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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002550-MR

LUCY HOLMES, as Next Friend of A.L., a minor; and RENITA WEATHERINGTON, as Next Friend of S.W., a minor, and as Next Friend of T.W., a minor — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CI-01649

LILLIAN MONTGOMERY; TRACY GLASS LAMB; SHARON JOHNSON; TERRI LEAST; and UNKNOWN DEFENDANTS — APPELLEES

OPINION

AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: COMBS and McANULTY, Judges; and JOHN D. MILLER, Special Judge.[1]

COMBS, JUDGE: Lucy Holmes, as next friend of her daughter, A.L., and Renita Weatherington, as next friend of her minor daughters,

[1] Senior Status John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

S.W. and T.W., have appealed from the summary dismissal of their complaint against the appellees, who were/are teachers and administrators employed by the Fayette County Board of Education (the Board). In their complaint, the appellants alleged that the appellees violated the civil rights of these minors by subjecting them to a strip search in contravention of their Fourth Amendment rights and of an established policy of the Board. In addition to asserting a claim pursuant to 42 U.S.C.[2] ' 1983, the appellants also raised several claims arising under state law pertaining to the search of the children by school officials. After a review of the record and numerous cases concerning warrantless searches of students, we have concluded that the trial court erred in summarily dismissing the federal claim and certain portions of the state claims. Thus, we affirm in part, vacate in part, and remand.

We shall briefly review the facts underlying this matter in a light more favorable to the appellants C as we must when reviewing a summary judgment. On November 17, 1998, during a physical education class at Lexington=s Tates Creek Middle School, a student reported missing a pair of shorts. The classroom teachers, appellees Terri Least and Sharon Johnson, told the students that they would be given five minutes to return the missing shorts. When the shorts were not returned, Least went to the principal=s office and returned with appellee Tracy

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[2]United States Code.

Lamb, an administrative intern, who gave the students an additional five minutes to return the shorts. After the period of time passed, Lamb left the class and returned with a security guard and Lillian Montgomery,[3] an assistant principal at the school. They informed the students that they would be searched in an effort to find the shorts. The students were then taken in pairs to a locker room and searched. The appellants= children, A.L., S.W. and T.W., all females, were taken to the girls= locker room, where they were instructed to expose their underwear to Lamb and Johnson by raising their shirts above their bras and by lowering their pants below their knees. A.L. and T.W. complied; S.W. refused to be searched. At all relevant times, the Board had in effect a policy regarding student searches, which provided: A[i]n no instance shall the school official strip search any student.@

Including the Board as a defendant, the appellants filed a complaint alleging that the wrongful acts of the appellees and the Board caused the students to suffer extreme indignities and humiliation as they had been Aheld up to ridicule before their peers.@ In addition to the ' 1983 claim, they asserted claims based on state law for the intentional infliction of mental distress, invasion of privacy, negligence, and denial of procedural due process. Following discovery, the Board moved for summary judgment on behalf of all the defendants. In

[3]Ms. Montgomery died after this lawsuit was commenced. Her estate has been substituted as a party to the underlying action.

response to the motion for summary judgment, the appellants conceded that the Board was immune from suit by virtue of the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity. They also conceded that the teachers and administrators were immune from suit in their official capacities. However, the appellants contended that the teachers were not entitled to qualified or governmental immunity for the searches in their individual capacities.

In its order dismissing the complaint, the trial court concluded that the students' rights had not been violated. It held as follows:

> The Court, having carefully considered the evidence presented, holds that the events leading up to this claim do not rise to the level of being deemed a Fourth Amendment violation. More specifically, this Court concludes that the inspection of the students in this case was reasonable, sensible and necessary to ensure order and discipline in the school system in question. The Plaintiffs in this case were not searched to the degree that the plaintiff in Williams v. Ellington, 936 F.2d 881 (6th Cir.1991) was, where the Court concluded that there was no Fourth Amendment violation. Various cases like Rone v. Daviess County Bd. Of Educ., Ky.App., 655 S.W.2d 28 (1983)[,] indicate school officials need only reasonable suspicion to search the person of a student. This Court feels the facts of this case establish that reasonable suspicion was present and in sum the search did not violate the Fourth Amendment rights of the Plaintiffs.

