

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000899-MR

AMY MARSHALL, INDIVIDUALLY AND
AS MOTHER AND NEXT FRIEND OF K.M.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 15-CI-006112

TAMELA COMPTON AND
HOLLY DUKES

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Amy Marshall, individually and as mother and next friend of K.M., appeals from the Jefferson Circuit Court's summary judgment in favor of Tamela Compton and Holly Dukes dismissing Marshall's claims for

negligence, negligence per se, retaliation, and outrageous conduct. After careful consideration, we affirm.

BACKGROUND

K.M. and B.O.C. were enrolled in the sixth grade at Noe Middle School (hereinafter “Noe”) in the Jefferson County Public School district (hereinafter “JCPS”) during the 2015-2016 school year. On September 8, 2015, K.M. and B.O.C. were involved in an altercation that resulted in physical injuries to K.M. and a six-day suspension for B.O.C. K.M. asserted that, while she was walking up a flight of stairs with her class, B.O.C. tripped her. K.M. kicked B.O.C. in the stomach, and B.O.C. punched K.M. in the stomach and ran away. K.M. then followed B.O.C. to question him as to why he punched her, and then attempted to hit him on the shoulder, but only grazed the side of B.O.C.’s head. B.O.C. thereafter punched K.M. in the face, breaking her nose and deviating her septum. Prior to this physical altercation, neither K.M. nor B.O.C. had any prior disciplinary record with JCPS.

K.M. further alleged that certain boys in her class had a history of taunting and bullying her, particularly B.O.C., and that she had reported this behavior to Dukes, a guidance counselor at Noe, on multiple occasions without relief. K.M. also testified during her deposition, however, that B.O.C. had never touched or threatened her before and that she had not feared for her safety prior to

the incident with B.O.C. Alternatively, Dukes asserted that she had no knowledge and could find no record of any issues between K.M. and B.O.C. or any reports to Dukes prior to the September 8, 2015 incident. Dukes did say that she had met with K.M. earlier in the school year related to K.M.'s depression regarding the suicide of her brother's friend, but those meetings were her primary interactions with K.M.

Following the altercation, Compton, an assistant principal at Noe in charge of discipline, investigated the incident and submitted the results to JCPS officials. JCPS suspended B.O.C. for six days, and the Noe administration rearranged B.O.C.'s academic schedule to limit contact with K.M. Further protective measures taken by the school included reassigning B.O.C. to a different team in an effort to prevent any overlap or potential hallway contact between the students, supplying K.M. with adult escorts, and providing K.M. an alternative place to eat lunch.

In December of 2015, Marshall filed a complaint against Dukes in her individual capacity alleging negligence, negligent supervision, and negligence per se. Marshall filed an amended complaint in February of 2016 adding Compton as a defendant and alleging that Compton had retaliated against K.M. by, among other things, not allowing K.M. to eat her lunch in the alternative location originally provided to K.M., reprimanding her for not being attentive in a math class, and not

allowing her to go on a field trip. K.M. alleged that Compton's actions were in violation of Kentucky Revised Statutes (KRS) 524.040 and rose to the level of "outrageous conduct."

Dukes and Compton (hereinafter, collectively "Appellees") filed a motion for summary judgment in December 2017, arguing that they had qualified immunity, that they had no duty to prevent K.M.'s unforeseeable injuries, that Marshall could not establish violations of the statutes alleged by Marshall to establish negligence per se, and that the facts in the record did not support Marshall's claims of retaliation and outrageous conduct.

The trial court granted the Appellees' motion for summary judgment, finding that, as a matter of law, neither Dukes nor Compton had breached a duty of care they owed to K.M. because the altercation was not reasonably foreseeable. Further, the trial court found that Marshall's claim for negligence per se was insufficiently developed, as either the statutes cited by Marshall were not directly applicable to her negligence per se claim or Marshall had failed to fully develop how the facts of the case fell under such statutes. Finally, the trial court found that Kentucky does not recognize "retaliation" as a tort under the facts alleged in Marshall's amended complaint.

The trial court declined to reach a conclusion on Appellees' qualified immunity defense, finding that Appellees had failed to produce sufficient evidence

to determine whether qualified immunity was applicable, and that a more fact-intensive analysis was required under *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), and *Patton v. Bickford*, 529 S.W.3d 717 (Ky. 2016).

