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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002319-MR

JOE MARSON, Individually; CAROLYN MARTIN, Individually and as Principal of the South Floyd Middle School; RHONDA PAIGE, Individually and as Teacher at South Floyd Middle School; SHERRY CAUDILL, Individually and as Teacher at South Floyd Middle School; NATASHA ALLEN, Individually and as Teacher at South Floyd Middle School; EDDIE HAMILTON, Individually and as Teacher at South Floyd Middle School; and DAVID TURNER, Individually and as Lead Custodian at South Floyd Middle School — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 09-CI-00199

SHERRY THOMASON, Individually; and ROGER THOMASON, Individually and as Next Friend of ANTHONY THOMASON — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, KELLER, AND STUMBO, JUDGES.

COMBS, JUDGE: This is a case involving injury to a student while on school premises. The Floyd Circuit Court denied a motion for summary judgment by the appellants, and they now appeal. They are: Joe Marson, individually;[1] Carolyn Martin, individually and as principal of South Floyd Middle School; Rhonda Paige, individually and as teacher at South Floyd Middle School; Sherry Caudill, individually and as teacher at South Floyd Middle School; Natasha Allen, individually and as teacher at South Floyd Middle School; Eddie Hamilton, individually and as teacher at South Floyd Middle School; and David Turner, individually and as lead custodian at South Floyd Middle School.

The appellants contend that summary judgment should have been granted in their favor because they are entitled to governmental immunity and/or qualified official immunity. Negligence claims were asserted against them by appellees, Sherry Thomason, individually; and Roger Thomason, individually and as next friend of Anthony Thomason. In the alternative, the appellants Marson and Martin (the high school and middle school principals) contend that those in supervisory positions are entitled to summary judgment since they could not be held vicariously liable for the acts of the others as a matter of law. Finally, Paige, Caudill, Allen, and Turner contend that they are entitled to judgment since none of

[1] Marson, South Floyd High School's principal, filed a motion for summary judgment as it related to the damages claims made against him in his official capacity. This motion was granted by agreed order.

them was on the premises or charged with any responsibility for students' safety on the date in question.

The Thomasons argue that the trial court properly determined that none of the appellants is entitled to assert the defense of immunity as a matter of law and, in addition, that genuine issues of material fact exist so as to preclude the entry of summary judgment at this juncture. After our review of the arguments of counsel, we conclude that the trial court properly denied summary judgment in part but erred by failing to grant summary judgment with respect to the claims asserted against the appellants in their representative capacities. Additionally, we conclude that the members of the faculty and staff who were not present on the premises were entitled to judgment as a matter of law. Consequently, we affirm in part, vacate in part, and remand to the trial court for further proceedings.

The action underlying this appeal arose from an injury to Anthony Thomason, a twelve-year-old student at South Floyd Middle School who is severely visually impaired. Anthony is legally blind even while wearing corrective lenses; he was wearing no glasses on September 15, 2008. Sometime between his arrival at school on September 15, 2008, and the beginning of the instructional day, Anthony was permitted to climb onto a set of improperly retracted bleachers in the gymnasium shared by South Floyd Middle School and South Floyd High School. Anthony fell from the bleachers to the floor – a distance of some six to eight feet. Appellants allege that Anthony was unsupervised at the time of the accident.

On February 9, 2009, the Thomasons filed a negligence action against the named appellants. In their complaint, the Thomasons alleged that the appellants were aware of Anthony's disability and that they should have realized that a lack of supervision near the improperly retracted bleachers put Anthony in danger and grave risk of harm. They claimed that the appellants' failure to supervise Anthony and to provide him with a safe environment caused him to suffer significant and permanent injuries to his head and left arm.

Following a period of discovery, the appellants filed a motion for summary judgment, arguing that they were immune from the claims asserted against them. The trial court denied the motion on December 21, 2010. This appeal followed.

Our appellate jurisdiction is generally restricted to *final* judgments. Ordinarily, an appeal from the denial of a motion for summary judgment would not be permitted because it is regarded as interlocutory. Nevertheless, the Supreme Court of Kentucky has held that an appeal from an order denying *claims of immunity* is authorized since the order cannot be meaningfully reviewed after the appellants have borne the costs and have undergone the other burdens attendant to litigation. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009). Consequently, we have jurisdiction to review the trial court's denial of summary judgment in this case.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03.

