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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000348-MR

JOSEPH W. CASEY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 99-CI-00483

GRAYSON COUNTY BOARD OF EDUCATION — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Joseph W. Casey appeals a summary judgment granted in favor of the Grayson County Board of Education (Board of Education) dismissing his personal injury claim allegedly caused by the negligent operation of a forklift by an employee of the Board of Education. The court determined the doctrine of sovereign immunity[1] barred the claim even though the Board of Education had purchased liability insurance to cover the specific situation. We opine that the language of KRS 160.310 contains an

[1] "Governmental immunity" is the proper terminology.

overwhelming implication that suit may be filed against the Board of Education, but that any judgment would be solely enforceable against the insurance carrier, not to exceed policy limits. Hence, we reverse and remand.

After making some repairs and renovations, the Board of Education conducted its annual auction to dispose of the used materials which it had declared surplus. The proceeds from the auction were deposited entirely back into the general operating fund of the Board of Education. Joseph Casey (Casey) claims that in December of 1998, while he was assisting a Board of Education employee load his truck, the employee negligently operated a forklift which resulted in some doors falling off the fork lift and striking Casey, causing low back injuries. For purposes of the summary judgment motion, the court assumed Casey was injured and that the injury was caused by the negligence of the Board of Education=s employee. The Board of Education had liability insurance for its employees= negligent operation of mobile equipment, including a forklift.

On appeal, Casey contends the trial court erred in granting summary judgment because the sale and loading of surplus material was a proprietary function as opposed to a governmental function; and that governmental immunity is waived under KRS 67.186(3) to the extent of policy limits. Both sides cite the recent Supreme Court decisions of Yanero v. Davis, Ky., 65 S.W.3d

510 (2001) and Reyes v. Hardin County, Ky., 55 S.W.3d 337 (2001), as controlling.

Our Supreme Court, in Yanero, revisited sovereign immunity, governmental immunity, and official immunity. Yanero, 65 S.W.3d at 527, held that a school board enjoyed the protection of governmental immunity and cannot be sued in tort for any negligence in the performance of that function as long as it was performing a governmental function. Casey asserts that selling surplus material is a proprietary function, not a governmental function, which subjects the Board of Education to tort liability. In Yanero, the Court distinguished between governmental and proprietary functions by asking whether the particular activity was Aa function integral to state government.@ Id. at 520, quoting Kentucky Center for the Arts Corp. v. Berns, Ky., 801 S.W.2d 327, 332 (1990). Yanero concluded that the organization of school athletic teams was an integral function of a school board and thus a governmental function entitling the board to immunity from liability for torts suffered by players. Inherent in this decision is that the governmental function of the school board includes more than teaching academics. Indeed, as early as 1912, the highest court of our Commonwealth recognized that the term Afor local school purposes@ included the building, maintenance, repair, improvement, and the equipment of schools. See Shanklin v. Boyd, 146 Ky. 460, 142 S.W. 1041 (1912).

Section 183 of our present Kentucky Constitution requires the General Assembly provide for an efficient system of common schools. Chapter 160 of the Kentucky Revised Statutes creates school districts and authorizes boards of education to run the operation. KRS Chapter 162 governs school property and buildings, allows the board of education to purchase property, erect buildings, and repair and maintain such once built. KRS 162.070 even regulates authorization of repairs, improvements, additions, etc. that exceed $7,500.00.

From the above, it is unquestionable that the Board of Education was performing a function of the school board when it authorized the repairs and improvements to the building. Likewise, cleaning up or disposing of surplus materials has to be an incidental power which is different than buying and selling materials for profit (like a home improvement center) to be used for education. See Montgomery v. Claybrooks, 213 Ky. 493, 281 S.W. 469, 470 (1926), wherein the Court said the power to purchase supplies, property, to repair, etc. includes the power Ato sell and convey the same or any part thereof, when it becomes unnecessary or unsatisfactory for school purposes in the opinion of the board.@ Having concluded that selling surplus material is a governmental function of the Board of Education, we conclude that under Yanero, the Board of Education cannot be held vicariously liable for any alleged negligence of its employees.

