RENDERED: FEBRUARY 14, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001766-MR

KIM RASCHE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CI-001198

DR. SHELDON H. BERMAN, SUPERINTENDENT, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; MICHAEL MULHEIRN, EXECUTIVE DIRECTOR OF FACILITIES AND TRANSPORTATION, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; JOSEPH HARDESTY, CHAIRMAN, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; CHARLES FLEISCHER, DIRECTOR OF SAFETY, ENVIRONMENTAL, AND HOUSEKEEPING SERVICES, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; RAYMOND PATTERSON, DIRECTOR, GENERAL MAINTENANCE, RENOVATIONS AND GROUNDS DEPARTMENT, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; CLARK DEBERKO, MANAGER OF GENERAL MAINTENANCE/ PREVENTIVE MAINTENANCE, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; MIKE RUEFF, MANAGER OF MAINTENANCE SCHEDULING/QUALITY CONTROL/CUSTOMER SERVICE, JEFFERSON COUNTY PUBLIC SCHOOLS,

INDIVIDUALLY; JAMES FEGENBUSH, MANAGER OF GROUNDS, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY; WAYNE COSBY, GROUNDS FOREMAN, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY, AND WILLIAM KAUFMAN, TRACTOR SERVICES FOREMAN, JEFFERSON COUNTY PUBLIC SCHOOLS, INDIVIDUALLY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Kimberly Rasche appeals from the Jefferson Circuit Court's entry of summary judgment in favor of the Appellees. Appellees are various employees of the Jefferson County Board of Education and district employees, who were sued in their individual capacities. The trial court held that the Appellees were entitled to qualified immunity and granted summary judgment in their favor. After careful review, we affirm.

On the morning of February 13, 2008, Rasche drove to Butler High School (Butler) to take her daughter to school and spend the day volunteering in the school office. Due to snowy and icy conditions, all schools in the Jefferson County Public School System were on a two-hour delay. Rasche arrived at Butler's parking lot at approximately 9:15 a.m. and parked her car in the closest available spot to the door in the front visitor parking lot. It was already light outside by that time, and it was not snowing or sleeting. Rasche claims the

parking lot at Butler was "visibly icy," but nevertheless she proceeded to walk across the icy portion of the parking lot toward the main office door. As Rasche crossed the parking lot, she slipped on the ice and fell. Rasche attributes injuries to her wrist to the fall.

On February 12, 2008, and into the morning of February 13, 2008, the Jefferson County Board of Education (JCBE) was in the midst of ongoing operations to clear accumulating snow and ice from school parking lots. Appellees Michael Mulheim (Mulheim), Executive Director of Transportation and Facilities; Ray Patterson (Patterson), JCBE's Director of General Maintenance, Renovation & Grounds; Jim Fegenbush (Fegenbush), JCBE's Manager of Grounds; Wayne Cosby (Cosby), former Foreman of Grounds; and Bill Kaufman (Kaufman), retired Foreman of Tractor Services, were responsible for working in alternating shifts to coordinate and supervise JCBE's snow removal efforts during that time frame. According to the Appellees, the snow removal efforts were not dictated by set policies and procedures, but by the ever-changing weather conditions and forecasts, and how they chose to implement and supervise ongoing snow removal operations at the approximately 170 schools within the district was a matter for their discretion.

Sometime during the night of February 12 and into the morning of February 13, 2008, JCBE's employees Robert Neval (Neval) and Aron Phelps (Phelps), neither of whom are parties to this action, salted the parking lot at Butler as part of JCBE's ongoing snow removal operations. According to their deposition

testimony, Neval drove the truck while Phelps operated the controls to throw salt into Butler's parking lot. Neval testified that the salt truck was operating properly, and that they salted the entire area of Butler's two parking lots.

Rasche filed suit regarding her alleged injury on February 11, 2009, claiming that the Appellees negligently failed to cancel school on February 13, 2008, and negligently failed to maintain Butler's parking lot in a reasonably safe condition on the day in question. Appellees moved for summary judgment on March 30, 2012, asserting that Rasche's negligence claims failed as a matter of law because they have qualified official immunity based on their discretionary duties, and that they did not owe Rasche a duty of care under the open and obvious doctrine. In her response, Rasche averred that the Appellees were not entitled to qualified official immunity because the maintenance of Butler's parking lot and the decision whether to cancel school on February 13, 2008, were ministerial duties. Rasche further argued that there was a question of fact as to whether the Appellees used reasonable care to clear Butler's parking lot despite the admittedly open and obvious nature of the ice on which Rasche fell.

On September 9, 2012, the trial court entered summary judgment in favor of the Appellees. In doing so, the court held that the Appellees were immune from Rasche's claim that they negligently failed to cancel school, reasoning that the decision whether to close Jefferson County Public Schools is clearly an act involving the exercise of discretion and judgment. The court further noted that none of the named Appellees were responsible for performing the ministerial act of

physically clearing the parking lots. Rather, the court found that the Appellees, as supervisors overseeing the district's snow removal efforts, had to exercise discretion as to when and how to maintain and evaluate the constantly changing conditions of numerous school parking lots given limited time and resources. Accordingly, the trial court granted summary judgment in the Appellee's favor on immunity grounds. The trial court did not reach the issue of whether the ice on the parking lot was an open and obvious condition. This appeal now follows.

