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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-000743-MR
&
NO. 2008-CA-002089-MR

RODNEY SALSMAN;
DEBRA SALSMAN;
SHAUN SALSMAN; AND
CHRISTOPHER SALSMAN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 08-CI-000406

SEARS, ROEBUCK AND COMPANY;
CRAIN HEATING & AIR
CONDITIONING, INC.; AND
RICHARD HOWLETT — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: Rodney Salsman, Debra Salsman, Shaun Salsman, and Christopher Salsman appeal from the Jefferson Circuit Court's entry of summary judgment in favor of Sears, Roebuck and Company, Crain Heating & Air Conditioning, Inc., and Richard Howlett.[2] The court dismissed Appellants' action on the grounds that: (1) they failed to timely file it within the one-year statute of limitations set forth in KRS 413.140(1)(a), and (2) appellee Howlett was entitled to immunity from suit. After our review, we conclude that summary judgment was prematurely granted and that genuine issues of material fact remain to be resolved. Thus, we vacate the trial court's entry of summary judgment and remand this matter for further proceedings.

**Facts and Procedural History**

The factual record before us is limited because of a lack of formal discovery prior to entry of summary judgment. The following facts are derived from affidavits tendered by appellant Rodney Salsman in opposition to Appellees' summary judgment motions and from Appellants' complaint. In March 1997, appellants Rodney and Debra Salsman purchased a Kenmore Series 90 gas-fired furnace from appellee Sears, Roebuck and Company and had it installed in their home by appellee Crain Heating & Air Conditioning, Inc., who had subcontracted the job of installation from Sears. The Salsmans' sons, Shaun and Christopher, were also living in the home at the time. The installation was inspected by

[2] The Louisville-Jefferson County Metro Government was also a defendant below who received summary judgment in its favor, but Appellants acknowledge that they are not challenging the court's decision as to that party. Thus, the Metro Government is not involved in this appeal.

appellee Richard Howlett, an inspector with the Louisville-Jefferson County Metro Government Department of Inspections, on or about April 8, 1997. According to Appellants, the furnace was installed in a crawl space that requires an individual to crawl approximately thirty feet into it in order to reach the furnace. They claim that from the time of its installation until January 2007, no service was performed on the furnace.

At some point following installation of the furnace, Appellants began experiencing various health problems. The extent to which Debra, Shaun and Christopher's health was affected is not detailed in the record, but Rodney's issues progressed to the point that on June 12, 2003, the Social Security Administration determined that he was disabled due to obstructive apnea, chronic obstructive pulmonary disease and coronary artery disease. Appellants claim that they never suspected that the furnace was a possible cause of their health problems.

On or around January 10, 2007, the furnace stopped working, and an unnamed repair person advised the Salsmans to contact the appropriate state agency because of possible installation issues. On January 23, 2007, the furnace was inspected by the Commonwealth of Kentucky Environmental and Public Protection Cabinet, Office of Housing, Buildings and Construction. The inspection revealed that the furnace had not been properly installed or vented to the outside and that as a result, carbon monoxide gas had been leaking into Appellants' home since the furnace was installed nearly ten years earlier. Appellants allege that they

were not aware of the faulty inspection or their possible sustained exposure to carbon monoxide until this inspection.

On January 10, 2008, Appellants filed suit against Appellees and the Metro Government in Jefferson Circuit Court. They alleged that negligent installation of the furnace and a subsequent failure to properly inspect that installation caused them to be exposed to dangerous levels of carbon monoxide and, as a result, to suffer from a number of physical and psychological ailments. The complaint further provided that Appellants "could not have discovered the condition of the subject furnace and were unaware of the dangerous condition of the subject furnace until January 23, 2007, when the subject furnace was inspected by the Commonwealth of Kentucky, Environmental and Public Protection Cabinet." This provision was probably intended to counter any possible statute-of-limitations defense that might be raised by Appellees because of the considerable length of time that passed between installation of the furnace and the filing of the complaint.

However, on January 25, 2008, appellee Howlett and the Metro Government filed a motion for summary judgment on the grounds that: (1) Appellants had failed to file their complaint within the one-year statute of limitations set forth in KRS 413.140(1)(a),[3] and (2) Howlett and the Metro Government were entitled to immunity from suit pursuant to the Kentucky

[3] KRS 413.140(1)(a) provides: "The following actions shall be commenced within one (1) year after the cause of action accrued: . . . [a]n action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant[.]"

