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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001766-MR

GARY TURNER AND CAROL TURNER, INDIVIDUALLY
AND AS PARENTS AND NATURAL GUARDIANS OF
JEREMY TURNER, A MINOR

APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 99-CI-00361

NEWPORT BOARD OF EDUCATION
AND BRIAN GECINA

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Turners appeal the decision of the Campbell Circuit Court dismissing their personal injury action against the Newport Board of Education and its teacher, Brian Gecina, based on the doctrine of sovereign immunity. We agree that the Board is entitled to immunity and affirm that part of the judgment. As to its teacher, in his individual capacity, we believe he is also entitled to official immunity as he was working within the scope of his employment, and we therefore affirm that holding.

Jeremy Turner was a student on April 1, 1998, at A.D. Owens School in Newport, Kentucky, who alleges he was seriously injured during gym class. Brian Gecina was Jeremy's gym teacher

at the time of the alleged injury. Jeremy and his parents filed suit against both the School Board and the gym teacher. The appellees requested summary judgment based on the doctrine of sovereign and official immunity and the circuit court granted the same as to the Board and the teacher respectively. The Turners appeal to this Court contending error in dismissing both the Board of Education and the gym teacher on the basis of sovereign immunity.

As to the Board of Education, appellants contend that summary judgment was premature because they were not allowed to make a record, and discover whether or not the Board maintained liability insurance. Appellants contend if there was insurance, sovereign immunity was waived to the extent of coverage by insurance, relying on Board of Education of Rockcastle County v. Kirby, Ky., 926 S.W.2d 455 (1996). We disagree. In Clevinger v. Board of Education of Pike County, Ky., 789 S.W.2d 5, 10, 11 (1990), it was clearly stated that local boards of education were covered by the doctrine of sovereign immunity under Section 231 of our state Constitution. Subsequently, in the case of Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997), our Supreme Court set the record straight concerning waivers and the effect of purchasing insurance. The Court reviewed Dunlap v. University of Kentucky Student Health Services Clinic, Ky., 716 S.W.2d 219 (1986), wherein it was determined that legislative authority to purchase liability insurance constituted a partial waiver of sovereign immunity, to the extent of insurance coverage. The Withers Court, 939 S.W.2d at 345, recognized that

in response to Dunlap, the General Assembly enacted statutes to preserve sovereign immunity unless there was an express waiver in a statute. To prevent misunderstanding of the intention of a statute, the General Assembly added KRS 44.073(14) which provides:

> The filing of an action in court or any other forum or the purchase of liability insurance or the establishment of a fund for self-insurance by the Commonwealth, its cabinets, departments, bureaus, or agencies or its agents, officers, or employees thereof for a government-related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereby held.

The Withers Court, 939 S.W.2d at 346, concluded "that the 1986 statutory changes abrogated the rule in Dunlap and its line of decisions which found waiver of immunity based on the purchase of liability insurance whether or not pursuant to statutory authorization." The Court went on to state that:

> [h]enceforth, in an effort to avoid the morass we have heretofore been in, we will observe a rule similar to the one found in Edelman v. Jordan, 415 U.S. 651, 673, 94 S. Ct. 1347, 1361, 39 L. Ed.2d 662, 678 (1974), as follows:
>
> > We will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S. Ct. 458, 464-65, 53 L. Ed 742 (1909).

Withers, 939 S.W.2d at 346. In view of the Withers decision, it doesn't matter that the appellants were not able to discover whether or not the Newport Board of Education had liability

insurance. Thus, summary judgment in favor of the Board was proper under Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

The Turners's second argument is that the gym teacher, Brian Gecina, is not entitled to sovereign or official immunity since the doctrine does not extend to employees of the immune agencies, etc. The Turners rely on Guffey v. Cann, Ky., 766 S.W.2d 55 (1989) and Copley v. Board of Education of Hopkins County, Ky., 466 S.W.2d 952 (1971). Unfortunately for the Turners, the line of demarcation on sovereign immunity and official immunity for permanent employees was drawn in sand, and it shifts. In Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195 (1997), decided after Withers, the Supreme Court considered whether or not employees of agencies entitled to sovereign immunity are also protected. The Court held that:

> In 1986, the legislature extended sovereign immunity to state officers and employees acting within the scope of their duties. KRS 44.070 et seq. Prior to the enactment of the amendments to the Board of Claims Act in 1986, Kentucky law imposed individual liability on public officials for ministerial acts negligently performed in the course of duty. See Upchurch, supra. However, following the 1986 amendments to the Board of Claims Act, this Court held that parts of KRS 44.070 which extended immunity to certain employees may violate the constitution. University of Louisville v. O'Bannon, Ky., 770 S.W.2d 215 (1989). This case determined that the legislature cannot constitutionally extend sovereign immunity to state officers or employees who engage in activities outside the traditional role of government. However, a lawful search of an individual following an arrest can only be conducted by an agent of the government. As long as the police officer acts within the scope of the authority of office, the actions are those of

> the government and the officer is entitled to the same immunity and the only recourse available to claimants is through the Board of Claims.

