

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001588-MR

BROOKE NELSON, INDIVIDUALLY;
AND BROOKE NELSON, AS
NEXT FRIEND OF F.B., A MINOR

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CI-00976

KENTUCKY SCHOOL BOARDS INSURANCE
TRUST; DIANNE TURNER; FAYETTE COUNTY
PUBLIC SCHOOLS; AND FAYETTE COUNTY
BOARD OF EDUCATION

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

STUMBO, JUDGE: Brooke Nelson, individually, and as next friend of F.B.,
appeals from an Order of the Fayette Circuit Court dismissing her claim against
Diane Turner, individually, and in her capacity as a public school teacher, and

against the Kentucky School Boards Insurance Trust (“KSBIT”). Nelson asserted a claim on behalf of F.B. alleging that F.B. was sexually abused by a female classmate named C.Y., and that Turner committed the tort of negligent supervision and improperly failed to report the allegation as required by statute.¹

Nelson’s claims against KSBIT arose out of several alleged instances of bad faith on its part, as well as its refusal to investigate F.B.’s claims. Nelson also claimed that KSBIT failed to communicate with her or her counsel, and improperly failed to seek a timely resolution of the dispute. Nelson’s claims against the Fayette County Public Schools and the Fayette County Board of Education were previously dismissed. Nelson now appeals from the circuit court’s determination that Turner was entitled to Summary Judgment. The circuit court based this determination on its conclusion that Turner was shielded by qualified official immunity because her duty to report the alleged sexual abuse is properly characterized as discretionary rather than ministerial. Because KRS 620.030 uses mandatory “shall” language to describe the reporting requirement, and since a motion for Summary Judgment requires the record to be viewed in a light most favorable to the non-movant, we reverse the Order of the Fayette Circuit Court and remand for further proceedings.

In November 2005, five-year-old F.B. was registered as a kindergarten student in Turner’s class at a public elementary school in Fayette

¹ This is Appellant’s second appeal to this Court. *Nelson v. Turner*, 256 S.W.3d 37 (Ky. App. 2008)

County.² On November 16, of that same year, F.B. was allegedly sexually assaulted in the classroom during regular school hours by a female classmate, C.Y., who was also enrolled in Turner's class. F.B. described the incident to Nelson two days after it had occurred. Nelson then telephoned Turner and reported that F.B. had complained that C.Y. had "put her finger up my butt" at school.

According to Turner, Nelson described a situation where F.B. had complained that C.Y. had been "up her butt," and she testified that she understood from this conversation that C.Y. had sexually assaulted F.B. Turner did not feel that Nelson was greatly upset as she related the incident described by F.B. Nevertheless, she assured Nelson that she would separate the children.

Turner's telephone conversation confirmed for Nelson her own impression that F.B. and C.Y. played together quite frequently at school. On the morning of Monday, November 21st, Turner advised her teaching assistant that F.B. and C.Y. would no longer be allowed to be close to one another. She also admonished C.Y. that touching someone's bottom was wrong. In an effort to keep the children apart, Turner assigned them specific seats and forbade them from attending the restroom at the same time.

After the lunch period on November 21, 2005, F.B. told Turner that C.Y. had been "up my butt" in the classroom during a reading group, but F.B. did not appear upset. While Turner was still unsure of what the contact involved, she

² We have adopted in large part the factual recitation as set out in Turner's prior appeal.

immediately questioned C.Y., who admitted that she had touched F.B. Turner left the children in her assistant's care and attempted to locate a school administrator for advice. Unable to find the school principal, Turner eventually carried on with her instructional duties. C.Y. did not return to the classroom that day. Turner would later state that she did not find it plausible that C.Y. could engage in inappropriate behavior with F.B. when a teacher (Turner) and teacher's assistant were present at all times during the reading group.

Nelson testified that during the evening hours of November 21st, F.B. reported to Nelson's sister, Bridget, that C.Y. had stuck her finger into F.B.'s genitals. Nelson discussed the incident with F.B. on the morning of November 22nd. Nelson was unable to meet with the principal, Frieda Collins, but telephoned her that afternoon. Collins related to Nelson that she knew nothing about the situation, but indicated that she would address it immediately by having both children report to her office for a talk. Following the conference, Collins reported to Nelson that C.Y. had admitted that she had accidentally touched F.B. between the legs, but that they denied that C.Y. had put her finger up F.B.'s bottom. Collins indicated to Nelson that she would continue her investigation. Concluding that the incidents were accidents, Collins did not report the matter to the authorities.

