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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001006-MR

JESSICA HAWORTH — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 15-CI-003080

H.R. BY PARENT AND NEXT
FRIEND, REGINA ROBBINS — APPELLEE

AND NO. 2017-CA-001007-MR

LOUISVILLE METRO MAYOR
GREG FISCHER AND LOUISVILLE
METRO POLICE CHIEF
STEVE CONRAD — APPELLANTS

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v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 15-CI-003080

H.R. BY PARENT AND NEXT
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OPINION
VACATING AND REMANDING
APPEAL NOS. 2017-CA-001006-MR
AND 2017-CA-001007-MR

** ** ** ** **

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jessica Haworth brings Appeal No. 2017-CA-001006-MR from a May 24, 2017, order of the Jefferson Circuit Court denying Haworth qualified official immunity. Louisville Metro Mayor Greg Fischer and Louisville Metro Police Chief Steve Conrad bring Appeal No. 2017-CA-001007-MR from the May 24, 2017, order, as amended on June 5, 2017, denying both Fischer and Conrad qualified official immunity. We vacate and remand Appeal No. 2017-CA-001006-MR and Appeal No. 2017-CA-001007-MR.

H.R. was a juvenile committed to the care of Maryhurst, Inc., a psychiatric treatment facility in Louisville, Kentucky. H.R. suffers from bipolar disorder, oppositional defiant disorder, and disruptive behavior disorder. On July 15, 2014, three Maryhurst counselors took six residents, including H.R., on a field trip to Waterfront Park. At the appointed time to leave the park, H.R. refused, so the lead counselor called 911. While speaking with the 911 operator, the lead counselor spotted Louisville Police Officer Haworth, and the counselor informed Haworth that H.R. had gone "AWOL." Haworth advised the lead counselor that a beat officer should be summoned as Haworth was working foot patrol on the Big

Four Bridge. At some point, H.R. met four individuals at the park and accompanied them to a house where she was sexually assaulted.

On July 19, 2015, H.R., by Regina Robbins, parent, legal guardian and next friend of H.R., filed a complaint against Maryhurst in the Jefferson Circuit Court. Therein, H.R. alleged that Maryhurst negligently hired, trained, and supervised its employees. H.R. also maintained that Maryhurst was negligent in its care, control, and supervision of H.R. on July 15, 2014. H.R. claimed to have suffered both physical and mental damages.

Thereafter, on October 17, 2016, H.R. filed an amended complaint against, *inter alios*, Haworth, Conrad, and Fischer. In the amended complaint, H.R. claimed that Haworth failed to adhere to Louisville Metro Police Department Standard Operating Procedures by failing to provide assistance and to take a missing person report on July 15, 2014. H.R. also claimed that Conrad and Fischer were negligent in hiring, training, and retaining Haworth. H.R. asserted that the wrongful conduct of Haworth, Conrad, and Fischer "led to . . . [H.R.] being sexually assaulted by three males." Amended Complaint at 14.

On November 23, 2016, Fischer and Conrad filed a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f). Fischer and Conrad argued that H.R.'s claims against them in their official capacity were barred by the doctrine of

sovereign immunity and her claims against them in their individual capacity were barred by qualified official immunity. H.R. filed a response and maintained that Fischer and Conrad were not entitled to immunity. Subsequently, on January 5, 2017, Haworth filed a motion for summary judgment arguing that she was entitled to qualified official immunity and that she breached no duty of care to H.R. Haworth also maintained that her actions or inactions were not the proximate cause of H.R.'s injuries.

By orders entered May 24, 2017, and June 5, 2017, the circuit court granted in part and denied in part Fischer's and Conrad's motion to dismiss. The court determined that Fischer and Conrad were entitled to sovereign immunity for claims asserted against them in their respective official capacity. The circuit court, however, concluded that Fischer and Conrad were not entitled to qualified official immunity for claims asserted against them in their respective individual capacity. The circuit court also denied Haworth's motion for summary judgment and held that Haworth was not entitled to qualified official immunity.

Haworth filed a notice of appeal (Appeal No. 2017-CA-001006-MR) and Fischer and Conrad filed a notice of appeal (Appeal No. 2017-CA-0001007-MR) from the interlocutory orders of the Jefferson Circuit Court. These appeals were consolidated for review purposes by order entered January 26, 2018. Our review is permitted from an otherwise interlocutory order where a public official is

denied qualified official immunity. *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009).

Both appeals involve the legal issue of entitlement to qualified official immunity. Qualified official immunity operates as a complete bar to any action against a public official for the negligent performance of a discretionary act when performed in good faith and within the scope of the official's authority. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Conversely, an official is not entitled to qualified official immunity for the negligent performance of a ministerial act. *Id.* In relation to qualified official immunity, the distinction between a discretionary act and a ministerial act is pivotal.