Malone, 957 S.W.2d at 202.

Thus, in addressing the liability of the state trooper, the Malone Court held that so long as the state officer is engaged in a ministerial activity that is within the "traditional role of government", he is protected by sovereign immunity. The Court then further held, as stated above, that so long as the police officer acts within the scope of his authority, he is entitled to sovereign immunity. Id. at 202. In this discussion of the liability of the state trooper, the Court spoke in terms of "state officers or employees". Moreover, the Court appeared to base its ruling on the availability of recovery under the Board of Claims Act which, arguably, does not cover actions of county employees or other governmental employees not under the direction and control of the central state government.

We say "arguably" because we recognize that the Malone Court assumed the contrary position on this issue later in the opinion in dicta when it stated, "[t]he Court of Appeals erroneously held that KRS 44.070 et seq. has no application to counties." Malone at 203-204. However, in Withers, 939 S.W.2d at 346, the Supreme Court said:

> All claims against immune entities fall squarely within the purview of the Board of Claims Act where resides exclusive jurisdiction for claims against the entity. The Board of Claims Act and sovereign immunity are co-extensive. Berns, 801 S.W.2d at 331, and Gnau v. Louisville & Jefferson Co. Metropolitan Sewer District, [Ky., 346 S.W.2d 754 (1961)]. It follows that a plea

> of sovereign immunity is an admission of Board of Claims jurisdiction.

Malone, 957 S.W.2d at 205, reiterated this position when the Court said:

> The only possible recourse for those who believe they are injured or damaged in some way by the activities of the government or its agents is a resort to a proper claim before the Board of Claims. Section 231 of the Kentucky Constitution is commonly referred to as providing immunity, but a reading of the exact language of the constitutional section indicates that it provides a direction for those who have claims and a method by which they can seek some limited redress of such claims. (emphasis added).

When specifically asked whether the Board of Claims has jurisdiction over all cases wherein sovereign immunity is found, the Courts' language is not so broad. In Gnau, 346 S.W.2d at 755, quoted by the Withers Court, the Court used a two-prong test. First, it held sovereign immunity applied to the sewer district, but before it was subject to jurisdiction of the Board of Claims, it had to be "under the direction and control of the central State government and . . . supported by monies which are distributed by authority of the Commissioner of Finance out of the State treasury." Id. Kentucky Center for the Arts Corporation v. Berns, Ky., 801 S.W.2d 327 (1990) cited Gnau with approval and was cited by the Withers Court. In Board of Education of Rockcastle County v. Kirby, Ky., 926 S.W.2d 455, 456 (1996), the Supreme Court added, "The act is limited to subdivisions of the central state government." Also, "The waiver of immunity found in KRS 160.310 and 160.160 is the type of claim excepted from the Board of Claims Act." Id. And, "[t]he Board

of Claims Act itself simply does not include local boards of education." Id. at 457. See also Ginter v. Montgomery County, Ky., 327 S.W.2d 98 (1959). Neither Withers nor Malone overruled these cases, although both seem to say the Board of Claims has jurisdiction whenever sovereign immunity applies.[1]

The proper construction of Malone has been and will be the subject of great debate. It appears to this Court that the Malone Court distinguishes between official immunity for state employees and county employees because the Court employed a different analysis as to the liability of county employees from that of the state trooper. In addressing the liability of fiscal court members, the Court recognized that an action against a county employee (or other subdivision of the state) in his official capacity is barred by sovereign immunity because the action is essentially one against the state or subdivision of the state. Malone at 201. The Court then left open the possibility of individual liability and proceeded with an analysis of whether the county employees possessed official immunity; i.e., whether they were exercising a discretionary or ministerial function.[2]

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[1]For informational purposes, this issue is before a panel of this Court in the case of Board of Claims v. Banks, 1999-CA-001001-MR.

