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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001502-MR

C.A., WHOSE INTEREST IS REPRESENTED
BY HER PARENTS G.A. AND P.A. APPELLANTS

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 08-CI-00221

DARREN SPARKMAN; TERRY WHITT;
DIANNE PHIPPS; AND TINA ADAMS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: C.A. (child) (whose interest is represented by her parents G.A. (father) and P.A. (mother)) (the family) appeals the grant of summary judgment to Darren Sparkman, Terry Whitt, Dianne Phipps and Tina Adams (the

school personnel) on the basis of qualified immunity, justification and failure to state a claim for assault and battery, and intentional infliction of emotional distress.

Child has severe disabilities and an I.Q. of forty-two. During the 2005-2006 school year, she was a student at Morgan County Middle School and primarily received services in the resource room. At the beginning of the school year, child's parents received a form encouraging them to read the section of the Morgan County Schools' Code of Acceptable Behavior and Discipline (the Code) relating to corporal punishment and determine whether to grant or deny the school permission to spank their child if other disciplinary measures failed. Mother filled out the portion of the form giving the school permission to spank child.

On May 18, 2006, child was emotionally out of control. She had torn her clothes, exhibited self-injuring behavior and attempted to hit other students. Her resource teacher, Adams, was not successful in controlling child's behaviors. Adams called mother and attempted to reach father to inform them of the situation and determine what additional measures should be taken to calm child down and correct her behavior.

Normally, when child was acting out, mother or father would go to her school and talk with her. However, on this occasion, mother could not come to the school due to a work commitment and father could not be reached. Mother talked with child on the phone and was unsuccessful in calming her down. Mother then spoke to Assistant Principal Whitt and asked "Could you spank her?" Assistant Principal Whitt responded that he would inform Principal Sparkman.

After this phone conversation ended, mother was able to contact father and told him what occurred.

After reviewing the situation, Principal Sparkman determined a paddling was appropriate. Principal Sparkman administered the paddling and was assisted by Adams and Assistant Principal Whitt, who held down child's arms while she was bent over a desk to prevent her hands from being hit with the paddle. Another teacher, Phipps, observed.

Principal Sparkman hit child's clothed bottom three times with a wooden paddle, as was his standard practice when administering this type of discipline. After the first swat, child attempted to get away. There are conflicting reports as to whether she retreated to another area of the room or fell to her knees, but it is undisputed she was returned to the desk for additional swats. During the paddling, child was screaming and crying.

After the paddling was complete, father arrived at the school. Child told him her bottom hurt. He then examined child's bottom and found child had a blood red whelp across her bottom, raised spots and a deep bruise. Father took child to mother to show her the marks on child. Father, who is employed by the Cabinet for Health and Family Services (the Cabinet), then took child to a Cabinet office.

No medical treatment was sought for child the day of the incident. Instead, the family took child to visit a nurse practitioner several days later upon the recommendation of the Cabinet.

Following two investigations, one by the local Cabinet office and another by an independent Cabinet office, the Cabinet determined Principal Sparkman physically abused child but Adams had not committed any violation. The deposition testimony of Cabinet employees is in agreement that child suffered bruising. The matter was referred to the grand jury, which declined to indict Principal Sparkman.

The family filed suit in federal district court raising a federal claim pursuant to 42 United States Code (U.S.C.) § 1983 that child's substantive due process rights were violated and stated claims for assault, battery and intentional infliction of emotional distress. The court dismissed the § 1983 claim, determining the family could not establish a substantive due process violation under the "shocks the conscience" test, which required: (1) a severe injury; (2) use of force "disproportionate to the need presented[;]" and (3) that the punishment was "inspired by malice or sadism rather than a merely careless or unwise excess of zeal[.]" *C.A. ex rel. G.A. v. Morgan County Board of Educ*., 577 F.Supp.2d 886, 890-94 (E.D. Ky. 2008) (quoting *Ellis ex. rel. Pedergrass v. Cleveland Mun. Sch. Dist*., 455 F.3d 690, 700 (6th Cir. 2006)). After the dismissal of the § 1983 claim, the federal court declined to exercise pendant jurisdiction over the family's state claims.

The family then filed an action in state court against the school personnel claiming negligent retention, assault and battery, and intentional infliction of emotional distress. The family argued the school personnel abused

child by assisting Principal Sparkman in administering corporal punishment that was excessive and caused physical injury, unnecessary pain and humiliation, and emotional injury.

