

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002278-MR

KRISTIN HUMPHREY, INDIVIDUALLY AND
AS NEXT FRIEND OF L.H. AND M.H.;
JASON HUMPHREY, INDIVIDUALLY AND
AS NEXT FRIEND OF L.H. AND M.H.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 10-CI-004576

KIM SAPP

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Kristin Humphrey (Kristin), individually and as next friend of L.H. and M.H., and Jason Humphrey (Jason), individually and as next friend of L.H. and M.H. (collectively the Humphreys), appeal from the trial court's summary judgment in favor of Kim Sapp (Sapp). On appeal the Humphreys argue that the

court incorrectly determined that Sapp has immunity. Having reviewed the record, we affirm.

FACTS

This appeal arises from allegations that Jason physically abused his infant daughter, M.H. Because the circuit court entered summary judgment before the parties undertook any discovery, the record from that court consists of the Humphreys' complaint, Sapp's motion to dismiss and/or for summary judgment, and the Humphreys' response to that motion. However, we note that the parties engaged in a significant amount of litigation at the administrative level, a summary of which is included in the opinion of the federal district court's opinion dismissing the Humphreys' federal law claims. We take our recitation of facts from that opinion.

The following description of the underlying events is drawn largely from the Findings of Fact, Conclusions of Law, and Recommended Decision of a Kentucky Administrative Law Judge (“ALJ”) who heard the Humphreys's [sic] appeal of Sapp's decision to substantiate child abuse allegations against Jason Humphrey. This discussion of the facts is designed to illuminate the underlying events. As this matter is before the Court on a Rule 12(b)(6) Motion to Dismiss, the Court will base its legal conclusions on the allegations set forth in the Complaint.

On April 27, 2008, Jason Humphrey was home alone with his two young children, “M.H.” and “L.H.,” while his wife, Kristin, was shopping with her sister, Vickie Osborne. Jason was holding M.H., who was approximately 1 month old at the time, against his shoulder when he began warming a bottle for her. According to Jason, while he was distracted[,] M.H.

pushed against his body and fell to the floor, hitting her head against the hard linoleum. Jason immediately called Kristin and Osborne, who proceeded straight home. Although Jason was able to calm M.H. within a few minutes, he became very concerned when he found a bump on her head. He called Kristin again and told her he wanted to take M.H. to the hospital. Kristin agreed and met Jason at their house just as he was preparing to leave.

Kristin and Jason took M.H. to Hardin Memorial Hospital, where she was seen by Dr. Gruber. Dr. Gruber testified that Jason's explanation of the events was credible and entirely consistent with M.H.'s injuries. He did not suspect any form of child abuse. However, because M.H. had sustained some significant head trauma, Dr. Gruber ordered that she be transferred to Kosair Children's Hospital in Louisville for specialty treatment. After arrival at Kosair, M.H. was seen by numerous physicians and extensive radiology was conducted. Two physicians with the University of Louisville Division of Pediatric Forensic Medicine, Drs. Pfitzer and Currie, reviewed M.H.'s test results; it appears they never treated M.H. or spoke with the Humphreys.

Drs. Pfitzer and Currie are required by law to report any potential child abuse to the proper state agency. After reviewing the test results, the two issued the following opinion:

It is possible that if the child fell six feet onto [a] linoleum floor she could have a skull fracture with associated scalp swelling and the underlying subdural hemorrhage. However, the severity (particularly the amount of separation of the fractured bones) of this fracture is significantly more than what we typically see with accidental falls. Further, the bleeding inside her head is not limited to the area of impact. It is scattered throughout the cranium. This implies a more global head injury that [sic] a simple contact

fall. Also, given the concerning radiological impression as cited, a thorough investigation is warranted. In addition, there are unexplained rectangular petechial marks on the baby's arm that imply that she sustained some sort of blunt trauma to that area. It is difficult to understand how a child could suck on her own arm and create a rectangular-shaped lesion.

After receiving the opinion, the agency assigned Sapp to investigate. Sapp never spoke with Dr. Pfitzer and, when called to testify before the ALJ, Dr. Pfitzer stated that she could not give an opinion whether M.H.'s injuries were more likely than not non-accidental.

Sapp is required by law to investigate all claims of potential child abuse assigned to her. She interviewed the Humphreys individually and their recollection of the events remained consistent throughout. Along with a Kentucky State Police Trooper assigned to investigate for criminal purposes, she spoke with a Dr. Moriarty at Kosair. Sapp claims that Dr. Moriarty and an MRI technician agreed that the injuries were more severe than would be expected from an accidental fall. The state trooper came away from the discussion with Dr. Moriarty differently; he claims that Dr. Moriarty shook his head when told about Dr. Pfitzer's conclusion and stated, "that's certainly her opinion." Further, the trooper testified that Dr. Moriarty stated that the Humphrey's explanation was certainly plausible. Dr. Moriarty did not testify before the ALJ.

