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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001046-MR

QUINN BOBEL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 12-CI-02616

CAROLINE A. CORNETT — APPELLEE

AND

NO. 2017-CA-001108-MR

CAROLINE A. CORNETT — CROSS-APPELLANT

v.

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 12-CI-02616

KEENEY HERSEY AND
SCOTT SHEETS — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND J. LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: After Caroline A. Cornett was injured at a pool owned and operated by the Lexington-Fayette Urban County Government (LFUCG), she filed a complaint alleging negligence against the pool lifeguard, Quinn Bobel; the manager of the pool, Keeney Hersey; and the LFUCG aquatic programs manager, Scott Sheets.[1] The defendants moved for summary judgment. The Fayette Circuit Court held that Hersey and Sheets, but not Bobel, were entitled to qualified official immunity. Bobel has brought an appeal against Cornett and Cornett has brought a cross-appeal against Hersey and Sheets. Having reviewed the record and applicable law, we affirm.

Factual and Procedural Background

On June 4, 2011, Cornett took five children to the pool. She instructed them to stay within a small area. One of the children, N., who was four years of age and did not know how to swim, wandered away several times and eventually climbed up on the three-meter diving board. Bobel, who was working as a lifeguard that day, had just rotated off the lifeguard chair when he noticed N.

[1] Cornett's complaint also named the Recreation Manager, Rudy Cruse, as a defendant but he was subsequently dismissed by agreed order of the parties.

was not jumping off the board and appeared to be frightened. When he approached the board, Cornett told him to go up and get N. He said, "No, I can't do that." Bobel determined that the safest way to get the child down was to coax her to jump off the front of the board into the water, where he could swim her to safety. Bobel got into the pool and tried to persuade N. to jump from the front of the board.

Meanwhile, Cornett, who feared that N. might try to jump towards her onto the concrete pool deck, decided to climb to the top of the board and rescue the child herself. Hersey, the pool manager, attempted to discourage Cornett and advised her not to go up the ladder wearing flip-flops. Cornett nonetheless climbed the ladder and retrieved N. On her way down the ladder she fell and broke both her ankles. The child was not injured.

In her lawsuit, Cornett sought to hold Bobel, Hersey and Sheets, all employees of LFUCG, individually liable for her injuries. She alleged Bobel was negligent in his response to the emergency with N., and that Hersey and Sheets were negligent in training and supervising Bobel. Bobel, Hersey and Sheets invoked qualified official immunity on the grounds they were each engaged in discretionary, not ministerial, functions.

The trial court held that Hersey and Sheets were entitled to official immunity because their duties were discretionary whereas Bobel was not because

his duties were ministerial. This appeal by Bobel and cross-appeal by Cornett followed.

Standard of Review

In reviewing a grant of summary judgment, our inquiry focuses on "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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his [or her] favor and against the movant." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotation marks and citation omitted). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his [or her] favor." *Id*. at 480. "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

This interlocutory appeal is permissible because "an order denying a substantial claim of absolute immunity is immediately appealable even in the

absence of a final judgment." *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). The cloak of immunity entitles its possessor to be free "from the burdens of defending the action, not merely just an immunity from liability." *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citations omitted).

Analysis

As a classification of county government, LFUCG is entitled to sovereign immunity. *Lexington-Fayette Urban City Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004). "[W]hen 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." *Yanero v. Davis*, 65 S.W.3d 510, 522 (internal citation omitted). "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." *Id*. (citation omitted). "A government official is not afforded immunity from tort liability for the negligent performance of a ministerial act." *Patton v. Bickford*, 529 S.W.3d 717, 724 (Ky. 2016), *as modified on denial of rehearing* (Aug. 24, 2017).

The Kentucky Supreme Court has observed that "[c]ategorizing actions as either the performance of a discretionary duty or the performance of a ministerial duty is vexing to litigants and courts alike." *Id*. The Court provided the following guide for making this often-difficult distinction: "[p]romulgation of rules is a discretionary function; enforcement of those rules is a ministerial function." *Id*. (quoting *Williams v. Kentucky Department of Education*, 113 S.W.3d 145, 150 (Ky. 2003)). Thus, "a duty is ministerial 'when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.'" *Id.* (citation omitted). "[A] government official performing a ministerial duty does so without particular concern for his own judgment; . . . the act is ministerial 'if the employee has no choice but to do the act.'" *Id.* (quoting *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014)).

Discretionary acts, on the other hand, involve "the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id*. (citations omitted). "[A]t their core, discretionary acts are those involving quasi-judicial or policy-making decisions." *Marson*, 438 S.W.3d at 297. Immunity is provided for discretionary acts because the "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." *Yanero,* 65 S.W.3d at 519.