[2]Although the Malone Court found that fiscal court members were protected by official immunity, the Court went on to say later in the opinion that the plaintiff had failed to state a claim for personal liability against them in the complaint because the complaint failed to specify any individual capacity in the heading. Malone 957 S.W.2d at 204. We acknowledge that said holding would seem to be contradictory to the statement that "[h]is estate brought a negligence action against the police officer, the state, the county and a number of county officials in their official and individual capacities." Id. at 199.

Id. The Court decided that state employees and employees of subdivisions of the state (like county or school board employees) are entitled to official immunity when performing discretionary functions. Id. That leaves open the question of liability of governmental employees (other than those under the direction and control of the central state government) exercising ministerial functions.

We would also note that the Malone Court did not overrule any of the long line of cases holding that the immunity of the Commonwealth does not extend to the personal liability of its agents, servants, and employees. See Speck v. Bowling, Ky. App., 892 S.W.2d 309 (1995); Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer Dist., Ky., 805 S.W.2d 133 (1991) (a complaint must state a separate cause of action for individual liability); University of Louisville v. O'Bannon, Ky., 770 S.W.2d 215 (1989) and Gould v. O'Bannon, Ky., 770 S.W.2d 220 (1989) (holding a state employee is individually liable for negligence in performing ministerial acts); Blue v. Pursell, Ky. App., 793 S.W.2d 823 (1989) (holding the Legislature cannot extend sovereign immunity to the personal liability of state employees); Happy v. Erwin, Ky., 330 S.W.2d 412 (1959) (holding a statute could not extend official immunity to individual employees of the city fire department).

It could be argued that the Supreme Court in Malone meant to hold that certain ministerial activities are inherently within the traditional role of government. Thus, any employee of the state or its subdivisions performing such duties will always

be deemed to be acting within the scope of his or her official capacity. In that case, the employee would have no individual liability, and thus would be protected by the doctrine of sovereign or official immunity. Such a reading of Malone would resolve the apparent conflict with the Supreme Court's earlier holdings. It would also leave open the Malone Court's possibility of liability for employees of subdivisions of the state which are not subject to the direct direction or control of the central state government, for performing ministerial duties or functions outside the scope of their employment.

With that background, we can consider and summarize the possible liability of Brian Gecina for alleged negligent supervision of the gym class. As an employee of the Newport Board of Education, Brian is an employee of a subdivision of the state government,[3] which is not subject to the direct direction or control of the central state government. If Brian is being sued in his official capacity, he has sovereign or official immunity.[4] If Brian is being sued in his individual capacity, we need to ask whether he was performing a discretionary function or a ministerial function. If it is a discretionary function, he has official immunity.[5] If it is a ministerial function, we need to ask if he was performing a ministerial duty within the scope of his official capacity, a ministerial activity inherently

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[3]Clevinger, 789 S.W.2d at 5.

[4]Malone, 957 S.W.2d at 202; Calvert Investments, 805 S.W.2d at 133.

[5]Malone, 957 S.W.2d at 201.

within the traditional role of government.[6] If he is, official immunity applies. If he is not, the employee has no official immunity, although he may have a defense to an allegation of wrongdoing.

Assuming *arguendo* that Brian Gecina is not entitled to official immunity or sovereign immunity in his individual capacity, we find insufficient evidence of negligence on his part to survive the motion for summary judgment. Actionable negligence consists of: (1) a duty; (2) a breach of that duty; and (3) consequent injury. The absence of any one of the three elements is fatal to the claim. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992); Illinois Central Railroad v. Vincent, Ky., 412 S.W.2d 874, 876 (1967).

The Turner complaint alleges negligent supervision and monitoring of the gym class. Basically, the Turners are contending there must have been negligence because Jeremy Turner fell off the scooter and was injured. However, there is no evidence that the injury was caused by Brian Gecina nor that Jeremy Turner's injury was of the type which could not have occurred except due to Brian's negligence, pursuant to the doctrine of *res ipsa loquitur*. Perkins v. Hausladen, Ky., 828 S.W.2d 652 (1992). Although the Turners were not required to exclude all other possible conclusions beyond a reasonable doubt, they were required to make out a case from which the jury might have reasonably concluded that, more probably than not, the injury occurred due to Brian's negligence. Id. at 656; quoting,

[6]Malone, 957 S.W.2d at 202.

Restatement (Second) of Torts, § 328D, comment f, p. 160. In addition, a party opposing a properly supported motion for summary judgment cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482. Consequently, we find that the trial court properly dismissed the remaining claim of negligence against Brian Gecina.

Accordingly, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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