

RENDERED: MAY 24, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001190-MR

ART DAVIS; JOHN FOGLE;  
UNKNOWN EMPLOYEES OF  
PADUCAH TILGHMAN HIGH  
SCHOOL AND PADUCAH PUBLIC  
SCHOOLS; DONALD SHIVELY;  
JONATHAN SMITH; ALLISON STIEG;  
CHRIS DURFEE; DALE BECK;  
JOEL BRINDLEY; VIRGIL DAVIS;  
ALTON GOODRICH; DEBBIE HALL;  
CHARLES LIGON; VINCENT LYNN;  
GERREN ROGERS; EDWARD  
WARNER; DAVID WATKINS; TROY  
BROCK; JOHN FUTRELL; TODD  
MOORE; TIM DORAN; SCOTT  
MCDONALD; DANNY MCDONALD;  
KEITH HOLDER; AND GARY COX

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, SPECIAL JUDGE  
ACTION NO. 17-CI-00136

ROSE LOWERY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Art Davis, John Fogle, Unknown Employees of Paducah Tilghman High School and Paducah Public Schools, Donald Shively, Jonathan Smith, Allison Stieg, Chris Durfee, Dale Beck, Joel Brindley, Virgil Davis, Alton Goodrich, Debbie Hall, Charles Ligon, Vincent Lynn, Gerren Rogers, Edward Warner, David Watkins, Troy Brock, John Futrell, Todd Moore, Tim Doran, Scott McDonald, Danny McDonald, Keith Holder, and Gary Cox (collectively referred to as appellants) bring this interlocutory appeal from a June 26, 2017, Order of the McCracken Circuit Court denying appellants' motion to dismiss based upon exclusive remedy immunity under Kentucky's workers' compensation law. We affirm.

Rose Lowery (appellee) was an elected member of the Board of Education for the Paducah Public School System. In her capacity as board member, appellee participated in a graduation ceremony at Paducah Tilghman High School on May 28, 2016. Upon completion of graduation, appellee tripped and fell in the parking lot of the high school. Appellee sustained serious injuries, including paralysis rendering her a quadriplegic.

On February 17, 2017, March 7, 2017, and May 26, 2017, appellee filed complaints against Art Davis, Individually and in his capacity as Principal, Paducah Tilghman High School; John Fogle, Individually and in his capacity as Maintenance Supervisor, Paducah Public Schools; Unknown Employees of Paducah Tilghman High School and Paducah Public Schools, Individually; Precision Concrete Cutting of KY, LLC; Precision Concrete Cutting, Inc. d/b/a Safe Sidewalks; A&K Construction, Inc.; A&K Construction Services, Inc.; Paducah Power System; Mr. Patterson, employee of City of Paducah; Donald Shively, Superintendent of Paducah Public Schools, Individually; Jonathan Smith, Vice Principal at Paducah Tilghman High School, Individually; Allison Stieg, Custodian Supervisor at Paducah Tilghman High School, Individually; Chris Durfee, Assistant Principal and Athletic Director at Paducah Tilghman High School, Individually; Dale Beck, Custodian Supervisor at Paducah Tilghman High School, Individually; Joel Brindley, Custodian at Paducah Tilghman High School, Individually; Virgil Davis, Lead Custodian at Paducah Tilghman High School, Individually; Alton Goodrich, Custodian at Paducah Tilghman High School, Individually; Debbie Hall, Custodian at Paducah Tilghman High School, Individually; Charles Ligon, Custodian Supervisor at Paducah Tilghman High School, Individually; Vincent Lynn, Custodian at Paducah Tilghman High School, Individually; Gerren Rogers, Custodian at Paducah Tilghman High School,

Individually; Edward Warner, Custodian at Paducah Tilghman High School,  
Individually; David Watkins, Custodian at Paducah Tilghman High School,  
Individually; Troy Brock, Facilities Director of Paducah Public Schools,  
Individually; John Futrell, Maintenance Supervisor of Paducah Public Schools,  
Individually; Todd Moore, Maintenance Technician of Paducah Public Schools,  
Individually; Tim Doran, Maintenance Technician of Paducah Public Schools,  
Individually; Scott McDonald, Maintenance Technician of Paducah Public  
Schools, Individually; Danny McDonald, Maintenance Technician of Paducah  
Public Schools, Individually; Keith Holder, Maintenance Technician of Paducah  
Public Schools, Individually; and Gary Cox, Maintenance Technician of Paducah  
Public Schools, Individually.

