

RENDERED: JULY 19, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000598-MR

SHEILA PATTON, ADMINISTRATRIX
OF THE ESTATE OF STEPHEN
LAWRENCE PATTON

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 08-CI-00653

DAVIDA BICKFORD; PAUL
FANNING; RONALD "SONNY"
FENTRESS; JEREMY HALL;
ANGELA MULLINS; LYNN
HANDSHOE; AND GREG NICHOLS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Sheila Patton, as administratrix of Stephen Lawrence Patton's estate (referred to as "the Estate"), appeals from the Floyd Circuit Court's

order granting summary judgment in favor of Davida Bickford (referred to as “Principal”), Paul Fanning and Ronald “Sonny” Fentress (collectively referred to as “Superintendents”), and Jeremy Hall, Angela Mullins, Lynn Handshoe, and Greg Nichols (collectively referred to as “Teachers”). For the following reasons, we affirm.

The Estate filed the underlying wrongful death action against the Teachers, Principal, and Superintendents, in their individual capacities, alleging negligence in failing to supervise Stephen Patton and other students at Allen Central Middle School (“ACMS”). The Estate claims that the Teachers, Principal, and Superintendents failed to comply with ACMS’s and Floyd County School Board’s anti-bullying policies and procedures, which resulted in Stephen’s being subjected to constant bullying, and eventually taking his own life.

The Teachers, Principal, and Superintendents moved for summary judgment, which the trial court granted on two grounds: (1) the Teachers, Principal, and Superintendents were entitled to qualified official immunity and (2) Stephen’s act of suicide was an intervening and superseding act which cut off any liability. This appeal followed.

Summary judgment shall be granted only 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.” CR¹ 56.03.

¹ Kentucky Rules of Civil Procedure.

The trial court must view the record “in the 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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Further, “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 (citations omitted).

On appeal from a granting of summary judgment, our standard of review 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 a judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). We review the trial court’s legal conclusions *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

At the outset, we note that the Estate’s appellate brief deviates from the format mandated by CR 76.12 because it fails to cite to the trial record. When an appellate brief fails to abide by the rules, our options are: “(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only.” *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted). In this instance, we choose to ignore the deficiencies and proceed with the review, not to reward deviating from the rules, but because this case

exclusively rests on a judgment of law. Thus, citation to the factual record is not particularly crucial to our review.

Proceeding to the merits, the Estate first claims the trial court erred by granting summary judgment on grounds of qualified official immunity. We agree.

The Kentucky Supreme Court has addressed the issue of qualified official immunity as follows:

[W]hen 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. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed. Qualified official immunity is an affirmative defense that must be specifically pled.

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) (internal citations omitted).

Under KRS² 161.180(1), "[e]ach teacher and administrator in the public schools shall in accordance with the rules, regulations, and bylaws of the board of

² Kentucky Revised Statutes.

education made and adopted pursuant to KRS 160.290³ for the conduct of pupils, hold pupils to a strict account for their conduct on school premises[.]” The rules and regulations promulgated by the board of education in the Floyd County district include an anti-bullying policy, which, by way of KRS 161.180(1), the teachers and administrators of public schools are required to enforce. In this case, Appellees’ duty of care with respect to bullying incidents is set forth in the Floyd County Schools Student Handbook & Code of Conduct (“Handbook”) as follows, in relevant part:

HARASSMENT/DISCRIMINATION

. . . .

. . . Students who engage in harassment/discrimination of an employee or another student *shall* be subject to disciplinary action including, but not limited to, suspension and expulsion.

District staff *shall* provide for a prompt and equitable resolution of complaints concerning harassment/discrimination.

. . . .

³ KRS 160.290(1) reads:

Each board of education shall have general control and management of the public schools in its district and may establish schools and provide for courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the administrative regulations of the Kentucky Board of Education. Each board shall have control and management of all school funds and all public school property of its district and may use its funds and property to promote public education.

Within **twenty-four (24) hours** of receiving a serious allegation of harassment/discrimination, district personnel *shall* attempt to notify parent(s)/guardian(s) of both student victims and students who have been accused of harassment/discrimination.

.....

Procedures

Students who believe they have been a victim of harassment/discrimination or who have observed other students being victimized shall, as soon as reasonably practicable, inform their teacher, guidance counselor or principal of the incident.

