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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000141-MR

BREATHITT COUNTY BOARD OF EDUCATION — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 06-CI-00238

DOT PRATER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, VANMETER AND WINE, JUDGES.

WINE, JUDGE: The Breathitt County Board of Education ("the Board") appeals from an order of the Breathitt Circuit Court denying the Board's motion to dismiss a personal injury action filed against it by Appellee, Dot Prater ("Prater").[1] The Board argues it has governmental immunity against the claims raised in Prater's suit. Although the Board's appeal from the trial court's order denying the motion to dismiss is interlocutory, we

[1] We note that the Appellee failed to file a responsive brief before this Court. We believe it to be injudicious to believe one's position is so sound that opposing counsel's arguments need not be addressed, especially with an issue such as immunity.

conclude that this matter is properly before the Court at this time. Nevertheless, we agree with the trial court that this claim arises from the Board's performance of a proprietary function. Consequently, the Board is not entitled to governmental immunity. Hence, we affirm.

This case raises purely legal questions as the facts are undisputed. We will use the trial court's introduction as a brief overview of the facts of the case:

> The Breathitt County School Board owned and maintained a private residential premise on school property that it provided to a night watchman as compensation for monitoring the school grounds. On or about June 14, 2005, the Plaintiff, Dot Prater, while an invitee to the premises, was injured when a structure she was standing on collapsed. The Plaintiff alleges that the Defendants were negligent in the maintenance of the premises on which the structure was located and breached its duty to ensure the safety of persons upon the premises. The Plaintiff argues that her visit was personal and private, it is in no way related to any governmental function, and therefore the defense of governmental immunity does not apply to this action.
>
> The Defendants move to dismiss this action arguing that a board of education is an agency of state government cloaked with governmental immunity and can only be sued for damages for tortious performance of a proprietary function, not a governmental function, unless the immunity is waived by the General Assembly.

As a preliminary matter, we note that the trial court's order denying the Board's motion to dismiss was clearly interlocutory. Only judgments entered pursuant to a final order may be reviewed on appeal, CR 54.01, and generally an order denying a motion to dismiss is not a final order but would be interlocutory and not appealable. However, immunity claims are different than other defenses. Immunity is a shield

against suit and is meant to protect the state, and to a lesser extent, its individual officers from the expense and harassment of trial. *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). The interest in avoiding the burden of litigation is lost if immunity is denied and the claimant is subjected to trial. An appeal from a final judgment comes too late to afford meaningful relief. Thus, the United States Supreme Court held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment [.] . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985), *citing Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).

The United States Supreme Court has also held "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 2191 [the appellate jurisdiction statute] notwithstanding the absence of a final judgment." *Mitchell v. Forsyth,* 472 U.S. at 530. 105 S.Ct. at 2817. *See also Johnson v. Jones*, 515 U.S. 304, 313, 115 S. Ct. 2151, 2156, 132 L. Ed. 2d 238 (1995) (emphasizing that to be immediately appealable the qualified immunity issue must not involve a genuine factual dispute, but rather must be "a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law"). Accordingly, notwithstanding the absence of a final judgment, the Appellants have appropriately invoked this Court's jurisdiction, and we may entertain their appeal to the extent that it raises purely legal grounds for challenging the trial court's order denying

their immunity claims. *Cf. Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005). ("[A] denial of qualified immunity on purely legal grounds is immediately appealable. A denial of qualified immunity that turns on evidentiary issues is not." Our review is limited to issues of law so the scope of that review is *de novo. Id.*

Turning to the merits of the appeal, we first note with approval the language cited by the Board to the Kentucky Supreme Court's holding in *Grayson County Board of Education v. Casey*, 157 S.W.3d 201, 202-03 (Ky. 2005).

> A board of education is an agency of state government and is cloaked with governmental immunity; thus, it 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. *Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003); *Yanero v. Davis*, 65 S.W.3d 510, 526-27 (Ky. 2001). Although an employee of a board of education can be sued in a judicial court for damages caused by the negligent performance of a ministerial duty, *Schwindel*, 113 S.W.3d at 169; *Williams v. Ky. Dep't. of Educ.*, 113 S.W.3d 145, 155 (Ky. 2003); *Yanero*, 65 S.W.3d at 529, the board cannot be held vicariously liable in a judicial court because of the employee's negligence. *Williams*, 113 S.W.3d at 154; *Yanero, 65 S.W.3d at 527.*

The Board argues that since Prater's action was brought in a judicial court and not in the Board of Claims, it should have been dismissed. We disagree. The Court in *Yanero* stated that a local school board is not a "government" but an agency of state government. As such, it is entitled to governmental but not sovereign immunity. *Yanero*, 65 S.W.3d at 527. Consequently, it is ordinarily immune from tort liability when performing a public or governmental function, but is not immune from liability when

performing a private or propriety function. *Id*. Here the trial court found that the Board providing housing for an employee in exchange for security and groundskeeping was a proprietary function.

Conversely, the Board argues its actions were included by statute as a function of the Board of Education. Specifically, the Board cites to KRS 160.290(1) and *Scott County Board of Education v. McMillen,* 109 S.W.2d 1201, 1203 (Ky. 1937), wherein the former Court of Appeals noted that a county board of education has the power to control its realty for school sites and promote public eduction in a manner deemed necessary and proper. Thus, the Board contends that its maintenance of buildings on school grounds and its compensation of school employees are within the scope of its governmental functions.

However, we agree with the trial court that the Board serving as a landlord of a private residential premise is not a practice typically deemed necessary or proper to further education in county schools. The Board's action was providing a service not considered a governmental function of a typical school board. Therefore, the governmental immunity does not apply to this action.

Finally, the Board argues it cannot be held vicariously liable for the alleged negligence of school employees. The "no vicarious liability" principle recognizes that an otherwise immune entity does not lose that status merely because its agents or servants can be held liable for the negligent performance of their ministerial duties. But since we have already determined that the Board was engaging in a proprietary, not a

governmental function, the Board is not cloaked with governmental immunity and the rule against vicarious liability does not apply.

Accordingly, we affirm the Breathitt Circuit Court's order denying the Board's motion to dismiss.

DIXON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The trial court's and majority's characterization of Board's actions as the ownership and lease of rental property is erroneous in view of the facts that the residential premises were on school grounds, were furnished to the night watchman as part of his compensation, and were designed to provide security. *See Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003) (stating that "[t]he test for whether a government agency is performing a governmental function or a proprietary function is whether the agency is 'carrying out a function integral to state government.'") (quoting *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 332 (Ky. 1990)). While the ownership and lease of rental property could be characterized in certain instances as a proprietary function, *see Bass v. City of New York*, 38 A.D.2d 407, 330 N.Y.S.2d 569, 573-74 (1972), *aff'd*, 32 N.Y.2d 894, 346 N.Y.S.2d 814, 300 N.E.2d 154 (1973); *see generally*, L. S. Tellier, Annotation, *Suability, and Liability, for Torts, of Public Housing Authority*, 61 A.L.R.2d 1246 (1958), the Board, in this instance, is not operating an apartment complex in downtown Jackson in the same way that a private individual or corporation could. Instead, the Board is

fulfilling its obligation to maintain and secure school property. KRS 160.290(1). The Board did not receive rent for the property, but instead furnished the premises to the night watchman as a part of his compensation. Accordingly, I agree with the Board's argument that its actions are governmental functions for which it should have immunity.

As such, the Breathitt Circuit Court's order should be reversed, and the Board's motion to dismiss should be granted.

BRIEF FOR APPELLANT:

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No brief filed for appellee