In a subsequent order, the trial court clarified its ruling and stated that it was dismissing all of the claims brought by the

appellants against all of the appellees in their individual capacities. This appeal followed.

We review a summary judgment *de novo*. See, Lewis v. B&R Corporation, Ky.App., 56 S.W.2d 432, 436 (2001). Therefore, we are neither compelled nor permitted to defer to the findings and conclusions of the trial court. We shall first review the claim arising under 42 U.S.C. ' 1983 (Athe 1983 claims@).

I. ' 1983 CLAIMS

In order to recover under ' 1983, a plaintiff must establish that he was deprived of his constitutional rights by an individual acting under color of state law. 42 U.S.C. ' 1983. The appellants contend that the Fourth Amendment right of the children to be free from unreasonable searches was violated during the blanket search of all of the students in the gym class in the attempt to find a missing pair of shorts. They characterize the search as Aoverly invasive given the minor nature of the purpose for which the search was done.@ However, the appellees counter by arguing that the search was reasonable and that it did not violate either the students= constitutional rights or the Board=s policy prohibiting strip searches of students. They rely on the fact that the students were searched in a gender-specific locker room, where they claim that a student has a Adiminished expectation of privacy@ in the company of other students also Ain a greater state of undress than those receiving

[their] attention.@ In the alternative, the appellees assert that they are entitled to qualified or official immunity from damages.

Any inquiry into the constitutionality of a search of juveniles in a school setting must perforce begin with New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). In attempting to balance the interests of schools *versus* students, the Supreme Court in T.L.O. determined that an exception to the warrant requirement was a practical necessity in the school context:

> requiring a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

Id. at 340. Holding that a search could be justified on a lesser standard than probable cause, the Court nonetheless stated that a school search must be both Ajustified at its inception@ and Apermissible in its scope.@ Id., 469 U.S. 341-42. The Court then defined its terms, holding that a search is justified at its inception when:

> there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

Id., 469 U.S. at 342. A search is permissible in scope when:

> the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and

> sex of the student and the nature of the infraction.

Id. (Emphasis added.)

In T.L.O., two students were discovered smoking in the bathroom. When one of them denied smoking, a school administrator searched her purse and found cigarettes, marijuana, and other evidence of drug dealing. The Supreme Court held that the search of the purse was justified by the fact that the school official had received a report from a teacher specifically alleging that he had witnessed that student engaging in forbidden conduct. T.L.O., 469 U.S. at 345-46. Similarly, in Williams v. Ellington, supra, which the trial court cited, the Court upheld the search of a student as having been justified at its inception even though the events indicating drug use had occurred over the course of a week prior to the actual search. 936 F.2d at 887.

Unlike the circumstances in either T.L.O. or Ellington, there was no particularized suspicion of the students searched in the case before us. The decision to search all the students in the gym class was based solely on the fact that a pair of shorts was missing. In light of the current state of the record, no evidence has been presented nor was there an allegation that the appellees had any reason to suspect these specific children of any wrongdoing. Thus, the appellants argue that the absence of any reason to suspect their children of taking the shorts, compounded by the intrusive nature of a semi-strip search,

constituted violation of the Fourth Amendment rights of the students.

The Court in T.L.O. refrained from addressing the issue of whether an individualized suspicion is an essential element of the reasonableness standard that it adopted for school searches. However, it strongly intimated that an intrusive search in the absence of individualized suspicion might be constitutionally infirm.

> Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where Aother safeguards@ are available Ato assure that the individual=s reasonable expectation of privacy is not >subject to the discretion of the official in the field.=@

Id., 469 U.S. at 342, n.8, (citing Delaware v. Prouse, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 59 L.E.2d 660 (1979)). Writing separately in T.L.O., Justice Stephens stated:

> One thing is clear under any standard--the shocking strip searches that are described in some cases have no place in the schoolhouse. . . . To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.

