

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000530-MR

EMILY OLIVER, by and through her
Guardian, PATRICIA OLIVER

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 10-CI-00334

TODD McDANIEL; LISA BAKER;
RONNIE MATHIS; AND
REUBEN BENNETT

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, Chief Judge; COMBS and STUMBO, JUDGES.

COMBS, JUDGE: Emily Oliver, by and through her guardian, Patricia Oliver (Oliver), appeals the order of the Clay Circuit Court granting summary judgment to appellees Lisa Baker, Todd McDaniel, and Ronnie Mathis. Oliver also appeals the

order that dismissed her claims against Reuben Bennett. After our review, we vacate the orders and remand.

In 2009, Emily, five years of age, was a student at Hacker Elementary. She suffered from a hearing disability which gravely affected her speech. The parties do not dispute that sometime between August 5, 2009, and November 2, 2009, Emily was sexually assaulted by some older boys who were also Hacker Elementary students. The assault occurred on the school bus. However, the parties do dispute the details of the abuse and whether it happened once or several times. Other contested facts will be noted in the course of our analysis.

Patricia learned of the abuse on November 2, 2009. She immediately notified law enforcement¹ and McDaniel, who is the principal of Hacker Elementary. McDaniel promptly initiated an investigation and interviewed several students who had been on the bus. Oliver also notified the Clay County bus-driver trainer, Carol Roberts, and Bennett, the bus driver.

Some of the children whom McDaniel interviewed related that a woman had been driving the bus when the incident (or one of the incidents) occurred. When school officials reviewed the driver records, they determined that the only day on which a woman had driven that particular bus was October 21, 2009; the substitute driver was appellee Lisa Baker. Some of the children also told McDaniel that the incident or incidents occurred when Bennett was driving the bus. Some stated that they had reported the behavior to Bennett.

¹ The case resulted in juvenile proceedings which are not part of the record before us.

As a result of the investigation, Bennett was assigned to a different bus route. Emily and her siblings eventually enrolled in a different elementary school in Clay County. On August 10, 2010, Oliver filed a complaint alleging that McDaniel (the principal) and Baker (the substitute driver) had acted negligently in allowing the assault on Emily to occur on a school bus. On May 6, 2011, Oliver filed an amended complaint which added as defendants Mathis (the Clay County Schools transportation manager and transportation area coordinator) and Bennett (the regular bus driver) as defendants.

Bennett filed a motion to dismiss the claims against him. McDaniel, Baker, and Mathis filed a motion for summary judgment. A hearing on the motions was held on December 1, 2011. The court granted both motions on February 24, 2012. This appeal follows.

We first address the order dismissing Bennett. His motion to dismiss alleged failure to state a claim pursuant to Kentucky Rule[s] of Civil Procedure (CR) 12.02. A motion to dismiss based on the failure to state a claim should be granted only if “it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When the trial court considers evidence outside the pleadings, the motion is treated as a motion for summary judgment. *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995). Although the trial court did not provide any written findings for its order dismissing Bennett, the two motions involving all

four defendants were heard at the same hearing. The court considered the same discovery for both motions. Therefore, we shall analyze both the motion to dismiss and the motion for summary judgment according to the standard of review governing summary judgments.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is to be applied cautiously because it “takes the case away from the trier of fact before the evidence is actually heard.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists and “should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy.” *Id.* It is indeed a stringent standard.

The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to overcome a motion for summary judgment, the non-moving party must present “at least some affirmative evidence showing the existence of a genuine issue of material fact.” *Id.* See also CR 56.03. On appeal, the standard of review which we employ 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Further, because summary judgments do not involve fact finding, we undertake our review

de novo. Pinkston v. Audubon Area Community Services, Inc., 210 S.W.2d 188, 189 (Ky. App. 2006).