Quinn Bobel

In applying the foregoing principles, the trial court found that although Bobel's duties as a lifeguard included discretionary elements, they were predominantly ministerial in nature. The court found that Bobel had a ministerial duty to provide for the safety of the children at the pool even though there may not have been a specific rule governing the situation at hand, *i.e.*, a child "stuck" on the diving board.

Bobel argues that the trial court's decision was erroneous as a matter of law because a lifeguard's response to an unfolding emergency is inherently discretionary. According to Bobel's deposition testimony, he used all his training and knowledge to determine the best course of action to get N. safely off the diving board. He decided it was safer for her to jump from the front of the board into the water rather than come backwards down a ladder designed primarily for going up and not for coming down.

These elements of risk assessment and decision-making did not, however, mean Bobel's duty was predominantly discretionary. Almost every act is subject to some degree of judgment and discretion. An act can be ministerial even though it has a component of discretion and we should not limit ministerial acts to

only those that are directly compelled by an order or rule. *Marson*, 438 S.W.3d at 302. There is no dispute that Bobel was directly charged with getting N. safely from the diving board. He had no choice but to assist her although he retained discretion to decide the best means to do so. "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." *Mucker v. Brown*, 462 S.W.3d 719, 721 (Ky. App. 2015) (quoting *Yanero*, 65 S.W.3d at 522).

Bobel argues that the facts of his case are analogous to those of *Haney v. Monsky*, a case involving a camp counselor who was sued for negligent supervision after a child participating in a blindfolded night hike led by the counselor fell and was injured. *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010), *as corrected* (May 7, 2010). The Kentucky Supreme Court held that the camp counselor supervising the night hike was acting in a discretionary capacity and therefore enjoyed qualified official immunity. In making this determination, the Court explained that the counselor exercised a general supervisory authority over the children in her care. *Id*. at 243. All the camp counselors received training on a number of pre-approved activities, which included the night hike, but they were free to choose which activities they conducted with the children and were not required to use the night hike activity at all. *Id*. at 241.

Bobel, by contrast, had no supervisory duties or authority over patrons at the pool and no discretion in deciding on their activities. His primary, fixed duty was to assist individuals at the pool who appeared to be in danger.

In another case cited by Bobel, a mounted police officer was patrolling at a football game to control crowds and criminal activity when her horse unexpectedly spun and reared, injuring a bystander. *Prater v. Catt*, 443 S.W.3d 6 (Ky. App. 2014). A panel of this Court concluded that the officer was acting in a discretionary capacity because she "was not merely following a set of well-defined rules . . . [but] was required to use her judgment and discretion—informed by her training and familiarity with her mount[.]" *Id*. at 10. Although the police officer's duties were similar to Bobel's in focusing primarily on public safety, her duties were far broader and less specific than Bobel's in that she was required to "monitor and control the spontaneous activity of the crowd as well as the behavior of her horse." *Id*.

In ruling on the motion for summary judgment in the case before us, the trial court relied primarily on *Marson*, 438 S.W.3d 292, a Kentucky Supreme Court opinion which provides the fullest recent analysis of the ministerial/discretionary distinction. In *Marson* the Court addressed whether a teacher and two principals were entitled to qualified immunity after a child was injured in an accident at a middle school. As a convenience to parents, the school

allowed pupils to arrive early in the morning before the start of classes. Several teachers and staff were assigned each day to monitor the incoming students who sat in designated sections of the gym bleachers, which were extended every morning by the school custodians. One day, the custodians failed to extend the bleachers with the consequence that a legally blind student fell and was injured. The Kentucky Supreme Court held that the duties of the principals were discretionary whereas those of the teacher who was assigned to meet and supervise the students in the morning were ministerial. The Court described the duties of the principal as administrative and supervisory. *Marson*, 438 S.W.3d at 299. She was not required to personally perform tasks, such as extending the bleachers, which she assigned to the custodians. *Id*. Her duty was to provide a safe school environment. "Because that task is so situation specific, and because it requires judgment rather than a fixed, routine performance, looking out for children's safety is a discretionary function for a principal, exercised most often by establishing and implementing safety policies and procedures." *Id*. By contrast, there is no evidence that Bobel had any administrative or supervisory duties, that he assigned any tasks to others, or that he established or implemented safety policies and procedures.