Id., at 761, n. 25 (internal quotations omitted; emphases added).

The appellees have not cited any case decided since T.L.O. in which a strip search (or even a partial strip search) of a student has been upheld in the absence of individualized suspicion of wrongdoing, and we have found no such case in our own research. However, the appellees reason by analogy and rely

on two recent U.S. Supreme Court cases that have upheld blanket drug testing of student athletes and testing of students who participate in competitive extracurricular activities in an effort to discover illegal drug usage. Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 2d 564 (1995), and County v. Earls, ____ U.S. ____, 122 S. Ct. 2559, 153 L.Ed.2d 735 (2002), respectively.

These cases, however, bear little resemblance to the circumstances involved in the case before us. In both Acton and Earls, the Court emphasized that the drug testing pertained to voluntary extracurricular activities C as distinguished from mandatory general educational classes. As noted in Acton, students who choose to participate in a sport or other extracurricular activity:

> voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

Id. 515 U.S. at 657 (emphasis added). Furthermore, random drug testing is designed to combat the serious problems arising from use of drugs C a goal that is in harmony with the standard of Aimminent and serious harm@ articulated by Justice Stephens in T.L.O., supra. Therefore, the Court in Acton and Earls reasoned that schools may require students to submit to such testing as a prerequisite to voluntary participation in competitive activities.

The recovery of the missing gym shorts C whether they may have been lost or stolen C is neither congruent factually nor analogous logically with the drug testing rationale. The objective of recovering lost gym shorts must be balanced against the degree of intrusiveness of the search. No imminent or serious harm was threatened or even likely from a failure to discover the missing shorts. Even if the shorts had been stolen rather than merely misplaced, the infraction involved fell far short of the more serious criminal activity involved in drug use.

Additionally and specifically, once again mindful of the second prong (reasonable in scope) of T.L.O., we note the Court=s directive that the degree of intrusiveness of the search must be reasonably tailored to weigh the age and gender of the students and to balance those factors against the nature of the infraction. The scope of the drug testing sanctioned in Earls and Acton was less intrusive and publicly less invasive or embarrassing than the strip search at issue here. Students who were randomly required to provide a urine specimen for drug testing were given the same privacy to which they would be entitled in a doctor=s office. Factually, we are compelled to acknowledge that providing a urine sample from the privacy of a cubicle is far less invasive or publicly humiliating than exposing partially clad midriffs, thighs, and undergarments for visual inspection in the backdrop of an accusatory ambiance.

The appellees contend that the students had a diminished expectation of privacy because they were already in the locker room during a gym class. However, the routine of students undressing for a gym class is manifestly distinguishable from mandatory exposure of their underwear to the adversarial scrutiny of school officials in search of allegedly stolen goods. The searches allowed in the drug testing cases simply do not support by analogy the court=s conclusion that the searches of A.L., S.W., and T.W. were so reasonable as to merit dismissal by summary judgment.

We conclude that subjecting these students to a strip search for missing items of personalty was not reasonable and that a search under these circumstances constitutes a violation of a student=s Fourth Amendment rights. Thus, we hold that the trial court erred in dismissing the ' 1983 claims of A.L. and T.W. S.W. admitted in her deposition that she was not searched; she has not alleged that she suffered any adverse consequences resulting from her refusal to be searched. Therefore, we affirm the judgment disposing of her claims.

The appellees next contend that even if the students= rights were violated, they as school officials are insulated from liability for any resulting damages by qualified immunity. Qualified immunity protects school officials sued in their individual capacities from liability arising from Agood faith judgment calls made in a legally uncertain environment.@ Yanero

v. Davis, Ky., 65 S.W.3d 510, 522 (2001). However, such immunity cannot be invoked if the official:

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]. . .

Id., at 523, citing Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736-37, 73 L.Ed.2d 349 (1982). The appellees argue that in 1998, there was a Acomplete absence of any case law which would clearly establish [their] actions@ as violative of the students= Fourth Amendment rights. Therefore, they rely on the existence of a Alegally uncertain environment@ described in Yanero, supra.

