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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001248-MR

PIKE COUNTY BOARD OF EDUCATION and SCHOOL SYSTEM; TOMMY THOMPSON, individually and in his official capacity; DAVID ROWE, individually and in his official capacity; and LEE BURKE, individually and in his official capacity — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 09-CI-00417

ERIC MADDEN — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND KRAMER, JUDGES.

KRAMER, JUDGE: Eric Madden filed suit in Pike Circuit Court alleging that, but for the negligence of the above-captioned appellants, he would not have been

injured in a fight with another student (Thomas Forsyth[1]) that occurred in a restroom on the campus of Pike County Central High School during school hours and during a school event (an ice cream picnic). Some of the appellants (*i.e.*, the Pike County Board of Education and School System, along with the appellants in their official capacities as its employees) moved for summary judgment asserting governmental immunity from suit. The remaining appellants (*i.e.*, David Rowe, Lee Burke, and Tommy Thompson in their individual capacities) asserted qualified immunity from suit. The circuit court denied summary judgment and, pursuant to our jurisprudence recognizing an immediate right of appeal in this context, this interlocutory appeal followed. *See Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009); *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010); *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006).

Upon review, we reverse.

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010). Likewise, whether an individual is entitled to official immunity is a question of law reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). Summary judgment is proper only "if the pleadings, depositions, answers to

[1] Forsyth was never added as a party to this litigation.

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." Kentucky Rules of Civil Procedure (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*, 807 S.W.2d at 480.

With this standard in mind, the first argument raised on appeal is that the circuit court erred in failing to extend governmental immunity to the Pike County Board of Education and School System (the "Board of Education") and to the remaining appellants in their official capacities as the Board of Education's employees. We agree. Madden has never contended that the ice cream picnic (the event during which he was injured) was a proprietary function otherwise exempt from the purview of governmental immunity—that is, an activity more akin to those of a private entrepreneur or of a business enterprise as distinguished from governmental or public duties. And, as agencies of the state, school boards and their employees in their official capacities are entitled to governmental immunity in the context of performing non-proprietary functions. *See Jenkins Independent Schools v. Doe*, 379 S.W.3d 808, 810 (Ky. App. 2012) (citing *James v. Wilson*, 95 S.W.3d 875, 903 (Ky. App. 2002)).

Madden's sole argument as to why the Board of Education and its employees in their official capacities do not enjoy governmental immunity in this

case is his reading of Kentucky Revised Statutes (KRS) 160.160(1).[2] He points out that this provision states a school board "may sue and be sued," and he thus reasons that governmental immunity has been statutorily waived for all school boards regarding tort actions. However, this very argument has already been rejected in published case law. *See Grayson County Bd. of Educ. v. Casey*, 157 S.W.3d 201, 207 (Ky. 2005).

The second argument raised on appeal is that David Rowe and Lee Burke, respectively the principal and vice-principal of Pike County Central High School at all times relevant to this matter, were entitled to qualified immunity from suit in their individual capacities. We agree.

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

[2] KRS 160.160(1) provides:

> Each school district shall be under the management and control of a board of education consisting of five (5) members, except in counties containing a city of the first class wherein a merger pursuant to KRS 160.041 shall have been accomplished which shall have seven (7) members elected from the divisions and in the manner prescribed by KRS 160.210(5), to be known as the "Board of Education of...., Kentucky." Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; make contracts; expend funds necessary for liability insurance premiums and for the defense of any civil action brought against an individual board member in his official or individual capacity, or both, on account of an act made in the scope and course of his performance of legal duties as a board member; purchase, receive, hold, and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created. Each board of education shall elect a chairman and vice chairman from its membership in a manner and for a term prescribed by the board not to exceed two (2) years.

> 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).

Below, Madden contended that Rowe and Burke were individually liable for his injuries because they breached *ministerial* duties to properly supervise appellee Tommy Thompson (*i.e.*, the teacher who purportedly failed to supervise Madden and Forsythe and thus prevent Madden's injuries) and to otherwise provide Madden with a safe school environment.

However, the aforementioned duties were not ministerial. As to why, the reason is largely explained in the following excerpt from *Marson v. Thomason*, 438 S.W.3d 292, 299-300 (Ky. 2014):

> Principal Martin herself never performed the specific task of pulling out the bleachers. As a principal, she is hired to administer the running of the school, not to personally perform each and every task that must be done in the course of a day. One of her tasks is to direct various school employees in their job performance by assigning job duties and to generally supervise them. She testified that she did so in regard to getting the gym prepared for the students in the mornings. The acts required by her job do not include actually performing tasks that she has assigned to others. Nor is she required to follow behind the custodians every time they extend the bleachers to see that the bleachers are properly extended, even though she has general supervision duties. That is the kind of job detail a supervisor cannot be responsible for.
>
> There is a qualitative difference in actually extending the bleachers and assigning someone to fulfill that task.

