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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000003-MR

JOYCE FLORENCE — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CI-02053

L. P., as
Next Friend of JANE DOE — APPELLEE

AND NO. 2010-CA-000004-MR

MIKE ERNST AND
MICHAEL BAYLESS — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CI-02053

L. P., as
Next Friend of Jane Doe — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; AND SHAKE,[1] SENIOR JUDGE.

STUMBO, JUDGE: Joyce Florence, Mike Ernst, and Michael Bayless (hereinafter collectively referred to as the appellants) appeal from an order denying summary judgment based on qualified official immunity. These appellants argue that they are entitled to immunity based on state and federal grounds. L.P. (hereinafter referred to as Mother),[2] argues that the appellants are not entitled to immunity, or at a minimum, that there are still genuine issues of material fact that preclude the grant of summary judgment. We find that the trial court incorrectly denied summary judgment to the appellants and reverse and remand with instructions to grant summary judgment in favor of all three appellants.

This action arises from alleged instances of bullying and harassment at Crawford Middle School during the period of January of 2008, through April of 2008. Jane Doe and Mother allege that Doe was being harassed and bullied during this time period and that, despite numerous complaints, the teachers and administrators did not do enough to prevent it. Florence, Bayless, and Ernst are the

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] This case involves a minor child. The child and parents will not be identified by name to protect the minor child's identity. The daughter will be referred to as Jane Doe.

Principal, Associate Principal, and Director of Middle Schools for the Fayette County Public Schools, respectively. Three other individuals were named in the underlying suit, but the trial court granted summary judgment in their favor and there has been no appeal from that order.

Specific instances of alleged harassment and bullying are set forth in the record, along with evidence of a general atmosphere of bullying toward Doe. The student described by Doe as the primary instigator of the bullying will be referred to as Student 1. Doe claims that Student 1 would continually give her "bad looks" and make comments about her to other students. Doe also claims that Student 1 would turn other students against her and cause them to harass her. Specific instances of bullying and harassment described in Doe's deposition include an incident in January of 2008, in which Doe was involved in a heated argument with another student in the gym when that student threatened to beat up Doe; an incident in late January or early February of 2008, in which Student 1 made a posting on MySpace calling Doe a bitch and stating that his friend, Student 2, was going to "beat down" Doe for him; an incident in February of 2008, in which Student 1 pushed Doe and the two fought, resulting in both being suspended; an incident in March of 2008, in which Student 1 was allegedly making negative comments about Doe in Spanish class, which led to an argument between the two; and finally an incident in April of 2008, in which Doe alleged Student 1 walked past her in the hallway and bumped her.

The specific instances mentioned above were reported to school personnel. If the event was witnessed by a teacher or administrator, a punishment was administered. If there was no adult witness, an investigation ensued to determine what had happened. Additionally, Mother made several phone calls and sent numerous e-mails to Florence, Bayless, and Ernst attempting to resolve the harassment and bullying of her daughter.

In April of 2008, Doe was admitted to The Ridge, a behavioral health unit, for a psychiatric evaluation due to anxiety, depression, and suicidal ideation. Doe and Mother testified that these symptoms resulted from the bullying and harassment at school. Upon her release from The Ridge, Doe did not return to Crawford Middle School. This suit followed.

> The 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. Kentucky Rules of Civil Procedure (CR) 56.03 . . . . "The 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*., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . ." *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

When suit is brought against public employees in their individual capacities, the employees may be entitled to qualified official immunity. Qualified official immunity protects public employees in the negligent performance of "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." *James v. Wilson*, 95 S.W.3d 875, 905 (Ky. App. 2002) (quoting *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001)).

> Conversely, an officer or employee is afforded no immunity 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.

Id.

The question of immunity then turns on whether the appellants are alleged to have negligently performed discretionary or ministerial acts. The appellants all argue that they are entitled to qualified official immunity. They admit that if a school employee has direct knowledge that a student is violating a provision of the student code, such as bullying or harassing another student, and fails to take action, that employee would have breached a ministerial duty. But, they argue that when the employee only hears of misconduct and has no direct knowledge, then the decision of how to approach the misconduct is discretionary. Here, the appellants claim that when misconduct was directly observed, corrective or punitive action was taken. They further argue that because they did not directly

observe the bulk of the misconduct alleged by Doe, any action taken based on reported misconduct was discretionary, entitling them to qualified official immunity.

Whether someone is protected by official immunity is a question of law. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). We agree with the appellants that the discipline and supervision of students is a discretionary act. In the case at hand, the material facts are not in question; therefore, the case revolves around whether supervision is discretionary or ministerial. "In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

It is clear that as it concerns the above-mentioned specific instances of bullying and harassing behavior, the students involved were either punished or an investigation occurred. However, Doe and Mother both claim that students were constantly calling her names, saying things about her behind her back, and giving her dirty looks. They also informed the appellants about the continuing trouble Doe was having with Student 1. None of these "general" name calling and dirty looks were directly reported to school employees by Doe. The e-mails Mother sent to the appellants put them on notice of her belief that there was a general atmosphere of harassment going on.

The Courts of Kentucky have almost consistently held that the supervision of students is a discretionary act. *Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky.

2011); *James*, *supra*; *S.S. v. Eastern Kentucky University*, 431 F. Supp.2d 718, 734 (E. D. Ky. 2006); *Flynn v. Blavatt*, 2010 WL 4137478 (Ky. App. 2010)(2009-CA-001789-MR). *See also Rowan County, supra* (where the supervision of prisoners during a work release program was held to be discretionary.); *Haney*, *supra* (where the supervision of children during a camp hike was held to be discretionary.)

