

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001585-MR

BECKY RICHARDSON

APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 14-CI-00582

TONYA QUEEN, INDIVIDUALLY
AND AS NEXT FRIEND AND
MOTHER OF D. B., A MINOR

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, JONES, AND VANMETER,¹ JUDGES.

VANMETER, JUDGE: Becky Richardson appeals from the Jessamine Circuit Court's order denying her motion for summary judgment. This interlocutory appeal is properly before this court to review Richardson's asserted claim of

¹ Judge Laurance B. VanMeter authored this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

qualified governmental/official immunity. *Breathitt County Bd. Of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). For the following reasons, we affirm.

I. Factual and Procedural Background.

This case arises out of an unfortunate and tragic incident during which D.B., the minor son of Plaintiff Tonya Queen, suffered a serious traumatic brain injury when he fell and landed on his head during a Fitness of Life (PhyEd, or P.E.) class at East Jessamine County High School. D.B. was a sophomore at the time. D.B. and several of his classmates were engaged in a half-court, pick-up game of basketball at one end of the gymnasium. Basketball was a sanctioned activity for the P.E. class. According to the record, D.B. has no recollection of his fall, but his classmates' accounts of how he was injured recollect that he jumped to block another player, and then fell and hit his head on the gym floor.

Richardson was a substitute teacher in D.B.'s P.E. class that day. The regular teacher prepared a syllabus and classroom instructions for Richardson, since the absence was planned. Richardson is a retired teacher and frequent substitute teacher in the district. She was the only teacher in the gym when D.B. was injured. She did not see him fall, but heard a noise as he hit the floor. She immediately went to him, and instructed other students to stay back and to alert the school administration of the incident.

Several school administrators responded to the gym immediately, including Principal Janet Granada, school nurse Lori Shepherd, and Assistant Principals John Lyons and Joe Matthews. None of these administrators were

present in the gym when the incident occurred. Lyons and Matthews helped lead students from the gym. Lyons notified Queen of the injury, and coordinated communication between her and the EMTs who responded to the school as to where to transport D.B. for emergency medical treatment. Granada stayed close to D.B. Assistant Superintendent Matthew Moore was notified of the incident, and he notified Superintendent Kathy Fields.

In the Complaint, Queen, individually and on D.B.'s behalf, sued Fields, Granada, Moore, and Richardson in their individual capacities, alleging that they were negligent in exercising a general duty to provide for the safety of D.B. while he was attending school, and that their negligence was a substantial factor in causing his injury. Queen also alleged that the defendants were negligent per se by failing to adhere to 702 KAR² 3:190.

The defendants filed a motion for summary judgment on behalf of each individual defendant in their individual capacity, claiming entitlement to qualified official immunity. The circuit court granted summary judgment in favor of all defendants except for Richardson. Richardson now appeals.

II. Standard of Review.

CR³ 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to

² Kentucky Administrative Regulations.

³ Kentucky Rules of Civil Procedure.

produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings; so a trial court’s grant of summary judgment is reviewed de novo. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

“In the context of qualified official immunity, summary judgments play an especially important role, as the defense renders one immune not just from liability, but also from the suit itself.” *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (internal quotations and citation omitted). Thus, our review is one of law, “focusing on whether the moving party, [Richardson], was entitled to the defense of qualified official immunity and, consequently, judgment as a matter of law.” *Id.* (citations omitted).

III. Analysis.

Under Kentucky law, Richardson is entitled to qualified official immunity if she can demonstrate that her conduct giving rise to the allegations against her involved acts of discretion and judgment, taken in good faith, and within the scope of her employment as a public school teacher. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). To elaborate,

when 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. 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. Qualified official immunity is an affirmative defense that must be specifically pled.

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. (internal citations omitted).

The issue presented in this case is whether Richardson’s act of supervising students constitutes a discretionary or ministerial function. If discretionary, then Richardson is entitled to qualified official immunity, which means the claims against her are barred and the suit should be dismissed entirely. Discretionary functions are “those governmental acts that are not prescribed, but are done, involving policy-making or operational decision-making, without clear directive.” *Marson v. Thomason*, 438 S.W.3d 292, 302 (Ky. 2014). Public employees are not afforded immunity for a ministerial function, which is described as an act “that requires only obedience to the orders of others, or when an 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.

The Kentucky Supreme Court has repeatedly held that “a teacher’s duty to supervise students is ministerial, as it requires enforcement of known rules.” *Marson*, 438 S.W.3d at 292. While Richardson was substitute teaching on the day of D.B.’s injury, the governmental act she was charged with performing included teaching and supervising the students in the class. This act is a ministerial function. Even though this ministerial function might permit some decision-making during the process, Richardson did not have a decision as to whether or not she would teach and supervise the students during class. When she accepted the job as substitute teacher, she agreed to fulfill those responsibilities as part of her job duties. Indeed, in her deposition testimony, Richardson acknowledged that according to the Jessamine County schools job description for teachers, as a substitute teacher, her job duties included implementing the syllabus plan created by the regular teacher, supervising the students, and taking all necessary and reasonable precautions to protect the students.

In *Marson*, the Kentucky Supreme Court addressed this issue at bar directly:

There is certainly the temptation to say that a person such as a teacher acts in a discretionary manner, so that he may have immunity from suit, when the ministerial act he is required to do—here supervision of bus duty—can have unexpected events occur. One might

reason that it is impossible for a teacher to fully perform the ministerial duty of supervision of students because there are so many things involved in that process that are beyond what the teacher can control. For example, if a teacher is working with a student on one side of the room, and on the other side of the room a student stabs his desk mate with a pencil, it could rightfully be argued that no teacher could prevent all harm from coming to the children in his care. But that does not mean his supervision duty was discretionary, such that he would have immunity from suit.

Instead, the ministerial duty of supervision must be viewed through the lens of negligence. It is possible that some acts that happen when a teacher is supervising are outside the scope of what his supervision requires, and he will be entitled to a summary judgment as a matter of law. Or, as with the pencil stabbing, the question may be whether the teacher was negligent in his supervision, and then the reasonableness of the teacher's actions will be taken into account. Certainly, there are *defenses* to the claim that a teacher (or any official) has breached his ministerial duty. But that does not mean such a claim is barred by immunity. The nature of the *acts* performed by the teacher, or any governmental employee, determines whether they are discretionary or ministerial.

Id. at 301-302.

Here, any potential liability on the part of Richardson must stem from her assigned responsibilities, which included following the regular teacher's daily work schedule and job description requirements. Included in those assigned responsibilities is the duty to supervise students. This supervisory function is ministerial and thus Richardson is not entitled to qualified official immunity so as to bar the claims against her as a matter of law.

IV. Conclusion.

For the reasons stated above, the Jessamine Circuit Court's order denying Richardson's motion for summary judgment is affirmed.

JONES, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Suzanne Cassidy
Covington, Kentucky

BRIEF FOR APPELLEE:

Corey Ann Finn
Louisville, Kentucky