The appellants present three arguments for our review. First, with respect to the claims asserted against them in their representative capacities, the appellants argue that they are shielded from liability by the Board of Education's governmental immunity. Next, with respect to the claims asserted against them in their individual capacities, the appellants contend that they are entitled to claim qualified official immunity from suit or that they are otherwise entitled to judgment as a matter of law since they were not present when the alleged negligent act or omission occurred. Finally, with respect to the issue of vicarious liability on the part of their subordinates, the appellants contend that public officers are responsible only for their own misfeasance and negligence and cannot be held responsible for the negligence of those employed by them as long as they have employed persons of suitable skill. For these reasons, the appellants contend that the trial court erred by failing to grant them summary judgment. We shall address each of these arguments.

Carolyn Martin, Rhonda Paige, Sherry Caudill, Natasha Allen, Eddie Hamilton, and David Turner were sued in their official capacities as principal, teachers, and lead custodian, respectively. They contend that they are entitled to assert governmental immunity against the liability claims made against them in their official capacities. We agree.

"'[G]overnmental immunity' is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency." *Yanero v. Davis* 65 S.W.3d 510 (Ky. 2001)(*citing* 57 Am.Jur.2d, *Municipal, County, School and State Tort Liability, §*10 (2001)). When an employee is sued in his or her ***representative capacity***, he or she is entitled to the same immunity which is granted to the agency which the employee represents. *Yanero,* 65 S.W.3d at 522*; Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617 (Ky. 2011). "[A] state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Yanero,* 65 S.W.3d at 519. Thus, the employee is afforded governmental immunity as long as the acts or omissions in question were performed in the exercise of a governmental function.

Education is an integral aspect of state government. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009). The Supreme Court of Kentucky has held that activities undertaken in direct furtherance of education are to be deemed governmental rather than proprietary in nature. *See Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997); *Autry v. Western Kentucky University*, 219 S.W.3d 713 (Ky. 2007).

In this case, the alleged acts and/or omissions of the school employees were performed in the course of exercising a governmental function. Children were admitted into the school gymnasium before the beginning of the instructional day as part of its child care. This accommodation to students and their parents was

made in conjunction with the school's educational mission in promoting public education. Consequently, the school employees (in their representative capacities) were entitled to immunity from damages claims arising from that function. The trial court erred by failing to grant summary judgment to Martin, Paige, Caudill, Allen, Hamilton, and Turner in their representative capacities.

Next, with respect to the claims asserted against them in their individual capacities, the appellants contend that they are entitled to the protection of "qualified official immunity." The appellants who were present on the premises on the date of Anthony's accident claim that their alleged acts and/or omissions in this case resulted from discretionary decisions performed in good faith and within the scope of their authority. We need not reach the issues of whether the alleged acts or omissions were performed in good faith or within the scope of their authority because we conclude that they were not the result of discretionary decision-making. Consequently, the appellants are *not* entitled to the protection afforded by qualified official immunity in their individual capacities.

When an action is brought against public employees in their individual capacities, the employees may be entitled to assert their qualified official immunity. *Yanero v. Davis* 65 S.W.3d 510 (Ky. 2001). However, qualified official immunity protects public employees only where the officials' act or omission is one that is discretionary in nature. *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011). "Discretionary acts are, generally speaking, 'those involving the exercise of discretion and judgment, or personal deliberation, decision, and

judgment.'" *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (internal citations omitted) (*quoting Yanero v. Davis*, 65 S.W.3d at 522 (Ky. 2001)).

"[D]iscretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney*, 311 S.W.3d at 240. However, an act or omission is not necessarily deemed "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed. *Franklin County v. Malone,* 957 S.W.2d 195 (Ky. 1997).

Public officers or employees are not immune from tort liability for the negligent performance of a ministerial act; *i.e.*, "one requiring 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." *Franklin County v. Malone, supra* at 201. "That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." *Upchurch v. Clinton County,* 330 S.W.2d 428, 430 (Ky. 1959).

Whether a public official is protected by official immunity is a question of law. *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006). And, while our courts have held that the supervision of students is ordinarily a discretionary act, there have been notable exceptions to that conclusion.

