RENDERED: DECEMBER 15, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001610-MR

PHILLIP COLLINS,
in his individual capacity; and
DANNY LITTLE, in his
individual capacity APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 13-CI-00805

GEORGE JEFFREY VANDIVER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Appellants Danny Little and Phillip Collins are Floyd County Sheriff's deputies who function as court security officers. On February 28, 2013, they transported approximately twelve inmates from the Floyd County Detention Center to the Floyd County Justice Center. Appellee George Jeffrey

Vandiver was one of the inmates. After arriving at the justice center, Little and Collins parked the transport van and opened the side doors for the inmates to exit. When it was Vandiver's turn to exit, he tripped out of the van and struck the back of his head and upper shoulders on the concrete driveway, sustaining injuries.

Ultimately, Vandiver filed suit in Floyd Circuit Court against Little and Collins for negligence. However, after a period of discovery and motion practice, both deputies moved for summary judgment on the bases of qualified immunity. The circuit court denied their motions after determining that the duties Little and Collins had allegedly violated were ministerial in nature. 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). Upon review, we affirm.

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) (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. 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.

When employees of state agencies (*e.g.*, Little and Collins) 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 actions they have taken 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). Our Supreme Court has explained the difference between ministerial and discretionary duties 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:
>
> > 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 & Pub. Safety Cabinet, 447 S.W.3d 628, 634 (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.
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> 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.
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> 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).

We now turn to what Little's and Collins' relevant duty was on February 8, 2013. It may not have been codified in a policy manual,[1] but it was described in the various depositions filed of record in this matter.

Two of their supervisors, Lieutenant Clayton Teel and Chief Deputy Greg Clark, testified that training with respect to inmate transportation is done "in-house." Both explained that prior to opening the double side doors of the van and allowing the inmates to exit, the officers transporting the prisoners are required to place a wooden box (which has an area of about two square feet and a height of about six inches) under the van to function as an additional step to the ground. This is done because it is the custom of the Floyd County Sheriff's Department to require handcuffs and ankle shackles on all inmates who are transported from the detention center to the justice center regardless of the inmate's offense; and the ankle shackles make it difficult for inmates to otherwise step down approximately one foot from the van directly onto the ground.

Next, the inmates would exit the van in a single-file line and, as Teel testified:

> You've got one, they just come down, grab ahold to the door, and they'll take short steps down. A deputy is always standing there telling them, you know, "Watch your step. You know, you've got another step here." And then they get to the floor and they step. But other than that, you know, they're watched.

[1] It is unclear whether, during these events, the Floyd County Sheriff's Department had a specific written policy regarding the transportation of inmates. The employees of the Sheriff's Department who testified in this matter gave no definitive answer in that regard; and, although they agreed a written manual existed at that time, no written manual was ever produced in discovery.

To be sure, Teel, Clark, Little and Collins each testified that nothing required the transporting officer to *offer* assistance to every inmate entering or exiting the transport van. Collins and Little also explained they typically assisted inmates who (unlike Vandiver) asked for assistance, or were pregnant, elderly, or injured. Everyone acknowledged, however, that the inmates entering or exiting the transport van needed to be *watched*; and if an inmate was having difficulty, or would foreseeably have difficulty, the officer assisted the inmate. As Little explained:

> It's not every inmate, you know, because every one of them don't need assistance. Sometimes, they just walk out easily . . . But, we stand there and watch them to make sure they don't, you know, they've got long jump suits, and we don't, we don't want them stepping on them or anything like that.

The crux of Vandiver's suit is that Collins and Little substantially contributed to the cause of his injuries because they either failed to watch him while he was exiting the transport van, or watched him and did nothing to prevent him from falling. From how their duties are described above, Collins and Little were *required* to watch the inmates as they exited the transport van; thus, any failure to do so would have amounted to the breach of a ministerial duty. *See Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky. 2011) (explaining failure to supervise is a breach of a ministerial duty and not subject to qualified immunity).

Moreover, the necessity of ascertaining whether an inmate was having difficulty exiting the van would not operate to convert this duty into one

discretionary in nature. *See Upchurch*, 330 S.W.2d at 430 (citation omitted). If an inmate needed assistance, Collins and Little did not have the discretion to simply allow the inmate to fall; rather, they had an absolute, certain, and imperative duty to give assistance. In the words of their supervisor, Clayton Teel, "Everybody knows they're supposed to help. You know, if they're having trouble getting on or off, they'll help them."

In short, the circuit court correctly determined that the duties Collins and Little allegedly violated were ministerial and nature and not subject to qualified immunity. We therefore AFFIRM.

ALL CONCUR.

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