The trial court granted summary judgment to Baker, Mathis, and McDaniel based on its finding that they were entitled to qualified immunity. The doctrine of immunity is “a bedrock component” of our law. *Caneyville Volunteer Fire Dep’t v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009). Sovereign immunity allows the “state, legislators, prosecutors, judges, and others doing the essential work of the state” an immunity from fear of suit. *Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007).

School boards and their employees are not entitled to sovereign immunity; however, as agencies of the state, it is settled law that they enjoy governmental immunity. *James v. Wilson*, 95 S.W.3d 875, 903 (Ky. App. 2002). Governmental immunity is granted to state agencies in their performance of governmental functions. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). The doctrine arises from the reasoning that it is inappropriate for courts to:

pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political, or economic policy. Put another way, “it is not a tort for government to govern.”

Yanero, supra (quoting *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956,

979, 97 L.Ed. 1427 (1953)). When employees of governmental agencies are sued in their *individual* capacities, they may enjoy a qualified official immunity. *Bolin v. Davis*, 283 S.W.3d 752, 757 (Ky. App. 2008).

Qualified official immunity shields public officers or employees from liability for:

the negligent performance . . . 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 at 522. However, public officers and employees are not entitled to qualified immunity if they have negligently performed a ministerial act; *i.e.*, a duty that is “absolute, certain, and imperative[.]” *Id.* Thus, the distinction between discretionary *versus* ministerial as to the nature of duties is crucial and pivotal to the entitlement of a governmental employer to claim qualified immunity. That distinction must be analyzed and established on the particular facts of every case.

Oliver argues that prior to the incident, Bennett, Baker, McDaniel, and Mathis each failed to follow procedures that would have prevented the incident from occurring. We note that the trial court did not address these claims asserted by Oliver; instead, it focused on the responses of McDaniel and Mathis and on issues such as causation and damages. We agree with Oliver that these claims are essential to the issue of qualified immunity to a negligence claim. Therefore, we have carefully examined the law and the record. Again, the court did not give its

reasons for dismissing the claims against Bennett. However, in his motion to dismiss, he also asserted the defense of qualified immunity. Thus, we must include Bennett in our immunity analysis.

The General Assembly has instructed school boards to implement policies that define the duties of employees and the rules of conduct for students. Kentucky Revised Statute[s] (KRS) 160.290(2). Additionally, teachers and administrators are to “hold pupils to a strict account for the conduct . . . on the way to and from school[.]” KRS 161.180. In response to these requirements, the Clay County Board of Education has adopted the Student Code of Acceptable Behavior, which includes employee guidelines as well. Employees of the board of education are also subject to the duties that are detailed in the Local District Classification Plan.

We will address immunity as it relates to the bus drivers, Baker and Bennett. As to Baker, the trial court granted summary judgment because it believed that no genuine material issue of fact existed. The trial court based its summary judgment on a surveillance video from her bus. It found that the video conclusively proved that nothing sinister or irregular had occurred on Baker’s bus. We also have reviewed the same video, and we cannot reach the same conclusion as did the trial court.

The video does not include audio, and it is not very clear. Only the first few seats are visible. All accounts of the assault were consistent that the assaults occurred in the back of the bus. Baker testified that Emily sat toward the back. At times, portions of the bus were completely obscured by sun glare.

Oliver viewed the video during her deposition and testified that it was difficult for her to identify Emily – her own daughter. She stated that Emily “disappeared” after getting on the bus and then later appeared to move to the back. There was also testimony that a student tried to tell Baker that the assault was occurring and that Baker told the student to sit down and be quiet. The conduct that occurred on the bus remains a question of material fact clearly precluding entry of ordinary summary judgment for Baker.

In order to determine whether Baker and Bennett as bus drivers are entitled to qualified immunity, we must examine whether they breached duties imposed by the policies and procedures adopted by the Clay County Board of Education. The local district classification plan instructs bus drivers to “[m]aintain order and discipline among students on bus following District policies and procedures regarding disciplining of students and contact with school officials, parents and the public[.]” Chapter 7 of the Student Code of Acceptable Behavior prohibits students from moving around the bus and from engaging in vulgar behavior. It also places an *affirmative duty* upon the bus driver to report violations of the conduct code to the principal.

