RENDERED: JULY 10, 2015; 10:00 A.M.
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OPINION OF DECEMBER 24, 2014, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001443-MR

DAN LOGAN; AND
DAVID L. RALEIGH — APPELLANTS

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 13-CI-00008

SARAH MILLINER; AND
KENTUCKY ASSOCIATION OF
PEP SPONSORS, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: David L. Raleigh and Dan Logan bring this interlocutory appeal from an order of the Owen Circuit Court denying their motion to dismiss

negligence claims brought against them in their official and individual capacities. We agree with the trial court that there are factual issues regarding whether Logan is entitled to qualified official immunity in his individual capacity. However, we conclude that Logan and Raleigh are clearly entitled to immunity from suit in their official capacities, and that Raleigh is entitled to qualified official immunity in his individual capacity. Hence, we affirm in part, reverse in part, and remand for further proceedings.

For purposes of this appeal, the following facts are relevant: Sara Milliner alleges that, on January 14, 2012, she fell on the premises of the Owen County High School in Owenton, Kentucky, while attending a cheerleading event sponsored by the Kentucky Association of Pep Organization Sponsors, Inc. (KAPOS). She filed a complaint naming the following parties as defendants: KAPOS; the Owen County Board of Education (the Board); Sonny Fentress, Superintendent of the Owen County Schools; David L. Raleigh, former Superintendent of the Owen County Schools; Duane Kline, Principal of Owen County High School; Dan Logan, Facilities Director for Owen County Schools; and five "John Doe" defendants, individuals or companies alleged to have exercised control over the premises and to have contributed to the injury. By amended complaint, Milliner named Fentress, Raleigh, Klein and Logan in their official and their individual capacities.

The Board filed a motion to dismiss, arguing that it was entitled to governmental immunity. Fentress, Raleigh, Klein and Logan also moved to

dismiss, arguing that they were entitled to absolute immunity in their official capacities, and qualified immunity in their individual capacities. After considering the arguments of the parties, the trial court granted the motion to dismiss the individual claims against Fentress and Klein, noting the unrefuted evidence that they were not employed by the Board on the date of the incident. The trial court also granted the Board's motion to dismiss, concluding that it was entitled to governmental immunity. However, the court denied the motion to dismiss the claims against Raleigh and Logan in their individual capacities. They moved to alter, amend or vacate the order denying the motion to dismiss pursuant to CR[1] 59.05. The trial court denied their motion on July 22, 2013. Raleigh and Logan now appeal from that order.

As a general rule, an order denying a motion to dismiss is not a final order. However, an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment. *Breathitt Cnty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). As an initial matter, Raleigh and Logan argue that they are entitled to absolute immunity in their official capacities. The trial court did not address this issue in its order denying the motion to dismiss. However, it is well-established that, if a state agency is deemed to have governmental immunity, then its officers or employees have official immunity when they are sued in their official or representative capacity. *Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007). As the trial court

[1] Kentucky Rules of Civil Procedure.

found, the Board was clearly entitled to governmental immunity pursuant to *Yanero v. Davis*, 65 S.W.3d 510, 526-27 (Ky. 2001). Thus, as employees of the Board, Raleigh and Logan were also entitled to immunity in their official capacities. *Id.*

However, when such officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity. *Autry*, 219 S.W.3d 717. In the proceedings before the trial court, both parties relied heavily on this Court's unpublished decision in *Marson v. Thomason*, No. 2010-CA-002319-MR, 2012 WL 876754 (Ky. App. 2012). Subsequently, the Kentucky Supreme Court accepted discretionary review in *Marson*. We have held this matter in abeyance pending a final decision in that case. The Kentucky Supreme Court rendered an opinion in *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014) on April 14, 2014, and that opinion became final on September 18, 2014. We conclude that the Supreme Court's analysis in *Marson* is dispositive of the issues presented in this appeal.

Like in the current case, *Marson* involved a claim arising from an injury on school premises. The Thomasons brought the action on behalf of their son for injuries sustained in a fall from bleachers in a middle school gym. They alleged that the bleachers had not been fully extended, and that their legally-blind son had walked off the retracted portion of the bleachers and had fallen to the floor. The Thomasons brought a complaint naming the two school principals in charge of the gym and the teacher who was supervising the students that day.

This Court held that the principals and the teachers were entitled to immunity to the extent that they were sued in their official capacities. However, this Court concluded that they were not entitled to qualified official immunity in their individual capacities because the alleged negligence (failing to ensure the bleachers were properly extended, and inadequate supervision) consisted of a fixed, routine duty and were therefore ministerial in nature. The Kentucky Supreme Court analyzed this issue as follows:

> Whether qualified immunity extends to the Appellants turns on whether the acts of the various defendants were discretionary or ministerial. *See Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001).
>
> The question of when a task is ministerial versus discretionary has long plagued litigants and the courts. Generally, a governmental employee can be held personally liable for negligently failing to perform or negligently performing a ministerial act. Part of the rationale for allowing this individual liability is that a governmental agent can rightfully be expected to adequately perform the governmental function required by the type of job he does. To the extent his job requires certain and specific acts, the governmental function is thwarted when he fails to do or negligently performs the required acts. But when performance of the job allows for the governmental employee to make a judgment call, or set a policy, the fact that there is uncertainty as to what acts will best fulfill the governmental purpose has resulted in immunity being extended to those acts where the governmental employee must exercise discretion. To some extent, this says that governing cannot be a tort, but failing to properly carry out the government's commands when the acts are known and certain can be.
>
> Stated another way, properly performing a ministerial act cannot be tortious, but negligently performing it, or negligently failing to perform it, can be. And the law provides no immunity for such acts, meaning the state employee can be sued in court.