The school personnel moved for summary judgment claiming qualified official immunity in Principal Sparkman's decision to paddle and administration of the paddling. Additionally, they claimed the paddling as administered was proper and within the scope of the consent granted by mother. The family argued qualified immunity was not available because Principal Sparkman had no discretion to paddle in an abusive manner and exceeded the scope of his ministerial authority to discipline and the scope of mother's consent. The circuit court orally granted the motion. The family filed a motion to alter, amend or vacate this ruling, which was denied in the written order granting the motion for summary judgment.

The circuit court carefully examined all the evidence regarding child's injury, including the federal court's findings and the deposition testimony of father and mother, before making extensive factual findings. Considering this evidence in the most favorable terms to the family, it determined as follows:

> [O]ther than redness and/or markings that were present after the paddling, the bruising was the only injury resulting from the paddling. There has been no evidence of permanent injury or disfigurement or of any prolonged impairment of health or of the function of a bodily organ. While it is unfortunate that bruising occurred, the fact that bruising occurs in administration of corporal punishment does not automatically equate to a violation

> of the standard established under Kentucky law or to a violation of the rights of the student.

The circuit court determined there could not be any liability to the school personnel under qualified official immunity because Principal Sparkman exercised discretion in deciding to paddle child, and mother requested and authorized the paddling. The circuit court also determined liability was precluded based on a variety of other grounds including the family could not state a claim for assault and battery or intentional infliction of emotional distress. Because we determine that resolution of the qualified immunity issue and failure to state a claim are dispositive, we do not reach the circuit court's alternative grounds for granting summary judgment.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004) (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 482 (Ky. 1991)).

"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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

We apply this standard to determine whether summary judgment was appropriately granted on the basis of qualified immunity. "Qualified official immunity . . . is intended to protect governmental officers or employees from liability for good faith judgment calls in a legally uncertain environment." *Autry v. W. Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007).

> 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. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed.

Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001) (internal 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 that requires 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. Routine duties are ministerial in nature. *Marson v. Thomason*, 438 S.W.3d 292, 301 (Ky. 2014); *James v. Wilson*, 95 S.W.3d 875, 906 (Ky.App. 2002).

Once a duty is established as ministerial, the only remaining question is whether the employee complied with such a duty or not. *Mattingly v. Mitchell*, 425 S.W.3d 85, 90 (Ky.App. 2013). If a ministerial act is properly performed, there simply is no tort. *Marson*, 438 S.W.3d at 297; *Autry*, 219 S.W.3d at 717. "Of course, whether a ministerial act was performed properly, i.e., non-negligently, is a separate question from whether the act is ministerial, and is usually reserved for a jury." *Marson*, 438 S.W.3d at 297.

> The apparent basis for this distinction [between discretionary and ministerial acts] is that a failure to provide immunity for discretionary acts would jeopardize the free operation of government, while, on the other hand, granting immunity for ministerial duties would deny private citizens the right to compensation when they suffer loss due to the failure of public servants to competently perform their duties.

James, 95 S.W.3d at 906.

> In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. 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, 240-241 (Ky. 2010) (footnote omitted). *See Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 477-479 (Ky. 2006) (reviewing cases and categorizing them).

The analysis of whether an act is discretionary or ministerial is influenced by the source of any duty to act in a certain manner. A statute, regulation or even a common law duty "could render an act or function essentially ministerial . . . [if] the alleged action or inaction is an identifiable deviation from an 'absolute, certain, and imperative' obligation[.]" *Haney*, 311 S.W.3d at 245 (quoting *Yanero,* 65 S.W.3d at 522).

A statute's use of the mandatory language "shall" indicates the required duty was ministerial and "imports the absolute necessity of carrying out these legal conditions according to their tenor" even where "some discretion must be resorted to as regards the means to be employed in the execution of the acts." *Upchurch v. Clinton Cnty.*, 330 S.W.2d 428, 430 (Ky. 1959). *See Wales v. Pullen*, 390 S.W.3d 160, 166 (Ky.App. 2012). In *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145, 150-151 (Ky. 2003), the Court determined public school faculty could be liable for negligent supervision where they disobeyed mandatory rules to supervise students and enforce student rules of conduct as given by statute and the local board of education's code of conduct, and the evidence was their supervision violated their ministerial duty because it was either insufficient or nonexistent. Where there is a mandatory rule that must be followed, a public employee's actions relating to that rule are ministerial even if the employee retains discretion

in how to follow the rule. *Marson*, 438 S.W.3d at 301-02. *But see Haney*, 311 S.W.3d at 242-43 (determining the enforcement of a directive to keep blindfolded children in the middle of the path was not ministerial because there were numerous options as to how to enforce the rule).

