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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001945-MR

JULIE WILLIAMS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 17-CI-000232

CANDY ROGERS, as Mother
and Next Friend of Z.R. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, JONES AND NICKELL, JUDGES.

GOODWINE, JUDGE: Appellant, Julie Williams ("Williams"), appeals from an interlocutory order of the Jefferson Circuit Court denying her motion for summary judgment of dismissal related to her claim of qualified official immunity. Appellee, Candy Rogers ("Rogers"), as mother and next friend of Z.R., alleged Williams is liable for injuries her son sustained in a school fight. Because Williams was performing a ministerial act in supervising the students in the

cafeteria, the trial court correctly denied Williams's motion. Finding no error, we affirm.

BACKGROUND

In the fall of 2016, Z.R. was a seventh grader at Frederick Law Olmsted Academy North ("Olmsted"), an all-boys middle school in the Jefferson County Public School System ("JCPS").[1] On the morning of December 16, 2016, between 11:20 and 11:50, Z.R. and several other students were eating lunch in the cafeteria.

Williams, the seventh-grade counselor, was one of three employees supervising the students in the cafeteria.[2] She was at one end of the cafeteria facing the students and directly in front of Z.R. The other two supervisors, the assistant principal and security guard, were at the other end of the cafeteria, also facing the students. Williams was walking around the cafeteria. For a short period of time, she was sitting in front of the table where Z.R., K.T., and another boy sat. The boys were being rambunctious. Williams told them to stop "clowning

[1] Z.R. attended Olmsted from August 12, 2015 until December 16, 2016.

[2] Williams had been a school counselor at Olmsted since August 5, 2013. Her job description as counselor included performing other duties as assigned by the principal. The principal assigned Williams the task of supervising students in the cafeteria from 11:20 to 11:50 daily. She arrived in the cafeteria at 11:15 and remained until the last student left.

around."[3] After a few minutes, she got up to walk to another part of the cafeteria. Within seconds, a fight broke out between Z.R.[4] and K.T. The assistant principal and security guard rushed over and broke up the fight, separating the boys. Immediately, Z.R. went to the office, utilized an ice pack, and waited for his mother to pick him up.[5] Z.R. never returned to Olmsted, transferring to another Jefferson County Public School.

Prior to the incident, Williams met with Z.R. in counseling sessions to address his behavior, namely his picking on other students and why he got upset when students he picked on retaliated. However, Williams was unaware that Z.R. was ever bullied at Olmsted. In fact, Olmsted never received any complaints from Rogers prior to the fight. Olmsted has an anti-bullying policy in place, with corresponding disciplinary procedures.

On January 12, 2017, Rogers filed a complaint against: (1) the principal, (2) the assistant principal, (3) Williams, and (4) K.T. On June 29, 2017,

[3] Williams stated that the boys' behavior did not rise to the level of giving them a warning or otherwise reprimanding them.

[4] Z.R. neither admits nor denies hitting the other student first. However, the video surveillance in the cafeteria clearly shows Z.R. struck K.T. first and K.T. retaliated by returning the punch, causing damage to Z.R.'s orbital socket. There was no history of conflict between Z.R. and K.T. Williams, in her role as counselor, was aware that Z.R. picked on other students at times but neither Z.R. nor K.T. had any history of fighting or any behavioral writeups. Rogers admitted she never reported to any Olmsted employee any issues Z.R. had with being bullied.

[5] His mother took him to Norton Children's Hospital later that evening.

all three school employees filed a motion for summary judgment, arguing qualified official immunity barred the suit. The trial court granted partial summary judgment, dismissing the suit against the principal. It stated the principal was entitled to qualified official immunity because his duty to supervise teachers and students, ensuring that anti-bullying policy and procedures existed, was a discretionary function. The trial court dismissed the assistant principal from suit for another reason. It found he was performing a ministerial duty in supervising the students and was not entitled to qualified official immunity but because he broke up the fight, and there was no evidence of negligence in his supervision, there were no genuine issues of material fact regarding his liability; thus, he was entitled to judgment as a matter of law.

With respect to Williams, the trial court found Williams also performed a ministerial act when she supervised the students and was not entitled to qualified official immunity. On that basis, it denied her motion for summary judgment. The trial court also found a genuine issue of material fact existed regarding Williams's negligence, given that she walked around the cafeteria supervising the students, turned her back to them at one point, with knowledge that Z.R. picked on students in the past, which led to him getting upset if one of the students retaliated. This appeal followed.

STANDARD OF REVIEW

Summary judgment is a remedy to be used sparingly, "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 favor and against the movant." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (citation omitted). The Supreme Court cautions that the term "impossible" is to be used in a practical sense, not in an absolute sense. *See id.* (citing *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992)).

