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(FILE NO. 2008-SC-0365-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001942-MR

THOMAS PENNINGTON and JAN PENNINGTON,
as Parents and Guardian of ANDREW RICE;
and ANDREW RICE, Individually — APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CI-00339

GREENUP COUNTY BOARD OF EDUCATION
and TRACEY KELLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Thomas and Jan Pennington brought this action on behalf of their son Andrew Rice. Andrew suffers from mental retardation. At the time relevant to the action, Andrew was a special education student at Greenup County High School.

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

While on a school outing, Andrew fell and broke his ankle. Andrew's parents sued the Greenup County Board of Education and Andrew's teacher, Tracey Kelley. The circuit court granted summary judgment to both defendants, holding that the Board of Education is protected from suit by governmental immunity and that Ms. Kelley is protected by qualified immunity. The issue presented on this appeal is whether or not the circuit court erred when it found that Tracey Kelley's actions in supervising Andrew were discretionary rather than ministerial in nature, resulting in the legal conclusion that Ms. Kelley is entitled to the protection of qualified official immunity. Upon review, we affirm.

The facts relevant to our determination are not in dispute. Andrew Rice has a primary diagnosis of mental retardation, functioning in the profound range. He attended special education classes at Greenup County High School, where Tracey Kelley was his teacher. An Individualized Education Program (IEP) was designed for Andrew, as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. In accordance with 20 U.S.C. § 1414(d), Andrew's IEP required that he be given the opportunity to take part in community activity programs. One such program included the community outing to the Spare Time Recreation Center in Ironton, Ohio, during which Andrew was injured. There was a roller rink at the recreation center. Andrew was fitted with a pair of roller skates, and the wheels of the skates were locked to prevent them from rolling. “Peer tutors” were assigned to supervise and assist Andrew while he was on the skates. An adult, who was along to assist in supervising the class on the outing, was on the skating rink floor taking photographs of the students. She approached Andrew and his peer tutors and started to take their picture. Andrew fell when he leaned over and tried to kiss one of the other students on the cheek as the picture was being taken. Ms. Kelley was told that Andrew

had fallen and went to see about him. When she arrived Andrew was sitting on the floor with his legs straight out in front of him. He told Ms. Kelley that his ankle hurt. Andrew was helped off the floor, and Ms. Kelley removed his skate and sock and looked at the ankle, but couldn't see any obvious indication of an injury. Ms. Kelley contacted Andrew's mother and told her about the incident and asked what she wanted to do. When she was told that the class was going to a steakhouse in Ashland for lunch, Andrew's mother told Ms. Kelley that she would meet them there. Ms. Pennington then took Andrew to be examined by a physician and discovered that his ankle was broken. As a result, this action was filed against the Greenup County Board of Education and Ms. Kelley.

Following discovery, the Board of Education and Ms. Kelley filed summary judgment motions based on governmental immunity from suit. The Greenup Circuit Court granted the motions on behalf of both defendants, holding that the Board of Education is immune from suit due to governmental immunity and that Ms. Kelley is immune due to qualified official immunity. The Penningtons filed motions to alter, amend or vacate the judgment pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 and requesting that the court make a factual finding, pursuant to CR 52, indicating whether Tracey Kelley was acting in a discretionary or ministerial capacity at the time Andrew was injured. The CR 59.05 motion was denied, but the court granted the CR 52 motion and entered a brief order specifically finding that Ms. Kelley's "act . . . in putting Andrew Rice on roller skates was solely discretionary on her part." The Penningtons then appealed the portion of the judgment dismissing their claim against Tracey Kelley.

As a general rule, "[t]he standard of review on appeal of a 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); Kentucky Rules of Civil Procedure (CR) 56.03. "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky.App. 2000). However, in conducting our review, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky.1991).

The extent to which local school boards and their employees are protected from suit by governmental immunity is an area of law which has received considerable attention in Kentucky's appellate courts in recent years. *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001), the most frequently cited recent Kentucky case relating to governmental immunity, involved a high school student who was injured when he was struck by a baseball thrown by another student on school grounds. *Williams v. Kentucky Department of Education,* 113 S.W.3d 145 (Ky. 2003), an appeal from a Board of Claims decision, arose from an allegation that negligent supervision by high-school teachers contributed to the death of a student in an automobile accident. And in *Lamb v. Holmes,* 162 S.W.3d 902 (Ky. 2005), our Supreme Court, relying on qualified official immunity, dismissed a 42 U.S.C. § 1983 "strip search" action against school employees.

It is now familiar law in Kentucky that when an employee of a local board of education is sued in her representative capacity, her "actions are afforded the same immunity, if any, to which the agency, itself, would be entitled[.]" *Yanero* at 522.

> 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. Qualified official immunity is an affirmative defense that must be specifically pled.
>
> 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.

Yanero, 65 S.W.3d at 522 (internal citations and quotation marks omitted).

And so, while a public employee such as Ms. Kelley, sued in her representative capacity, has no immunity from suit for the negligent performance of ministerial acts, she may be immune from suit for the negligent performance of discretionary acts, if those acts are performed in good faith while she is acting within the course and scope of her authority. Whether or not a defendant is protected by official immunity is a question of law, which we review *de novo. Rowan County v. Sloas,* 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess County,* 105 S.W.3d 841, 844 (Ky.App. 2003).

The courts cannot make a "bright line" rule of demarcation between discretionary and ministerial acts. The act or acts complained of in each case must be measured against the standards quoted above from *Yanero.* Consistent application of those standards can prove difficult, as seen in *Williams* at 150 (teachers' duty to supervise students a ministerial function); *Sloas* at 479-481 (deputy jailer's supervision

of inmates while cutting trees and brush a discretionary function) and *Lamb* at 909 (search of students by school personnel a discretionary function). After examining these precedents and others, we are unable to conclude that the circuit court erred as a matter of law by granting summary judgment in favor of Ms. Kelley. The record establishes that she had to exercise personal judgment and deliberation numerous times during this incident, including deciding how to best implement Andrew's IEP, whether to take him on the outing, how and by whom he should be supervised, whether to permit him to skate, whether to lock his skates, and so on. For purposes of "discretionary versus ministerial" analysis, it is our opinion that Ms. Kelley's decisions required as much personal deliberation and judgment as that exercised by the employees in *Sloas* and *Lamb,* and we are unable to rationally distinguish the relevant factual bases of those recent cases from that of the present case.

We briefly note that no questions were raised in this appeal regarding whether Ms. Kelley acted in good faith and within the course and scope of her employment. Although silent on those issues, the court's grant of summary judgment necessarily implied findings in favor of Ms. Kelley, and we found nothing in the record to disturb that result. In our opinion Ms. Kelley is one of those individuals spoken of in *Yanero* at 522, protected by the law from liability for her good faith judgment calls made in a legally uncertain environment.

The judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Garis L. Pruitt
Catlettsburg, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Suzanne Cassidy
Covington, Kentucky

NO ORAL ARGUMENT FOR
APPELLANT.