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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001292-MR

NELSON COUNTY BOARD OF
EDUCATION; THE CLUBHOUSE,
A DAYCARE CENTER; ASHLEY JACKSON;
TAMMY GIRDLEY; KRISTEN HARRELL;
AND BRENDA HICKMAN — APPELLANTS

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 11-CI-00597

THOMAS NEWTON AND SARAH
WIMSATT, INDIVIDUALLY, AS
PARENTS, AND FOR AND ON
BEHALF AND AS THE NEXT
FRIEND OF BRANDON NEWTON — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND
REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Ashley Jackson and Tammy Girdley, childcare providers and instructional assistants employed by the Nelson County Board of Education; Brenda Hickman, childcare coordinator for the Nelson County Board of Education; and Kristin Harrell, director of The Clubhouse, a childcare facility operated by the Nelson County Board of Education, appeal from the decision of the Nelson Circuit Court that denied them summary judgment on the grounds that they are not entitled to qualified official immunity from negligence claims. The claims were asserted by Thomas Newton and Sarah Wimsatt, both individually and as next friends of Brandon Newton. Since the duties of the childcare providers were not discretionary in nature, those appellants were not entitled to claim the defense of qualified official immunity as a matter of law. Therefore, we hold that the trial court did not err by failing to grant their motion for summary judgment. As to Jackson and Girdley, we affirm that part of the order. However, since we conclude that Hickman and Harrell are entitled to qualified official immunity from the negligence claims asserted against them, we must vacate and remand that portion of the order pertaining to them.

During the summer of 2008, the Nelson County Board of Education operated a childcare and learning facility at Bloomfield Elementary School known as The Clubhouse Center. The facility was operated, supervised, and staffed by employees of the Nelson County Board of Education.

On Friday, June 6, 2008, The Clubhouse Center hosted a field day event scheduled from 9:00 a.m. until 3:00 p.m. Parents were reminded in writing

to send children to the school wearing sunscreen. They were also instructed to complete a "sunscreen authorization form." The facility advised that with this authorization and a labeled bottle of sunscreen, "[w]e will help your child reapply [sunscreen] if necessary."

Two-year-old Brandon Newton's mother, Sarah Wimsatt, did not apply sunscreen to Brandon on the morning of June 6, 2008, before dropping him off at the elementary school. But she did sign the authorization form and provided the facility with a bottle of sunscreen for him. Before taking the children outside, childcare providers Ashley Jackson and/or Tammy Girdley applied sunscreen to Brandon's face, neck, arms, and legs. The children played outside from 9:30 a.m. until nearly 11:30 a.m., when they were brought back inside to the school cafeteria for lunch. After lunch, Jackson and Girdley reapplied sunscreen to Brandon's face, neck, arms, and legs. The children were permitted to play outside again from approximately 1:00 p.m. until 3:30 p.m., when they were taken back inside and were prepared for their parents to arrive. On Sunday morning, Wimsatt took Brandon to the emergency room of the local hospital. Brandon had suffered a severe sunburn to his shoulders and upper back with first-degree and second-degree burning at his shoulders.

On July 29, 2011, Wimsatt and Brandon's father, Thomas Newton, filed an action against the Nelson County Board of Education; The Clubhouse; and the childcare providers, Ashley Jackson and Tammy Girdley. Wimsatt and Newton alleged that the Board of Education and others had failed to supervise and

train Jackson and Girdley and had failed to implement policies that would have adequately protected Brandon. They also alleged that Jackson and Girdley had failed to care adequately and properly for Brandon with the result that he had sustained lasting personal injury. The defendants answered and denied the allegations. They pleaded immunity as an affirmative defense.

On December 11, 2012, the Board of Education, The Clubhouse, and the childcare providers filed a motion for summary judgment. In response, Wimsatt and Newton effectively conceded that the Nelson County Board of Education and The Clubhouse were entitled to summary judgment on the basis of governmental immunity. However, they argued that the childcare providers had been sued in their individual capacities and were not entitled to the protection afforded by qualified official immunity since applying sunscreen to children was a ministerial function of their employment. By order entered June 12, 2013, the circuit court denied the motion with respect to Jackson and Girdley.