The trial court's primary directive, in this context, is to determine whether a genuine issue of material fact exists. If so, summary judgment is improper. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). This requires the facts be viewed in the light most favorable to the party opposing summary judgment—here Rogers. *Id.* "A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482.

A motion for summary judgment presents only questions of law and "a determination of whether a disputed material issue of fact exists." *Shelton*, 413 S.W.3d at 905; CR[6] 56.03. Our review is *de novo*, and we afford no deference to

[6] Kentucky Rules of Civil Procedure.

the trial court's decision. *Grange Mut. Ins. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

"Summary judgments play an especially important role when dealing with immunities, as we also view qualified official immunity as an immunity from suit, that is, 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) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

ANALYSIS

Williams argues that she is entitled to "qualified official immunity" from suit. Specifically, she contends her actions and alleged inactions of supervising students in the cafeteria resulted from discretionary decisions. As a result, she cannot be held liable for the tort of negligent supervision based on *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011). We disagree. Rogers argues that Williams negligently supervised the students in the cafeteria and failed to follow rules related to said supervision, which resulted in a fight injuring Z.R. Rogers argues Williams's acts of supervision were ministerial, relying on *Patton v. Bickford*, 529 S.W.3d 717 (Ky. 2016); *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003); and *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014). We agree.

In *Patton*, our Supreme Court noted:

> The application of qualified official immunity to particular activities has long been problematic and this case is no different. Qualified official immunity, generally speaking, is "immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions." *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). Qualified immunity applies only to the negligent performance of duties that are discretionary in nature. A government official is not afforded immunity from tort liability for the negligent performance of a ministerial act. The act of "governing cannot be a tort, but failing to carry out the government's commands properly when the acts [to be performed] are known and certain can be." *Marson v. Thomason*, 438 S.W.3d 292, 296 (Ky. 2014).
>
> Categorizing actions as either the performance of a discretionary duty or the performance of a ministerial duty is vexing to litigants and courts alike. We recently affirmed that the distinction "rests not on the status or title of the officer or employee, but on the function being performed. 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 296-297 (internal quotes and citation omitted). A somewhat rudimentary expression of the distinction between discretionary and ministerial acts provides that "[p]romulgation of rules is a discretionary function; enforcement of those rules is a ministerial function." *Williams v. Kentucky Department of Education*, 113 S.W.3d 145, 150 (Ky. 2003) (citations omitted). This is, of course, too simple for most circumstances, but it serves as a sound point from which to begin.

Patton, 529 S.W.3d at 723-24 (footnote omitted).

"[T]he analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial." *Haney v.*

Monsky, 311 S.W.3d 235, 240 (Ky. 2010). Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. "Discretionary acts are, generally speaking, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* (quoting *Yanero*, 65 S.W.3d at 522). Additionally, discretionary acts or functions are those that by necessity require the exercise of reason in adapting a means to an end, and discretion to determine whether the act should be done or how the course should be pursued. *Haney*, 311 S.W. 3d at 240. "In *Yanero*, . . . we described discretionary acts as 'good faith judgment calls made in a legally uncertain environment.'" *Patton*, 529 S.W.3d at 724 (quoting *Yanero*, 65 S.W.3d at 522).

> The underlying rationale for providing immunity to discretionary acts 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." [*Yanero*, 65 S.W.3d] at 519. This rationale makes clearer that discretionary acts are those performed at the policy-making level, but acts performed at the operational level are included within this category as well.

Id.

On the other hand, ministerial acts or functions—for which there is 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." *Marson*, 438 S.W.3d at 297 (quoting *Yanero*, 65 S.W.3d at 522). The fact that it may be necessary to ascertain fixed and designated facts does not operate to convert a ministerial act into one discretionary in its nature. *Haney*, 311 S.W.3d at 240-41 (citations omitted). That is the operative distinction we have here. Williams was assigned the task of supervising students in the cafeteria. In doing so, she had to keep students from misbehaving and prevent food fights and violent behavior. As a result, she had to ascertain or assess certain facts and whether they gave rise to misbehavior or violent behavior. Said assessment did not "convert the [ministerial] act into [a discretionary one]." *Id.*

In *Haney*, a camp counselor asserted qualified official immunity as a defense to a negligent supervision claim. 311 S.W.3d at 239. The counselor had received a "single oral instruction to keep the children in the middle of the path . . . during a 10 to 15 minute training session" on how to conduct a hiking activity. *Id.* at 242 (internal quotation marks omitted).

Although given to ensure the safety of the activity, the Supreme Court refused to deem enforcement to be ministerial because the instruction to keep the children in the middle of the path created "a general and continuing supervisory duty . . . which depended upon constantly changing circumstances—indeed, the

continuing moment-by-moment, worm-like movement of all the children upon the path." *Id.* at 243.