Building Code and *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). Appellants responded to this motion with a pleading that challenged the legal claims made by Howlett and the Metro Government along with an affidavit produced by their attorney pursuant to Kentucky Rules of Civil Procedure (CR) 56.06. The response indicated that no formal discovery had been taken, and requested that discovery be allowed before any motion for summary judgment was considered.

Appellants challenged Howlett's claim of immunity by contending: (1) that his acts were ministerial in nature and he therefore was not entitled to immunity under *Yanero*, *supra*, and (2) even assuming that Howlett's duties were of the type that would generally entitle him to immunity, he did not exercise those duties in "good faith" and was consequently subject to civil suit. As to the statute-of-limitations claim, Appellants relied upon the so-called "discovery rule" in arguing that their complaint was timely filed. Under the discovery rule, "a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Wiseman v. Alliant Hosps., Inc.*, 37 S.W.3d 709, 712 (Ky. 2000), *quoting Hazel v. General Motors Corp.*, 863 F. Supp. 435, 438 (W.D. Ky. 1994). In support of this argument, Appellants tendered an affidavit from appellant Rodney Salsman in which he indicated that while he and the other Appellants had "experienced health problems since the installation of the subject furnace in 1997," they did not have

"any reason to suspect that their health problems were related to exposure to carbon monoxide gas before January 23, 2007."

Despite Appellants' complaints about the lack of discovery, the trial court granted summary judgment in favor of both Howlett and the Metro Government in an order entered on March 14, 2008. Appellee Crain subsequently filed its own motion for summary judgment on April 3, 2008, in which it asserted that Appellants had failed to file their complaint within the one-year statute of limitations set forth in KRS 413.140(1)(a). Appellee Sears filed its own motion for summary judgment on May 27, 2008, in which it asserted the same statute-of-limitations arguments made by the other Appellees. Oral arguments on the motions were held on July 25, 2008.

On October 8, 2008, the trial court granted both motions for summary judgment on the grounds that Appellants had failed to timely file their complaint. In doing so, the court relied solely on Rodney Salsman's acknowledgment that he and the other Appellants had "experienced health problems since the installation of the subject furnace in 1997." Based on this statement, the court concluded that "[i]f all four plaintiffs have been experiencing health problems since the installation of a furnace, the exercise of reasonable diligence should have led them to the discovery of this injury before 2007." Therefore, since Appellants did not file their action until well after the furnace was installed, summary judgment in favor of Appellees was appropriate.

Appellants filed timely appeals from all summary judgment orders entered by the trial court. The appeals were consolidated by order of this Court on February 11, 2009 and stand submitted for our review.

**Standard of Review**

The standards for reviewing a trial court's entry of summary judgment are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and 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. 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." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest*[4] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

[4] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

*Id.* at 436 (internal footnotes and citations omitted). "The burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied." *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974), *quoting Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). With these standards as our guide, we turn to the parties' arguments.

**Issues**

The parties present two general issues for this Court's consideration: (1) whether Appellants timely filed their complaint pursuant to KRS 413.140(1)(a) and the "discovery rule," and (2) whether appellee Richard Howlett was entitled to immunity from suit under the Kentucky Building Code and Kentucky's immunity case law.

Howlett moved for summary judgment within days of the filing of the complaint and was awarded that judgment in March 2008 – a little more than two months afterward. Following Howlett's lead, the other Appellees moved for summary judgment in April and May 2008. In all three instances, summary judgment was sought before discovery had commenced despite Appellants' request for an opportunity to conduct discovery before the court ruled on the motions. We have held that a summary judgment "is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence." *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App.

2007). Accordingly, "[a]bsent a sufficient opportunity to develop the facts . . . summary judgment cannot be used as a tool to terminate the litigation." *Id.* at 842.

Howlett's motion for summary judgment was granted before the Appellants had an opportunity to conduct any discovery. And soon after this was done, the remaining Appellees proceeded with their own motions. We have held that trial courts should exercise caution in granting summary judgment. *Bauer v. Piercy*, 912 S.W.2d 457, 458-59 (Ky. App. 1995).