In the complaints, appellee asserted premises liability claims and negligence concerning the condition of the parking lot. She particularly alleged that the high school parking lot was unsafe due to various conditions.

Appellants filed a motion to dismiss and argued that appellee was an employee of the Board of Education for purposes of the Workers' Compensation Act.<sup>1</sup> As a result, appellee was subject to the exclusive remedy provision set forth in Kentucky Revised Statutes (KRS) 342.690, and appellants are immune from liability as employees or officers of the Board of Education.

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<sup>1</sup> See June 2, 2017, Agreed Order.

Appellee responded by arguing that she was not an employee of the Board of Education under KRS 342.640(3); therefore, the exclusive remedy provision (KRS 342.690(1)) was not controlling. Appellee pointed out that she was never compensated for being an elected member of the Board of Education.

As the circuit court considered matters outside of the pleadings, it correctly reviewed appellants' motion as a motion for summary judgment. *See Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994). In denying the motion for summary judgment, the circuit court concluded that appellee was not an employee under KRS 342.640(3), thus rendering the exclusive remedy provision (KRS 342.690(1)) of the Workers' Compensation Act inapplicable. This interlocutory appeal follows.<sup>2</sup>

Appellants contend the circuit court erred by deciding that appellee was not an employee of the Board of Education pursuant to KRS 342.640(3). Appellants maintain that the circuit court misinterpreted KRS 342.640(3). In particular, appellants argue:

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<sup>2</sup> Contrary to Rose Lowery's argument that this interlocutory appeal should be dismissed, our case law clearly establishes the right to file an interlocutory appeal from an order denying "immunity" based upon the exclusive remedy provision (Kentucky Revised Statutes 342.640(1)) of the Workers' Compensation Act. *See Ervin Cable Construction, LLC v. Lay*, 461 S.W.3d 422, 424 (Ky. App. 2015). Additionally, we do not view Precision Concrete Cutting of KY, LLC; Precision Concrete Cutting, Inc. d/b/a Safe Sidewalks; A&K Construction, Inc.; A&K Construction Services, Inc.; Paducah Power System; or Mr. Patterson, employee of City of Paducah, as indispensable parties to this appeal. *See Jenkins v. Best*, 250 S.W.3d 680, 685-87 (Ky. App. 2007).

A straightforward reading of KRS 342.640(3) demonstrates that [appellee] was an “employee” of the Board of Education at the time of her injury. Two classes of public “employees” are included in the statute: first, “every person in the service” of a school district, “under any contract of hire,” and second, “every official or officer” of the school district, “whether elected or appointed, while performing [her] official duties.” [Appellee] is not in the first class of employees because she was not compensated for her service as a member of the Board of Education, and thus, was not “under any contract of hire.” However, as an elected member of the Board of Education, [appellee] is an “official or officer” of the Board. It is also not disputed that [appellee] was on the premises of Paducah Tilghman High School at the time of her injury “in her capacity as a member of the Paducah Schools Board of Education,” to attend the high school’s graduation ceremonies. Because [appellee] was an elected official or officer of the Board of Education performing her official duties at the time of her injury, the plain meaning of the statutory text leads to the conclusion that she qualifies as an “employee” of the Board of Education for purposes of the Workers’ Compensation Act.

Appellants’ brief at 12 (citation omitted).

Summary judgment is proper where there exists no material issue of fact, and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). It is well-established that interpretation of a statute presents an issue of law for the court, and we are bound to adopt a reasonable interpretation that advances the statute’s legislative purpose. *Marcinek v. Commonwealth ex rel. Marcum*, 999 S.W.2d 722, 723 (Ky.