We disagree. T.L.O., supra, was decided in 1985, thirteen years before this incident. T.L.O. unequivocally established the proper parameters of school searches and did not leave a Alegally uncertain environment@ in its wake. We reiterate those criteria. The search of a student in the school must be: (1) justified from its inception, (2) reasonably related in scope to the circumstances causing the search, and (3) not excessive given the age and sex of the students and the nature of the alleged offense.

Even before T.L.O. was decided, strip searches were generally held not to be reasonable. See Doe v. Renfrow, 631 F.2d 91 (7thCir.1980). After T.L.O., in Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7thCir.1993), the court upheld a strip search of a 16-year-old

male student whom school officials suspected to be involved in criminal activity involving drugs. However, the court simultaneously admonished:

> [W]hether a search is Areasonable@ in the constitutional sense will vary according to the context of the search. In this regard, a couple of points should be immediately apparent. A nude search of a student by an administrator or teacher of the opposite sex would obviously violate this standard. Moreover, a highly intrusive search in a response to a minor in fraction would similarly not comport with the sliding scale advocated by the Supreme Court in *T.L.O.* To elaborate, A[a] search of a child=s person or of a closed purse or other bag carried on his person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.@

Id., at 1320, citing T.L.O., 469 U.S. at 337-38.

Oliver v. McClung, 919 F.Supp. 1206 (N.D.Ind.1995), dealt with circumstances nearly identical to those in the case before us. In McClung, the court condemned as unreasonable the search of middle school female students in order to find a small amount of money. During gym class, two students reported that they were missing $4.50. The teacher informed the principal, McClung, of the alleged theft. McClung decided to search all of the students and their lockers. When the search of the girls= lockers and book bags failed to uncover the missing money, the girls were taken into the locker room and searched. They were required to removed their shirts and loosen their bras to see if any money fell out. Because of the striking degree of similarity

in the searches, we recite at some length McClung=s analysis of the argument by school personnel that they were entitled to a qualified immunity:

> While the cases cited by Defendants all involved strip searches, and those searches were held to be reasonable, it does not automatically follow that the search at issue in this case is also reasonable. The position taken by the Defendants ignores the plain language of the *T.L.O.* case, which held that Athe legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.@ 469 U.S. at 341 (italics added). In the present case, the Plaintiffs were in the seventh grade, making them all about thirteen years old at the time of the search. Perhaps even at that tender age, such a search might be argued to be reasonable if [the teachers] had evidence that certain of the girls were in possession of illegal drugs or weapons. It cannot be disputed that drugs and violence plague our nation=s schools. Contraband such as drugs and weapons can constitute a threat of imminent harm to the students who possess them, to other students, and to teachers and other school personnel. However, that was simply not the situation in the present case.
>
> In light of the case law as it existed at the time, especially the Supreme Court=s decision in *T.L.O.* and the Seventh Circuit=s decision in *Doe v. Renfrow*, the argument that it is not unreasonable to conduct a strip search of young school girls in an effort to recover the grand sum of four dollars and fifty cents is simply not convincing. As the Plaintiffs properly point out, *T.L.O.* was decided nearly eleven years ago, and *Renfrow* was decided some fifteen years ago. The mere fact that Defendants can cite a few cases since then where strip searches have been held to be reasonable under certain circumstances does not change the facts of this case or the state of the law at the time this search was conducted. This Court finds that the Plaintiffs have met their burden of

> establishing that there was a Aclearly established . . . constitutional right of which a reasonable person would have known.@

Id., at 1218. We concur with the reasoning in McClung. We therefore hold that in 1998, the law was not so uncertain that the appellees should not have known that the search they conducted might violate the constitutional rights of their students.