On October 8, 2013, Jackson and Girdley filed a second motion for summary judgment. The motion was supported by affidavits. In their affidavits, both Jackson and Girdley indicated that there were no established rules to follow in deciding whether the children could play outdoors; how long the children could remain outside; or when and how sunscreen should be applied to them. They explained that decisions about how and whether sunscreen would be applied to the children were made on a case-by-case basis since the circumstances differed with respect to each child and changed throughout the course of the day. They

contended that making decisions with respect to whether the children could play outside and whether enough sunscreen had been applied to a particular child were matters of discretionary authority. They again argued that they were protected from the claims asserted against them by qualified official immunity.

In response, Wimsatt and Newton argued that the childcare providers had access to a "weather chart" that indicated that Brandon should not have been permitted to play outside on the afternoon of June 6. They argued that someone had removed Brandon's shirt during the course of the afternoon and that the decision not to apply sunscreen to his back and shoulders was not a discretionary one. (Evidence of record indicates that Brandon reported that Girdley and Jackson told him that he could remove his shirt after it had gotten wet as a result of the afternoon's field day activities.)

In reply, Girdley and Jackson argued that the "weather chart" was -- at most -- a resource available to them. They contended that the Board of Education had never adopted or implemented a policy based upon the recommendations reflected in the chart. They reiterated that no policy governed their application of sunscreen and that they had made decisions in good faith with respect to the children's welfare during the field day event.

In an order entered on December 27, 2013, the trial court gave Brandon's parents 120 days to take discovery in support of their contention that the childcare providers had been negligently engaged in ministerial acts when Brandon was injured. Numerous depositions followed.

On November 19, 2014, the circuit court permitted Wimsatt and Newton to file an amended complaint. The complaint alleged that Kristen Harrell, director of The Clubhouse, and Brenda Hickman, the Nelson County Board of Education's childcare coordinator, failed properly to train and supervise Girdley and Jackson. Harrell and Hickman answered and denied the allegations against them.

On January 12, 2015, the childcare providers, Jackson and Girdley, joined now by Harrell and Hickman, renewed their motion for summary judgment. They argued that no evidence suggested that their actions on the day in question were anything but discretionary and that they were, consequently, immune from suit. Wimsatt and Newton countered and contended that they had demonstrated that the defendants were not entitled to qualified official immunity.

The Nelson Circuit Court denied the motion for summary judgment by order entered July 27, 2015. It concluded that "the act of applying sunscreen to young children . . . was not a judgment call" and observed that "Jackson has even testified that she considered the application of sunscreen to be mandatory." This appeal followed.

Summary judgment is appropriate where "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." CR[1] 56.03.

[1] Kentucky Rules of Civil Procedure.

In the context of qualified official immunity, "[s]ummary judgments play an especially important role" as the defense renders one immune not just from liability, but also from suit itself. *Rowan County v. Sloas*, 201 S.W.3d 469 at 474 (Ky. 2006)(citing *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Whether one is entitled to immunity is a question of law which is reviewed *de novo. Id.*

Kentucky's boards of education are agencies of state government. *Schweindel v. Meade Co.,* 113 S.W.3d 159 (Ky. 2003). When an employee of the state is sued in his or her individual capacity, that employee enjoys qualified official immunity from tort liability stemming from the performance of discretionary functions. *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001). The performance of ministerial functions is not protected by immunity, however. *Id.*

Discretionary acts include "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* at 522 (citing 63C Am. Jur. 2d § 322). Discretionary acts or functions necessarily require the exercise of reason in determining how or whether the act shall be done. Ministerial acts or functions include those that require "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,* 65 S.W.3d at 522 (citing *Franklin County v. Malone,* 957 S.W.2d 195, 201 (Ky. 1997)).

