analysis. *Id*. If the act is discretionary, then the officer or employee may be entitled to qualified official immunity. *Turner v. Nelson*, 342 S.W.3d 866, 874 (Ky. 2011). If the act is ministerial, then the officer or employee is not entitled to qualified official immunity. *Id*.

A ministerial act is one where the employee is to obey another's orders, or where a duty is absolute and certain and involves mere execution of a specific act under fixed and designated facts. *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014) (citation omitted). The employee may have some discretion in performing the act and in choosing the means and method to accomplish the task. *Id*. However, at its core, a ministerial act is one that an employee must do. "In other words, if the employee has no choice but to do the act, it is ministerial." *Id*.

Conversely, discretionary acts require the employee to exercise discretion and judgment and make a good-faith call. They involve "quasi-judicial or policy-making decisions." *Marson*, 438 S.W.3d at 297. They involve making "higher-level decisions and giving orders to effectuate those decisions[.]" *Id*.

The distinction between discretionary and ministerial acts is important, as the latter opens up the individual actor to liability for negligence:

> Thus, 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.

Marson, 438 S.W.3d at 297-98 (paragraph breaks added).

In light of the well-established law, it is apparent that plowing snow and removing ice are ministerial functions. They are duties about which a person is required to act. Though they require some discretionary decisions to carry out, for example, what direction in which to plow the parking lot and where to pile up the snow, the general acts of plowing snow and spreading salt require little-to-no discretion. They certainly are not judgment calls in a legally uncertain environment.

More importantly, Fields and Rains were directed to (or operated with the understanding that they should) plow snow and remove ice. To that extent, they were performing ministerial functions. Accordingly, the trial court did not err by finding Fields and Rains were not entitled to qualified official immunity because their snow plowing and ice removal duties were ministerial functions.

But simply deciding that these acts are ministerial does not end the summary judgment analysis. As the Kentucky Supreme Court held in *Marson*, just because an act is ministerial does not mean an actor performing it is not entitled to summary judgment as a matter of law. The act for which the employee is being sued may be outside the scope of his or her employment. For example, though the Court has held that a teacher's supervision of children is a ministerial act, "[i]t is possible that some acts that happen when a teacher is supervising are outside the scope of what his supervision requires, and he will be entitled to a summary judgment as a matter of law." 438 S.W.3d at 302.

Thus, rather than simply label the snow and ice removal duties as ministerial and end our analysis there, we must examine the scope of the ministerial duties assigned to Fields and Rains. Relevant here, Fields and Rains were tasked with both snow removal and ice removal. The scope of those duties was substantially different, as is proved by the equipment provided to accomplish those tasks.

The uncontested deposition evidence in the record, viewed in a light most favorable to Baker, indicates that the scope of the snow removal duty was broad – Fields and Rains were to plow the snow at all of the schools and administrative buildings. Conversely, the scope of the ice removal duty was narrow – they were to salt only the entrances to the two administrative buildings. They were also to salt the parking lots when directed to do so by the superintendent or assistant superintendent. On the day that Baker was injured, there is no

evidence that Fields and Rains had been directed to apply salt to the high school student parking lot.

The limited scope of the ice-removal duty is clearly seen in the equipment Fields and Rains were given to perform their ministerial task. Between the two of them, they were given three trucks with plows, but only one small salt spreader. That salt spreader was insufficient to use at all seventeen schools and two administrative buildings. Moreover, their supervisor did not want Fields and Rains to salt or brine the school parking lots. Kennedy testified he both considered and rejected using brine and salt on all the schools' parking lots.

Thus, the scope of the ice-removal duties was exceedingly narrow and did not extend to laying down salt in all of the school parking lots every time snow and ice occurred. As the facts are uncontested that the high school parking lot had been plowed of snow, that Baker fell on ice in the high school parking lot, and that it was not within the scope of duties for Fields and Rains to apply salt to the high school parking lot or remove ice from the same, summary judgment should have been granted to Fields and Rains in their individual capacities because the alleged negligent acts were outside the scope of their ministerial duties. Accordingly, we reverse and remand for proceedings consistent with this Opinion and Order.

Finally, we grant the Appellants' motion to cite supplemental authority. We have considered *Rasche v. Berman*, 491 S.W.3d 182 (Ky. App. 2016), and find it inapplicable to the instant case. There, a panel of this Court found the supervisors and coordinators of the individuals who plowed and salted

the school parking lots in Jefferson County were performing discretionary functions. The instant case deals with whether the individuals who plow and salt the parking lots are performing ministerial or discretionary functions. Thus, the *Rasche* analysis is irrelevant to the instant appeal.

CONCLUSION

While we agree with the trial court that Fields and Rains were performing ministerial duties when they plowed snow and removed ice and were thus not entitled to summary judgment under the qualified official immunity doctrine, we disagree that Fields and Rains were not entitled to summary judgment. The uncontested facts in this case are that: Fields and Rains plowed the snow off of the parking lot; it was not within the scope of their ministerial duties to remove ice from the student parking lots unless expressly directed to by the superintendent or assistant superintendent; and Baker slipped and fell *on ice* in the student parking lot.

As Baker's injuries are alleged to have occurred by Fields and Rains failing to remove ice from the student parking lot, and it was not within the scope of their job duties to remove ice from the student parking lot, summary judgment is appropriate. Accordingly, we reverse and remand for proceedings consistent with this Opinion and Order.

ALL CONCUR.

ENTERED: January 27, 2017

/s/ Denise G. Clayton
JUDGE, COURT OF APPEALS

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