With this said, we are reluctant to vacate the trial court's summary judgments solely because discovery was not given an adequate opportunity to proceed. Ultimately, the question of "[w]hether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter*, 226 S.W.3d at 842. We acknowledge that summary judgment may sometimes be justified before discovery has been conducted, and it is only with caution that we affect the judgments of trial courts. However, as discussed in detail below, the alacrity with which summary judgment was entered fixes our attention upon the fact that in this case, the relevant issues involve material questions of fact that have yet to be adequately resolved. In an oft-cited opinion, the Fifth Circuit Court of Appeals recognized:

> Where, as in this case, the decision of a question of law by the Court depends upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for a summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain

> that it is making a correct determination of the question of law.

*Palmer v. Chamberlin*, 191 F.2d 532, 540 (5th Cir. 1951).

**1. Did Appellants Timely File Their Complaint Pursuant to KRS 413.140(1)(a) and the "Discovery Rule"?**

As noted above, in granting summary judgment in favor of Appellees pursuant to KRS 413.140(1)(a), the trial court relied solely on Rodney Salsman's acknowledgment that he and the other Appellants had "experienced health problems since the installation of the subject furnace in 1997." From this statement the court concluded that "[i]f all four plaintiffs have been experiencing health problems since the installation of a furnace, the exercise of reasonable diligence should have led them to the discovery of this injury before 2007." Thus, Appellants' complaint was untimely filed. To counter this conclusion, Appellants argue that although they began experiencing health problems after the subject furnace was installed in 1997, they did not suspect that exposure to carbon monoxide gas was a potential cause of those problems. Therefore, they were not put on inquiry notice of a potential claim until the furnace was inspected on January 23, 2007.

The parties acknowledge that resolution of the question of whether Appellants timely filed their complaint requires application of the "discovery rule" because Appellants' injuries and the cause of those injuries were not immediately apparent until some time after the furnace was installed. "A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of

reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 501 (Ky. 1979), *quoting Raymond v. Eli Lilly & Co.*, 371 A.2d 170, 174 (N.H. 1977). "Accrual of the cause of action is dependent upon the plaintiff's knowledge that not only has he suffered an injury but also who caused the injury." *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 659 (Ky. App. 2009). For purposes of the discovery rule, the statute of limitations "is tolled only during the period when the plaintiff had no knowledge at all that the wrong had occurred and, as a reasonable person, was not put on inquiry." *Potts v. Celotex Corp.*, 796 S.W.2d 678, 680-81 (Tenn. 1990).

The trial court determined as a matter of law that Appellants should have known that they had suffered injury at the hands of Appellees prior to January 2007. However, in reaching this conclusion it relied only on a general statement by Rodney Salsman that Appellants had suffered health problems after the furnace was installed in 1997. We believe that the trial court gave this statement too much emphasis for purposes of granting summary judgment. Based on the limited record before us, it cannot be concluded as a matter of law that Appellants should have investigated whether they were injured by Appellees simply because they suffered from health issues. We reach this conclusion for a number of reasons.

The trial court's opinion suggests that it may have confused the issues of "injury" and "harm," which were distinguished by our Supreme Court for

purposes of the discovery rule in *Wiseman v. Alliant Hospitals, Inc.*, *supra*. There, the Court noted that "'[d]iscovery of injury' jurisdictions have concluded that the statute of limitations does not begin to run even though a harmful condition is known to a plaintiff so long as its negligent cause and its deleterious effect are not discovered." *Wiseman*, 37 S.W.3d at 712. Accordingly, determining when a statute of limitations begins to run first requires a distinction between "discovery of harm" and "discovery of injury." *Id.* "The Restatement (Second) of Torts § 7, comment (1965), defines 'harm' as 'the existence of loss or detriment in fact of any kind to a person resulting from any cause.' . . . 'Injury,' on the other hand, is defined as 'the invasion of any legally protected interest of another.'" *Id.* For purposes of the discovery rule, "it is the date of the actual or constructive knowledge of the *injury* which triggers the running of the statute of limitations." *Id.* (Emphasis added).

Here, Rodney Salsman's affidavit reflects merely that Appellants were "harmed" following installation of the furnace. However, their "cause of action did not accrue until the fact of [their] injury became objectively ascertainable." *Id.* at 713. Appellants claim to have had no knowledge that they were being exposed to carbon monoxide in their home until their furnace was inspected in January 2007. Thus, they did not know that they had been wronged or "injured" until that time. "Whether the plaintiff's lack of knowledge within the one-year time frame will toll the statute of limitations depends upon whether the plaintiff exercised reasonable diligence in obtaining knowledge that he has a claim

against the tortfeasor." *Franklin*, 290 S.W.3d at 659. The case before us obviously presents a situation in which Appellants' "reasonable diligence" in discovering that they were injured and had a claim against Appellees is in issue.