App. 1999); *City of Worthington Hills v. Worthington Fire Protection Dist.*, 140 S.W.3d 584, 591 (Ky. App. 2004).

KRS 342.640 reads:

The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:

- (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;
- (2) Every executive officer of a corporation;
- (3) Every person in the service of the state or any of its political subdivisions or agencies, or of any county, city of any class, school district, drainage district, tax district, public or quasipublic corporation, or other political entity, under any contract of hire, express or implied, and every official or officer of those entities, whether elected or appointed, while performing his official duties shall be considered an employee of the state. Every person who is a member of a volunteer ambulance service, fire, or police department shall be deemed, for the purposes of this chapter, to be in the employment of the political subdivision of the state where the department is organized. Every person who is a regularly-enrolled volunteer member or trainee of an emergency management agency, as established under KRS Chapters 39A to 39E, shall be deemed, for the purposes of this chapter, to be in the employment of this state. Every person who is a member of the Kentucky National Guard, while the person is on state active duty as defined

in KRS 38.010(4), shall be deemed, for the purposes of this chapter, to be in the employment of this state; and

- (4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury.

The controversy in this appeal surrounds the following statutory language found in KRS 342.640(3) – “every official or officer of those entities [school district], whether elected or appointed, while performing his official duties shall be considered an employee of the state.”

Appellants maintain that the above language set forth in KRS 342.640(3) plainly does not require an official to be compensated; therefore, appellee qualifies as an employee. This proposed interpretation of KRS 342.640(3) at first blush seems compelling. However, we are guided in our interpretation of KRS 342.640(3) by the decision of the Kentucky Supreme Court in *Hubbard v. Henry*, 231 S.W.3d 124 (Ky. 2007).

In *Hubbard*, the Supreme Court was squarely faced with the proper interpretation of KRS 342.640. Relevant to this appeal, the Court concluded that only those individuals who received compensation qualified as an employee under KRS 342.640(1)-(4). *Id.* at 129. In reaching its decision, the Supreme Court stated:

Under *Kentucky Farm & Power Equipment Dealers Association, Inc. v. Fulkerson Brothers, Inc.*, *supra*, and *Com., Dept. of Education v. Smith*,



*supra*, KRS 342.640(1)-(4) refer to an employee for hire. *Fulkerson* concerned whether gratuitous employment as a director of a non-profit association created employee status under KRS 342.640(2), which like KRS 342.640(4) makes no reference to a contract of hire. Although the court found it implicit that the legislature intended for the words “executive officer of a corporation” to refer to “an employee for hire,” the crux of its decision was the principle adopted from 1C Larson, *Workmen’s Compensation Law*, §§ 47.00 and 47.41 (1980), that the term “employee” excludes “workers who neither receive nor expect to receive any kind of pay for their services.” Thus, an “employee” under KRS 342.640 must be “an employee for hire” because “[t]he essence of compensation protection is the restoration of a part of wages which are assumed to have existed.” *Fulkerson*, 631 S.W.2d at 635.

....

KRS 342.640(4) does not refer to a contract for hire. It protects workers who are injured while performing work in the course of an employer’s business by considering them to be employees despite the lack of a formal contract for hire, unless the circumstances indicate that the work was performed with no expectation of payment or that the worker was a prisoner.

*Hubbard*, 231 S.W.3d at 129-30.

Following the reasoning of *Hubbard*, 231 S.W.3d 124, an elected or appointed officer/official of a school board is only considered an employee per KRS 342.640(3) if such officer/official receives compensation for his/her work. We view this interpretation as reasonable and as congruent with *Hubbard*, 231 S.W.3d 124.

In this case, it is undisputed that appellee did not receive compensation in her role as an elected member of the Board of Education. As a result, appellee does not qualify as an employee under KRS 342.640(3). Accordingly, the circuit court properly denied appellants' motion for summary judgment.

For the foregoing reasons, the Order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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