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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001674-MR

TONY SERGENT, SUPERINTENDENT;
LETCHER COUNTY BOARD OF EDUCATION;
WILL SMITH; MENDY BOGGS; TERRY CORNETT;
SAM QUILLEN, JR.; AND ROBERT KISER — APPELLANTS

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE JAMES W. CRAFT, II, JUDGE
ACTION NO. 13-CI-00303

MICHELLE MURPHY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Tony Sergent, Superintendent, et al., ("Appellants") appeal from an Order of the Letcher Circuit Court denying their Motions for Summary Judgment in this slip and fall action filed by Appellee. Appellants argue that the causes of action asserted against the Letcher County Board of Education, the

Superintendent and the Board members in their official capacities are precluded by governmental immunity, and that the claims against the Superintendent and the Board members in their individual capacities are barred by qualified official immunity. For the reasons stated below, we REVERSE and REMAND the Orders on appeal.

Appellee Michelle Murphy alleges that she slipped, fell and was injured on the premises of the Cowen Elementary School in Letcher County, Kentucky on September 10, 2012. Ms. Murphy, whose daughter was a student at the school, maintained that she was present on school property to take some papers to the school office and to sign her daughter out of school. According to Ms. Murphy, there was a wet substance on the floor of a hallway that caused her to fall.

Ms. Murphy filed her first Complaint alleging general negligence in Letcher Circuit Court against the Appellants in their official capacities. She asserted that they knew, or should have known, of the wet substance on the floor, and negligently failed to remove the substance or to warn her of it. Those Appellants consist of 1) the Letcher County Board of Education, 2) Superintendent Tony Sergent, and 3) Board members Sam Quillen, Jr., Robert Kiser, Mendy Boggs, Terry Cornett, and Will Smith.

Thereafter, Ms. Murphy filed a First Amended Complaint asserting the same negligence claims but adding the Superintendent and Board members in their individual capacities. A Second Amended Complaint added two additional defendants who are not parties to this appeal. Thus, the matter proceeded in

Letcher Circuit Court against the Board, and against the Superintendent and Board members in both their official and individual capacities.

Discovery commenced, whereupon the Superintendent and Board members stated by way of affidavit that their duties did not include checking for and cleaning up liquid spills on the floor of the Cowan Elementary School. Rather, they asserted that their duty was to develop policies and procedures that directed the manner in which the school property was to be maintained. Appellants stated that the duty to check for and clean liquid spills was assigned to the janitorial staff at the school.

Appellants filed a Motion for Summary Judgment seeking to have all claims against them dismissed based upon sovereign immunity, governmental immunity and qualified official immunity. The circuit court denied the Motions and this interlocutory appeal followed.[1]

Appellants now argue that the Letcher Circuit Court erred in failing to grant their Motions for Summary Judgment. They first argue that all claims against the Letcher County Board of Education are precluded by governmental immunity. They note that governmental immunity is a public policy derived from the doctrine of sovereign immunity, which limits the imposition of tort liability on a governmental agency. Appellants argue that a local Board of Education is a creation of the General Assembly and is entitled to governmental immunity unless

[1] The parties agree that an Order denying a claim of immunity from suit is appealable before the action reaches finality. *Jenkins Independent Schools v. Doe*, 379 S.W.3d 808, 810 (Ky. App. 2012).

such immunity has been expressly waived by statute. Appellants direct our attention to *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001), and *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003), for the proposition that the only limitation on governmental immunity for a local Board of Education is where the Board is performing a proprietary rather than governmental function at the time of the alleged injury. Based on these holdings, Appellants argue that the test for whether the Board or other governmental agency was performing a governmental or proprietary function is whether the Board was "carrying out a function integral to state government" or conversely is "engaged in a business of a sort therefore engaged in by private persons or corporations for profit." *Id.* at 168.

Appellants also rely on Kentucky Revised Statute (KRS) 160.290(1), which states that the general duty of a local Board of Education is to "have control and management of . . . all public school property of its district." Thus, according to Appellants, a Board of Education's control and management of school property is a "function integral to state government" and not a function engaged in "by private persons or corporations for profit." *Schwindel* at 168. In sum, Appellants argue that the Letcher County Board of Education is vested with absolute governmental immunity and that the circuit court erred in failing to so conclude.

Appellants go on to argue that the Superintendent and individual Board members in their official capacities are also entitled to governmental immunity. Pointing to *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007), they maintain that if a state agency is entitled to governmental

immunity, "its officers or employees have official immunity when they are sued in their official . . . capacity." *Id.* They argue that since the Board of Education is vested with governmental immunity, *Autry* extends that same immunity to the Superintendent and the Board members in their official capacities.