There is some question of fact concerning Bennett’s control of the bus. McDaniel testified that he repeatedly received complaints about Bennett’s inability to control the students and to maintain order. Bennett himself candidly testified that he had a difficult time with the students on the bus. He testified that he knew that Emily had been upset for several days but that he did not investigate why.

Carol Roberts, the bus-driver trainer, testified that Bennett's training dictated that he investigate Emily's distress and that he should have done so. Some of the students reported that they told Bennett that boys were "bothering" Emily and that his only response was that he would "get them tomorrow" -- instead of undertaking an inquiry immediately. Under these facts, it is a question of fact whether Bennett failed to perform ministerial duties resulting in harm to Emily. If so, Bennett could not claim the shield of immunity. The video shows students moving about Baker's bus, and, as mentioned before, there was some testimony that a student had reported an assault on Emily to Baker. Therefore, we hold that the court erred in dismissing the claims against Bennett and Baker on the grounds of immunity.

Oliver also contends that Principal McDaniel breached a ministerial duty by allowing the apparent ringleader of the perpetrating students to be on the bus. The record includes the school bus regulations that were in effect in 2009. The chapter begins with the following statement:

Should any pupil persist in violating any of these regulations, ***it shall be the duty*** of the driver to notify the principal and after due warning has been given the pupil, the principal ***shall then forbid*** such disobedient pupil the privilege of riding any school bus until permission to ride again has been given by the Board of Education.
(Emphasis added.)

The policy is mandatory. The regulatory language unequivocally imposes a ministerial duty upon the principal. While promulgation of the regulations is discretionary, their enforcement is ministerial. *See Yanero, supra*. There is no allowance for any exercise of discretion. Principal McDaniel testified that he had

previously suspended the offending student from riding the bus. He also testified that he had not sought the permission of the Board of Education before allowing the student to return to the bus. Therefore, by his own admission, McDaniel neglected to perform a ministerial act, and qualified immunity is not available to him. Oliver's allegation supports her claim that McDaniel contributed to the occurrence of the assault on Emily by improperly permitting the student perpetrator to be present on the bus. Therefore, the trial court erred in granting summary judgment to McDaniel.

Last, we turn to the claims against Mathis. Mathis is the Transportation Manager and Transportation Area Coordinator for Clay County Public Schools. According to the Local District Classification Plan, his job responsibilities include the duty to "resolve student transportation problems with parents, principals and other school administrators." He also is in charge of scheduling and assigning work, disciplining personnel, and recommending termination of personnel. Oliver alleges that Mathis was aware that students chronically misbehaved on Bennett's bus to such an extent that Bennett should not have been driving that particular bus. Mathis acknowledged in his testimony that he had received many complaints about Bennett. Additionally, Bennett testified that he had contacted "the garage" (Mathis and the bus-driver trainer) for a monitor several times. He wanted a monitor because the students on his bus were not well-behaved. Mathis testified that he did not remember receiving such a request. Therefore, another issue of fact remains.

According to the school policy, Mathis had the duty to resolve issues with student transportation. Bennett testified that he reported an issue – needing a monitor – that was not resolved. There is enough evidence to support Oliver’s claim that Mathis breached a ministerial duty. Therefore, summary judgment based on qualified immunity was premature.

Our review has been strictly limited to the issues of qualified immunity. It appears that the bus drivers, the principal, and the transportation manager were aware of student conduct problems on the bus route at issue. Questions of fact remain as to whether they breached ministerial duties and whether those potential breaches contributed to the assault on Emily. Discovery had not been completed at the time of this appeal. While we are remanding this case to the trial court for further proceedings, we specifically refrain from comment as to the factual merits of the case; *i.e.*, causation and damages.

We vacate the orders of the Clay Circuit Court and remand for further proceedings.

ALL CONCUR.

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