Generally, 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. And, a discretionary act involves "the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id*. With the foregoing legal principals in mind, we shall address each appeal *seriatim*.

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Haworth contends that the circuit court erred by denying her motion for summary judgment. Summary judgment is proper where there exists no

material issue of fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

Haworth particularly maintains that the circuit court erroneously determined that she was not entitled to qualified official immunity. She argues that her "decision to stay in what she believed was her area of patrol and advise . . . [the counselor] to call 911 to obtain assistance from a nearby beat or patrol officer was a discretionary act." Haworth's Brief at 14.

In its order denying Haworth's motion for summary judgment, the circuit court determined that Haworth was required to follow Louisville Metro Police Department Standard Operating Procedures (SOP) as to missing persons. Particularly, the circuit court concluded that "Haworth was required to follow the policies for missing persons, rendering the task ministerial in nature." Order at 4. In determining that a ministerial duty existed, the circuit court did not review the terminology of the SOP at issue and apply same to the particular facts herein. Rather, the court simply concluded that the mere existence of a SOP necessarily gave rise to a corresponding ministerial duty. This was error.

An SOP or similar policy may establish ministerial and/or discretionary duties. *See Coleman v. Smith*, 405 S.W.3d 487, 493-96 (Ky. App. 2012). The court below must analyze the particular terminology utilized in the

SOP to determine the fundamental nature of the duty – discretionary or ministerial. *Id.*

In *Haney v. Monskey*, 311 S.W.3d 235 (Ky. 2010), the Supreme Court explained the difficulty in analyzing discretionary and ministerial acts:

> In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act. For this reason, this Court has observed that an act is not necessarily taken out of the class styled 'ministerial' because the officer performing it is vested with *a discretion respecting the means or method to be employed.* Similarly, "that *a necessity may exist for the ascertainment* of those [fixed and designated] facts does not operate to convert the [ministerial] act into one discretionary in its nature." Moreover, a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act. The portions of the investigative responsibilities as set out in the regulations . . . *were particular in their directive,* but we noted that others, which required the exercise of judgment, were not. . . . The first part was ministerial, but what followed was held to be discretionary.

Id. at 240-41 (internal quotations, internal brackets, and citations omitted).

In its order, the circuit court referenced two SOPs in relation to Haworth (SOP 8.32.2 and SOP 8.32.3). SOP 8.32.2 is contained in the record as an exhibit. However, a close examination of the exhibit reveals that the full text of SOP 8.32.2 was not provided. Without the complete text of SOP 8.32.2, neither

this Court nor the circuit court can determine whether ministerial or discretionary duties were established thereunder.

As to SOP 8.32.3, the full text was provided, and it reads as follows:

> **8.32.3 MISSING PERSONS INVOLVING EXTRAORDINARY CIRCUMSTANCES**
> (CALEA 41.2.5f)
>
> In addition to the above reporting requirements, officers shall notify their commanding officer and a Missing Persons Squad detective in the following situations that involve missing persons with extraordinary circumstances. The commanding officer shall respond to the scene and coordinate an immediate search with available resources (CALEA 41.2.6b-f).
>
> - The missing person, of any age, has a verified mental or cognitive impairment (e.g. Alzheimer's) and/or a development disability (e.g. autism, traumatic brain injury or physical disability) and whose disappearance poses a credible threat to the health, or safety, of the person. Verbal confirmation of the mental or cognitive impairment and/or a developmental disability by the complainant shall be considered verification of the condition. The Missing Persons Squad detective shall respond to the scene and, after conferring with the division commanding officer, he/she shall contact a Missing Persons Squad Commander and relay all pertinent information regarding the missing person. If, based on this information, the Missing Persons Squad Commander agrees that the missing person has a mental or cognitive impairment and/or a developmental disability, he/she shall immediately report the

information as a "Golden Alert" to the Louisville Metro Emergency Management Agency (EMA) Director and the Kentucky Division of Emergency Management, via MetroSafe, and to local media outlets, via Media and Public Relations Officer (refer to KRS 39F.180) (KACP 30.5).

- A missing child, ten (10) years of age or younger.

- A missing child, regardless of age, who has special needs or may require medical attention.

- A missing child, where there is evidence that the child may have been abducted or may be the victim of a crime and the AMBER Alert plan needs to be implemented. Requirements for an AMBER Alert are that a child is in danger of serious bodily harm or death. The AMBER Alert plan is only for serious child abduction cases and is only activated by officers through the Missing Persons Squad (refer to SOP 12.5) (KACP 30.7).

- Any other missing or lost person, regardless of age, that the officer has reason to believe is in distress. Examples of distress include:

    - The person has special needs, limiting his/her ability to care for himself/herself

    - The person is in need of, or may require, medical attention.

