RENDERED: MARCH 7, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000487-MR

ERIN HANEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 06-CI-005614

BILJANA MONSKEY, AS THE NEXT FRIEND OF
MAX ZAGER, A MINOR CHILD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Erin Haney appeals the February 13, 2007, order denying her motion for a summary judgment in Max Zager's personal injury action against her. We affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In the summer of 2005, Max, an infant, was in Louisville, Kentucky visiting his grandmother who enrolled him in one of the Louisville Zoo's week long summer camps. While at the camp, Max was assembled in a group of other children in his age range under the leadership of Erin Haney. On June 27, 2005, while playing a game called "night hike", supervised by Erin, Max fell and fractured his right arm. Approximately a year later, Max's parents filed a lawsuit, on his behalf, in circuit court asserting negligence and breach of duty by the zoo and its employees, namely Erin and Diane Moon. The only remaining defendant in the action is Erin. Erin filed a motion to dismiss, claiming qualified immunity based on her role as a government employee. Her motion, treated as a motion for summary judgment, was denied in an order dated February 13, 2007. This appeal followed.

The standard of review of a trial court's 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Erin argues that, because she was a government employee at the time of Max's accident and that since she was acting in a discretionary capacity, she is entitled to

immunity. There is no dispute that Erin's role as a camp counselor at the zoo falls under the threshold of a government employee. The only issue before us is whether Erin's duty of reasonable care and supervision of Max while performing her duties as a camp counselor was a ministerial or discretionary function.

In its order, the trial court found that Erin was acting in a ministerial capacity and therefore was not entitled to qualified immunity. The trial court relied heavily on the case of *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), which expounds on the issue of governmental immunity.

> Official immunity is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity . . . Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled. . . But when 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. 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. *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.* . . .
>
> Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, 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. *That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature.*

Id. at 521-522 (emphasis added) (internal quotations and citations omitted).

The night hike activity was one that was listed on the camp's formal regiment of activities and was taught to the camp counselors during their training. In her deposition, Erin stated that she was allowed to choose activities from the camp regiment but did not have to. She further stated that she had never deviated from the zoo's list of activities. A night hike is played when children walk down a designated path and observe the terrain. The children are next blindfolded and line up single-file with an arm on the person in front of them. The children re-walk the chosen path, led by a non-blindfolded person, and use their senses to help them find their way. During the night hike game in which Max was a participant and Erin was supervising, several children, including Max, bumped into each other and fell down.

In its order, the trial court found that Erin was following the training she had received from the zoo when conducting the night hike game and was not performing a discretionary act. We agree. While Erin may argue that she chose the exact path to be followed during the game or other similar details, she did not choose the manner in which the game would be played. In other words, she was following her training. As emphasized above, an act does not become discretionary simply because the agent performing it exercises some discretion in the means or method to be employed. Erin had received instruction on how to function as a camp counselor. Her instruction regarding the night hike activity was part and parcel of her overall training. Therefore, her acts in

carrying out her training and any discretion that she exercised when determining exactly where and when the activity took place is not sufficient to raise the act to the level of discretionary. Although this finding means that Erin does not have immunity from the lawsuit, it does not determine whether or not she is liable for any injuries sustained by Max. That is an issue to be determined by the finder of fact at the trial court level.

For the foregoing reasons, the February 13, 2007, order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stephen P. Durham
Assistant Jefferson County Attorney
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert L. Heleringer
Louisville, Kentucky