

RENDERED: MAY 8, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000028-MR

ADAIR COUNTY BOARD OF EDUCATION;
FLOYD BURTON, Individually and as a member of
of the Adair County Board of Education;
MARSHA WALKER, Individually and as a member of
the Adair County Board of Education;
MIKE HARRIS, Individually and as a member of
the Adair County Board of Education;
JOSEPH PAYNE, Individually and as a member of
the Adair County Board of Education;
REBECCA TURNER, Individually and as a member of
the Adair County Board of Education

APPELLANTS

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 11-CI-00216

PATRICK BACK

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: The Adair County School Board and its members appeal the order of the Adair Circuit Court which denied their motion for summary judgment. After our review, we vacate and remand.

On December 27, 2010, during Christmas vacation, the middle school basketball team played a home game despite snow and icy weather conditions. Patrick Back, the appellee, attended the game. As he was leaving, he slipped on ice in the parking lot. His fall resulted in a broken leg and torn ankle ligaments. He has suffered permanent problems from the injuries.

On August 31, 2011, Back filed a lawsuit against the Adair County Board of Education alleging negligence for improper maintenance of the parking lot. On March 27, 2012, Back filed an amended complaint naming each member of the Board, both individually and in his or her official capacities. The Board and its members filed a motion for summary judgment on August 8, 2012. On December 3, 2013, the trial court denied summary judgment. The Board and its members filed this appeal.

We first note that Kentucky Rule[s] of Civil Procedure (CR) 54.01 limits appealable judgments to final orders. Although a court's order overruling a motion to dismiss or denying a motion for summary judgment is not a final order, our Supreme Court has held that such an interlocutory order is nonetheless subject to appeal if immunity issues are involved. In *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009), The Supreme Court held "that an order denying a substantial claim of absolute immunity is immediately appealable even

in the absence of a final judgment. Therefore, in an order entered on April 11, 2014, this Court allowed the appeal to proceed but limited it to “whether the circuit court erred in denying their motion for summary judgment based on claims of 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). Immunity takes various forms depending on the actors, functions, and context. *Sovereign immunity* allows the “state, legislators, prosecutors, judges, and others doing the essential work of the state” immunity from fear of suit. *Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007). Although they are not entitled to sovereign immunity, state agencies enjoy *governmental immunity* in performing governmental functions. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). However, those agencies may be sued for the negligent performance of proprietary functions – that is, activities more akin to those of a private entrepreneur or of a business enterprise as distinguished from governmental or public duties. *Id.* at 527. *Prater*, 292 S.W.3d at 887, provides the following reasoning to serve as a means of distinguishing governmental (enjoying immunity) from proprietary (afforded no immunity) functions:

...[G]overnmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, *i.e.*, public acts integral in some way to state government. *Id.* The immunity does not extend, however, to agency acts which serve merely proprietary ends, *i.e.*, non-integral undertakings of a sort

private persons or businesses might engage in for profit.

Id. Under these rules, we have held that

[a] board of education is an agency of state government and is cloaked with governmental immunity; thus it can only be sued in a judicial court for damages caused by its tortious performance of a proprietary function, but not its tortious performance of a governmental function, unless the General Assembly has waived its immunity by statute.

The law is settled that school boards are entitled to governmental immunity.

James v. Wilson, 95 S.W.3d 875, 903 (Ky. App. 2002). Back contends that in this case, however, the Adair County School Board forfeited its entitlement to immunity because it was negligent in carrying out a proprietary function; *i.e.*, in allowing the basketball game to be held in spite of the inclement weather that resulted in the unsafe, icy condition of the parking lot.

Back argues that the basketball game was proprietary in nature because an admission fee was charged and concessions were sold. Thus, he contends that the activity sufficiently partook of the nature of private enterprise that it was deprived of its status as a governmental function. Our Supreme Court has addressed the proper characterization of interscholastic athletic events in *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003), holding that “[t]he conduct of interscholastic athletics is a *governmental* function of a board of education.” *Id.* at 168.

(Emphasis added). It continued its analysis as follows:

“[t]he fact that an admission fee was charged or that refreshments and event programs were sold . . . did not convert this event from a governmental function into a proprietary one.” *Id.* Therefore – regardless of its role in

the maintenance of the facilities – the Court held that Schwindel’s claims against the Board of Education were properly dismissed. *Id.* at 169.

The case before us falls squarely within the precedent of *Schwindel*. Thus, we must vacate the order denying summary judgment to the School Board.

Governmental immunity also extends to employees of an agency who are sued in their official capacity. *Autry, supra*. Therefore, Back’s complaint must be dismissed with respect to the members of the School Board in their *official capacity*.

The members of the School Board argue that they are also immune from being sued in their *individual capacities*. We agree. When employees of agencies are sued in their individual capacities, they are subject to *qualified official immunity*. *Bolin v. Davis*, 283 S.W.3d 752, 757 (Ky. App. 2008). Qualified official immunity prevents public officers or employees from being liable 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. . . . 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.

Yanero v. Davis, 65 S.W.3d at 522.

Back claims that supervision of parking lot maintenance and authorizing the conduct of school events on canceled school days are ministerial duties that are the

responsibility of the members of the School Board. Thus, he contends that because the duties are ministerial, they are not covered by immunity. However, the record contains no evidence that these duties are in any way the responsibility of the members of the School Board. Instead, it indicates that these are duties which belong to the Superintendent and principals. Thus, Back has not met the threshold requirement to overcome the official qualified immunity possessed by the School Board members and has erroneously attributed to them responsibility for duties that are not theirs. Therefore, the trial court should have granted them summary judgment based on their qualified official immunity.

We vacate the order of the Adair Circuit Court and remand for entry of an order granting summary judgment to the School Board and its members, both officially and individually.

ALL CONCUR.

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