Casey=s second argument contends that even if the Board of Education is entitled to governmental immunity, KRS 160.310 waives immunity to the extent of policy limits although the judgment would be binding only against the insurance company and not the Board of Education. This question on insurance was addressed in Reyes v. Hardin County, Ky., 55 S.W.3d 337 (2001). The upshot of the Reyes decision was to find a qualified waiver of immunity, if there is insurance coverage, but only to the extent of the limits of the policy, and only the insurance company can be bound by the judgment. The Reyes Court revisited Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997), which held that the language of KRS 44.072 and KRS 44.073(14) Aprecluded a finding of waiver from the mere purchase of liability insurance pursuant to a statute authorizing or requiring such purchase by an immune entity, but containing no express waiver of immunity.@ Reyes, 55 S.W.3d at 340. The Reyes Court considered the similarities between KRS 67.186 and KRS 160.310, the statute involved in this case, and held that:

> [I]f KRS 67.186 consisted only of subsections (1) and (2), KRS 44.073(14) and *Withers* would preclude Reyes from bringing this action. However, the Aoverwhelming implication[]@ of the text of KRS 67.186(3) Aleave[s] no room for any other reasonable construction@ than that suit may be brought against the hospital and a judgment obtained that is solely enforceable against the hospital=s liability insurance carrier.

Reyes, 55 S.W.3d at 340, quoting Withers, 939 S.W.2d at 346 (quoting Edelman v. Jordan, 415 U.S. 651, 673, 94 S. Ct. 1347,

1361, 39 L. Ed. 2d 662 (1974) and Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S. Ct. 458, 464, 53 L. Ed. 742 (1909)).

We have compared the language of KRS 67.186 to the current version of KRS 160.310 and the two are similar. KRS 67.186 reads:

> (1) The fiscal court of any county in which there is a county operated hospital may provide for liability and indemnity insurance for the benefit of the hospital against the negligence of the employees of such hospital.
>
> (2) The insurance policies so purchased by the fiscal court shall be purchased only from insurance companies authorized to transact business in this state, and any such policy shall bind the insurer to pay, subject to the terms and conditions of the policy, any final judgment, not in excess of the policy limits, rendered against the insured hospital or hospital employees for the death or injury of any patient, or damage to the property of any patient, resulting from the negligence of the hospital, its agents or employees.
>
> (3) This section shall not be construed as waiving the immunity of the county or county operated hospital from suit only to the extent of the policy limits, and no judgment may be enforced or collected against the county, fiscal court, the members thereof, or such hospital, but shall only measure the liability of the insurance carrier.

KRS 160.310 permits the purchase of insurance:

> Each board of education may set aside funds to provide for liability and indemnity insurance against the negligence of the drivers or operators of school buses, other motor vehicles, and mobile equipment owned or operated by the board. If the transportation

> of pupils is let out under contract, the contract shall require the contractor to carry indemnity or liability insurance against negligence in such amount as the board designates.
>
> In either case, the indemnity bond or insurance policy shall be issued by some surety or insurance company authorized to transact business in this state, and **shall bind the company to pay any final judgment, not to exceed the limits of the policy**, rendered against the **insured** for loss or damage to property of any school child or death or injury of any school child or other person. (emphasis added.)

Both statutes specifically qualify the waiver of immunity to the extent of insurance but preclude an enforceable judgment against the immune entity. Although the lawsuit must be brought against the immune entity, judgment can be rendered only to the extent of insurance coverage and binds solely the insurance company.

This is the same qualified waiver of immunity found by the Reyes Court. Reyes looked at KRS 67.186 and found no express authorization for a suit against an immune entity but found an overwhelming implication that suit may be filed based on the qualified waiver of immunity. The Reyes Court looked at KRS 160.310 and stated similarly Athat KRS 160.310 does not expressly authorize a suit against a board of education.@ Reyes, 55 S.W.3d at 341. (emphasis added.) Since the Court was only deciding if KRS 67.186(3) authorized a suit, it did not need to go further and find the overwhelming implication of KRS 160.310 was also a qualified waiver of immunity. That decision was left for another

day. Using the same rationale in Reyes in analyzing KRS 67.186 and KRS 160.310, we opine that the language of KRS 160.310 contains the same overwhelming implication of the qualified waiver of immunity found in KRS 67.186(3), that suit may be filed against the Board of Education and if a judgment is obtained, it would be solely enforceable against the Board of Education=s liability insurance carrier, not to exceed the limits of the policy.

For the foregoing reasons, the summary judgment of the Grayson Circuit Court is reversed and the matter remanded for proceedings consistent with this opinion.

ALL CONCUR.

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