The standard of review on appeal from a grant of 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) (citations omitted). Summary judgment is designed to "expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted). Because summary judgments involve only legal issues as opposed to disputed facts, appellate courts review the trial court's decision *de novo*. *3D Enter. Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005).

Rasche first argues that Appellees' acts, omissions, and decisions were ministerial in nature, and therefore the shield of qualified immunity does not apply. The Appellees counter that their actions were discretionary, and thus they are entitled to immunity. We agree with the Appellees.

Courts engage in a three-part test to determine whether qualified official immunity applies:

> 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.

Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001) (internal citations omitted). In other words, although public employees are exposed to liability for the negligent performance of *ministerial* acts, they are not liable for injuries arising out of *discretionary* acts that are performed in good faith. *Id*.

The distinction between discretionary and ministerial acts or functions is somewhat attenuated under established Kentucky law.

> An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts…. Discretionary or judicial duties are such as 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) (quoting 43 Am. Jur. *Public Officers* § 258). Importantly, ministerial acts for which there is no immunity require "only obedience to the orders of others…." *Rowan County v. Sloas*, 201 S.W.3d 469, 478 (Ky. 2006) (citation omitted).

Rasche argues that the acts performed by the Appellees are ministerial in nature because the Appellees did not have a choice to clear the subject parking lots, but were required to do so as part of their jobs. Rasche contends that there were specific policies and procedures to be followed in order for the parking lots to be cleared properly, and that following such policies and procedures did not require any discretion. The Appellees argue, and we agree, that they do not follow specific policies and guidelines during snow removal operations. Rather, they contend that every snow event is different, and the Appellees' responses to snow and ice accumulation really depends upon the circumstances. JCBE's snow removal operations are, by their very nature, dictated by the unique circumstances of each individual snowstorm.

The Appellees point out that only five of the named Appellees were even involved with JCBE's snow removal operations in February 2008. Mulheirn, as Executive Director of Transportation and Facilities, is ultimately responsible for overseeing snow and ice removal operations for the parking lots and driveways of each school within the District. Mulheirn, as an employee at the top of JCBE's management structure, was entitled to make policy decisions regarding snow and ice removal. This supports the trial court's conclusion that summary judgment was proper on immunity grounds based on the discretionary manner in which he implements and oversees district-wide snow removal efforts. Mulheirn testified that he does not manage and coordinate JCBE's snow removal efforts alone. He delegates decision making authority to Appellees Patterson and Fegenbush. When

asked about Fegenbush's and Patterson's respective roles in overseeing snow removal operations, Mulheirn testified that he does not always know how they delegate work because both have the authority and responsibility to decide how to implement snow removal operations. Furthermore, Patterson and Fegenbush are not the only supervisors tasked with deciding how to implement and oversee snow removal. They, along with Appellees Cosby and Kaufman, work together to decide how to best clear the myriad of school parking lots given the unique facts of each weather event, JCBE's limited resources, and the constantly changing and uncertain weather conditions.

The record reflects that during snow/ice removal operations, Cosby and Kaufman work alternating twelve hour shifts under the supervision of Patterson and/or Fegenbush to manage snow and ice removal operations from a central location at JCBE's Dawson Garage. Fegenbush, Cosby, and/or Kaufman work together with Patterson and/or Mulheirn to determine what precise snow removal method is appropriate given current and forecasted weather conditions. They then decide how best to coordinate JCBE's limited manpower and resources to effectuate snow removal. Cosby and/or Kaufman, either directly or through their subordinate lead men (who are not parties to this action), then communicate with the individual drivers assigned to plow and/or salt certain school parking lots and maintain lists to ensure that all schools are completed. As the trial court noted, these lower level employees responsible for physically clearing the parking lots are the only employees whose snow removal efforts could possibly be considered

ministerial functions. These employees were not named in the complaint. Rasche argues that she originally named these and other defendants responsible for actually salting and plowing the parking lot as "unnamed defendants," and that Appellees' counsel informed Rasche that two individuals were responsible for salting and plowing the lot on the night before the incident. However, counsel for Appellees later stated that those individuals only salted the lot, and JCBE was unsure who plowed the lot. Rasche claims she was not able to name all the relevant individuals involved in salting and plowing the lot due to the Appellees' inability to produce the relevant information that would have identified them.

We need not speculate as to whether or not Rasche could have named all of the individuals involved in clearing the JCBE school lots. We believe that the policies, procedures, and decisions on how to coordinate salting and clearing numerous lots throughout the county renders the Appellees' actions to be discretionary in nature. As such, the trial court properly afforded them qualified immunity and entered summary judgment.