    - The person is considered endangered.

If any search conducted by LMPD personnel, in the above situations, has lasted more than two (2) hours

> without locating the missing person, the commanding officer in charge shall advise MetroSafe to notify the Louisville Metro Urban Search and Rescue (LMUSAR) Coordinator and the EMA Director. If the search is for a juvenile, Kentucky State Police (KSP) will also be notified in compliance with KRS 39F.180. Nothing in KRS 39F.180 shall prevent the notifications from being made sooner.
>
> If a search occurs in a wilderness area, MetroSafe shall notify the EMA Director, who shall determine the need for the EMA's Volunteer Search and Rescue Team to assist in the search. The Volunteer Search and Rescue Team will not be responsible for structural searches, or searches for fugitives or parolees.

SOP 8.32.3 mandates that a police officer "notify" the commanding officer and "Missing Persons Squad detective" when informed of a missing person with an extraordinary circumstance. SOP 8.32.3 utilizes the word "shall," and we believe this notification mandate constitutes a ministerial duty. SOP 8.32.3 lists five different extraordinary circumstances that trigger the ministerial notification duty. Of the five extraordinary circumstances, we are concerned with two circumstances: (1) a missing person with a mental impairment who poses a danger to his/her health or safety, and (2) a missing child who may need medical attention. In these two circumstances, the officer also must have been informed or otherwise have known of the missing person's mental impairment and the health/safety danger or of the missing child's need of medical attention. In this case, neither the circuit court nor the parties focused upon whether the above two extraordinary

circumstances were present to trigger the ministerial notification duty set forth in SOP 8.32.3. And, these two extraordinary circumstances are largely fact dependent. So, we are of the opinion that it was premature for the circuit court to conclude that Haworth possessed a ministerial notification duty under SOP 8.32.3, without additional discovery and review of the circumstances necessary to trigger the ministerial notification duty.

Haworth also raises other issues of error dealing with duty and causation. We are, however, only authorized to review issues of immunity in this interlocutory appeal per *Prater*, 292 S.W.3d 887.

Accordingly, we vacate the circuit court's order concluding that Haworth possessed a ministerial duty under SOP 8.32.2 and SOP 8.32.3 and remand to the circuit court for additional proceedings consistent with this Opinion.

APPEAL NO. 2017-CA-001007-MR

Fischer and Conrad contend the circuit court erred by denying their motion to dismiss for failure to state a claim upon which relief may be granted under CR 12.02(f). Fischer and Conrad argue they were also entitled to qualified official immunity.

To begin, a review of circuit court's order reveals that the court considered matters outside of the pleadings. When the circuit court does so, the

motion to dismiss is treated as a motion for summary judgment. *Middleton v. Sampey*, 522 S.W.3d 875, 878 (Ky. App. 2017). Our review proceeds accordingly.

In reaching its decision to deny Fischer and Conrad qualified official immunity, the circuit court determined that Fischer and Conrad each possessed a duty to train Haworth and that such duty to train constituted a ministerial duty:

> While developing the content of policies and training are discretionary functions, training of employees is a ministerial function. *Hedgepath v. Pelphrey*, 520 F. App'x 385, 392 (6th Cir. 2013) *citing Yanero*, 65 S.W.3d at 529. [H.R.] has sufficiently plead that Haworth was either not trained or improperly trained, and Fischer's and Conrad's direct involvement in Haworth's training is a question of fact at this time.

Order at 3.

Our Supreme Court has recognized that a duty to train may be either ministerial or discretionary. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 480-81 (Ky. 2006). And, the Supreme Court additionally instructed that "[m]inisterial training is where you are mandated to train to avoid the event that occurred." *Id.* at 481.

In this case, it was clear error for the circuit court to summarily decide that "training of employees is a ministerial function." Order at 3. *See Sloas*, 201 S.W.3d at 480-81. As set forth above, the duty to train may be either ministerial or discretionary depending upon the facts of each case and the particular dictates of such duty. *See id.* Based on the record before this Court, it is unclear whether the duty to train Haworth constituted a discretionary or ministerial act, and it is equally

unclear whether Fischer and/or Conrad possessed such a duty. In fact, the source of a duty to train Haworth has not yet been identified by H.R. in the record below.

We, therefore, vacate the circuit court's order concluding that Fischer and Conrad each possessed a ministerial duty to train Haworth and remand to the circuit court for additional discovery and review of this issue by the court.

For the foregoing reasons, we vacate and remand Appeal Nos. 2017-CA-001006-MR and 2017-CA-001007-MR to the Jefferson Circuit Court for additional proceedings consistent with this Opinion.

ALL CONCUR.

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