Marshall thereafter filed a timely motion to amend, alter, or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, arguing that summary judgment was inappropriate because a genuine issue of material fact existed regarding whether Dukes had received K.M.'s reports of being bullied by B.O.C., and that the issue of foreseeability of harm was a question of fact that should be left to the jury. The trial court denied the motion, and this appeal followed.

ANALYSIS

At the outset, we note that the applicable 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) (citing CR 56.03). The court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (internal citations omitted). Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* at 479. However, “a party opposing a properly supported

summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482. Since summary judgment “involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo.*” *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). Further, “[i]f the summary judgment is sustainable on any basis, it *must* be affirmed.” *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006) (emphasis added).

As a preliminary matter, the only claim alleged against Compton in Marshall’s first amended complaint is that of “retaliation” and “outrageous conduct” under KRS 524.040. Further, Marshall’s response to the Appellees’ motion for summary judgment and her brief only discuss the negligence claims as they relate to Dukes. Marshall neglected to include Compton in her negligence arguments on appeal, and Marshall’s brief makes no reference to her claims for retaliation and outrage. As a result, any arguments relating to Compton or to Marshall’s retaliation or outrageous conduct claims are waived and judgment is final, as “[f]ailure of appellant to discuss the alleged errors in its brief is the same as if no brief had been filed in support of its charges.” *R.E. Gaddie, Inc. v. Price*, 528 S.W.2d 708, 710 (Ky. 1975). Therefore, we affirm the trial court’s summary judgment in favor of Compton.

As to Marshall's negligence, negligent supervision, and negligence per se claims against Dukes, while the trial court based its grant of summary judgment on the unforeseeability of the altercation, Dukes urges us to affirm the trial court's grant of summary judgment based on Dukes' qualified immunity. Dukes asserts that a case rendered after the trial court's ruling, *Ritchie v. Turner*, 559 S.W.3d 822 (Ky. 2018), expanded existing precedent and clarified that immunity is appropriate for school personnel not tasked with active supervision at the time an incident occurs. As previously stated, Dukes raised the issue of qualified immunity in her motion for summary judgment, and the trial court declined to determine whether they were shielded from immunity, reading the relevant case law at the time as requiring a more fact-intensive analysis. The determination of a school official's entitlement to qualified immunity is a matter of law, which this Court reviews *de novo*. *Patton*, 529 S.W.3d at 723.

We begin with a general discussion concerning the concept of qualified immunity under Kentucky jurisprudence. In Kentucky, when government officials are sued in their individual capacities, they are often granted qualified immunity. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (citation omitted). "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." *Id.* at 522 (internal citations omitted).

As a result, "[w]hether the employee's act is discretionary, and not ministerial, is the qualifier that must be determined before qualified immunity is granted to the governmental employee." *Marson*, 438 S.W.3d at 296 (emphasis in original). "[P]roperly performing a ministerial act cannot be tortious, but negligently performing it, or negligently failing to perform it, can be." *Id.* (citing *Yanero*, 65 S.W.3d at 522). Alternatively, "[n]egligently performing, or negligently failing to perform, a discretionary act cannot give rise to tort liability, because our law gives qualified immunity to those who must take the risk of acting in a discretionary manner." *Id.* (citing *Yanero*, 65 S.W.3d at 521-22).

A duty is ministerial "when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts[.]" *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959). A ministerial act is "one that requires only obedience to the orders of others" or is done "without regard to his or her own judgment or opinion concerning the propriety of the act to be performed." *Marson*, 438 S.W.3d at 297 (internal quotations and citations omitted).

Alternatively, discretionary duties are those "calling for a good faith judgment call made in a legally uncertain environment" and include "the exercise

of discretion and judgment or personal deliberation, decision and judgment.” *Id.* (internal quotations and citations omitted). As explained in *Marson*, “[t]o some extent, [differentiating between discretionary and ministerial acts] says that governing cannot be a tort, but failing to properly carry out the government’s commands when the acts are known and certain can be.” *Id.* at 296. Moreover, such distinction between ministerial and discretionary “rests not on the status or title of the officer or employee, *but on the function performed.*” *Yanero*, 65 S.W.3d at 521 (internal citation omitted) (emphasis added).

In the case *sub judice*, Dukes argues that *Ritchie*, which was rendered after the judgment in this case, simplified the relevant facts necessary for granting qualified immunity. *Ritchie* involved a middle school student who was allegedly sexually abused by her former teacher. *Ritchie*, 559 S.W.3d at 826-27. Over a two-year time period, the student would leave supervised morning meetings to go to the teacher’s classroom for sexual encounters. *Id.* at 831. The student filed negligence actions against the superintendent, principal, and other school officials, claiming a breach of ministerial duties to supervise students. *Id.* at 829-30.