Sapp spoke with other hospital officials in her investigation. She claims that Dr. Currie informed her that M.H.'s injuries were consistent with shaken baby syndrome, although she agrees that no doctor directly told her the baby had been shaken. She also received a report from an ophthalmologist indicating that a retinal examination showed no signs of shaken baby syndrome. After conducting this initial investigation, Sapp decided she should take action. Pursuant to KRS § 620.060, she sought and was granted an Emergency Custody Order,

which allows for the immediate removal of children from their parents when there are reasonable grounds to believe the children are in danger of imminent death or serious physical harm. To get such an emergency order, Sapp filed an affidavit presenting the evidence she had discovered, particularly the report from Drs. Currie and Pfitzer and the statement from Dr. Currie that M.H.'s injuries were consistent with shaken baby syndrome. Sapp did not inform the court of the ophthalmology report. Based on the emergency order, Sapp took both children into state custody.

KRS § 620.080 provides that when a child is removed from a parent pursuant to an emergency custody order, a temporary removal hearing must be held within 72 hours. Here, such a hearing was held the day after the emergency order was entered. At that hearing, Sapp introduced the same evidence, including the statement that M.H.'s injuries were consistent with shaken baby syndrome. The Court asked the Humphreys if they were willing to stipulate that probable cause existed to suspect abuse. The Humphreys claim that they were given two options: (1) stipulate to probable cause and have the children returned to the family home with Kristin on the condition that Jason move out of the house pending final resolution of the case; or (2) have the children taken into state custody until the final resolution of the case. Given this ultimatum, the Humphreys chose to stipulate to probable cause. Thereafter, the Court determined that probable cause existed and entered a Temporary Custody Order returning the children to the custody of Kristin on the condition that Jason move out of the house and one of Kristin's relatives, either her mother or sister, move in to the house.

For several months, the Temporary Custody Order remained in effect and Sapp continued her investigation. She conducted a few in-home visits with Kristin and the children and visited Jason. Kristin and her relatives claim that during those visits Sapp continually asserted that Jason was “guilty” and that Kristin “would thank” Sapp for her work. Eventually, the Temporary Custody Order was “informally adjusted,” as permitted by KRS §

620.140. Under that settlement, the Court neither confirmed nor rejected the allegations of abuse, but Jason was permitted to return home and the case was dismissed.

Sapp was admittedly upset with the “informal” resolution of the claims. She subsequently decided to “substantiate” her allegation of abuse against Jason pursuant to 922 KAR 1:470. “Substantiation” of allegations simply indicates a finding by the Cabinet that it is more likely than not that the accused abused or neglected a child. Once the allegations are substantiated, the accused has an immediate right to appeal the decision. If the substantiation is affirmed on appeal, then the accused's name is filed on a central registry of individuals for whom abuse allegations have been substantiated. The person's name remains on that registry for a minimum of seven years.

Jason Humphrey immediately pursued his right to appeal Sapp's substantiation of child abuse. Following a hearing, the ALJ reversed the substantiation, finding that Sapp's allegations lacked credibility and that the evidence clearly supported Jason's description of the events leading to M.H.'s injuries. It appears that this resolution ended the Humphreys's [sic] struggle with the Cabinet and that all claims were resolved in favor of the Humphreys.

Humphrey v. Sapp, No. 3:09-CV-305-H, 2010 WL 1416705, at *1-3 (W.D. Ky. Mar. 31, 2010).

Finding that Sapp had immunity under federal law, the federal district court dismissed the Humphreys' federal claims. Recognizing that significant questions of state law existed which would be better addressed by a state court, the court declined to exercise supplemental jurisdiction over the Humphreys' state law claims. The Humphreys then filed a complaint in Jefferson Circuit Court.

In their complaint, the Humphreys alleged that Sapp's actions amounted to: false arrest and false imprisonment, malicious prosecution and abuse of process, slander and libel, tortious interference with their familial relationship, gross negligence, and outrage. Sapp did not file a response, choosing to file a motion to dismiss and/or for summary judgment. In her motion, Sapp argued that the court had to dismiss the Humphreys' claims because she had qualified, statutory, and/or quasi-judicial immunity. Furthermore, Sapp argued that, even if she did not have immunity, the Humphreys' claims had no basis in fact or law.