The teacher in *Marson* was required to follow a set specific routine for coordinating the children and directing them in an orderly manner to the

gymnasium. *Id*. at 301. Bus duty was a specific task, which included looking out for safety issues such as water spilt on the floor or a fallen broom the children could trip over. *Id*. at 300. The Court concluded that although bus duty "might permit some decision-making during the process, it was not [the teacher's] decision to set up and perform bus duty. It was required of him, and at that point in time was the mandatory governmental act." *Id*. at 301.

Similarly, although Bobel was permitted to decide how best to rescue N., it was not his decision to perform the rescue. Unlike the school principals, Bobel did not assign any tasks to others nor did he establish or implement safety policies and procedures.

Bobel argues in reliance on *Yanero* that he was expected to make a good-faith judgment call in a legally uncertain environment when he embarked on his plan to rescue N. *Yanero*, 65 S.W.3d at 522. Nonetheless, his duty to rescue N. was "absolute, certain, and imperative[.]" *Id*. Certainly, as with the teacher in *Marson*, there were many factors involved in that process which were unexpected and beyond his control. As the *Marson* Court explained, "if a teacher is working with a student on one side of the room, and on the other side of the room a student stabs his desk mate with a pencil, it could rightfully be argued that no teacher could prevent all harm from coming to the children in his care. But that does not mean his supervision duty was discretionary, such that he would have immunity

from suit." *Marson*, 438 S.W.3d at 302. Similarly, it could be rightfully argued that no lifeguard could prevent all harm to patrons of the pool including Cornett. But this does not mean he enjoys qualified immunity. "Certainly, there are *defenses* to the claim that a teacher (or any official) has breached his ministerial duty. But that does not mean such a claim is barred by immunity." *Id.*

Cornett's Cross-appeal

Cornett has brought a cross-appeal from the trial court's grant of summary judgment to Hersey and Sheets. The trial court described Hersey and Sheets as supervisors required to promulgate rules and regulations to implement the various subjects addressed in the operational manuals for the aquatics program. The trial court found them both responsible for general supervision of the program and its lifeguarding staff, but not responsible for specific supervision of everyday situations that arise at the pool. The trial court described their responsibility to look out for the safety of children as general, rather than specific, likening it to that of the principals in *Marson*.

Hersey testified that her job as the pool manager included overseeing the concessions and daily finances; supervising the cashier and closing out the day's receipts; supervising the lifeguards; supervising the assistant manager; employee scheduling; conducting staff meetings and overseeing "reflections" with lifeguards, which were weekly sessions in which the lifeguards would discuss fact-

specific "what if" scenarios, talk about how they would use their judgment to respond to different situations, and practice rescue techniques. The actual training and certification of the lifeguards was performed by the American Red Cross.

Sheets's job duties included the hiring of lifeguards, managers, and staff, the coordination and scheduling of in-service training of lifeguards with the Red Cross and overseeing daily operations of the aquatics programs at LFUCG parks. Sheets was not present at the pool on the day of Cornett's accident.

Cornett argues that Hersey's duties were ministerial rather than discretionary, akin to those of the teacher in *Marson*. She contends that Hersey had a ministerial duty to establish emergency measures and procedures but failed to establish any procedure for rescuing a person "stuck" on the high diving board although this is not an uncommon occurrence. But the fact that Cornett ascribes rule-making duties to Hersey only supports the trial court's determination that Hersey's duties were discretionary, rather than ministerial.

Cornett further argues that Sheets should have ensured that Hersey implemented a specific policy for lifeguards to address the situation of a person "stuck" on the high diving board and should have trained Bobel regarding that policy. She contends he had a ministerial duty to supervise Hersey, including the ministerial duty to ensure she complied with her ministerial duty to establish emergency measures and train lifeguards to follow them. He did not exercise

governmental discretion and did not engage in planning, policymaking, or quasi-judicial decision-making with respect to these duties. She contends that subjecting him to potential liability does not test the merits of social, political or economic theory as required to invoke official immunity.

But the *Marson* Court emphasized that the discretionary category is broader than the highest levels of social, political or economic policymaking, "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." *Marson*, 438 S.W.3d at 297.

Hersey's and Sheets's duties, which included rulemaking, supervising and delegating tasks to others were certainly not "direct service or 'ground' level[,]" and fall well within the discretionary category. Their duties resemble those of the principal in *Marson* whose "responsibility to look out for the students' safety was a general rather than a specific duty, requiring her to act in a discretionary manner by devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees. Her actions were at least at an operational level, if not a policy- or rule-setting level." *Id*. at 299.

Conclusion

For the foregoing reasons, the Fayette Circuit Court's order denying summary judgment to Bobel and granting summary judgment to Hersey and Sheets on the grounds of qualified official immunity is affirmed.

ALL CONCUR.

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