The Superintendent *shall* develop procedures providing for the activities listed below.

1) Investigation of allegations of harassment/discrimination *to commence* as soon as circumstances allow, but *not later* than **three (3) school days** after submission of the original written complaint. A written report of all findings of the investigation *shall* be completed within **thirty (30) calendar days**, unless additional time is necessary due to the matter being investigated by a law enforcement or governmental agency. The Superintendent/Designee *may* take interim measures to protect complainants during the investigation.

2) A process to identify and implement, within **three (3) school days** of the submission of the written investigative report, methods to correct and prevent reoccurrence of the harassment/discrimination. If corrective action is not required, an explanation *shall* be included in the report.

3) Annual dissemination of written policy to all staff and students.

4) Age appropriate training during the first month of school to include an explanation of prohibited behavior

and the necessity for prompt reporting of alleged harassment/discrimination.

5) Development of alternate methods of filing complaints for individuals with disabilities and others who may need accommodation.

.....

Failure by an employee, immediate supervisor, principal, and/or superintendent to initiate an investigation of alleged harassment/discrimination, to follow approved procedures, or to take corrective action shall be cause for disciplinary action.

(Italics added). From our review of the Handbook, Appellees' duties were both ministerial and discretionary in nature. The language of the Handbook requires the Superintendent to develop procedures and mandates certain activities be included in those procedures, such as the aforementioned duty to investigate and report within the specified time frame. This duty of the Superintendent is clearly ministerial. Therefore, qualified official immunity was improperly granted. Furthermore, the Handbook requirement that district staff (including the Teachers and Principal) *shall* promptly resolve complaints of bullying is also a ministerial function, meaning that application of qualified official immunity was improper.

That being said, even if it could be proven that the Teachers and Principal breached their duty of care to Stephen, under Kentucky law, an act of suicide is considered an intervening and superseding act that cuts off liability:

Several exceptions have been carved into the general rule that suicide is an intervening cause eliminating liability on the part of a wrongdoer. The first exception is "where a person known to be suicidal is

placed in the direct care” of another owing a duty to protect the person from harm. . . . The second exception is found in workers compensation law and permits recovery when an injury sustained in the course of employment causes some type of “mental disorder sufficient to impair the worker’s normal and rational judgment, where the worker would not have committed suicide without the mental disorder.”

Finally, the third exception . . . is known as the irresistible impulse exception and occurs when a “decedent was delirious or insane and either incapable of realizing the nature of his act or unable to resist an impulse to commit it.”

Epelbaum v. Elf Atochem, North Am., Inc., 40 F.Supp.2d 429, 431 (E.D. Ky. 1999) (quoting *Watters v. TSR, Inc.*, 904 F.2d 378, 383-384 (6th Cir. 1990)).

Moreover, “[t]he question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury.” *Watters*, 904 F.2d at 383 (quoting *House v. Kellerman*, 519 S.W.2d 380, 382 (Ky. 1974) (footnote omitted)). Here, the trial court correctly found that Stephen’s act of suicide did not fall within any of the recognized exceptions. Stephen’s case does not involve a worker’s compensation claim or suggest the presence of an irresistible impulse to commit suicide.

Furthermore, Stephen’s suicide fails to meet the duty of care exception. The elements of this exception require that “a person known to be suicidal is placed in the direct care’ of another owing a duty to protect the person from harm.” *Epelbaum*, 40 F.Supp.2d at 431 (quoting *Watters*, 904 F.2d at 383). It does not appear from the record that anyone was aware that Stephen was suicidal, especially

considering that his friends and parents were shocked by the tragic incident. Additionally, when Stephen committed suicide in his home he was not in the direct care of Appellees. The custodial duty owed by teachers and administrators to care for students does not extend to their homes. *See Yanero*, 65 S.W.3d at 529 (“[t]he premise for [custodial] duty is that a child is compelled to attend school [and] ‘[t]he result is that the protective custody of teachers is mandatorily substituted for that of the parent[.]’”) (citation omitted).

In conclusion, the trial court erred as a matter of law by granting Appellees qualified official immunity. Nevertheless, we affirm the trial court’s grant of summary judgment in favor of Appellees on the basis that Stephen’s act of suicide cut off any potential liability. Hence, the Estate’s wrongful death claim was properly dismissed for lack of causation.

The order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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