The actions that school personnel may take to discipline students are strictly constrained by statutes, regulations and school district rules, which direct what schools are required to do, what they may do and what they cannot do. Local boards of education are required to address student discipline and safety issues. Kentucky Revised Statutes (KRS) 158.440(2); KRS 158.445(3)(4); KRS 160.290(1); KRS 161.180(1). Boards fulfill these mandates in part by adopting codes "of acceptable behavior and discipline" that are "designed to ensure the safety of all students[.]" KRS 158.148(4); 704 Kentucky Administrative Regulations (KAR) 7:160 § 2(1)(b).

School personnel must "hold pupils to a strict account for their conduct on school premises[.]" KRS 161.180(1). They also have an affirmative duty "to take all reasonable steps to prevent foreseeable harm to [their] students." *Williams*, 113 S.W.3d at 148. *See Yanero*, 65 S.W.3d at 529; *Nelson v. Turner*, 256 S.W.3d 37, 41-42 (Ky.App. 2008). School personnel, as persons in a "position of authority," KRS 532.045(1)(a), are prohibited from abusing children in their care. KRS 600.020(1)(a)1, 2. They cannot use adversive behavioral interventions that would cause physical or emotional trauma. 704 KAR 7:160 § 1(1), § 3(2)(c).

The Kentucky Department of Education instructs local boards of education through its Student Discipline Guidelines, April 2003 (the Guidelines)[1] that their codes should include classroom management techniques, expected behavior of students and consequences for failing to obey the standards. The Guidelines authorize districts to adopt codes which include the use of corporal punishment.

The Code adopted by the Morgan County Schools Board of Education is designed to comply with the Guidelines and fulfill all statutory and administrative requirements. The Code authorizes various disciplinary measures including corporal punishment, which it defines as "the deliberate infliction of physical pain by any means upon the whole or any part of a student's body as a punishment or penalty for misbehavior." Parents can opt out of corporal punishment being used on their child through a written request. The Code strictly limits when and how corporal punishment shall be used: A certified staff member may only administer corporal punishment by "striking the student's buttocks with a paddle" in the presence of another staff member but not in front of other students. Paddling is a last resort after other disciplinary methods have been found ineffective and after informing the student of the reason for the punishment. In administering corporal punishment, staff members are permitted to use physical

[1] The Kentucky Department of Education is responsible for developing statewide student discipline guidelines for distribution to all school districts which "shall contain broad principles and legal requirements to guide local districts in developing their own discipline code[.]" KRS 158.148(1), (3). This duty is fulfilled in 704 KAR 7:050 which incorporates by reference the "Student Discipline Guidelines, April 2003."

restraint to protect the student from physical injury. A report must be filed after corporal punishment is administered, documenting compliance with these and other requirements.

The Code specifically excludes excessive corporal punishment providing: "Corporal punishment shall not be excessive or unreasonable. Among the factors to be considered shall be the age, size, and health of the student."

Long before our present day doctrine of qualified immunity provided a clear distinction between ministerial and discretionary duties, civil liability was imposed on school personnel for civil assault of battery after inflicting excessive or unreasonable punishment while disciplining a student. In *Hardy v. James*, 5 Ky.Op. 36 (1872), the Court affirmed a civil judgment against a teacher holding that "the authority of the teacher to hold his pupil 'to a strict accountability in school' for disorderly behavior, did not, in our opinion, justify him in assaulting and beating the pupil on the playground[.]" The Court in *Carr v. Wright*, 423 S.W.2d 521, 522 (Ky. 1968), quoted 47 Am.Jur. 2d. *Schools* § 428 (2015) for the proposition that "[w]hile teachers are clothed with a discretionary authority with respect to the infliction of corporal punishment on their pupils, the punishment must be reasonable and confined within the bounds of moderation[.]" The Code incorporates this same premise.

