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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-000537-MR

SHARON ADAMS, INDIVIDUALLY
AND AS NEXT FRIEND OF AUSTIN HERALD — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 09-CI-00480

MELANIE DAWSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO AND WINE,[1] JUDGES.

STUMBO, JUDGE: Sharon Adams, individually and as next friend of Austin Herald appeals from an order granting summary judgment for Melanie Dawson. This is a personal injury case where Herald was injured while at school. Ms. Dawson was Herald's teacher. Adams argues that summary judgment should not

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

have been granted. We find Ms. Dawson was protected by qualified official immunity; therefore, summary judgment was appropriate.

During a math class taught by Ms. Dawson, Herald, a high school student, was injured when another student shot him in the left eye with a makeshift dart. When this occurred, Ms. Dawson had assigned the students to do an in-class worksheet. When each student would complete the worksheet, he or she was to go to Ms. Dawson in order for her to check the work, essentially having some one-on-one time with each student. This sometimes involved Ms. Dawson having to turn her back to the class and face the blackboard. The student who shot Herald with the dart testified during his deposition that Ms. Dawson's back was turned when he shot the dart. The incident was not reported to Ms. Dawson and she did not learn about it until the next day. This suit was filed around one year later.

After written discovery and depositions of the parties were taken, Ms. Dawson filed a motion for summary judgment. She argued that she was entitled to qualified official immunity and that the injury was unforeseeable. The trial court granted the motion, but did not give its reason for doing so. This appeal 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).

> [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.

*Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (citations omitted).

> 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.

*James v. Wilson*, 95 S.W.3d 875, 905 (Ky. App. 2002).

Whether someone is protected by official immunity is a question of law. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). 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).

Adams argues that Ms. Dawson's actions were ministerial and relies on two cases. Those are *Yanero v. Davis*, *supra*, 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 v. Nelson*.

> 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).

We find that Ms. Dawson is entitled to summary judgment as a matter of law. The supervision of students is a discretionary act. *Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky. 2011); *James v. Wilson*, *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). *See also Rowan County v. Sloas*, *supra* (where the supervision of prisoners during a work release program was held to be discretionary); *Haney v. Monsky*, *supra* (where the supervision of children during a camp hike was held to be discretionary).

In the case at hand, Ms. Dawson's supervision of her students during class required more discretionary actions than requiring a student to wear a helmet during batting practice, as in *Yanero*. In addition, Ms. Dawson did not fail to supervise her class, as was the case in *Williams*; she merely had her back turned while working with an individual student.

> It 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.

Since Adams relies solely on the ministerial versus discretionary aspect of qualified official immunity, there is no argument that Ms. Dawson's actions were done in bad faith or outside the scope of her employment. Even if these arguments had been made, we would find that Ms. Dawson's discretionary actions were in good faith and within the scope of her employment.

Based on the foregoing, we hold that the trial court did not err in granting Ms. Dawson summary judgment because she was entitled to it as a matter of law.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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