Determining whether reasonable diligence was exercised by Appellants necessarily requires an inquiry into when they were put on notice about the cause of their injury (or, in the exercise of reasonable diligence, should have been put on notice) and if that notice was within the statute of limitations. This necessarily requires an evaluation of what Appellants knew with respect to their injuries and their potential cause, and when they knew it. In other words, at what point did information become available to the Salsmans that would have alerted a reasonable person to begin an inquiry into a possible cause of action? Appellants insist that they were not aware that carbon monoxide poisoning resulting from an improperly installed furnace was the cause of their health problems until January 23, 2007. Appellees argue that, had Appellants exercised reasonable diligence, they could not have avoided being aware of the furnace problem. Whether Appellants should have known or investigated this possibility beforehand and when they were put on notice of a cause of action are questions of fact that should generally be answered by a jury. *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 737 (Ky. 2000); *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965); *Doe v. Coffee County Bd. of Educ.*, 852 S.W.2d 899, 904 (Tenn. Ct. App. 1992) ("The discovery rule applies only to matters of fact."). Indeed, we have recently affirmed that "if there is a factual dispute regarding the reasonable diligence of the plaintiff,

the question is properly submitted to the jury for resolution." *Franklin*, 290 S.W.3d at 659.

Nevertheless, it is possible that uncontroverted facts might ultimately be presented that would indicate when Appellants should have been on inquiry notice as a matter of law. In that instance, summary judgment on the issue would likely be appropriate since the question of whether, once Appellants are put on actual or inquiry notice, suit was filed within the applicable statute of limitations is one of law to be resolved by the trial court. *Lipsteuer*, 37 S.W.3d at 737. However, as the record stands before us, summary judgment was prematurely entered on these grounds.

**2. Was Appellee Richard Howlett Entitled to Immunity From Suit Under the Kentucky Building Code and Kentucky Immunity Law?**

While a statute-of-limitations defense was the sole ground for summary judgment for appellees Crain and Sears, appellee Richard Howlett also asserted immunity from suit in this case because of protections provided under the Kentucky Building Code and *Yanero v. Davis*, *supra*.[5] As noted above, Howlett was an inspector with the Louisville-Jefferson County Metro Government Department of Inspections and inspected the installation of the subject furnace in April 1997. Appellants contend that Howlett was not entitled to immunity because his acts were ministerial (as opposed to discretionary) in nature and such acts are

[5] Although the trial court's summary judgment order in favor of Howlett does not contain a recitation of the grounds for that decision, it reflects that it was rendered "[u]pon motion of defendants[.]" Since the issue of immunity was raised as a basis for summary judgment in Howlett's motion, we assume for purposes of this appeal that the court's decision was based, at least in part, on this argument.

not subject to protection from a negligence suit. They further contend that even if his acts in inspecting the furnace were discretionary, they must have been conducted in "good faith" and such was not established here. As explained below, the issues raised with respect to immunity all involved genuine issues of material fact. Therefore, summary judgment was improperly granted.

Howlett alleged below that he was entitled to immunity as an employee of the Louisville-Jefferson County Metro Government Department of Inspections pursuant to the Kentucky Building Code (KBC). The KBC was adopted by the Kentucky Board of Housing, Buildings and Construction pursuant to authority found in KRS 198B.040(7) and KRS 198B.050. 815 KAR 7:120 is the Kentucky Administrative Regulation that establishes the general provisions of the KBC. Section Five of the regulation incorporates by reference the "2007 Kentucky Building Code, Ninth Edition, 2007, revised June 2009," which contains the immunity provisions in issue. 815 KAR 7:120 §5(b). The parties acknowledge that the Metro Government has adopted the Code for all purposes relevant to this appeal. *See* Louisville Metro Codified Ordinance § 156.809.