Moreover, the instruction did not say "how to 'keep' the children in the middle of the path should they suddenly stray from it." *Id.* During the nature walk, the children were blindfolded. Once they strayed—as they often did—"she chose to caution the children that they were getting too close to the path's edge. Unexpectedly, this apparently created a chain reaction of tripping behind the leader." *Id.* at 244. The Supreme Court found her actions in deciding how and what to do to be discretionary. *Haney* is distinguishable in that it involves a one-time camp excursion. Whereas here, Williams supervised students in the cafeteria at a designated time daily.

Williams argues that her actions were more aligned with Turner's. We disagree. In *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011), the Supreme Court reasoned: "While there may be legitimate disagreement as to the approach taken by Turner, the consequences of liability under such circumstances would injuriously 'deter independent action and impair the effective performance of [teaching] duties.'" *Id.* at 876 (quoting *Haney*, 311 S.W.3d at 245).

> Although we consider Turner's conduct in this case to be discretionary, we recognize the apparent incongruity with our precedent regarding a supervisory duty in the public school setting, as "we have held that a claim of negligent supervision may go to a ministerial act or function in the public school setting." *Id.* at 244. However, *Yanero v.*

> *Davis*, 65 S.W.3d 510 (Ky. 2001) and *Williams*, 113 S.W.3d 145—the cases relied upon in enunciating the public school distinction—have quite different facts from those before us. *Id.*
>
> In *Yanero*, this Court deemed "enforcement of a known rule requiring student athletes wear batting helmets during baseball batting practice" to be ministerial. 65 S.W.3d at 522. Unlike the teacher's decision-making in this case, a helmet requirement constitutes "an essentially objective and binary directive." *Haney*, 311 S.W.3d at 242 (*discussing Yanero*, 65 S.W.3d 510). As a result, "[t]here is no substantial compliance with such an order and it cannot be a matter of degree: its enforcement was absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* (citation omitted) (internal quotation omitted). You do it or you don't—and unlike here, there is no factual determination required for its application.
>
> Admittedly, we have also "rejected the notion that the *failure* of teachers . . . to supervise their students in the face of known and recognized misbehavior was a discretionary act." *Id.* at 244 (*discussing Williams*, 113 S.W.3d at 150). This decision stemmed from the requirement in KRS 161.180(1) that teachers must "hold pupils to strict account for their conduct on school premises, on the way to and from school, and on school sponsored trips and activities." *Id.* The dispute in this case, though, concerns the *means* of supervision rather than a *failure* to supervise students who were drinking and driving to and from a school-sponsored function as occurred in *Williams.*

Turner, 342 S.W.3d at 876-77.

The Supreme Court differentiates between teachers tasked with enforcement of policy who have been given specific directives and those who have not.

> We have consistently held that the general supervision of students by teachers is ministerial in nature "as it requires enforcement of known rules." *Marson*, 438 S.W.3d at 301 (citing *Williams*, 113 S.W.3d at 150). In fact, we have only labeled the duty of supervision to be discretionary in two cases illustrating the same factual scenario. The distinguishing factor in those cases was that the supervisory official was given little or no direction or guidance on how the supervision was to be performed. *See Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010); *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006).

Patton, 529 S.W.3d at 727.

The Supreme Court acknowledged the "unique circumstances presented by a school environment" and "recognized 'that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom.'" *Id.* (quoting *Turner*, 342 S.W.3d at 876).

> To succeed, teachers "must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions as to what actually happened, and ultimately to determine an appropriate course of action, which may at times, involve reporting the conduct of the child to the appropriate authorities." *Id.* To be sure, there is a degree of discretion associated with the Teachers' duties here. But this discretion does not in and of itself transform an otherwise ministerial duty to a discretionary one.

Patton, 529 S.W.3d at 727-28. The Supreme Court concluded in *Patton* that "[t]he duty of the Teachers to report bullying was ministerial and so they lack the protection of qualified immunity." *Id.* at 728.

Williams argues her actions were more akin to Turner's and Haney's, whereas Rogers argues Williams's actions were more akin to Patton's and Marson's. After a careful review of the record, we could not find any specific rules or policies regarding supervision of the cafeteria. In reviewing Williams's job description,[7] it did not include supervising students in the cafeteria. Rather, said task was in a catchall category to "perform[] other duties assigned by the Principal." As such, it was a ministerial act. Only one-fourth of the cafeteria was being used, preventing what had become a breeding ground for fights and altercations among students. Said policy was not implemented by Williams. She was one of three adults there to maintain proper lunchroom decorum—prevent misbehavior.