Actually extending the bleachers is a certain and required task for the custodians to whom the task is assigned, and is thus ministerial to them. It is not a task that is assigned to the principals, and is not a ministerial task as to them. Principals do have a duty to provide a safe school environment, but they are not insurers of children's safety. They must only be reasonably diligent in this task. Because that task is so situation specific, and because it requires judgment rather than a fixed, routine performance, looking out for children's safety is a discretionary function for a principal, exercised most often by establishing and implementing safety policies and procedures.

Martin's responsibility to look out for the students' safety was a general rather than a specific duty, requiring her to act in a discretionary manner by devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees. Her actions were at least at an operational level, if not a policy- or rule-setting level. Indeed, the principal ordered the custodians to prepare the gym and the teachers to watch the children and to move them around as needed in the morning.
As a principal, she did not have the specific duty to extend the bleachers properly, nor did she choose to undertake that duty. Indeed, principals are not generally required to do maintenance duties, although specific instructions could make such duties required and thus ministerial. *Whitt v. Reed*, 239 S.W.2d 489 (Ky. 1951). Instead, Martin assigned the specific duty to prepare the gym to the custodians by requiring them to get the gym ready for students. She had no specific duty to do a daily inspection of the bleachers to see if they were properly extended, but only a duty to reasonably determine if the custodians were doing their jobs. What is required by the job assigned to the governmental employee defines the nature of the acts the employee performs.

Similarly, she assigned teachers to direct and lead students getting off the buses before school. This too was discretionary decision-making at an operational level. There is no proof that Martin herself ever

> undertook to direct children coming off the buses or to lead them to the gym.
>
> Martin's oversight and direction of the morning bus routine was a matter of her discretionary decision-making, not a specific directive from the school board. As such, she had to evaluate and exercise discretion in determining how that job was to be done. She assigned the specific duty of preparing the gym to the custodians, and the duty of coordinating the children's movement from the buses into the school and ultimately to the gym to the teachers on duty. Her general responsibility for students' safety was discretionary. She is therefore entitled to qualified official immunity.

Marson involved a school custodian's failure to properly extend bleachers; a student injuring himself by falling from the bleachers; a teacher's alleged negligence in failing to prevent the student's injuries; and an assertion that the principal of the school was likewise negligent for breaching ministerial duties to supervise and otherwise provide a safe school environment. As the above quote indicates, *Marson* rejected the notion that a principal's duty to provide a safe school environment is ministerial, rather than discretionary.

Furthermore, and to analogize and paraphrase *Marson*'s discussion of a school administrator's duties relative to custodians: the acts required by the job of a principal or vice-principal do not include actually performing tasks assigned to others, such as a teacher's task of supervising students. Nor are they required to be in a teacher's classroom; to oversee any particular teacher or student every time a class is in session; or to personally supervise every part of the school's campus even though principals and (as in this case) vice-principals have general

supervision duties. That is the kind of job detail a supervisor cannot be responsible for. There is a qualitative difference in actually supervising students and assigning someone to fulfill that task. Actually supervising students is a certain and required task for the teachers to whom the task is assigned and is thus ministerial to them. *See also id*. at 300-301 (explaining that the teacher assigned to supervise the area in which the accident occurred had a ministerial duty to do so). It is not a task that is typically assigned to the principals and vice-principals and is not a ministerial task as to them.

In short, Madden has identified two discretionary duties, not two ministerial duties. As such, any actions Rowe and Burke took in the context of performing their two aforementioned duties were proper subjects for qualified immunity analyses.

With this in mind, it was Madden's burden at the summary judgment phase to produce evidence that any actions Rowe and Burke took in the contexts of performing these two discretionary duties were indicative of bad faith. *Yanero*, 65 S.W.3d at 523.[3] Madden failed to provide any such evidence, much less argue the

[3] As further explained in *Yanero*, 65 S.W.3d at 523,

> [I]n the context of qualified official immunity, "bad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive. 63C Am. Jur. 2d, Public Officers and Employees, § 333 (1997). Once the officer or employee has shown prima facie that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991), as modified by, *Cox v. Kentucky Dept. of Transp*., 53 F.3d 146 (6th Cir. 1995).

issue. Therefore, the circuit court erred by denying Burke and Rowe summary judgment on the basis of qualified immunity.

