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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000068-MR

KENNETH W. JOHNSON

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 16-CI-00149

SUSAN HUTCHERSON,
INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE
ESTATE OF REGINALD JOSEPH
DOUGLAS PRICE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: Kenneth W. Johnson brings this interlocutory appeal from a Madison Circuit Court order denying his motion to dismiss the complaint of Susan Hutcherson, acting individually and as the administratrix of the estate of her late son, Reginald Joseph Douglas Price. The sole issue is whether Johnson, an

employee of Eastern Kentucky University (“EKU”), is entitled to qualified official immunity in this wrongful death action.

In 2009, as part of its Policies and Procedures, ECU created an Emergency Action Plan (“EAP”), which it subsequently revised on February 11, 2014. The EAP is an 86-page document divided into 21 sections addressing various potential emergency situations that might arise on campus and at the homes of members of the university community. These emergencies include fires, severe weather, medical emergencies, crime and violent behavior, hostile intruders and bomb threats. Section 2 of the EAP is entitled “**Immediate Emergency Action and Notification**.” It states: “In a Life-Threatening Emergency – Dial 911.” This section also provides phone numbers for the ECU Public Safety Dispatch Center.

Section 11 of the EAP specifically addresses psychological crises. It provides in part as follows:

EKU Faculty/Staff 911 Guide – Helping Students in Difficulty

Psychological Crisis

A psychological crisis exists when an individual is threatening to harm themselves, or is agitated and disruptive.

Psychological Crisis

EMERGENCY ACTION

Call 911 (If the Situation Becomes Violent or Life Threatening)

Price was a full-time student at Eastern Kentucky University. He was twenty years of age and resided in an on-campus dormitory. Johnson, an admissions counselor at ECU, knew Price and was aware that he was experiencing academic and social difficulties. On March 26, 2014, Price called Johnson at about 4:30 p.m. and “intimated or expressed the intention to take his own life.” Johnson instructed two student workers in the admissions office to check on Price in his dorm room. The students were denied access to the dorm room by the front desk attendant. They eventually made their way to the room, where they heard noises and shuffling followed by a loud noise from behind the locked door. The front desk attendant again denied their request to be admitted to the room. Approximately ten to twenty minutes later, the adjoining suitemate arrived and let them into Price’s room. They found that he had hanged himself.

Hutcherson filed suit against Johnson, alleging that he had breached his ordinary duty of care to Price as an ECU student and violated the EAP, which required him to notify campus security and to call 911 rather than attempt to address Price’s situation individually. The complaint contended that adherence to the university’s Policies and Procedures did not permit the exercise of any discretion on Johnson’s part and that his adherence was consequently a ministerial function not protected by qualified official immunity.

Johnson filed a motion to dismiss the complaint, arguing alternatively that he owed no duty to prevent or protect Price from self-inflicted harm or suicide; that the suicide constituted an intervening and superseding act which broke the chain of causation; and that Johnson is entitled to qualified official immunity.

The trial court entered an order denying the motion to dismiss. This appeal by Johnson followed.

A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010), *reh'g denied* (Aug. 26, 2010)

(internal citations and quotation marks omitted).

This interlocutory appeal is permissible because an “order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.” *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). The cloak of immunity entitles its possessor to be free “from the burdens of defending the action, not merely just an immunity from liability.” *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citations omitted).

Consequently, our review is confined solely to addressing whether Johnson is entitled to qualified official immunity.

“Governmental immunity extends to state agencies that perform governmental functions . . . and are supported by money from the state treasury.” *Atry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007) (citing *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001)). ECU “is a state agency because it serves as a central arm of the state performing the essential function of educating state citizens at the college level and because it receives money from the state treasury in support of this function.” *Id.* (citing *Withers v. University of Kentucky*, 939 S.W.2d 340, 343 (Ky. 1997)). “The immunity that an agency enjoys is extended to the official acts of its officers and employees.” *Id.*

But when a state agency employee like Johnson is sued for a negligent act in his individual capacity, he has only qualified official immunity, *id.*, which extends solely to “acts performed in the exercise of . . . discretionary functions.” *Patton v. Bickford*, 529 S.W.3d 717, 723 (Ky. 2016), *reh’g denied* (Aug. 24, 2017) (citing *Yanero*, 65 S.W.3d at 521). “A government official is not afforded immunity from tort liability for the negligent performance of a ministerial act.” *Id.* at 724. “The act of ‘governing cannot be a tort, but failing to carry out the government’s commands properly when the acts [to be performed] are known and

certain can be.’” *Id.* (quoting *Marson v. Thomason*, 438 S.W.3d 292, 296 (Ky. 2014) (brackets as per *Patton*)).

The Kentucky Supreme Court recently observed that “[c]ategorizing actions as either the performance of a discretionary duty or the performance of a ministerial duty is vexing to litigants and courts alike.” *Id.* The Court provided the following guide for making this often-difficult distinction: “[p]romulgation of rules is a discretionary function; enforcement of those rules is a ministerial function.” *Id.*, (quoting *Williams v. Kentucky Dep’t of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003)). Thus, “a duty is ministerial ‘when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.’” *Id.* (internal citation omitted). “[A] government official performing a ministerial duty does so without particular concern for his own judgment; . . . the act is ministerial ‘if the employee has no choice but to do the act.’” *Id.*, (citing *Marson*, 438 S.W.3d at 297).

Discretionary acts, on the other hand, involve “the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” *Id.* (citing *Knott County Bd. of Educ. v. Patton*, 415 S.W.3d 51, 57 (Ky. 2013) (quoting *Yanero*, 65 S.W.3d at 522)). Immunity is provided for discretionary acts because the “courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort

actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy.” *Id.* (quoting *Yanero* at 519).

Thus, the issue before us is whether when Johnson decided to send two students to check on Price rather than complying with the EAP directive to contact 911, he was acting in a ministerial or discretionary capacity. Put another way, did the EAP impose a ministerial duty on Johnson to contact 911, or was his decision a “good faith judgment call[] *made in a legally uncertain environment*[?]” *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (quoting *Yanero*, 65 S.W.3d at 522 (Ky. 2001) (emphasis per *Haney*) (citing 63C Am. Jur. 2d *Public Officers and Employees* § 309 (1997))).

The procedure set forth in the EAP is clear and unmistakable. When a student is experiencing a life-threatening psychological crisis, the only option provided in the EAP is to call 911. This is not a situation in which Johnson was called upon to perform “a governmental act that was ‘not prescribed’ or was left ‘without clear directive.’” *Patton*, 529 S.W.3d at 727 (quoting *Marson*, 438 S.W.3d at 302).

Johnson argues that this entire analysis mistakenly presupposes he owed a duty to Price, whereas Hutcherson has not established that he did. “In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the

breach of the duty and an injury suffered by the plaintiff.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436–37 (Ky. App. 2001). “The determination of whether a duty exists is a legal question for the court.” *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 908 (Ky. 2013). Johnson is seeking to invoke qualified official immunity as an employee of a state agency. ECU’s action in promulgating the EAP may well have been a ministerial act made in response to federal and state law directives, but Johnson’s duty under the EAP was obvious and unambiguous. The promulgation of the EAP by ECU imposed a ministerial duty on Johnson, as an employee of ECU, to call 911 when he learned that Price was intending to take his own life.

For the foregoing reasons, the order denying the motion to dismiss is affirmed and the case is remanded for further proceedings.

ALL CONCUR.

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