After school on November 22, F.B. allegedly told Nelson that C.Y. had pushed her into a table, had rubbed and pinched her nipples, and had touched her anus and vagina. Nelson took F.B. to the University of Kentucky Medical

Center for a physical examination. Doctors there noted “some small irritation of the vagina” and advised Nelson that she would need to speak to a social worker about the events described by F.B. University medical personnel reported the incident to police. Nelson removed F.B. from enrollment in the Fayette County Public Schools, and an internal investigation followed.

On March 3, 2006, Nelson filed an action against KSBIT. In her complaint, Nelson alleged that KSBIT had violated several portions of the Kentucky Insurance Code (“KIC”) by engaging in unfair claims settlement practices; failing to timely respond to the claimant; failing to timely complete an investigation of the matter; engaging in unfair or deceptive acts; failing to acknowledge and to act promptly upon communications regarding the claimant; failing to adopt and to implement standards for the prompt investigation of claims; refusing to pay the claim; and failing to provide a reasonable explanation of the basis for the denial of the claim or of the lack of an offer of a compromise settlement. Nelson also asserted a claim of intentional infliction of emotional distress against KSBIT. She sought both compensatory and punitive damages.

Following a hearing on KSBIT’s motion seeking dismissal of the claims, the trial court ruled that the action would be dismissed without prejudice. Before the court’s written order was entered by the clerk, however, Nelson filed a motion to amend the complaint. In an order entered on May 11, 2006, the trial court permitted Nelson to file an amended complaint.

In her amended complaint, Nelson renewed her allegations against KSBIT and also included new and separate allegations against Turner and the Fayette County Board of Education. Nelson alleged that Turner failed to exercise ordinary care to supervise the children in her classroom and to report to enforcement officials the sexual assault perpetrated by C.Y. as required by KRS 620.030. Under common law principles of agency, Nelson alleged that the Board was vicariously liable for damages caused by Turner's failure to protect F.B. from harm. Finally, Nelson claimed that Turner's inappropriate response to the situation amounted to outrageous conduct. She sought compensatory and punitive damages along with attorneys' fees, costs and expenses.

Each of the named defendants answered and denied Nelson's substantive allegations. In addition, Turner and the Board contended that they were entitled to the protections of governmental and qualified official immunity.

On January 19, 2007, following a period of extensive discovery, Turner and the Board filed a motion for Summary Judgment. In the memorandum supporting the motion, Turner and the Board argued that they were entitled to judgment as a matter of law. The Board contended that it could not be sued in tort since it is shielded by governmental immunity and that it could not be held vicariously liable for Turner's alleged failure to protect F.B. under firmly established legal principles.

Turner contended that her supervision of F.B. was undertaken in good faith and as part of her discretionary functions as a primary school teacher. She

argued that under these circumstances, she was entitled to qualified official immunity from liability. Turner also argued that she was not required by the provisions of KRS 620.030 to make a report of the alleged assault to any local law enforcement agency. Regardless of any arguable applicability of the statute, she contended that it did not create a private right of action enforceable by Nelson. Finally, Turner argued that Nelson could not establish a *prima facie* case to support the allegation of outrageous conduct. Nelson opposed the motion for Summary Judgment and submitted her own memorandum in support of her position.

On February 6, 2007, KSBIT filed a motion to dismiss the action against it. KSBIT reasoned that since Turner and the Board were entitled to judgment as a matter of law, no claims predicated upon its bad faith with respect to the claim could survive since its alleged bad faith was wholly derivative of a viable, underlying cause of action.

Following a hearing, the Fayette Circuit Court determined that Turner and the Board were entitled to claim the shield of immunity and that they were entitled to judgment as a matter of law. The court entered judgment in their favor on March 1, 2007. Agreeing with KSBIT that the claims asserted against it necessarily failed as a result of the dismissal, KSBIT's motion to dismiss the action was granted as well.

Nelson then prosecuted an appeal to this Court. By way of a published Opinion rendered on June 6, 2008, a panel of this Court affirmed in part, vacated in part and remanded. The panel determined that the circuit court

improperly failed to demonstrate why Turner's duty to report the alleged abuse was discretionary - thus entitling her to qualified immunity - rather than ministerial and thus mandatory. The panel remanded the matter to the Fayette Circuit Court for a determination of whether Turner's duty to report was discretionary or ministerial.

