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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001789-MR

RYAN FLYNN — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, JUDGE
ACTION NO. 07-CI-02280

BRYAN BLAVATT, MICHAEL BLEVINS, TODD SHUPE, MARY SARGENT, JASON SHEARER, TODD BERGER, AND CHUCK WILSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Ryan Flynn appeals an order of the Boone Circuit Court granting summary judgment to the appellees. After our review, we affirm.

On October 14, 2004, Flynn was a student at Connor High School in Hebron, Kentucky. Near the end of physical education (P.E.) class, Matt Bass, another student, hit Flynn in the face and broke his jaw in half. As a result,

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Flynn's jaw was wired shut for several weeks, and he will need orthodontic treatment to re-align his teeth.

In October 2007, Flynn filed a lawsuit naming Bass,[2] Bryan Blavatt, Michael Blevins, Todd Shupe, Mary Sargent, Jason Shearer, Tom Berger, and Chuck Wilson (Defendants) as defendants. At the time of the incident, Blavatt was the Boone County School District Superintendent; Blevins was the principal of Conner High School; Shupe, Sargent, and Shearer were assistant principals; and Berger and Wilson were P.E. teachers. The complaint alleged that the two teachers were liable under the theory of negligent supervision and that the other defendants were vicariously liable.

After discovery had been conducted, the trial court granted the Defendants' motion for summary judgment in August 2009, finding that they were protected by the doctrine of immunity. Flynn filed this appeal.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

[2] Matt Bass, the student who struck the blow, is not a party to this appeal; he is subject to a default judgment.

In contemplating entry of summary judgment, the trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to prevent the summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. On appeal, the standard of review that we employ 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). Because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

The trial court found that the defendants were entitled to "absolute immunity" and qualified official immunity. However, on appeal, Flynn only argues that the trial court erred when it found that Berger and Wilson, the two teachers, were entitled to qualified official immunity. We disagree.

We first note that Flynn's complaint did not specify whether he was suing the defendants in their individual or official capacities. However, all of the allegations in the complaint refer to actions and responsibilities relating to their jobs. Recently, when confronted with a similar situation, our Court held that when a complaint fails to specify that a defendant is being sued in his official capacity, he shall be deemed as amenable to suit only in his individual capacity. *Bolin v. Davis*, 283 S.W.3d 752, 756-57 (Ky. App. 2008).

The doctrine of immunity is "a bedrock component" of our law. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc*., 286 S.W.3d 790, 799 (Ky. 2009). Sovereign immunity confers upon the "state, legislators, prosecutors, judges, and others doing the essential work of the state" an immunity from fear of suit. *Autry v. Western Kentucky Univ*., 219 S.W.3d 713, 717 (Ky. 2007).

School boards and their employees are not entitled to sovereign immunity. However, as agencies of the state, they are cloaked with governmental immunity. *James v. Wilson*, 95 S.W.3d 875, 903 (Ky. App. 2002). This immunity extends to agencies' employees and officers when they are sued in their official capacities. *Autry, supra*. Where, as in this case, agency employees are sued in their individual capacities, they are subject to qualified official immunity. *Bolin, supra*.

Qualified official immunity prevents public officers or employees from being liable for:

> the negligent performance . . . 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. . . . 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.

Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001).

Flynn does not contend that the teachers in this situation acted in bad faith or outside the scope of their employment. Rather, his only claim is that the duty to supervise is ministerial, thus removing from them the protection of qualified official immunity.

The question of whether "acts by school staff relating to safety and discipline within schools" are discretionary or ministerial have been answered by Kentucky's state and federal courts. *S.S. v. Eastern Kentucky University*, 431 F.Supp.2d 718, 734 (E.D. Ky. 2006). Our courts have consistently and emphatically held that enactment of the rules and enforcement of them are discretionary in nature. *James v. Wilson*, 95 S.W.3d at 906. Therefore, the defendants are entitled to the protection of qualified official immunity and cannot be held liable for the assault on Flynn by another student.

Furthermore, it is undisputed that Bass attacked Flynn at the end of P.E. class when students were changing from gym clothes to street clothes. As the students finished changing, they returned to the gym until it was time to go to their next class. The teachers (one taught the class that was ending, and the other was waiting for the next class to begin) were in the office. The office is in a hallway where the locker rooms and gym doors both are located. The office is centrally placed with respect to the gym and locker rooms. Logically, the teachers could not be in all the locations at the same time. The record shows that the office has a window through which the teachers could view the hallway. Although Flynn argues that the teachers gave conflicting testimony in their depositions concerning

the view, he has failed to include those depositions in the record. Consequently, we are bound to "assume that the record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Because the acts of the two teachers were discretionary, they enjoy qualified official immunity. Therefore, Flynn's claims against the administrators for vicarious liability are rendered moot. Accordingly, we affirm the summary judgment order of the Boone Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald L. McDermott
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BRIEF FOR APPELLEES:

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