RENDERED: JANUARY 23, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000773-MR

JAMES W. BEWARD AND
GARY EMBERTON — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-01410

CODY WHITAKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND STUMBO, JUDGES.

J. LAMBERT, JUDGE: James W. Beward and Gary Emberton, former Bullitt Central High School principals, have appealed from the April 4, 2013, summary judgment of the Bullitt Circuit Court ruling that they were not entitled to qualified official immunity for injuries student Cody Whitaker sustained in an unsupervised hallway prior to the start of the school day. The circuit court held that the school's

2008 Spring Supervision Schedule gave Beward and Emberton ministerial duties to supervise the Freshman Hall End station in the absence of the person assigned to supervise that station. We affirm.

On February 7, 2008, Bullitt Central freshman student Cody Whitaker was injured in the school hallway just prior to the beginning of his first class by fellow student Joseph Seay. Seay put Whitaker into a chokehold until he passed out. Seay let go of Whitaker, and he fell to the ground, hitting his head on the floor and incurring severe head trauma. No teachers or administrators were in the hallway at that time to supervise the students. At the time of the attack, Bullitt Central had in place a Code of Student Behavior and Discipline pursuant to Kentucky Revised Statutes (KRS) 158.148(4).[1] The Introduction states:

> The Bullitt County Board of Education requires high standards of personal conduct from each student to promote respect for the rights of others and to accomplish the purposes of the schools. The Board also requires

[1] KRS 158.148 provides in relevant part:

> (4) Each local board of education shall be responsible for formulating a code of acceptable behavior and discipline to apply to the students in each school operated by the board. The code shall be updated no less frequently than every two (2) years, with the first update being completed by November 30, 2008.
>
> > (a) The superintendent, or designee, shall be responsible for overall implementation and supervision, and each school principal shall be responsible for administration and implementation within each school. Each school council shall select and implement the appropriate discipline and classroom management techniques necessary to carry out the code. The board shall establish a process for a two-way communication system for teachers and other employees to notify a principal, supervisor, or other administrator of an existing emergency.

compliance with established standards and rules of the district and the laws of the community, state and nation.

The central purpose of the school system is to educate each student to the highest level possible. To support the success of the educational program, the Board directs employees to hold each student accountable to the Code standards in a fair manner: Compliance with the **standards is necessary to provide**:

* Orderly operation of the schools[,]
* A safe environment for students, district employees and visitors to the schools,
* Opportunities for students to achieve at a high academic level in a productive learning environment,
* Assistance for students at risk of failure or of engaging in disruptive behavior,
* Regular attendance of students,
* Protection of property.

This code applies to all students in the District while at school, on their way to and from school, while on the bus or other District vehicle, and while they are participating in school-sponsored trips and activities. The Superintendent/designee is responsible for its implementation and application throughout the District. The Principal is responsible for administration and implementation of this Code within his/her school in a uniform and fair manner without partiality or discrimination. Each school/council must select and implement appropriate discipline and classroom management techniques necessary to carry out this Code and shall provide a list of the school's rules and discipline procedures in the school handbook. Teachers and other instructional personnel are responsible for administering Code standards in the classroom, halls, and other duty assignment locations. [Emphasis in original.][2]

[2] The Code was promulgated in compliance with KRS 161.180(1), which provides that, "[e]ach teacher and administrator in the public schools shall in accordance with the rules, regulations, and bylaws of the board of education made and adopted pursuant to KRS 160.290 for the conduct of pupils, hold pupils to a strict account for their conduct on school premises, on the way to and from school, and on school sponsored trips and activities."

Rule 09.426 provided that "[b]ehavior that materially or substantially disrupts the educational process, whether on school property or at school-sponsored events and activities, shall not be tolerated and shall subject the offending pupil to appropriate disciplinary action." In addition, the Code expressed a zero tolerance policy:

> The Bullitt County Public School District is committed to providing a safe and secure learning environment for all students and staff. In order to achieve this environment, the District has established a zero-tolerance approach that assures parents and communities that schools will strive to be free of alcohol and other illicit drugs, free of firearms and other deadly weapons, assaultive behavior, free of vandalism and theft.
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> As part of this concept, there will be fair and progressive discipline, early prevention programs, violence prevention/conflict resolution programs, ongoing programs that will reinforce these ideas, opportunities for staff development, crisis prevention, and early intervention and referral services.
>
> This approach provides a fair and equitable means of achieving a safe, disciplined, and drug-free learning environment.