There are two cases that Jane Doe relies on to show that the supervision of students is ministerial. Those are *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), and *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003). We find these two cases distinguishable, for the same reasons the Kentucky Supreme Court did in *Turner*, *supra*.

> Although we consider [Appellant's] conduct in this case to be discretionary, we recognize the apparent incongruity with our precedent regarding a supervisory duty in the public school setting, as "we have held that a claim of negligent supervision may go to a ministerial act or function in the public school setting." However, *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001)[,] and *Williams* [*v. Kentucky Dept. of Educ.*], 113 S.W.3d 145 [(Ky. 2003)]-the cases relied upon in enunciating the public school distinction-have quite different facts from those before us.
>
> In *Yanero,* this Court deemed "enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice" to be ministerial. Unlike the teacher's decision-making in this case, a helmet requirement constitutes "an essentially objective and binary directive." As a result, "[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."

> You do it or you don't-and unlike here, there is no factual determination required for its application.
>
> Admittedly, [in *Williams*] we have 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." This decision stemmed from the requirement in KRS 161.180(1) that teachers must "hold pupils to strict account for their conduct on school premises, on the way to and from school, and on school sponsored trips and activities." The dispute in this case, though, concerns the *means* of supervision rather than a *failure* to supervise students who were drinking and driving to and from a school-sponsored function as occurred in *Williams.*

Turner at 876-877(citations omitted).

In the case at hand, the appellants' supervision of the students required more discretionary actions than requiring a student to wear a helmet during batting practice, as in *Yanero*. Further, the appellants did not *fail* to supervise and discipline students, as was the case in *Williams*. As is clear from the evidence of record consisting of depositions, e-mails exchanged by Mother to the school staff, and transcripts of telephone calls, the appellants all took action when notified by Mother of her belief that her daughter was being bullied and harassed. Florence acted by meeting with teachers to see if they knew about the harassment and to direct them to monitor Doe and Student 1. She also directly asked Doe if there was anything Doe needed to tell her about the incidents or if Doe would like her to follow up later. Florence gave Doe an administrative pass that would allow her to leave class anytime she felt uncomfortable or anxious and had Student 1's schedule

changed so he and Doe would not be in the same class. Florence also called and e-mailed Mother in order to keep her informed and to gather more information.

As for Bayless, he also stayed in contact with Mother and referred Doe to counseling for conflict resolution. Additionally, Bayless put Student 1's mother in contact with Doe's mother in order to try to resolve some issues.

Finally, as it concerns Ernst, his job as Middle School Director did not include the daily discipline and supervision of students. However, when Mother contacted him about Doe he followed up with her. He also discussed the situation with Florence.

All three appellants took action when informed of Mother's belief concerning Doe's harassment. They acted with discretion in determining how to handle the general accusations of harassment and bullying. There is no question that they were all acting within the scope of their authority. The question then comes down to whether their discretionary actions were done in good faith.

Public officials are presumed to have performed their duties in good faith. *Rowan County*, *supra*; *Koscot Interplanetary, Inc. v. Commonwealth, by Allphin*, 649 S.W.2d 201, 202 (Ky. 1983). Although Doe's brief suggests bad faith on the part of the appellants, the record of appellants' conduct from the first incident brought to their attention in mid-January until Mother removed Doe from Crawford in mid-April contains not an instance of disrespectful or unconcerned conduct toward Doe or her mother. On the contrary, what is notable in review of the e-mail and recorded conversations between the appellants and Mother and

between the appellants and other school personnel is the respectful, concerned tone which the appellants maintained even as the tone of Mother increasingly reflected her escalating frustration due to her perceptions of Doe's victimization. However, a concerned parent's conclusion that her child is being victimized does not make it so. What is legally significant is that her concerns were heard and the appellants took steps to determine whether Doe was being bullied and to stop or prevent any bullying.

In discussing the conduct of school officials following the carnage at the hands of Michael Carneal, the *James* Court stated:

> Any of the conduct engaged in by the teachers, administrators and Board members can be properly classified as discretionary as they personify the type of acts which are intended to receive protection. Without such protection, the ability of those entrusted with the education of our children to perform the varied functions fundamental to their employment would be hindered. The conduct exhibited by the school appellees inherently required conscious evaluation of alternatives, personal reflection and significant judgment. By definition, their actions were discretionary. In this circumstance, their judgment may arguably be questionable, particularly with the benefit of hindsight, but applying such an unrealistic standard is not only unjust, it's unauthorized.

James, at 909-10.

In this case, there is no allegation that known rights were violated or that malice and/or corruption were responsible for the conduct of the school personnel. Consequently, neither the appellants' actions nor any inaction resulted from bad faith. The Kentucky Supreme Court has stated,

> [i]t is imperative that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom. To do this, they must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions (based on facts not always known) as to what actually happened, and ultimately to determine an appropriate course of action, which may, at times, involve reporting the conduct of a child to the appropriate authorities. In fact, protection of the discretionary powers of our public officials and employees, exercised in good faith, is the very foundation of our doctrine of "qualified official immunity."

Turner at 876.

Based on the foregoing, we find that the trial court incorrectly denied summary judgment for the appellants. We therefore reverse and remand this case with instructions to grant the appellants' motions for summary judgment due to qualified official immunity.

SHAKE, SENIOR JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS.

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