In support of his immunity argument, Howlett specifically relies upon KBC Section 103.12, which is entitled "Liability" and provides, in relevant part, as follows:

> The building official, member of the Board of Appeals or employee charged with the enforcement of this code, while acting for the jurisdiction in good faith and without malice in the discharge of the duties required by this code or other pertinent law or ordinance, shall not thereby be

> rendered liable personally and is hereby relieved from personal liability for any damage accruing to persons or property as a result of any act or by reason of an act or omission in the discharge of official duties.

For purposes of Howlett's claim of immunity under the KBC, Appellants concede that his activities in inspecting the furnace are of the type that would generally provide him protection from suit under Section 103.12 because he was an employee acting in enforcement of the KBC. However, they note that the provision explicitly requires that the employee must have been acting "in good faith" in discharging his duties. Appellants contend that the question of whether Howlett was acting in good faith when he inspected the subject furnace is in issue because the furnace was later found to be clearly improperly installed and vented. Therefore, summary judgment was inappropriate.

The determination of whether a party acted in good faith is a question of fact. *See Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). It is unclear from the record whether the trial court took this rule of law into account, but the question of whether Howlett acted in good faith clearly presents an issue of material fact. The arguments to the contrary raised by Howlett generally go to the question of whether he acted in good or bad faith and are not a basis for summary judgment. Howlett also contends that summary judgment was supported by the fact that Appellants did not allege that he had acted in bad faith in their complaint. However, Appellants clearly argued in their response to Howlett's motion for summary judgment that he had not acted in good faith in conducting his inspection

of the subject furnace. When the rule that questions of good faith are questions of fact is considered in conjunction with the fact that Appellants were not allowed to conduct any discovery with respect to their claim against Howlett, we believe that summary judgment was prematurely entered as to the issue of whether Howlett was entitled to immunity under the KBC.

Appellants further suggest that the KBC is perhaps inapplicable in this case because Howlett's duties in inspecting the subject furnace were ministerial, as opposed to discretionary, in nature. This distinction is of importance because Howlett has also raised a claim of qualified immunity pursuant to *Yanero v. Davis*, *supra*. Under *Yanero*, "[q]ualified 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." *Yanero*, 65 S.W.3d at 522 (citations omitted). In order to overcome a claim of qualified immunity, a plaintiff essentially has to establish "bad faith" on the part of the defendant in question. *Sloas*, 201 S.W.3d at 475. This

> can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

*Yanero*, 65 S.W.3d at 523.

Conversely, "public agents and employees are not vested with immunity for the negligent performance of their ministerial functions." *Id.* at 524. Such functions "require[] only obedience to the orders of others" or can also be classified as 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.* at 522. In order to decide whether a particular activity "is ministerial or discretionary, it is necessary to determine whether the acts involve policy-making decisions and significant judgment, or are merely routine duties." *Collins v. Commonwealth of Ky. Natural Res. and Envtl. Prot. Cabinet*, 10 S.W.3d 122, 126 (Ky. 1999).

The distinction between discretionary and ministerial acts is not a small one because the latter requires far fewer hurdles for a plaintiff to overcome in seeking damages for negligence against a public employee. However, we need not consider the issue of whether Howlett's actions in inspecting the subject furnace were ministerial or discretionary in nature at this juncture because

> the decision as to whether a public official's acts are discretionary or ministerial must be determined by the facts of each particular case after weighing such factors as the nature of the official's duties, the extent to which the acts involve policymaking or the exercise of professional expertise and judgment, and the likely consequences of withholding immunity.

*Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 809 n.9 (Ky. 2009) (plurality opinion), *quoting* 63C Am.Jur.2d Public Officers and Employees § 321 (2008). Here, the record reflects that none of these

considerations was made even though they involve specific and important factual questions. No discovery was conducted on the matter. Therefore, we again conclude that summary judgment should not have been granted.[6]

For the foregoing reasons, the summary judgments entered by the trial court in favor of Appellees are vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

[6] Howlett also contends that even if his duties are considered ministerial in nature, Appellants would still be required to establish bad faith pursuant to KBC Section 103.12. Because we are remanding this case for further proceedings with respect to the classification of Howlett's duties, we decline to reach a definitive holding here as to this issue. We reiterate, however, that our Supreme Court has held that "public agents and employees are not vested with immunity for the negligent performance of their ministerial functions." *Yanero*, 65 S.W.3d at 524. Consequently, to the extent that Section 103.12 attempts to establish otherwise, it would appear to be void under the current state of the law.

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