In relation to implementing the Code, Bullitt Central adopted a 2008 Spring Student Supervision Schedule, in which teachers and administrators were assigned specific locations to supervise throughout the school day. Teacher Joshua Durham was assigned to supervise and monitor the Freshman Hall End from 7:05 to 7:20 each morning. Mr. Durham was not present at school on the day of the attack, and no other teacher or administrative staff member had taken his assigned place. Other members of the administrative staff, including Beward and Emberton, as

well as all available teachers, were assigned to hall sweeps during that same time period every day.

On October 28, 2008, Whitaker, through his conservator, Donald Cundiff, filed a complaint alleging causes of action for negligence and for negligent supervision, training, and control, as a result of injuries he sustained in the attack.[3] As defendants, he named Keith Davis, the Superintendent of the Bullitt County Board of Education, Principal Beward, Assistant Principal Emberton, and several other teachers and administrators, in both their official and individual capacities. Whitaker alleged that the named defendants failed to meet their duty to keep the students safe, monitor the hallways, and maintain control of the students at the time he was attacked and therefore breached their duty of care to him. He alleged that the defendants knew or should have known of the previous bullying and violent behavior of the student who attacked him. In addition, Whitaker alleged that Davis, Beward, Emberton, and the other assistant principals named in the complaint failed to meet their duty to train, supervise, and control Bullitt Central's teachers and that this failure was a substantial factor in causing his injuries. Davis and the other defendants, excluding Beward and Emberton, filed an answer stating that they were entitled to qualified official immunity, governmental immunity, sovereign immunity, or official immunity for their actions pursuant to

[3] By order entered December 8, 2011, Whitaker was substituted as the plaintiff because he had reached the age of eighteen.

§231 of the Kentucky Constitution.[4] In their separate answer, Beward and Emberton similarly claimed that Whitaker's claims were barred against them by various immunities.

Whitaker moved for leave to file a first amended complaint in early 2011, seeking to add three defendants in both their official and individual capacities: assistant principals Laura Allgeier and Andrew Pohlman, and teacher Joshua Durham. The court granted the motion, and the amended complaint was filed on February 14, 2011.

Beward and Emberton filed a motion for summary judgment on September 25, 2012, arguing that they were entitled to absolute governmental immunity in their official capacities and to qualified official immunity in their individual capacities. Related to their qualified official immunity argument, they argued that their duties to supervise were discretionary, not ministerial, and as such they were entitled to immunity. In his response, Whitaker conceded that Beward and Emberton were entitled to immunity in their official capacities, but objected to their claim that they were entitled to qualified official immunity because their actions in failing to supervise the students and failing to enforce the Code and student supervision schedule were ministerial.

On April 4, 2013, the circuit court entered an order ruling on Beward and Emberton's motion for summary judgment. While the court agreed that they

[4] Defendants Stephanie Lewis and Roger Hayes were dismissed by order entered September 13, 2010, on Whitaker's motion. Defendants Davis, Angela Cunningham, and Angela Moore were also dismissed on Whitaker's motion on November 19, 2012.

were entitled to governmental immunity in their official capacities, the court held that Beward and Emberton were not entitled to qualified official immunity in their individual capacities, determining that their failure to enforce the Code and student supervision schedule was ministerial. These were "rules which required supervision of students to prevent student behavior that harmed other students and which put in place a supervision schedule for specific location and times. The Court notes that promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function." The Court stated that the performance of their duty to exercise the degree of care that ordinarily prudent school administrators, engaged in the supervision of students, would exercise under similar circumstances, was ministerial, not discretionary, "because it involved only the enforcement of (a) a known rule requiring students not to behave in a manner that could harm other students and (b) a known supervision schedule[.]" In support of its holding, the circuit court cited *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003), among other cases. The court permitted the case to proceed for a factual determination of whether Beward and Emberton were negligent in the performance of their ministerial duties. This interlocutory appeal, taken by Beward and Emberton pursuant to *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), now follows.

