

RENDERED: MARCH 24, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

OPINION RENDERED FEBRUARY 25, 2005, WITHDRAWN

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001044-MR

KANSAS CLEMONS, BY AND THROUGH
HER NATURAL MOTHER,
PATRICIA CLEMONS SCRUGGS

APPELLANT

v. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
ACTION NO. 03-CI-00003

METCALFE COUNTY BOARD OF EDUCATION

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

BARBER, JUDGE: Petitioner/Appellee Metcalfe County Board of

Education brings a Petition for Rehearing before this Court.

The Board of Education argues that this Court's ruling was in

error. The ruling of the Kentucky Supreme Court in Grayson

¹Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

County Board of Education v. Casey, 157 S.W.3d 201 (Ky. 2005), is binding on this Court, and therefore we amend our earlier opinion and affirm the dismissal of Clemons' claims by the Metcalfe Circuit Court.

Respondent/Appellant Kansas Clemons, age 9, brought a claim against the Metcalfe County Board of Education through her mother and next friend, Patricia Clemons Scruggs. Patricia asserted that Kansas was injured while a passenger on a school bus. Kansas was attacked by another student on the bus. Patricia claimed that the bus driver should have prevented or stopped the attack. She failed to name the bus driver as an individual defendant. The Board of Education filed a motion to dismiss the suit, asserting governmental immunity. The Metcalfe Circuit Court granted the motion to dismiss. Patricia filed a motion to alter, amend or vacate the order of dismissal. Both sides agree that the Board of Education is immune from suit. In her motion, Patricia argued that KRS 160.310, which permits Boards of Education to set aside funds to insure school buses and bus drivers, constitutes a waiver of immunity for injury resulting from negligence of the bus driver. She asserted that the action may be filed and prosecuted, and recovery may be had solely against the liability insurer for injuries occurring on the bus, without affecting the immunity of the Board of Education.

The Board of Education argued on appeal that when the legislature enacted KRS 44.072 and 44.073, they intended that governmental immunity be waived "only where stated by the most express language or by such overwhelming implications from the text as to leave no room for any other reasonable construction." Withers v. University of Kentucky, 939 S.W.2d 340, 345 (Ky. 1997). The Board claimed that even though liability insurance is purchased to protect against negligence of bus drivers, the purchase does not operate to waive immunity.

Patricia contends that immunity is waived to the extent of the insurance coverage purchased. She relies on Reyes v. Hardin County, 55 S.W.3d 337 (Ky. 2001), in which the Kentucky Supreme Court held that KRS 67.185, which permits county hospitals to purchase liability insurance, waived immunity to the extent of the coverage of such insurance. KRS 67.185(3) specifically provides that "this section shall not be construed as waiving the immunity of the county or county operated hospital . . . but shall only measure the liability of the insurance carrier. . . ." In contrast, KRS 160.310, which permits purchase of liability insurance for school bus drivers, does not contain an express waiver of governmental immunity. The Board of Education claims that the failure of the statute to include such an express waiver prohibits coverage of injuries such as those suffered by Kansas.

The circuit court denied Patricia's motion to alter, amend or vacate, finding that the statute at issue, KRS 160.310, failed to include the express language necessary to protect the county's sovereign immunity while permitting suit against the insurance carrier. In the absence of such express language, a suit may be brought in circuit court against an individual defendant, but not against the school board.

The Kentucky Supreme Court recently addressed this issue in Grayson County Board of Education v. Casey, 157 S.W.3d 201 (Ky. 2005). Our Supreme Court found that a statute authorizing the purchase of liability insurance does not waive the immunity of the governmental entity purchasing such insurance unless the statute specifically provides for such a waiver. Id. at 203, citing Schwindel v. Meade County, 113 S.W.3d 159, 168 (Ky. 2003). The purchase of insurance does not waive the immunity of the governmental entity, but merely permits the filing of a claim against an individual defendant. Grayson County Board of Education v. Casey, 157 S.W.3d at 205, citing KRS 44.073(14).

In the present case, Patricia failed to name any defendant individually liable for her injuries. No suit is permitted and no civil judgment can be rendered where only the county board of education is named as a party defendant as the county board of education is immune from civil suit. Grayson

County Board of Education v. Casey, 157 S.W.3d at 207. Since Patricia did not bring such an action, her claim is barred.

Patricia argues on rehearing that her claim is permitted. She asserts that "a board may be sued for damages while performing a proprietary function, or when an employee is sued for damages caused by the negligent performance of a ministerial act or bad-faith performance of a discretionary act." Grayson County Board of Education v. Casey, *supra*, at 205. She argues that her action fell within the ambit of that exception to immunity. We believe that Patricia failed to properly assert such a claim, and therefore, her action is barred by the doctrine of sovereign immunity, as expressed in Withers v. University of Kentucky, 939 S.W.2d 340 (Ky. 1997), and Reyes v. Hardin County, 55 S.W.3d 337 (Ky. 2001).

The judgment of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gail Lyndon Williams
Columbia, Kentucky

BRIEF FOR APPELLEE, METCALFE
COUNTY BOARD OF EDUCATION:

Regina A. Jackson
Brett A. Reynolds
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