II. State Law Claims

A. The Tort of Outrage

The appellants argue that the trial court erred in dismissing their claims based on the tort of outrage. They contend that searching children beneath their clothes for a pair of shorts is Aconduct that shocks the conscience.@ We find no error in the dismissal of this claim. First recognized in Kentucky in Craft v. Rice, Ky., 671 S.W.2d 247 (1984), the tort of outrage has evolved to allow recovery only for truly egregious behavior in those situations where no other cause of action exists. See, Rigazio v. Archdiocese of Louisville, Ky.App., 853 S.W.2d 295 (1993). These appellants have other adequate remedies for the allegedly inappropriate conduct by means of their civil rights claim and the other tort claims. We believe that the appellants have failed to allege the existence of facts that would support damages for the intentional infliction of emotional

distress so as to buttress a claim arising under the tort of outrage.

B. Violation of Appellants= Substantive Due Process Rights under ' 2 of the Kentucky Constitution

After searching the record, we agree with the appellees that this claim was not raised in the trial court. Therefore, we cannot consider it on appeal.

C. & D. Violation of the Right of Privacy and Negligence

From our review of the record, we conclude that the trial court erred in summarily dismissing these tort claims. The appellees contend that they are entitled to official immunity with respect to these claims because their discipline of the students constituted matters over which they exercised their discretion. They rely on Yanero, supra. Kentucky=s most recent Supreme Court case analyzing the issues of sovereign and qualified immunity, Yanero held that a qualified immunity may shield public officials from liability under certain circumstances. In order to invoke a qualified immunity, those public officials must be performing an activity commonly held to be within the traditional role or scope of government and must also be called upon to exercise discretion rather than merely to be performing ministerial tasks. Yanero, supra. However, the Board in the case before us had in place a written policy categorically prohibiting strip searches of students. Therefore,

we conclude that no discretion existed or remained to the appellees on this point. Any arguable discretion had clearly been pre-empted by the written policy.

The appellees next argue that they did not violate the Board=s policy because the students were not required to remove any article of clothing, noting that in the context of police searches of suspected criminals, a strip search is commonly considered a search of a detainee=s nude body. However, in the context of school searches, we believe that the term *strip search* contemplates something far less than a nude search. The appellees have failed to establish that they are entitled to summary judgment as a matter of law under the strict standards articulated in Steelvest Inc. v. Scansteel Service Center, Inc, Ky., 807 S.W.2d 476 (1991), and Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

Finally, appellee Terri Least argues that she was entitled to summary judgment as a matter of law on all claims of the appellants because she did not take part in the searches of the students but rather remained at all times in the gymnasium. We agree. After reviewing the record, we have found nothing to support the appellants= claims that Least violated their rights, invaded their privacy, or was negligent with respect to the manner in which she conducted her class. She merely sought assistance from the administrative staff after failing to discover the missing shorts. There is no evidence that Least

took any other action against the students or participated in the search of them in the locker room. She effectively turned the matter over to the authority of the administration.

To conclude, we affirm the summary judgment as it pertains to the dismissal of the claims against Least. As stated earlier, the record conclusively reveals that S.W. was not subjected to a search; thus, we affirm that summary judgment with respect to the dismissal of all of the claims raised by S.W. We also affirm the dismissal of the complaint with respect to the claim of outrage and the claim alleged pursuant to '2 of the Kentucky Constitution. In all other respects, the judgment is vacated and remanded for further proceedings consistent with this opinion.

McANULTY, JUDGE, CONCURS.

MILLER, SPECIAL JUDGE, DISSENTS BY SEPARATE OPINION.

MILLER, SPECIAL JUDGE, DISSENTING. I dissent. Even if the students' rights were violated, no action is maintainable under 42 U.S.C. §1983. The school officials were acting in their official capacity and, per force, were not "persons" within the meaning of the statutes. Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

It is not the pleadings that determine whether an action may be maintained under the Act but rather the role of the actor. Id. If the defendant is performing a governmental function he is, of course, acting within his official capacity, and neither he nor the state may be subjected to liability under

the Act.

As to state claims, I am of the opinion they are barred under the authority of Yanero v. Davis, Ky., 65 S.W.3d 510 (2001). The school officials were acting as state employees performing traditional governmental functions.

For these reasons I would affirm the circuit court.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
David R. Marshall Lexington, Kentucky	Robert L. Chenoweth Frankfort, Kentucky