The Kentucky Supreme Court determined that the school officials were entitled to qualified immunity on the negligent supervision claims. *Id.* at 832. The Court found that discretionary functions for school officials, such as establishing and implementing policies and procedures, was “qualitatively different

from actually supervising the students, a ministerial duty *for those who are assigned such supervision.*” *Id.* (internal citation omitted). Focusing on the fact that school officials were not assigned supervisors of the morning meeting area and did not pass the student in the hallways on her trips to the teacher’s classroom, the court held that the school officials “*were not actually involved in the active supervision of the students at the times relevant to [the plaintiff’s] complaint.*” Consequently, the school officials only had a general supervisory duty over [plaintiff]” and were entitled to qualified immunity. *Id.* (emphasis added).

In this case, no evidence can be gleaned from the record that Dukes, a guidance counselor, had a specific ministerial duty of student supervision in the hallway when the altercation occurred. Nor is there any evidence that Dukes was anywhere near the hallway when the altercation occurred. As in *Ritchie*, Dukes was not involved in the active supervision of K.M. or B.O.C. As such, the record does not support that Dukes had a ministerial duty to supervise either K.M. or B.O.C.

Further, Marshall alleged that Dukes had directly received reports of K.M. being verbally harassed and bullied in Dukes’ official capacity as a guidance counselor. While there is no doubt that there are both discretionary and ministerial aspects to a guidance counselor’s duty to respond to allegations of bullying, the “analysis looks for the *dominant* nature of the act” at issue. *Haney v. Monsky*, 311

S.W.3d 235, 240 (Ky. 2010) (emphasis in original). Even taking Marshall’s allegations as true, there can be no argument that Dukes’ duties towards her students as a guidance counselor were primarily discretionary. Guidance counselors are regularly required to make discretionary decisions and judgment calls in performing their functions. *See James v. Wilson*, 95 S.W.3d 875, 909-10 (Ky. App. 2002) (categorizing teachers’ conduct as discretionary because it “inherently required conscious evaluation of alternatives, personal reflection and significant judgment”). Dukes’ actions required enormous discretion in determining the correct course of action for students who may come to her for guidance. In fact, the Court in *Turner v. Nelson* stressed the importance of:

appropriate leeway to . . . investigate complaints[,] . . . to form conclusions (based on facts not always known) as to what actually happened, and ultimately to determine an appropriate course of action, which may, at times, involve reporting the conduct of a child to the appropriate authorities. In fact, protection of the discretionary powers of our public officials and employees, exercised in good faith, is the very foundation of our doctrine of “official qualified immunity.”

342 S.W.3d 866, 876 (Ky. 2011). Dukes’ role was “so situation specific” and “require[d] judgment rather than a fixed, routine performance.” *See Marson*, 438 S.W.3d at 299. Moreover, Marshall failed to produce any evidence to prove that Dukes’ duty was ministerial, and as previously discussed, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting

at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Steelvest*, 807 S.W.2d at 482. Accordingly, we find that Dukes is entitled to qualified immunity.

Alternatively, we agree with the trial court that the altercation between K.M. and B.O.C. was not foreseeable, and therefore that Marshall could not maintain a successful negligence claim. Under Kentucky law, one element of a negligence claim requires proof that “the defendant owed a duty of care to the plaintiff[.]” *Lee v. Farmer’s Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211 (Ky. App. 2007). As stated by a panel of this Court in *Lee*:

In Kentucky, the scope and character of a defendant’s duty is largely defined by the foreseeability of the injury: Every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury. Even so, such a duty applies *only* if the injury is foreseeable. Foreseeability is to be determined by viewing the facts as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight.

Id. at 212 (citations and internal quotation marks omitted) (emphasis in original).

Moreover, “the existence of a duty of care to the plaintiff, and its underlying foreseeability inquiry, is a pure question of law for the court.” *Id.* at 218 (internal citations omitted).

In this case, although B.O.C. had allegedly been having verbal altercations with K.M., the facts do not indicate that Dukes would have foreseen

that a physical altercation, with the resulting injury, would have occurred. Neither child had ever touched the other, nor did either child have any prior disciplinary record with JCPS. K.M. even testified in her deposition that she was not in fear for her safety. Viewing the facts as they reasonably appeared to Dukes, we cannot find that K.M.'s injury was foreseeable and can therefore find no duty of care under the negligence standard.

CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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