As to the claim against KSBIT, the panel of this Court opined that as long as questions remain with respect to Turner's alleged liability in the underlying negligence action, the question of KSBIT's obligation to pay the claim could not be adjudicated as a matter of law. It, therefore, remanded the claim against KSBIT pending further adjudication of Turner's underlying claim.

On remand, the Fayette Circuit Court determined that Turner's duty to report was discretionary and that, therefore, Turner was shielded by qualified official immunity. In reaching this conclusion, the circuit court noted that Turner did not observe the alleged bad acts, and the sole evidence she had before her was the allegation of five-year-old F.B. and the purported admission of five-year-old C.Y. The court opined that, "[t]he statute clearly does not require the reporting of every allegation of sexual abuse or the reporting of mere suspicion." It went on to conclude that the circumstances of the allegation required Turner to make a judgment about what may have happened and to respond accordingly. It characterized this requirement as falling within Turner's discretion which left to her the determination as to whether there was a reasonable cause to believe that sexual abuse had occurred. Upon determining that Turner's duty was

discretionary, the court ruled that Turner was shielded by qualified official immunity, and that Summary Judgment, therefore, was appropriate as to Nelson's claims against both Turner and KSBIT. This appeal followed.

Nelson now argues that the Fayette Circuit Court improperly dismissed the action against Turner. She maintains that KRS 620.030 clearly establishes that reporting alleged sexual abuse is a mandatory requirement and is not left to a teacher's discretion. Nelson also contends that even if the reporting of alleged sexual abuse were properly characterized as discretionary, Turner is still not shielded by qualified immunity. She directs our attention to KRS 620.030, which she argues clearly provides for mandatory reporting and which evinces a public policy which errs, if at all, in favor of protecting children.³ In sum, Nelson maintains that Turner breached her statutory duty to report the allegation and that Summary Judgment, therefore, was not appropriate.

KRS 620.030(1) states that,

Any person who knows or has reasonable cause to believe that a child is . . . abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise.

³ The purpose of KRS 620.030(1) is to put abused children in a position to seek and receive appropriate counseling and medical treatment. C.Y. admitted touching F.B. to Collins and Turner apparently felt the situation serious enough to separate the children. While a child the age of C.Y. is unlikely to be criminally prosecuted, this behavior cries out for treatment of both children. To allow a teacher to exercise her discretion and remain silent is detrimental to both children.

We are persuaded by Nelson’s claim of error for two reasons. First, we both acknowledge and concur with the holding in Nelson’s first appeal that KRS 620.030(1) sets out a “mandatory reporting requirement” The Legislature’s usage of the mandatory “shall” language evinces its intent that a person who has reasonable cause to believe that a child has been abused has no discretion on the question of whether the alleged abuse must be reported. See also, *Commonwealth v. Allen*, 980 S.W.2d 287, 280 (Ky. 1998), holding that, “[t]he language of KRS 620.030(1) is clear and unambiguous. All individuals with firsthand knowledge or reasonable cause to believe that a child is abused have a mandatory duty to report that abuse.” Because the reporting requirement of KRS 620.030(1) is mandatory, Turner is not protected by qualified immunity. *Allen, supra*.

The central issue now before us, however, is whether the circuit court properly determined that Summary Judgment was appropriate. Summary judgment “shall be rendered forthwith if 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 56.03. “The record must be viewed 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). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any

issue of material fact.” *Id.* Finally, “[t]he 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).

When viewing the record in a light most favorable to Nelson and resolving all doubts in her favor, we must conclude that - *for purposes of the Summary Judgment motion only* - Turner had a reasonable cause to believe that F.B. was abused. On November 16, 2005, Nelson telephoned Turner and reported that F.B. had complained that C.Y. had “put her finger up my butt” at school. After the lunch period on November 21, 2005, F.B. again told Turner that C.Y. had been “up my butt” in the classroom during reading group. And about one week later, F.B. told Nelson that C.Y. had pushed her into a table, had rubbed and pinched her nipples, and had touched her anus and vagina. Principal Collins also reported to Nelson that C.Y. had admitted that she had touched F.B. between the legs, though C.Y. claimed that the touching was accidental. It merits noting that Turner took these allegations seriously. She spoke with Nelson, F.B. and C.Y. about the matter, physically separated the children in the classroom, and did not allow them to use the restroom at the same time. Turner also sought to discuss the matter with Principal Collins, though it is not clear whether any discussion occurred between the two.