Rasche relies extensively on *Hurt v. Parker*, 2011-CA-2257-MR (Ky. App., Jan. 4, 2013), a case in which this Court rejected a defendant school principal's argument that the manner in which he chose to respond to uneven gravel in a school parking lot was discretionary. However, Defendant Hurt moved the Kentucky Supreme Court for discretionary review on February 5, 2013. Therefore, the opinion in *Hurt* is not final and may not be cited by Rasche.

Even assuming this Court could properly consider *Hurt*, that opinion can be distinguished from the instant case. *Hurt* involved a situation where the defendant failed to repair a defect in a single parking lot. Unlike the instant case, the dangerous condition in *Hurt* was a known, unchanging condition. By contrast, the hazard presented by snow and ice is always changing based on weather conditions. The Appellees' duties during snow removal operations are not, as Rasche claims, as simple as reporting conditions up the chain of command. Rather, the Appellees must decide how best to allocate JCBE's limited physical resources and manpower to effectively treat each of the approximately 170 public schools in the county. Moreover, they must constantly assess the weather and predicted forecasts to decide how to respond to ever-changing conditions. The trial court properly noted that "supervision of every parking lot in the JCBE district is impossible given the restraint of resources and time." For that reason, the Appellees had to exercise discretion to determine how and when to evaluate and re-evaluate parking lots prior to the beginning of school each day.

We find this case to be more analogous to *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 810 (Ky. 2009), in which the Kentucky Supreme Court held that a fire chief was entitled to qualified official immunity in discharging his job, where his duties required him to direct and control the operation of the fire department and the control of the members in the discharge of their duties. Despite his statutory duties, the Court found that the Fire Chief had discretion regarding how, with what assistance, and in what manner to

extinguish fires. *Id*. Appellees' duties likewise require them to employ reasonable discretion when directing JCBE's resources to provide as safe an environment as possible for the tens of thousands of students, parents, and teachers who cross JCBE's numerous parking lots every day.

Next, Rasche argues that the actual decision to hold classes on February 13, 2008, was a ministerial action, and therefore the Appellees are not entitled to qualified official immunity. Rasche contends that the cancellation of a school day to ensure students and faculty members are not injured does not require any significant judgment, statutory interpretation, or policy making decisions. Instead, she argues that decision merely requires attention to the weather conditions known to the Appellees.

We disagree with Rasche. The decision whether to cancel school due to weather is the epitome of a discretionary function for which the Appellees are entitled to immunity. The decision whether to cancel or delay school due to inclement weather is made by JCBE's Superintendent. The Superintendent makes that decision based on recommendations from Mulheirn and Richard Caple, JCBE's Director of Transportation. There are no formal policies or procedures applicable to the decision whether to delay or cancel school due to weather. Rather, Dr. Berman, Mulheirn, and Caple analyze a multitude of factors to determine whether to close or delay school. They review available weather forecasts and the particular conditions of each unique weather event and rely on JCBE employees who travel throughout the district to observe weather and road

conditions at various schools and in various neighborhoods. These employees report their findings to Caple and Mulheirn, who then analyze all available information about the current weather conditions and forecast before making their recommendations to the Superintendent.

Qualified official immunity is based on the principle that public officials will not be held liable for "bad guesses in gray areas." *Caneyville Volunteer Fire Dept.*, 286 S.W.3d at 810 (quoting *Sloas*, 201 S.W.3d at 475). The decision not to cancel school on February 13, 2008, was the precise type of "good faith judgment call[] made in a legally uncertain environment" that is the hallmark of a discretionary function. *Yanero*, 65 S.W.3d at 522. There were no rules governing the decision making process. Rather, the Appellees involved in the decision had to balance out a whole host of factors to determine whether cancelling school would be in the best interest of all involved. Ultimately, the decision was solely within the Superintendent's discretion.

Rasche next argues that the Appellees are not entitled to summary judgment because there are genuine issues of material fact as to whether the ice in the Butler parking lot was an "open and obvious" condition. Rasche argues that the Kentucky Supreme Court's decision in *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 391 (Ky. 2010), aligned premises liability law with Kentucky's adoption of a pure comparative fault scheme. Rasche contends that the decision lays out clear and precise circumstances where, because a hazard is known or

foreseeable to the landowner, the landowner still owes a duty to others, despite the allegedly "open and obvious" nature of the danger.

Rasche concedes that the trial court did not reach the issue of whether the ice in the Butler parking lot was an "open and obvious" condition, but urges us to review the issue anyway. "It is well settled that a party may not raise an issue for the first time on appeal." *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (overruled on other grounds by *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)). Because the trial court did not reach the merits of the open and obvious doctrine and its applicability in the instant case, we will not address it now on appeal.

For the foregoing reasons, we discern no abuse of discretion in the trial court's entry of summary judgment granting qualified official immunity to the Appellees. The decision to hold school on February 13, 2008, was a discretionary decision, as was the process of salting and clearing the school parking lots. As such, JCBE and its employees are not liable to her for her injuries.

ALL CONCUR.

BRIEF FOR APPELLANT:

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