On appeal, Beward and Emberton argue that the circuit court erred in failing to afford them qualified official immunity because their duties and actions were discretionary, performed in good faith, and within the scope of their official

duties for the Bullitt County Board of Education. Whitaker disputes this claim, arguing that the enforcement of the rules was a ministerial function.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "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*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). With this standard in mind, we shall review the judgment on appeal. There are no disputed issues of material fact related to whether Beward and Emberton were entitled to immunity in this action, and therefore we shall review the circuit court's ruling of law *de novo*.[5]

[5] We do not agree with Whitaker that the circuit court found that there were any disputed issues of material fact related to the immunity issue on page 7 of its order. Rather, the court was suggesting that there were issues of fact relating to whether Beward and Emberton were negligent in failing to follow procedures that might have prevented the incident from occurring.

The Supreme Court's opinion in *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), is the seminal case on sovereign immunity in the Commonwealth. On the issue of official immunity, the Court instructs:

> "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. *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989). 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 as discussed in Part I of this opinion, *supra*. 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, as discussed in Part II of this opinion, *supra*. 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. 63C Am.Jur.2d, *Public Officers and Employees*, § 309 (1997). 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, *id.* § 322; (2) in good faith; and (3) within the scope of the employee's authority. *Id*. § 309; Restatement (Second) Torts, *supra*, § 895D cmt. g. 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. *Franklin County v. Malone*, *supra*, at 201 (*quoting Upchurch v. Clinton County*, Ky., 330 S.W.2d 428, 430 (1959)). Qualified official immunity is an affirmative defense that must be specifically pled. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

> 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. *Franklin County v. Malone*, *supra*, at 201. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." *Upchurch v. Clinton County*, *supra*, at 430. *See also* Restatement (Second) Torts, *supra*, § 895D cmt. h; 63C Am.Jur.2d, *Public Officers and Employees*, §§ 324, 325 (1997).

Yanero, 65 S.W.3d at 521-22. "Ultimately, however, once the material facts are resolved, whether a particular defendant is protected by official immunity is a question of law, *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 825 (Ky. 2004), which we review *de novo*. *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003)." *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). There is no dispute that Beward and Emberton were acting in good faith and within the scope of their duties. Therefore, the only issue to decide is whether the act of supervision was discretionary or ministerial under the circumstances of this case. We hold that Beward and Emberton's actions were ministerial, and thus we agree with the circuit court that they are not entitled to immunity in their individual capacities.

Beward and Emberton cite several reported and unreported cases in support of their position. In *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011), the Supreme Court of Kentucky extensively reviewed the qualified official immunity doctrine. Turner was a kindergarten teacher in the Fayette County school system who was

sued by the parent of one of her five-year-old students. The student had allegedly been sexually abused by another student in the classroom. Nelson claimed that Turner failed to exercise ordinary care to supervise her students or report the assault to law enforcement officials. The Supreme Court detailed Turner's actions related to the incident, including separating the students and explaining that the behavior was inappropriate, among other actions. The Court ultimately held as follows:

> Relying upon our rationale in *Stratton* and *Haney*, we consider Turner's actions in supervising the children to have been discretionary. While there may be legitimate disagreement as to the approach taken by Turner, the consequences of liability under such circumstances would injuriously "deter independent action and impair the effective performance of [teaching] duties." *Id*. at 245.
>
> It is imperative that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom. To do this, they must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions (based on facts not always known) as to what actually happened, and ultimately to determine an appropriate course of action, which may, at times, involve reporting the conduct of a child to the appropriate authorities. In fact, protection of the discretionary powers of our public officials and employees, exercised in good faith, is the very foundation of our doctrine of "qualified official immunity."