We have no difficulty concluding that Principal Sparkman's decision to paddle child was discretionary because it "inherently required conscious evaluation of alternatives, personal reflection and significant judgment." *James*, 95 S.W.3d at

910. Discussing a teacher's responsibility to investigate and respond to inappropriate conduct between children, in *Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky. 2011), the Kentucky Supreme Court opined as follows:

> It is imperative that teachers maintain the discretion to appropriately discipline children. . . . To do this, they must have appropriate leeway to do so, to investigate complaints . . . to form conclusions . . . as to what actually happened, and ultimately to determine an appropriate course of action[.]

This reasoning applies equally to a principal determining whether to use corporal punishment in response to student misconduct.

Principal Sparkman had a variety of discipline options available to resolve child's behavior and also could respond with non-disciplinary measures. Because other disciplinary measures failed to correct child's behavior, the Code provided that paddling was one option Principal Sparkman could consider. While the family now insists that he should have contacted the school counselor and sought mental health assistance for child, he was not obligated to choose this option. Therefore, his discretionary decision to paddle child was protected by qualified immunity. *Yanero*, 65 S.W.3d at 522.

While Principal Sparkman's decision to use corporal punishment was discretionary, the manner in which he administered it was ministerial because his actions were strictly constrained by the Code. The Code provides a specific methodology for how corporal punishment must be administered, including informing the student why she is receiving the paddling, who must and must not be

present, and what must happen before and after the paddling. Therefore, any limited discretion Principal Sparkman had in administering the paddling itself, such as how many times he could strike child with the paddle, does not change the overall ministerial nature of the act, given these clear and mandatory directives. *See Upchurch*, 330 S.W.2d at 430; *Williams*, 113 S.W.3d at 151.

Because we have determined the act was ministerial and the school personnel presented evidence that Principal Sparkman's actions were appropriate, the only remaining question is whether the family has presented sufficient evidence to raise a jury issue as to whether excessive force was used. *See Hallahan*, 138 S.W.3d at 705; *Marson*, 438 S.W.3d at 297; *Autry*, 219 S.W.3d at 717.

The family's argument, that bruising automatically equals excessive force, is untenable. We do not discount that bruises could be caused by excessive force or unreasonable discipline, but the family has offered absolutely no evidence that the bruising at issue here was the result of either.

The family failed to present any evidence that the amount of force required to cause child's bruise was excessive. The family did not seek any immediate treatment for child or present any medical evidence that child suffered a physical or mental injury as a result of unreasonable or excessive force. Considering the undisputed evidence of the injury most favorably to the family, the temporary marks, redness and bruising that resulted from Principal Sparkman's spanking child is simply insufficient, as a matter of law, to establish that excessive force was used. Therefore, the family's substantive claims fail.

This decision does not authorize teachers and administrators to inflict corporal punishment in any manner they wish. Qualified immunity will only protect school personnel that properly exercise their discretion to punish within mandated bounds. If factual issues are presented that corporal punishment imposed for disciplinary purposes is excessive or otherwise unreasonable, qualified immunity does not apply. *See, e.g., Spacek v. Charles*, 928 S.W.2d 88, 95 (Tex.App. 1996) ("allegations that a teacher restrained a child in a headlock and placed a weapon against his head, and that another teacher attempted to grab the student to hang him with an extension cord, undoubtedly raise a question of excessive force"); *Chrysinger v. Decatur*, 3 Ohio App.3d 286, 287, 445 N.E.2d 260, 261-262 (1982) (evidence that plaintiff who was paddled could not lie on his back for one week, had large and multiple bruises of dark color, as well as blisters, and was in such pain that he started crying after the second hit with a paddle presented a genuine issue of material fact as to the excessiveness or unreasonableness of the discipline inflicted); *Rupp v. Zinter*, 53 Montg. 173, 29 Pa.D.&C. 625, 628 (1937) (upholding a jury verdict holding teacher civilly liable for student's ruptured eardrum and permanent hearing loss resulting from disciplinary blow to his ear, explaining even if such harm was not intended, jury could determine teacher acted unreasonably in hitting student hard in the ear rather than administering a spanking). *See also Banks v. Fritsch*, 39 S.W.3d 474, 476-79 (Ky.App. 2001) (teacher chained a truant student to a tree but did not claim action authorized as within the scope of his authority as a teacher).

Accordingly, we affirm the Morgan Circuit Court's grant of summary judgment on the basis of qualified immunity.

ALL CONCUR.

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