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[7]

> The job functions of the middle school counselor include[] teacher-based guidance, individual/group counseling, academic planning, parent education, grouping and scheduling students. The counselor is the school agent for compliance with federal, state, and local regulations. The counselor conducts inservice, serves as liaison to parents and community and orients students, parents, and teachers to the middle school. The counselor is responsible for maintaining and auditing the records for each of the students.

JCPS Middle School Counselor Job Description. (R. 221).

Williams argues this Court should follow its holding in *Brown v. S.F.*, No. 2011-CA-001898-MR, 2013 WL 1697766 (Ky. App. April 19, 2013). Therein, this Court held that supervising students during bathroom breaks was analogous to *Turner*, and that the facts in *Williams* were distinguishable. The *Brown* appellants were not merely enforcing a rule but were using discretion and judgment in the method of supervising the children in the bathroom and in addressing the disciplinary problems. While the school had general policies relating to the supervision of children, there were no school policies related to bathroom break supervision, meaning that the teachers had to use their own judgment in accomplishing this task, as the school's general policies required them to do. *Id.* at *9.

This Court held in *Brown*:

> The undisputed facts of this case in conjunction with the school's policies establish that the issue in this case is the means of supervision rather than a failure to supervise. Therefore, pursuant to the holding in *Turner v. Nelson*, the appellants' actions were discretionary. And because the appellants' acts of supervising and disciplining the students were discretionary, even if there might be a legitimate disagreement regarding the methods they used, they are entitled to the protection of qualified official immunity from S.F.'s suit. Accordingly, we hold that as a matter of law, the actions of the appellants in this case related to supervision were discretionary, and the circuit court erred in concluding that these acts were ministerial; therefore, we must reverse its ruling.

Id. at *10. What distinguishes the acts in *Brown* from the facts here? First, as part of their jobs, teachers are cloaked with the daily discretion and decision-making of educating our children. To that end, they must determine how to incorporate breaks, including bathroom breaks, into the daily regimen, in the least intrusive and disruptive manner as possible. That decision, as in *Brown*, might necessitate supervising some students, while leaving others unsupervised. The teacher did not think it necessary to stand guard outside the girls' bathroom but found it necessary to stand guard outside the boys' bathroom, never having experienced problems with the girls misbehaving.

Thus, the issue before us is whether Williams's supervision of the students in the cafeteria was a ministerial act or a discretionary one. Put another way, did any school policies impose a ministerial duty on Williams to monitor the cafeteria or was her decision to do so a "good faith judgment call [ ] *made in a legally uncertain environment*[?]" *Haney*, 311 S.W.3d at 240 (quoting *Yanero*, 65 S.W.3d at 522). Williams was following a mandate to "[p]erform[] other duties as assigned by the Principal."

Rogers argues that Williams had a ministerial duty to enforce the rules of the cafeteria that there be no misbehavior, food fights, and no acts of violence, especially causing injury to other students. Discovery revealed Williams supervised the lunchroom daily from 11:20 to 11:50. This assigned task was in

addition to her regular job duties as the seventh-grade counselor. The trial court found that Williams was performing a ministerial act while supervising the lunchroom, thus, not entitled to qualified official immunity. We agree.

The trial court relied on *Marson*, 438 S.W.3d 292, where the teacher "was [required] to perform bus duty . . . . This was a ministerial function." *Id.* at 301.

> Even though this ministerial act might permit some decision-making during the process, it was not his decision to set up and perform bus duty. It was required of him, and at that point in time was the mandatory governmental act. Consequently, he does not have qualified immunity, and can be sued individually. Whether his actions on that morning amount to a tort or not depends on whether he negligently failed to perform his mandatory acts, or negligently performed them, which is a question for a jury, assuming of course there is evidence that he acted unreasonably, that is, negligently.

Id. Ministerial acts involving supervision, such as bus duty and cafeteria duty, can have unexpected events occur. *Marson* explained this very succinctly:

> One might reason that it is impossible for a teacher to fully perform the ministerial duty of supervision of students because there are so many things involved in that process that are beyond what the teacher can control. For example, 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.

> Instead, the ministerial duty of supervision must be viewed through the lens of negligence. It is possible that some acts that happen when a teacher is supervising are outside the scope of what his supervision requires, and he will be entitled to a summary judgment as a matter of law. Or, as with the pencil stabbing, the question may be whether the teacher was negligent in his supervision, and then the reasonableness of the teacher's actions will be taken into account. 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. The nature of the acts performed by the teacher, or any governmental employee, determines whether they are discretionary or ministerial.

Id. at 302. Using the *Marson* rationale, the trial court concluded that Williams's act of supervising the students in the cafeteria was a ministerial act. Thus, she was not entitled to qualified official immunity. We agree.

CONCLUSION

Based on the foregoing analysis, we affirm the Jefferson Circuit Court's order denying Williams's motion for summary judgment.

ALL CONCUR.

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