Id. at 876. Finally, addressing earlier decisions holding otherwise, the Supreme Court explained:

> Although we consider Turner's conduct in this case to be discretionary, we recognize the apparent incongruity with our precedent regarding a supervisory duty in the public school setting, as "we have held that a claim of negligent supervision may go to a ministerial act or function in the public school setting." *Id*. at 244. However, *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) and *Williams*, 113 S.W.3d 145—the cases relied upon in enunciating the public school distinction—have quite different facts from those before us. *Id*.
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> In *Yanero*, this Court deemed "enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice" to be ministerial. 65 S.W.3d at 522. Unlike the teacher's decision-making in this case, a helmet requirement constitutes "an essentially objective and binary directive." *Haney*, 311 S.W.3d at 242 (*discussing Yanero*, 65 S.W.3d 510). As a result, "[t]here is no substantial compliance with such an order and it cannot be a matter of degree: its enforcement was absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id*. (citation omitted) (internal quotation omitted). You do it or you don't—and unlike here, there is no factual determination required for its application.
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> Admittedly, we have also "rejected the notion that the *failure* of teachers ... to supervise their students in the face of known and recognized misbehavior was a discretionary act." *Id*. at 244 (*discussing Williams*, 113 S.W.3d at 150). This decision stemmed from the requirement in KRS 161.180(1) that teachers must "hold pupils to strict account for their conduct on school premises, on the way to and from school, and on school sponsored trips and activities." *Id*. The dispute in this case, though, concerns the *means* of supervision rather than a *failure* to supervise students who were drinking and driving to and from a school-sponsored function as occurred in *Williams*.

Turner, 342 S.W.3d at 876-77 (emphasis in original).

Beward and Emberton contend that the student supervision schedule did not include any direction or rule to address when a teacher or administrator assigned to a post was absent. Therefore, they contend that it was left to their discretion as to how to proceed in such instances, entitling them to immunity.

Whitaker also relies upon several reported and nonreported cases to support his position. In particular, Whitaker cites to *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997), *overruled on other grounds by Commonwealth v. Harris*, 59 S.W.3d 896 (Ky. 2001), and *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), as did Beward and Emberton, for this proposition: "The adoption of rules providing for the proper treatment of prisoners is a discretionary policy determination and thus a discretionary function." Here, Whitaker contends that while the enactment of the student supervision schedule was discretionary, its enforcement was ministerial, and its enforcement would necessarily include knowledge of a teacher's absence.

Whitaker also cites to *Williams*, *supra*, to support his argument that supervision is a ministerial act. *Williams* arose out of a wrongful death action brought in the Board of Claims following an automobile accident when the students should have been at a school-sponsored extracurricular activity at school. The suit alleged that the high school faculty was negligent in supervising the activity. The Supreme Court stated:

> It is well established in this jurisdiction that a school teacher can be held liable for injuries caused by negligent supervision of his/her students. The basic

> premise for this duty is that a child is compelled to attend school so that "the protective custody of teachers is mandatorily substituted for that of the parent." The "special relationship" thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students.

Williams, 113 S.W.3d at 148 (footnote and internal citations omitted). The Court further addressed the requirement that a teacher must supervise his or her students:

> We disagree with the Board of Claims' conclusion that a teacher's duty to supervise students is a "regulatory" (discretionary?) function. Promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function. *Yanero*, 65 S.W.3d at 529.

Williams, 113 S.W.3d at 150.

We have carefully reviewed the parties' briefs and the cited case law, and we must agree with Whitaker that Beward and Emberton were engaged in ministerial actions in enforcing the Code via the student supervision schedule. We agree with Whitaker that enforcement of the student supervision schedule did not require either Beward or Emberton to use discretion; they were tasked with enforcing the schedule, a ministerial function, and they failed to do so. Furthermore, this is not a matter such as in *Turner*, *supra*, or *Brown v. S.F.*, 2013 WL 1697766 (2011-CA-001898-MR) (Ky. App. April 19, 2013), which addressed the means of supervision as opposed to a failure to supervise. Accordingly, the circuit court did not err as a matter of law in concluding that Beward and Emberton were not protected by qualified official immunity in their individual capacities and

in denying their motion for summary judgment. In so holding, we offer no statement as to whether either Beward or Emberton acted negligently; that matter shall be considered by the finder of fact upon remand.

For the foregoing reasons, the summary judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Robert E. Stopher
Robert D. Bobrow
Louisville, Kentucky

BRIEF FOR APPELLEE:

Anne W. McAfee
Shepherdsville, Kentucky