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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001993-MR

UNIVERSITY OF KENTUCKY
FIRE MARSHALS, GLENN G.
WILLIAMSON and JASON D.
ELLIS — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-01440

MARK SAUNIER
and BARBARA SAUNIER — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: Glenn G. Williamson and Jason D. Ellis appeal an order denying their motion for summary judgment, based on assertions of qualified official immunity, as to negligence claims brought against them by Mark and Barbara Saunier. For the reasons discussed below, we reverse.

Williamson and Ellis are employed by the University of Kentucky ("UK") as fire marshals. They were both working a UK basketball game at Rupp Arena on November 8, 2013. Mark Saunier attended the game as a fan.

Saunier left his seat during halftime to walk the perimeter of the playing floor in a pathway located between the bleacher seating and the courtside seating for players, officials, and media. At one point during his walk, Saunier stopped to briefly converse with Doug Botkin, an acquaintance and UK usher, whose seat was located near the stairs at the lower part of the bleachers. Saunier took a backward step down from the bleachers onto the floor and fell in the vicinity of an "aisle pad." An aisle pad is a 2 ½-inch-high covering with ramped sides and a bright yellow top that is placed on floors over power cables to mitigate tripping hazards.

Saunier filed suit against Williamson and Ellis in their individual capacities, alleging he had tripped on the aisle pad which he maintained was located on the floor in a hazardous position at the foot of the bleacher stairs, He further claimed that Appellants' failure to move the aisle pad to a safer location prior to his injury constituted negligence. Based on the same allegations, Mark's wife, Barbara Saunier, asserted a claim for loss of spousal consortium.

Shortly after Saunier filed this action, Williamson and Ellis moved for summary judgment on the basis of qualified official immunity. The trial court denied their motion, having concluded that Williamson and Ellis had breached a ministerial, rather than discretionary duty and thus were subject to claims for

negligence. This interlocutory appeal followed. *See Breathitt Cnty Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009); *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010); *Rowan Cnty v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (recognizing an immediate right of appeal regarding a claim of immunity).

Appellate review of a summary judgment involves only questions of law 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) (citation omitted). Likewise, whether an individual is entitled to qualified official immunity is a question of law reviewed *de novo*. *Sloas*, 201 S.W.3d at 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.

We begin our analysis by outlining a few relevant underlying legal principles. State universities of this Commonwealth, including the University of Kentucky, qualify as state agencies. *Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014). When employees of state agencies are sued in their

individual capacities, they may be entitled to qualified official immunity from suit. *Bolin v. Davis*, 283 S.W.3d 752, 757 (Ky. App. 2008). Qualified immunity shields employees of state agencies from negligence suits based upon acts or omissions which are: (1) discretionary, rather than ministerial; (2) made in good faith; and (3) within the scope of the employee's authority. *See Yanero v. Davis*, 65 S.W.3d 510, 522-23 (Ky. 2001).

The trial court agreed with the Sauniers that qualified immunity did not shield Williamson and Ellis from these claims because they allegedly breached a ministerial duty. Our Supreme Court has explained the difference between ministerial and discretionary duties. The Court provided the earliest explanation in *Upchurch v. Clinton Cnty.*, 330 S.W.2d 428, 430 (Ky. 1959): first defining a ministerial duty as "[a]n official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts . . ." and then contrasting it with the definition for discretionary duties, which 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." Subsequent courts have refined those definitions by emphasizing 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 of method to be employed." *Collins v. Commonwealth of Ky., Nat. Res. and Envt'l. Prot. Cabinet*, 10 S.W.3d 122, 125-26 (Ky. 1999) (quoting *Franklin Cnty v. Malone*, 957 S.W.2d 195 (Ky. 1997).