The circuit court, noting that the parties had introduced and relied on evidence outside the pleadings, treated Sapp's motion as one for summary judgment. Applying the summary judgment standard, the court granted Sapp's motion. In doing so, the court found that the Humphreys had not put forth sufficient evidence that Sapp acted in bad faith and that Sapp was, therefore, entitled to qualified and statutory immunity. It is from the court's judgment that the Humphreys appeal.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest*,

Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481. With these standards in mind, we address the issues raised by the Humphreys on appeal.

ANALYSIS

A public employee, such as Sapp, has qualified immunity from liability for negligence arising from the performance of discretionary acts or functions. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). However, qualified immunity does not extend to negligent performance of ministerial duties, which are routine and do not involve the exercise of judgment, nor does it extend to discretionary acts that are not performed in good faith. *Id.*

On appeal, the Humphreys argue that Sapp is not entitled to qualified immunity for three inter-related reasons, all flowing from the affidavit Sapp filed to institute the dependency, neglect, and abuse proceeding. Because that affidavit is at the heart of the Humphreys' appeal, we set forth the pertinent parts below.

Dr. Curry [sic] with UL forensic reported that child's injuries are not consistent with accidental means. [M.H.] has a 1 cm. fracture of the skull that has distorted the shape of the skull. Further MRI testing has revealed blood throughout the brain - consistent with shaken baby.

Upon entering hospital [M.H.] had rectangular bruising on her arms which natural mom reported to having been there for a few days. See attached.

The attachment stated as follows:

Natural father, Jason Humphrey, and natural mother, Kristin Humphrey[,] reported that Jason Humphrey was the only caregiver present on day of incident. Natural mother, Kristin Humphrey[,] denies that injuries occurred, non-accidental, and denies possibility that natural father inflicted injuries.

The Humphreys' first argument is that Sapp is not entitled to immunity because she fabricated evidence of shaken baby syndrome in her affidavit. However, a careful review of the record reveals no such fabrication. As noted by the Humphreys in their brief, Sapp or another social worker "spoke with [Dr.] Currie on April 30 at 1:02 p.m., and . . . Currie related that the MRI technician's report stated that [M.H.]'s MRI indicated that there was bleeding all over the head in a scattered pattern, with a parenthetical insertion of 'such would occur in shaken baby.'" This is consistent with what Sapp set forth in her affidavit: "MRI testing has revealed blood throughout the brain - consistent with shaken baby." Therefore, based on the record relied on by the Humphreys, Sapp's statement in the affidavit was not fabricated.

Although the Humphreys have chosen to characterize the information in Sapp's affidavit as fabricated, it appears that their true complaint, and the gist of their second argument, is that the information Sapp provided was incomplete. As noted by the Humphreys, Sapp had been informed on April 29 that M.H.'s "eye

exam was normal and therefore it does not appear to be a case of shaken-baby syndrome." Sapp did not include that information in her affidavit. The Humphreys have cited federal case law indicating that a social worker does not have absolute immunity from liability arising from fabricated information. However, they have cited no case law indicating that a social worker would not have qualified immunity from liability arising from the failure to include information. According to the Humphreys, Sapp's failure to include the information regarding M.H.'s eye exam amounted to bad faith, thus negating Sapp's entitlement to qualified immunity.

[I]n the context of qualified official immunity, "bad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

Yanero, 65 S.W.3d at 523.

The Humphreys have put forth no evidence, other than speculation, that Sapp acted willfully, maliciously, with a corrupt motive, or with intent to harm them. Therefore, Sapp's failure to include exculpatory evidence in her affidavit does not amount to bad faith and does not preclude the defense of qualified immunity.

The Humphreys' third argument is that Sapp was acting in a ministerial, not discretionary capacity, when she completed the affidavit. According to the

Humphreys, "Sapp had no discretion in whether to truthfully advise the dependency court of the medical proof in the case."

Completing an affidavit is a two-step process. First, the affiant must decide what information to put in the affidavit. Because that is a matter of judgment, it is a discretionary act. Second, the affiant must truthfully set forth the information she deems necessary. Being truthful is not a matter of judgment; therefore, it is a ministerial act.

As we previously noted, the information Sapp put in the affidavit was truthful. Therefore, Sapp complied with the ministerial portion of the process. Where Sapp fell short, if she fell short, was in deciding what proof to include in the affidavit. That is a discretionary act and, absent bad faith, Sapp is entitled to qualified immunity.

Sapp argues that she is also entitled to absolute and statutory immunity and that the Humphreys' various causes of action are not viable. Because we have found that Sapp is entitled to qualified immunity, we need not address these arguments.

CONCLUSION

Based on the record before us, we hold that the circuit court correctly determined that Sapp did not act in bad faith and that she is entitled to qualified immunity. Therefore, we affirm the court's summary judgment.

ALL CONCUR.

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