In *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011), the Supreme Court of Kentucky held that the means by which a teacher supervised her students was

discretionary. However, it recognized the "apparent incongruity" with precedent holding that "negligent supervision may go to a ministerial act or function in the public school setting." *Id.* at 876, (internal citations omitted) (*quoting Haney v. Monsky,* 311 S.W.3d 235 (Ky. 2010)). For example, in *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001), the court held that "enforcement of ***a known rule*** requiring that student athletes wear batting helmets during baseball batting practice" amounted to a ministerial act. 65 S.W.3d at 522. (Emphasis added.) Revisiting the holding of *Yanero* in *Haney v. Monsky*, 311 S.W.3d 235, 242 (Ky. 2010), the court observed that the helmet requirement constituted "an essentially objective and binary directive" and that "[t]here is no substantial compliance with such an order and it cannot be a matter of degree: its enforcement was absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."

The court has also "rejected the notion that the ***failure*** of teachers . . . to supervise their students in the face of known and recognized misbehavior was a discretionary act." (Emphasis added.) *Id.* at 244 (*discussing Williams v. Kentucky Dept. of Educ.* 113 S.W.3d 145(Ky. 2003)) (citations omitted). The known and recognized misbehavior addressed in *Williams* was drinking and driving to and from a school-sponsored function.

The claims in this case concern the named officials' alleged failure to supervise Anthony. We agree with the trial court that the acts at issue are: (1) properly extending the bleachers to their full length to ensure a safe environment

for students and (2) providing adequate supervision to those arriving at school before the beginning of the instructional day. These acts do not involve policy making or the significant exercise of judgment. Instead, they relate to the performance of a fixed, routine duty regularly required to be performed by the school's faculty and staff. While the discharge of these responsibilities involved some decision-making on the part of faculty and staff, it did not convert the essentially ministerial responsibility into a discretionary function. The trial court did not err in determining these responsibilities to be ministerial in nature.

Turner, the school custodian, indicated in his deposition that the principal had advised the custodians to make sure everything was in proper order for the students' arrival. He confirmed that it was the duty of the custodial staff to extend the bleachers each morning. Hamilton, a teacher, admitted that his duties as bus monitor that morning included keeping alert to any safety concerns. Hamilton admitted that he had not entered the gymnasium before the students were permitted to enter and that he was not aware that anyone else had checked to see that the bleachers were properly extended. He testified in his deposition that he would not have allowed students to enter the gymnasium if he had known that the bleachers were partially retracted.

Johnson, another teacher on bus duty that morning, indicated that students would not be permitted into the gymnasium but would be kept in the foyer if the gymnasium bleachers were not properly extended. Johnson stated that no faculty or staff member was on the floor of the gymnasium that morning to check that the

bleachers were fully extended and available to students. No one was posted nearby to warn that the bleachers could be hazardous or to redirect students to a safer location.

Because the negligent performance of a ministerial act can subject the officer or employee to liability for damages, the trial court did not err by failing to grant the motion for summary judgment on this basis. However, the proof indicates that Rhonda Paige, Sherry Caudill, and David Turner were not on the premises at the time of the accident and that none of them had been assigned any responsibility for students' safety that morning. As a result, the claims against them must fail as a matter of law. Natasha Allen was not affiliated with the middle school at the time of the accident; the claims asserted against her must fail as well.

We note that the Thomasons believe that they have also established negligence on the part of the appellants with respect to Anthony's Individual Education Plan (IEP), which addressed in detail his vision disability. He enjoys only ten feet of frontal vision and no peripheral vision. However, the proof indicates that Anthony's teachers were fully aware of the requirements contained in his IEP and that those requirements were being met. We cannot conclude that there was any negligence on this issue.

Finally, with respect to their alleged vicarious liability, appellants Marson and Martin contend that public officers are responsible only for their own misfeasance and negligence and that they cannot be held responsible for the negligence of those employed by them. The appellants are correct. As a matter of

law, they cannot be held vicariously liable for the alleged negligence of their employees. *See Yanero,* 65 S.W.3d at 525. Consequently, to the extent that the negligence claims made against Marson and Martin are based on vicarious liability, we agree that they were entitled to summary judgment.

In summary, we conclude that the trial court erred by denying summary judgment with respect to the appellants sued in their representative capacities; by denying summary judgment to those appellants who were not present on the premises on the date of the accident; and by denying summary judgment to the schools' principals to the extent that they were alleged to have been vicariously liable for the acts of their subordinates. We affirm the trial court's denial of summary judgment with respect to the issue of qualified official immunity, and we hold that the claims against appellants for which they had sought the protection of qualified immunity may proceed. We remand for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jonathan C. Shaw
Paintsville, Kentucky

BRIEF FOR APPELLEES:

Glenn Martin Hammond
Pikeville, Kentucky