Lastly, Appellants maintain that the Superintendent and the Board members are entitled to qualified immunity as to the claims asserted against them in their individual capacities. Again, pointing to *Yanero*, Appellants argue that public officers and employees sued in their individual capacities are entitled to qualified immunity if the acts complained of are 1) discretionary acts or functions involving the exercise of discretion and judgment or personal deliberation, 2) made in good faith, and 3) within the scope of the employee's authority. *Yanero* at 522. They acknowledge that if the acts are not discretionary, but are ministerial in nature, then qualified immunity is not implicated. *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014). They direct our attention to *Yanero*, which held that an act is ministerial if it is one "that requires 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." *Yanero* at 522. As applied herein, Appellants contend that the duties of the Superintendent and the Board members are clearly discretionary rather than ministerial because they made policy regarding system-wide operations, and because their duties did not involve observing or maintaining the floors of the Cowan Elementary School.

In sum, Appellants argue that they are entitled to governmental immunity[2] as to the claims made against them in their official capacity and qualified official immunity as to the claims made against them in their individual capacities. They seek an Opinion reversing the Orders on appeal.

We will first consider whether Summary Judgment was properly denied as to the Appellee's claim against the Letcher County Board of Education. *Yanero* guides our analysis. In *Yanero*, the Jefferson County Board of Education was one of several Defendants in an action filed by the parents of Ryan Yanero, who was struck in the head by a baseball while participating in a Waggener high school junior varsity baseball team practice. The issues centered on the alleged negligence of the multiple Defendants in failing to develop, implement and enforce rules and regulations pertaining to the proper hiring and training of coaches and athletic directors qualified to provide for the safety of students participating in batting practice, and/or in the proper medical procedures to be followed in case of a head injury. The Jefferson County Board of Education asserted governmental immunity, which ultimately led to a Summary Judgment in favor the Board. That Judgment was sustained on appeal to this Court and the Kentucky Supreme Court.

In examining the Jefferson County Board of Education's claim of governmental immunity, the *Yanero* court noted that, "[w]e and our predecessor Court have often addressed this issue and have usually held that local boards of

[2] To complicate matters, the phrases "governmental immunity" and "official immunity" describe the same immunity and are used interchangeably in the published literature. As discussed below, however, the phrases "official immunity" and "qualified official immunity" are not synonymous.

education are immune from tort liability for their actions." *Id.* at 525. The Court recognized that governmental immunity for boards of education derived from the theory of sovereign immunity because boards of education were the creations of the state government through its Legislature. *Id*. at 527. The Court went on to hold that the application of governmental immunity to boards of education was not universal. Rather, governmental immunity was applied when a board was engaged in a "governmental function", but not when it engaged in a "propriety function." *Id*. Said the Court, "whether the Jefferson County Board of Education is subject to tort liability in this case partially depends upon whether it was performing a governmental function or a proprietary function in authorizing the organization and maintenance of extracurricular baseball teams at Waggener High School." *Id.* The test to determine if the function is governmental, and thus shielded by governmental immunity, is whether the activity is "an integral part of . . . education and, thus, a governmental function." *Id*.[3]

The question for our consideration, then, is whether the duty at issue, i.e., to know of the danger of wetness on the floor, to prevent it and/or to warn of it,[4] constituted an integral part of secondary education. *Id*. If so, then the Letcher County Board of Education was entitled to governmental immunity.

Just as in *Yanero*, there appears to be no published opinions with precisely the same fact pattern as the one before us. In at least two instances,

[3] For a comprehensive discussion of the historical development of governmental immunity, see *Yanero* beginning at p. 517.
[4] Complaint at paragraphs 5-6.

however, sovereign immunity has been found to shield the Commonwealth and its subdivisions from slip and fall litigation.[5] While these cases examined *sovereign* immunity for the Commonwealth and its subdivisions as opposed to *governmental* immunity for entities created by the Commonwealth, and therefore are not directly on point, they do stand for the broad proposition that immunity may be found to shield against slip and fall claims.

The dispositive question, though, is whether the acts complained of are governmental functions, thus implicating the application of governmental immunity to shield the Letcher County Board of Education from suit. Stated differently, is the activity an integral part of education and thus a governmental function? We must answer this question in the affirmative. The *Yanero* Court underwent an analysis leading it to the conclusion that the creation and administration of interscholastic athletics was a governmental function. "In creating the Kentucky Board of Education, the General Assembly recognized that its functions would include the management of interscholastic athletics, and it authorized the Board to designate an agent for the purpose of performing this function. KRS 156.070(2)." *Yanero* at 527. We conclude that if the management of interscholastic athletics is an integral function of education, how much more so is the establishment of protocols and procedures for creating a safe school environment and custodial remediation of spills and other dangers in school

[5] *Louisville/Jefferson County Metro Government v. Cowan*, 508 S.W.3d 107, 109 (Ky. App. 2016) (disc. rev. denied Feb. 9, 2017), and *Edmonson County v. French*, 394 S.W.3d 410 (Ky. App. 2013).

hallways. That is to say, the creation and maintenance of school facilities is a fundamental duty of boards of education, is "governmental" in that it derives from statutory mandate,[6] and such activities are therefore shielded by governmental immunity.