As we are not the trier of fact, we may not determine whether Turner had a reasonable cause to believe that F.B. was abused for purposes of subsequent

proceedings or possible trial. However, for the limited purpose of addressing the Summary Judgment motion, and in light of the requirement that all doubts be resolved in favor of Nelson, we must conclude that Nelson rebutted the argument that no genuine issues remained for adjudication. A genuine issue exists as to whether the claims reported to Turner are properly characterized as a “reasonable cause to believe” that F.B. had been abused for purposes of KRS 620.030. As a general rule, whether a defendant breached a duty is a question of fact for the jury. *Lee v. Farmer’s Rural Elec. Co-op. Corp.*, 245 S.W.3d 209 (Ky. App. 2007).

Similarly, reasonableness - in this case, whether Turner had a reasonable cause to believe that F.B. was abused - is also a question of a fact. *Brown v. Noland Co.*, 403 S.W.2d 33 (Ky. 1966); *Davis v. Howard*, 276 S.W.2d 460 (Ky. 1955).

Therefore, Summary Judgment was not warranted.

For the foregoing reasons, we reverse the Order of the Fayette Circuit Court granting Summary Judgment.

WINE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion which, if left to remain the law in this Commonwealth, jeopardizes the effectiveness of teachers as they will be held to an insurmountable standard of legal culpability. I do not doubt that the majority writes with the intent of protecting children: I am equally distressed by the perpetration of sexual abuse

against children. However, I believe the majority's opinion does nothing to rectify the disturbing increase in the deplorable crime of child sexual abuse but only subjects a teacher, who acted reasonably under the circumstances, to liability premised on a misinterpretation of the law.

The majority premises its opinion on KRS 620.030 and its mandatory language requiring the report of abuse. Absent the application of the statute, the decision regarding the action to be taken by this teacher would be a discretionary function and protected by qualified immunity. See *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002). Thus, KRS 620.030 is pivotal to the majority opinion.

Unfortunately, in the first appeal, a panel of this Court held that the statute was applicable and the only question was whether the duty to report the alleged sexual abuse was discretionary or ministerial. Because the statute is not applicable to the present situation, the analysis was faulty and, today, we have the opportunity to correct that error. However, the majority has chosen to perpetuate the error.

KRS 620.030 requires that abuse be reported when a person "knows or has reasonable cause to believe that a child is dependent, neglected or abused." When read in conjunction with the definition of "dependent, neglected or abused" in KRS 600.020(1), it is incontrovertible that the legislature intended to facilitate the reporting of abuse against a child by a "parent, guardian, or other person exercising custodial control or supervision of the child." Yet, the majority ignores the explicit statutory language and, by implication, holds that a five-year-old child

is mentally and legally capable of committing abuse. The flaws in its reasoning are evident.

I will not prolong my discussion but state three basic points. First, the five-year-old kindergarten student was not in a supervisory capacity over her classmate. Moreover, a child under the age of seven is conclusively presumed incapable of criminal intent. See *Davis v. Commonwealth*, 967 S.W.2d 574, 581 (Ky. 1998). Finally, a five-year-old child is incapable of acting with the intent of sexual gratification.

Although the teacher had a duty to exercise a degree of care commensurate with her position, the performance of that duty was not ministerial. *James*, 95 S.W.3d at 908-909. Upon being told about the alleged contact between the students, she had to assess the situation and make a decision regarding the action required. The undisputed facts demonstrate the reasonableness of her actions: (1) she separated the children in the classroom; (2) she did not permit the children to leave the classroom together to use the restroom; (3) she alerted the principal regarding the incident; and (4) she discussed the incident with the child.

It is apparent that with total good faith, the teacher acted reasonably under the circumstances and the only possible theory of liability is a misguided and labored application of KRS 620.030. I believe the result reached by the majority is legally and factually unjustifiable.

I would affirm.

BRIEFS FOR APPELLANTS:

J. Dale Golden
Michael T. Davis
Melissa M. Thompson
Sarah E. Noble
Lexington, Kentucky

BRIEFS FOR APPELLEE,
KENTUCKY SCHOOL BOARDS
INSURANCE TRUST:

Guy R. Colson
Barry M. Miller
Christina L. Vessels
Lexington, Kentucky

BRIEF FOR APPELLEES,
DIANNE TURNER, FAYETTE
COUNTY PUBLIC SCHOOLS AND
FAYETTE COUNTY BOARD OF
EDUCATION:

Mark S. Fenzel
Dana L. Collins
Kevin L. Chlarson
Louisville, Kentucky