

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001357-MR

VALESA DECK (IN HER CAPACITY AS
A TEACHER AT EMMALENA SCHOOL)

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 07-CI-00038

TINA NOBLE, Guardian of
Makayla J. Noble, a Minor

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

DIXON, JUDGE: Valesa Deck appeals from an interlocutory order of the Knott Circuit Court denying her motion for summary judgment based on qualified official immunity. Because we conclude Deck is entitled to judgment as a matter of law, we reverse and remand.

Deck is employed as a public school teacher at Emmalena School in Emmalena, Kentucky. On the afternoon of August 30, 2006, Deck took her third-grade students to the school's playground as a reward for doing well on their science assignments. One of Deck's students, Makayla Noble, played "Follow the Leader" with some of her classmates near the basketball court. Makayla stepped in a "dip" in the ground at the edge of the basketball court and fell down. Makayla advised Deck that she fell down and complained of arm pain. Makayla subsequently sought medical treatment and learned her arm was broken.

In February 2007, Tina Noble, Makayla's mother, filed a complaint in Knott Circuit Court alleging negligence by the Knott County Board of Education. Noble later filed an amended complaint to add several school administrators as defendants. In August 2009, Noble was granted leave to file a third amended complaint alleging a claim of negligent supervision against Deck; thereafter, the court granted summary judgment to the Board of Education and administrators on the basis of official immunity. In July 2010, the court denied Deck's motion for summary judgment on the basis of official immunity, and this appeal followed.

Though interlocutory, an order denying summary judgment to a party asserting an immunity defense is appealable. *Breathitt Co. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). It is well settled that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the [non-moving party] to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service*

Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). “[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. Here, it appears no material facts are in dispute. We must determine whether Deck, as the moving party, was entitled to the defense of qualified official immunity and judgment as a matter of law. *See Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

In *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), the Kentucky Supreme Court addressed the defenses of official immunity and qualified official immunity. The Court explained, in relevant part, as follows:

‘Official immunity’ is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed.

But 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.

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. at 521-522 (internal citations omitted).

In the case at bar, Deck points out that Noble's third amended complaint failed to delineate between official capacity claims or individual capacity claims. We agree with Deck that, as to an official capacity claim, she is entitled to official immunity as a result of the governmental immunity afforded her employer, the Knott County Board of Education, in the circuit court's summary judgment order of September 8, 2009. *Id.* at 522. A review of the record indicates the allegations of negligence pled in Noble's complaint are directed solely to the actions of Deck; consequently, we construe the complaint as asserting an individual capacity claim against Deck. *McCollum v. Garrett*, 880 S.W.2d 530, 533 (Ky. 1994).

Deck asserts she is entitled to qualified official immunity because taking her students outside for reward time constituted a discretionary function that she carried out in good faith and in the scope of her authority as a teacher. Noble, on the other hand, asserts Deck acted outside the scope of her authority by allowing the children to make an unscheduled visit to the playground; consequently, she contends it is immaterial whether a discretionary or ministerial function was involved. *See Bryant v. Pulaski County Det. Ctr.*, 330 S.W.3d 461, 466 (Ky. 2011).

Pursuant to KRS 161.180(1), "Each teacher and administrator in the public schools shall in accordance with the rules, regulations, and bylaws of the board of

education made and adopted pursuant to KRS 160.290 for the conduct of pupils, hold pupils to a strict account for their conduct on school premises, on the way to and from school, and on school sponsored trips and activities.”

In the case at bar, there is no indication that a rule existed that prohibited Deck from taking her students to the playground. Noble points to the deposition of Principal Sharon Johnson, who testified that Deck should have advised the principal’s office that she was taking the children outside. A review of Johnson’s testimony indicates that when teachers gave students reward time, the children were generally allowed to choose what activity they wanted to do, such as basketball or playing on the playground. Furthermore, in Deck’s deposition, she testified that it was common for teachers to offer students “reward time” to motivate them to do well on assignments. Deck also testified she was not aware of any policy or rule prohibiting teachers from taking students to the playground for reward time.

In examining the scope of Deck’s authority, we are mindful that “it is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official.” *Rowan County v. Sloas*, 201 S.W.3d 469, 488 (Ky. 2006) (internal quotation marks and brackets omitted). Based on the facts presented here, we are not persuaded that taking the children to the playground for reward time, though unscheduled, was so “manifestly or palpably beyond” Deck’s authority as a public school teacher that it precludes a defense of qualified official immunity. *Id.*

Finally, we agree with Deck's argument that her actions were discretionary rather than ministerial, entitling her to qualified official immunity. In *Yanero*, *supra*, the Court held that the enforcement of a known safety rule is a ministerial duty imposed on school employees, while promulgation of school safety rules is a discretionary function. *Yanero*, 65 S.W.3d at 529. "It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney*, 311 S.W.3d at 240. Here, there is no indication a specific rule existed regarding reward time; consequently, we conclude Deck acted within her discretion as a teacher when she decided to take her students to the playground for reward time at the end of the school day.

After carefully reviewing the record, we conclude Deck is entitled to judgment as a matter of law based on official immunity and qualified official immunity; consequently, the trial court erred by denying her motion for summary judgment. We reverse the order of the circuit court and remand for proceedings consistent with this opinion.

For the reasons stated herein, the judgment of the Knott Circuit Court is reversed and remanded.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonathan C. Shaw
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Jeffrey R. Morgan
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