This leads to the question of whether the Superintendent and Board members are entitled to governmental immunity in their official capacities. We must answer this question in the affirmative. If a state agency is entitled to governmental immunity, "its officers or employees have official immunity when they are sued in their official . . . capacity." *Autry* at 717. Having concluded that the Letcher County Board of Education is entitled to protection from litigation for governmental acts including the maintenance of school buildings, it follows that the Superintendent and the Board members are also so entitled.

The final issue for our consideration is whether the Superintendent and the Board members are availed of qualified immunity or qualified official immunity[7] in their individual capacities. Again, we look to *Yanero* for guidance.

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[6] KRS 160.290 provides in relevant part that:

> (1) Each board of education shall have general control and management of the public schools in its district and may establish schools and provide for courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils . . . . Each board shall have control and management of . . . all public school property of its district and may use its funds and property to promote public education[.]
> (2) Each board shall make . . . rules, regulations, and bylaws for . . . the management of the schools and school property of the district[.]

[7] The terms "qualified immunity" and "qualified official immunity" are used interchangeably in the published case law. The *Yanero* Court alternates in their usage depending on the context.

> "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity . . . . Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled . . . . But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (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. 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.
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> …
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> Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.,* one that requires 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.

Yanero at 521-22 (citations omitted).

Simply put, the question for our consideration on this issue is whether the implementation of the statutory mandate by the Superintendent and the Board

members to manage the public schools in their district (KRS 160.290(1)) requires "discretion and judgment" – thus implicating qualified official immunity – or "requires only obedience to the orders of others". *Id.*

> Since *Yanero,* the doctrine of qualified official immunity and its discretionary versus ministerial duties analysis continues to perplex even the most learned jurists. 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[.]"

Mucker v. Brown, 462 S.W.3d 719, 721 (Ky. App. 2015).

In *Marson*, *supra*, an action was brought against a middle school teacher and two principals alleging negligence in the placement of school bleachers from which a legally blind student fell and was injured. The Kentucky Supreme Court determined that the act of extending the bleachers, as carried out by the school custodian, was ministerial as to the custodian in that the custodian merely followed orders to prepare the gymnasium for activity. Conversely, the Court determined that the principals' duty to provide a safe school environment was discretionary, as it entailed decision-making and policy considerations. Said the Court,

> 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.* (Emphasis added).

Marson at 299.

Just as the middle school principals in *Marson* were found to have discretionary duties as to the implementation of school safety, and were therefore shielded by qualified official immunity, so too are the Superintendent and the Board members vested with discretionary rather than ministerial duties as to school safety. This is especially true in that the Superintendent and Board members are more removed from the actual school facilities than are principals, both geographically and administratively. As we now conclude that the Superintendent and the Board members have discretionary duties as to school safety, we therefore find that they were entitled to qualified official immunity in their individual capacities as to the instant cause of action.

Summary judgment "shall be rendered forthwith 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 Rule 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, Inc. v. Scansteel Service*

Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

In the context of qualified official immunity, "[s]ummary judgments play an especially important role" as the defense renders one immune not just from liability, but also from suit itself. *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citing *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Whether one is entitled to immunity is a question of law which is reviewed *de novo. Id.* at 475.

When viewing the record in a light most favorable to Ms. Murphy and resolving all doubts in her favor, we conclude that there is no genuine issue as to any material fact and that the Appellants are entitled to Summary Judgment as a matter of law. The Letcher County Board of Education is shielded by governmental immunity, as are the Superintendent and the Board members in their official capacities. Further, the Superintendent and the Board members in their

individual capacities are immune not just from liability, but from the suit itself under the doctrine of qualified official immunity.[8]

For the foregoing reasons, we REVERSE the Orders of the Letcher Circuit Court. Because the matter is before us via interlocutory appeal, we REMAND it to the Letcher Circuit Court for entry of Judgment dismissing all claims against the Appellants herein.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

David C. Jones
Lexington, Kentucky

BRIEF FOR APPELLEE:

Daniel F. Dotson
Whitesburg, Kentucky

[8] Superintendent Sergent and Board members Mendy Boggs and Robert Kiser attest by way of affidavit that they were not members of the Letcher County Board of Education on the date of Ms. Murphy's fall. This argument is moot.