The evidence taken during the litigation established that one of the duties of the fire marshals on November 8, 2013, was to ensure that aisles of Rupp Arena were clear and unobstructed so as to permit safe ingress and egress. This included looking for safety issues, including tripping hazards, both before and during games. Williamson testified he had probably walked by the location of where Saunier fell that very evening, before it had happened. After being presented with a photograph of the aisle pad's alleged location at the foot of the bleachers that night, he testified that if he had seen it, he would have had the aisle pad immediately moved back to its "normal" location by someone employed by the Lexington Center. Specifically, the "normal" position of these pads was at the corners of the arena floor, lined up about one foot to the left of the outside edges of the bleachers, away from where people descending the bleachers would step onto the floor. However, no written rule or policy mandated this placement. Williamson and Ellis learned this "proper" placement through experience, and not formal training.

Ellis echoed Williamson when he testified that if he had seen the aisle pad in the location depicted in the photograph, he would have brought it to Williamson's attention or had it moved back to its "normal" location. Both Williamson and Ellis stopped short of classifying the depicted location of the aisle pad as hazardous.

The manager of Lexington Center's engineering department, Jimmy Barber, also offered testimony in deposition. Barber and his immediate

subordinates were tasked with preparing Rupp Arena prior to basketball games, including placement of the four aisle pads on the floor. Barber testified no one had explained to him where the pads needed to be placed, and when he became manager he relied entirely on the electricians in his department, whom he trusted to properly place the pads. Barber testified that his department makes a conscious effort not to put aisle pads in front of the bleacher steps. He also testified that he and his subordinates merely set up the arena for events and are not tasked with monitoring Rupp Arena for safety issues.

While the duty to safely maintain a given area may be ministerial, "giving orders to effectuate" supervisory decisions has been held to be discretionary. *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014). To be sure, a general supervisor acts in a discretionary capacity, rather than a ministerial capacity, when delegating tasks to subordinates. In *Marson*, the principal of a school acted in a discretionary capacity when delegating a more specific duty of supervision, or assigning ministerial tasks, to teachers and custodians. *Id.* at 299-300.

The evidence established that Williamson's and Ellis's duty relative to the aisle pads was discretionary. Botkin's testimony cast Williamson and Ellis in a general supervisory role with respect to safety issues in Rupp Arena, noting that while his own responsibilities were likewise unwritten, they included keeping the aisles in his own designated area "open" for the fire marshal.

The testimony of several witnesses established the authority of the fire marshal to give orders to effectuate their decisions regarding safety. As noted above, Botkin's testimony cast Williamson and Ellis in a supervisory role on issues of safety. Williamson testified in his deposition that if he had noticed the pad's position before Saunier fell, he would have "got on the radio and talked to somebody with Lexington Center and said 'we need to get this moved.'" Ellis testified similarly, that he would have either notified Williamson, or directed someone else to move the pad. This indicates not only that the fire marshals were not themselves tasked with moving or placing the pads, but also that the individuals whose duties did include movement and placement were subordinate to the fire marshals and obligated to move them upon request. Barber's testimony indicated that his staff, who place the pads, is not responsible for safety issues.

Much like the principal in *Marson*, the fire marshal's task is not to perform the act intended to further the purpose of safety, but rather to assign the task to another to effectuate. The duty to look out for the safety of the game's attendees is a "general rather than a specific" duty, requiring Williamson and Ellis to act in a discretionary manner by devising procedures, assigning tasks, and providing general supervision to ensure the tasks were accomplished. *Marson* at 299.

Because the trial court's decision denying Williamson and Ellis qualified immunity relied on an erroneous conclusion as to the nature of their

duties, we reverse and direct the trial court to enter orders consistent with this opinion.

TAYLOR, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KRAMER, CHIEF JUDGE, DISSENTING: Respectfully, I dissent. As noted, the sole basis of the circuit court's decision was that Williamson and Ellis were not entitled to qualified immunity from the Sauniers' causes of action because they were both alleged to have breached a ministerial duty. The difference between ministerial and discretionary has been explained as follows:

> In recent years, very little has been added to improve upon the explanation given more than 50 years ago by our predecessor court in *Upchurch v. Clinton Cnty*., 330 S.W.2d 428, 430 (Ky. 1959), and we find it worth repeating here:
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> > The essentials of a ministerial as contrasted with a discretionary act are thus set forth in 43 Am.Jur., Public Officers, sec. 258, p. 75: 'An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature. Discretionary or judicial duties are such as 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. However, 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.

