RENDERED: MAY 27, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001982-MR

BETTY BULLOCK — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 10-CI-00502

LARRY E. WARREN; DINKY PHIPPS;
PAUL MIDDLETON; AND ROBERT BROWN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Public school officials are generally entitled to qualified official immunity for their discretionary decisions but not for ministerial actions negligently made for which liability may attach. In this case, Betty Bullock was

injured when she fell on the bleachers of the Barbourville Elementary School. The decision we must make in this case is whether the Knox Circuit Court erred in granting summary judgment in favor of Larry Warren, Superintendent of the Barbourville Independent Schools ("School District"), Vencil "Dinky" Phipps, Athletic Director of the School District, and Paul Middleton, Principal of the School.[1] We hold that the circuit court did not err, and therefore affirm its judgment.

I. Factual and Procedural Background.

As noted, Bullock was injured as she descended the bleachers at the School. Bullock in her deposition testimony stated that she did not fall because of a puddle, spilled drink or loose board, but because she misstepped since the step was a lot further down than she anticipated. As described by Bullock, at the time of her fall, the bleachers in the 1937 gym were made of maple and were a permanent fixture in that they could not be moved or collapsed. The bleachers had no aisles, handrails, or guardrails, and the only steps were the seats themselves.[2]

Bullock filed this action in 2009 against the Board of Education of the Barbourville Independent School District and Warren, Phipps, Middleton and Brown. The individual defendants were named in their official capacities and their

[1] Bullock also sued Robert Brown, the coach of her grandson's team which was playing the day she was injured. The trial court granted summary judgment in favor of Brown, and he was named in the notice of appeal. Bullock's brief does not mention Brown or assert any claim against him in this appeal.

[2] In 2010, the School District renovated the 1937 gym, removing the maple bleachers and replacing them with modern plastic bleachers with steps, aisles and rails.

individual capacities. Bullock alleged negligence in the construction and maintenance of the bleachers, based on defective design and/or dangerous condition, which negligence was the proximate cause of her injuries. By agreed Order entered June 24, 2011, the parties agreed that the Board of Education was to be dismissed based on the affirmative defense of governmental immunity, and the individual defendants in their official capacities were to be dismissed based on the affirmative defense of qualified immunity. This Order left Bullock's action pending against the individual defendants in their individual capacities.

After additional discovery, the individual defendants renewed their motion for summary judgment based on qualified immunity. The trial court granted the motion. This appeal followed.

II. Standard of Review.

In the recent case of *Haney v. Monsky*, 311 S.W.3d 235, 239-40 (Ky. 2010), the Kentucky Supreme Court set forth our standard of review in a case wherein the trial court ruled upon a motion for summary judgment based on an immunity claim:

> "Summary judgment procedure authorized by CR 56.01 *et seq*. is intended to expedite the disposition of cases and if the grounds provided by the rule are established, it is the responsibility of the trial judge to render an appropriate decision." *Pile v. City of Brandenburg,* 215 S.W.3d 36, 39 (Ky. 2006). Summary judgment is generally appropriate where "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." CR 56.03. This Court has also held that summary judgment is proper "where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). In either case, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992). A "trial court must then view the record 'in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.'" *Rowan County v. Sloas,* 201 S.W.3d 469, 474 (Ky. 2006) (*quoting Steelvest,* 807 S.W.2d at 480).
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> 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. *Sloas,* 201 S.W.3d at 474 (*citing Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Here, the material facts have been resolved, and thus our review is one of law, focusing on whether the moving party, Haney, was entitled to the defense of qualified official immunity and, consequently, judgment as a matter of law. *See Pile,* 215 S.W.3d at 39–40; *Sloas,* 201 S.W.3d at 475.

III. Issues on Appeal.

In *Haney*, the court explained the parameters of qualified immunity, as set out in *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001), stating that "when an officer or employee of the state or county (or one of its agencies) is sued in his or her individual capacity, that officer or employee enjoys qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Id*. at 240 (quotation and citation omitted).

The application of the defense and the analysis employed

> depend[] upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. *Id.* Discretionary acts are, generally speaking, "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* at 522 (*citing* 63C Am. Jur. 2d § 322). It may also be added that discretionary acts or functions are those that 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. *Upchurch v. Clinton County,* 330 S.W.2d 428, 430 (Ky. 1959). On the other hand, ministerial acts or functions—for which there are no immunity—are those that require "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,* 65 S.W.3d at 522 (*citing Franklin County v. Malone,* 957 S.W.2d 195, 201 (Ky. 1997)).

Id. Furthermore, "determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance, [since] few acts are ever purely discretionary or purely ministerial." *Id*. The analysis must look at "the *dominant* nature of the act." *Id*.

As we view this case, and while Bullock strives to couch the respective duties of the Superintendent, Principal and Athletic Director in terms of the responsibility of each for the maintenance and safety of school property and

claims that such duties are ministerial, as opposed to discretionary, the Board of Education "shall have control and management of . . . all public school property of its district." KRS[3] 160.290(1). The Board of Education is the decision-making body responsible for building and renovation decisions. KRS 160.160; see OAG[4] 92-65 (stating that "the school board has control and management of all school funds and public school property[]"). With a limited budget, the Board's decisions as to allocation of financial resources for construction and renovation must be considered discretionary decisions.

The gym in question was constructed in 1937, and the bleachers apparently date from 1957-58; Bullock, however, points to no facts which would indicate that the bleachers were in poor repair or improperly maintained. The words "'maintain' and 'repair' mean to preserve or remedy the original condition." *Thompson v. Bracken Cnty.*, 294 S.W.2d 943, 946 (Ky. 1956). Whatever the characterization of the Superintendent's, the Principal's, or the Athletic Director's respective duties regarding maintenance of the building and the bleachers, the discretionary decision on whether the building or bleachers should be renovated was that of the Board of Education.

IV. Conclusion.

For the foregoing reasons, the Knox Circuit Court's judgment is affirmed.

[3] Kentucky Revised Statutes.

[4] Kentucky Opinions of Attorney General.

ALL CONCUR.

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