



Breathitt County Board of Education v. Combs

2010 | Cited 0 times | Court of Appeals of Kentucky | September 10, 2010

NOT TO BE PUBLISHED

OPINION

VACATING AND REMANDING

BEFORE: CAPERTON, THOMPSON, AND VANMETER, JUDGES.

The Breathitt County Board of Education ("Board") and Arch Turner, individually, appeal from the Breathitt Circuit Court's denial of their motion for summary judgment. For the following reasons, we vacate and remand.

Larry Combs filed a claim of negligence against the Board and its Superintendent, Turner, in his individual capacity, alleging that the Board and Turner were responsible for the care and custody of his minor child, had a duty to transfer custody of the child after school only to authorized individuals, and breached their duty of care by allowing an unauthorized individual to pick up the child from school without ascertaining whether the individual had Combs' permission, and by failing to investigate the matter or take appropriate remedial action to avoid future similar incidents. Combs claimed as a result he suffered emotional distress.

The Board and Turner moved for summary judgment on grounds of governmental immunity and qualified immunity, respectively.¹ The trial court heard oral arguments at motion hour and thereafter denied their motion, as reflected by the motion hour docket sheet dated March 20, 2009. This appeal followed.

As an initial matter, "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). In other words, the jurisdiction of this court is properly invoked "to address the Board's immunity claim, a substantial claim that would be stripped of meaningful review if the Board were obliged to forego appellate consideration until after it had borne all the costs and inconveniences of trial." *Id.* at 885.

Furthermore, summary judgment shall be granted only if "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 a judgment



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as a matter of law." CR² 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelevest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). In addition, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

On appeal from a granting of summary judgment, our standard of review 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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is de novo. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

The Board and Turner claim the trial court erred by denying their motion for summary judgment. We agree.

A local board of education is "a state agency entitled to governmental immunity" from civil damages actions. *Yanero v. Davis*, 65 S.W.3d 510, 526 (Ky. 2001). See also *Prater*, 292 S.W.3d at 887. This means the Board "can only be sued in a judicial court for damages caused by its tortious performance of a proprietary function, but not its tortious performance of a governmental function, unless the General Assembly has waived its immunity by statute." *Prater*, 292 S.W.3d at 887 (quoting *Grayson County Bd. of Educ. v. Casey*, 157 S.W.3d 201, 202-03 (Ky. 2005)). In other words, "governmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, i.e., public acts integral in some way to state government." *Prater*, 292 S.W.3d at 887 (citing *Yanero*, 65 S.W.3d at 519).

The test for determining whether an agency such as the Board is performing a governmental function or a proprietary function is "whether the agency is 'carrying out a function integral to state government,' or whether it is 'engaged in a business of a sort theretofore engaged in by private persons or corporations for profit.'" *Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003) (citations omitted). The Kentucky Supreme Court has held that "education is an integral aspect of state government and that activities in direct furtherance of education will be deemed governmental rather than proprietary." *Prater*, 292 S.W.3d at 887.

In this case, administration of the Board's transportation ("pick-up/drop-off") policy for students after school concerns the supervision and safety of students in direct furtherance of education and thus is a governmental function afforded immunity from actions based on the administration of that policy. Further, the record does not disclose any indication that the Board's immunity in this instance has been waived by statute. Accordingly, the Board was entitled to governmental immunity from this action.



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Next, the Board and Turner argue the trial court erred by denying their motion for summary judgment on grounds of Turner's qualified immunity. The Kentucky Supreme Court has addressed the issue of qualified immunity as follows:

[W]hen 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.

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

Here, the record reflects that Turner was Superintendent at the time of the alleged incident and was not present when the alleged incident took place. Combs claims that Turner met with him after the incident and told him that "something would be done" but failed to take any action. Combs asserts that Turner's failure to investigate the matter, take disciplinary action, and enact new policies to prevent future similar incidents do not entitle him to qualified immunity.

However, Combs' assertion that Turner's actions "were sufficiently personally involved to remove him from the scope of qualified immunity" fails to establish that Turner's actions denote a ministerial act so as to eviscerate the protections afforded by qualified immunity. See Yanero, 65 S.W.3d at 528 (athletic director who was not present when student athlete was struck by a baseball pitch was entitled to qualified immunity from student's lawsuit alleging negligence on behalf of director for failure to promulgate a written rule designating penalties for students who do not wear helmets during practice); Wesley v. Page, 514 S.W.2d 697 (Ky.App. 1974) (principal who delegated direction of school play to teacher and who was not in attendance when student was injured by a projectile from a live ammunition gun during the play violated no duty to student participant, even though principal did not caution students concerning use of the guns). Here, nothing in Combs' complaint avers that Turner failed to exercise personal discretion, in good faith, and within the scope of his authority. Accordingly, Turner was entitled to qualified immunity from this action.

The order of the Breathitt Circuit Court is vacated and this case is hereby remanded for further proceedings consistent with this opinion.



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ALL CONCUR.

1. Combs claims this court is precluded from addressing Turner's assertion of qualified immunity since the motion for summary judgment was filed solely on behalf of the Board, thereby failing to preserve the issue for review. However, the record reflects that the issue of qualified immunity was addressed in the reply brief filed on behalf of the Board and Turner, by counsel who represented both defendants, and thus the issue was presumably considered by the trial court in ruling on their motion. As a result, the issue of Turner's entitlement to qualified immunity is properly before this court.

2. Kentucky Rules of Civil Procedure.