Gaither v. Justice & Public Safety Cabinet, 447 S.W.3d 628, 633-34 (Ky. 2014).

> [T]he duty compelling the performance of a ministerial act need not spring from a specific statute, administrative regulation, or formal policy statement or protocol. There are instances in which ministerial actions may flow from common law duties or professional customs and practices. Our jurisprudence has taken note of such instances.
>
> For example, in *Commonwealth, Transp. Cabinet, Dep't of Highways v. Sexton*, 256 S.W.3d 29, 33 (Ky. 2008), we noted that "an act may be ministerial even if that act is not specifically covered by applicable statutes, or administrative regulations." We then cited this hypothetical instance as an example: "if a state entity has actual notice of the existence of a dead or dangerous tree on property owned by that state entity, inspecting or removing the tree may be a ministerial act." While there is no duty requiring state employees to inspect trees, a ministerial imperative would arise from the knowledge that the tree is dangerous and the common law duty of landowners with respect to latent hazards of which they have notice.
>
> In *Haney v. Monskey*, 311 S.W.3d 235, 245 (Ky. 2010), citing to *Sexton*, we said, "[b]ecause it is the nature of the duty that controls the analysis, we have also recognized that a common law duty—if specific and affirmative in its command—could render an act or function essentially ministerial in the absence of any statute or regulation on point."
>
> Perhaps the clearest example of a ministerial act premised upon a duty that arose from custom and practice can be found in the landmark case of *Yanero*, 65 S.W.3d at 510, where we concluded that the failure of a high school baseball coach to require a player to wear a batting helmet during batting practice was a ministerial act, even though there was no established or written rule mandating the use of helmets. In *Yanero*, we cited testimony establishing that despite the lack of a formal rule, all the participants in high school baseball, players and coaches alike, knew that a player taking batting practice was required to wear a helmet. *Id*. at 528. We held that the coach had the common law "duty to exercise that degree of care that ordinarily prudent teachers or coaches engaged in the supervision of students of like age as the

> plaintiff would exercise under similar circumstances." We held further, in no uncertain terms, that "[t]he performance of that duty in this instance was a ministerial, rather than a discretionary, function" because "it involved only the enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice. The promulgation of such a rule is a discretionary function; the enforcement of it is a ministerial function." *Id*. at 529. It is significant that the batting helmet rule was a rule, in part, simply because everyone knew it to be *the rule*—it was a commonly known, imperative part of baseball practice.

Id. at 635-36 (internal footnotes omitted).

In my view, Williamson's and Ellis's duty relative to the aisle pads arose from a commonly known rule derived from a "regimented" professional custom and practice. It involved merely execution of a specific act arising from fixed and designated facts: if one of the four the aisle pads was out of position, it was to be moved back to its "normal" position. Therefore, Williamson's and Ellis's duty relative to the aisle pads was ministerial.

The duty to safely maintain a given area is ministerial, not discretionary. *See Faulkner v. Greenwald*, 358 S.W.3d 1, 4 (Ky. App. 2011) (explaining an athletic director's duty to safely maintain a concession stand is ministerial). The act of "inspecting," or a necessity to ascertain facts to otherwise fulfill that duty, does not make it discretionary. *Upchurch*, 330 S.W.2d at 430. Nor does it make a difference that Williamson and Ellis had the discretion to decide when and where to begin looking for safety issues. *See Mucker v. Brown*, 462 S.W.3d 719 (Ky. App. 2015) (explaining elementary school plant operator had

a ministerial duty to remove ice from surrounding sidewalks, despite having discretion to decide when and where to begin removing the ice.)

Based on the foregoing, the circuit court did not err in its decision to deny Williamson and Ellis qualified immunity. Accordingly, I would affirm.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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