Wimsatt and Newton have argued that the childcare providers negligently permitted Brandon to participate in the afternoon's field day events in light of the outside temperature and that they negligently failed to apply the provided sunscreen to his back and shoulders. The issue is whether the childcare providers' care of Brandon involved primarily discretionary or ministerial functions.

Wimsatt and Newton argue that the "weather chart" in the classroom unambiguously governed whether children of a particular age could be permitted to participate in outdoor activities when outside temperatures rose to certain ranges. However, there is no copy of the weather chart in the record. Brenda Hickman testified by deposition that she had received the weather chart as a hand-out during a summer safety training session and that she had posted it at the Nelson County Board of Education's several childcare centers upon her return. She explained that the directives contained on the weather chart were supposed to be enforced by the childcare providers. According to Hickman, the chart indicated that children Brandon's age should **not have been permitted** to participate in outdoor activities on the afternoon of June 6 due to high temperatures.

In *Haney v. Monsky*, 311 S.W.3d 235, (Ky. 2010), the Supreme Court of Kentucky observed "that supervising the conduct of others is a duty often left to a large degree—and necessarily so—to the independent discretion and judgment of the individual supervisor." Supervising the safety of children's physical activities often involves anticipating the potential for danger caused by carelessness, unruly

behavior, and/or a multitude of other factors. Weighing the risks that are presented and devising methods to control or minimize potential hazards are often ongoing. However, tending to the safety of children as it relates to exposure to weather does not entail such uncertainty and unpredictability. The course of conduct of childcare providers in this regard is subject to direction and supervision. As a result, policies and guidelines concerning children's outdoor playtime are routinely devised and implemented by schools and childcare facilities. The need to exercise a measure of judgment and discretion is not required where these policies are properly implemented, and the duty to enforce such policies is clearly ministerial in nature.

Wimsatt and Newton contend that Hickman and Harrell failed to properly train and supervise Girdley and Jackson. Hickman was charged with coordinating the childcare providers working for the Nelson County Board of Education; Harrell was charged with training and supervising the childcare providers at The Clubhouse. The supervising, training, and coordinating of subordinates are activities that are inherently subjective in nature. Since these activities are entirely discretionary and there is no indication that Hickman and Harrell had undertaken them with a bad motive, they are protected by official immunity. Accordingly, Hickman and Harrell are entitled to summary judgment with respect to the claims against them.

We next consider the claims asserted against Jackson and Girdley. The trial court acknowledged that it struggled with the discretionary/ministerial

dichotomy – as does every court considering the issue of sovereign, governmental, or qualified official immunity. We, too, have wrestled with the claims asserted against them, and we are troubled by the spectre of a number of unanswered questions.

Where is the weather chart that seems to play such a pivotal role? The school board has not produced it – despite the extensive testimony of persons concerning its primacy in determining the responsibility of Jackson, Girdley, and other childcare providers in other childcare centers operated by the Nelson County Board of Education.

What about the sunscreen lotion? What brand was it? Was it possibly out of date and diminished in potency? It was furnished by Brandon's mother. Was she able to verify its suitability for the intended purpose?

Were other children allowed to play outside on the day that Brandon sustained his sunburn? If so, how often was sunscreen applied to them? What brand of sunscreen was utilized?

We are persuaded that these questions are merely representative of other queries that could be raised as to the facts surrounding the care of Brandon on the day in question. Therefore, under CR 56, the presence of material issues of fact validates the denial of summary judgment at this juncture with respect to Jackson and Girdley. Therefore, we affirm the circuit court in its denial of their motion for summary judgment and remand for additional proceedings.

In summary, we vacate the order denying the motion for summary judgment as to all appellants except Jackson and Girdley and remand for entry of an appropriate order. We affirm the denial of summary judgment as to Jackson and Girdley and remand for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark S. Fenzel
Louisville, Kentucky

BRIEF FOR APPELLEE:

John Douglas Hubbard
Bardstown, Kentucky