Yanero, 65 S.W.3d at 522. Negligently performing, or negligently failing to perform, a discretionary act cannot give rise to tort liability, because our law gives qualified immunity to those who must take the risk of acting in a discretionary manner. *Id.* at 521–22. Whether the employee's act is discretionary, and not ministerial, is the qualifier that must be determined before qualified immunity is granted to the governmental employee.

The distinction between ministerial and discretionary, of course, is where courts and litigants seem to have the most trouble. The decision "rests not on the status or title of the officer or employee, but on the function performed." *Id.* at 521. Indeed, most "immunity issues are resolved by examining 'the nature of the functions with which a particular official or class of officials has been lawfully entrusted.' *Id.* at 518 (*quoting Forrester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)).

At its most basic, a ministerial act is "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." *Id.* at 522. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." *Id.* (*quoting Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959)). And an act is not necessarily outside the ministerial realm "just because the officer performing it has some discretion with respect to the means or method to be employed." *Id*; *see also* 63C Am. Jur. 2d *Public Officers and Employees* § 319 (updated through Feb. 2014) ("Even a ministerial act requires some discretion in its performance."). In reality, a ministerial act or function is one that the government employee must do "without regard to his or her own judgment or opinion concerning the propriety of the act to be performed." 63C Am. Jur. 2d *Public Officers and Employees* § 318 (updated through Feb. 2014). In other words, if the employee has no choice but to do the act, it is ministerial.

On the other hand, a discretionary act is usually described as one calling for a "good faith judgment call[ ] made in a legally uncertain environment." *Yanero*, 65

S.W.3d at 522. It is an act "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* Given the volume of litigation on the subject, it is clear that these definitions are not a model of clarity. No doubt, this is due to their having been written in general, somewhat sweeping terms.

But at their core, discretionary acts are those involving quasi-judicial or policy-making decisions. Indeed, the premise underlying extending the state's own immunity down to it agencies and, in some instances, officers and employees is "that 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.* at 519. But the discretionary category is still somewhat broader, encompassing "the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level." 63C Am. Jur. 2d *Public Officers and Employees* § 318 (updated through Feb. 2014). The operational level, of course, is not direct service or "ground" level.

The distinction between discretionary acts and mandatory acts is essentially the difference between making higher-level decisions and giving orders to effectuate those decisions, and simply following orders. Or, as we have stated, "Promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function." *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003).

Thus, a ministerial act is a direct and mandatory act, and if it is properly performed there simply is no tort. But if such an act is omitted, or performed negligently, then that governmental employee has no immunity, and can be sued individually for his failure to act, or negligence in acting that causes harm. Of course, whether a ministerial act was performed properly, i.e., non-negligently, is a separate question from whether the act is ministerial, and is usually reserved for a jury. Qualified immunity applies only to discretionary acts. And that immunity is more than just a defense; it

> alleviates the employee's or officer's need even to defend the suit, which is to be dismissed.

Marson v. Thomason, 438 S.W.3d at 296-98.

Based on the evidence presented to the trial court, the Supreme Court noted that extending the bleachers was a routine duty, regularly performed by the custodian on duty. Thus, the Court concluded that this task was ministerial in nature to the person charged with that job. However, the Court noted that the two principals were only responsible for assigning job duties and generally supervising them. The Court held that such responsibilities are discretionary in nature. As a result, the Court determined that the two principals were entitled to qualified official immunity. *Id.* at 298-99.

On the other hand, the Supreme Court also noted that the teacher had been assigned to directly supervise the children, which included looking out for safety issues and taking the routine steps that were the established practice at that school. As such, his job required him to perform specific acts that were ministerial in nature, as it required enforcement of known rules. *Id.* at 300. Based on this conclusion, the Supreme Court held that the teacher was not entitled to qualified official immunity.

The current case requires a similar analysis. Since this matter was decided on a motion to dismiss, we must assume that all well-pleaded allegations in the complaint are true. *City of Pioneer Village v. Bullitt Cnty. ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003). Milliner's complaint alleges that

Raleigh was Superintendent of the Board at the time of the injury. There is no allegation that he had any direct responsibility for maintenance or supervision of the facilities at Owen County High School. Indeed, unlike in *Marson*, there is no allegation that he had any responsibility for assigning or supervising the individuals charged with those duties. Furthermore, the statutory duties of a superintendent are clearly discretionary in nature. *See* KRS[2] 160.370. Even based on the limited record before us, we must conclude that Raleigh was entitled to qualified official immunity in his individual capacity.

The record is not as clear concerning Logan. Milliner's complaint alleges that he was "in charge of maintenance of the Owen County Schools, including Owen County High School." The Appellants have admitted that Logan held the position of Facilities Director for the Owen County Schools. It is not clear from the record whether Logan had direct responsibility for maintaining the school facilities, merely assigning others to conduct those tasks, or some combination thereof. We conclude that the allegations were sufficient to support an inference that his duties were ministerial in nature, in the sense that they required performance of known and specific responsibilities. Although this inference may not be sustained ultimately upon further discovery, at this point we cannot say that Logan was clearly entitled to the protection of qualified official immunity in his individual capacity.

[2] Kentucky Revised Statutes.

Accordingly, the order of the Owen Circuit Court is affirmed to the extent that the trial court denied the motion to dismiss the claims against Logan in his individual capacity, and reversed to the extent that the Court denied the motion to dismiss the claims against Raleigh and Logan in their official capacities and against Raleigh in his individual capacity. This matter is remanded to the Owen Circuit Court for further proceedings on the merits of the claims against the remaining defendants.

ALL CONCUR.

BRIEF FOR APPELLANTS:

J. Dale Golden
Melissa Thompson Richardson
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No brief for Appellees