The third argument raised on appeal is that Thompson was likewise entitled to qualified immunity from liability for Madden's injuries. We agree.

Ostensibly, Madden's theory of Thompson's liability is based upon the recognition in our jurisprudence that the *failure* of teachers to supervise their students in the face of known and recognized misbehavior is a breach of a ministerial duty and is not subject to qualified immunity. *See Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky. 2011). Madden contends Thompson breached this ministerial duty. To fully explore the contours of Madden's argument, however, it first becomes necessary to set forth Madden's version of the events that led to the injuries he sustained and his reasons for filing suit against Thompson. In his response to the appellants' motion for summary judgment, Madden explained:

> [O]n May 6, 2008, during his junior year and as [Madden] was entering the classroom of Defendant Tommy Thompson, one of L.N.'s friends, Thomas Forsyth, "hollered out" in the presence of other students as well as Defendant Thompson that some John Lennon-type sunglasses that [Madden] was then wearing in conjunction with a school picnic that had been scheduled later that day "look[ed] gay on [Madden]." To this unsolicited and unkind remark, Madden responded by explaining to Mr. Forsyth that he did not "care what you think." Mr. Forsyth, for his part, then countered aggressively, stating to [Madden] (still in the presence of other students and Defendant Thompson) "Why don't you shut the fuck up?" and that "if [Madden] said anything else to him, he would beat the fuck out of

[Madden]." Defendant Thompson then told [Madden] and Mr. Forsyth to stop their verbal exchange, after which Mr. Forsyth continued to stare at [Madden] for much of the remainder of the class. Some time thereafter, Defendant Thompson, knowing that there was a potential problem between [Madden] and Mr. Forsyth and recognizing the danger that their close proximity to each other posed, informed [Madden] that he would allow him to leave class five minutes early so as to create separation between he and Mr. Forsyth.[4] Subsequently, [Madden] went to the school's lunchroom and library, where he continued to be stared and gestured at by Mr. Forsyth, though Plaintiff was able to avoid any direct contact with Mr. Forsyth at those two locations.

After leaving the library, however, [Madden], along with virtually all of his classmates, went outside for an ice cream picnic that had been scheduled for that day at the school's track and field. While [Madden] walked around the school's track with some friends, Mr. Forsyth "started hollering out, 'Those glasses look gay. You are a faggot. You are a pussy' in [Madden's] direction. When [Madden] was outside at the school's track and field, Mr. Forsyth also continued to threaten to assault him, but when [Madden] looked for a teacher or administrator to whom he could report these threats, he could not find or see any teachers or administrators anywhere outside. In [Madden's] words, "[t]here were no teachers out there . . . [t]here was nobody out there." After repeatedly ignoring Mr. Forsyth's threatening comments, [Madden] finally confronted him and said "Look, I don't want to fight you. I plan on going to the prom with my girlfriend. If you want to handle this out of school, that's fine, but don't bother me. Just leave me alone when I'm at school."

[4] According to the evidence of record (and in the words of Madden's counsel), Thompson also granted Madden's request "to go to the rest room to sort of calm himself down, maybe splash some water in his face, maybe, you know, when people get frustrated and their temper rises, it's a good thing to withdraw their self from the situation. But—and then [Madden] said he came back to the classroom and that later before the class—come close to ending but before it ended, the instructor, Mr. Thompson, allowed him to leave class early, basically what it appears to be to keep the boys separated[.]"

> [Madden] then walked away and went into the school's outside boy's restroom. According to [Madden], Mr. Forsyth followed him into the restroom with a large group of his friends, the latter of which held the restroom door closed and began chanting and "hollering" the following: "Beat the fuck out of the pussy. Beat the fuck out of the pussy." Then, "while [Madden] was using the bathroom and before [Madden] had zipped up and turned around, [Mr. Forsyth] had taken his shirt off and that's when [Mr. Forsyth] attacked [Madden]." Ultimately, Mr. Forsyth beat [Madden] so severely in the boys' restroom that he dislocated [Madden's] shoulder, fractured [Madden's] left orbital bone and left [Madden] unconscious on the restroom floor. After regaining consciousness, [Madden] exited the restroom where he finally observed two (2) teachers, one of whom took him to the principal's office, where the paramedics were called and took [Madden] to the emergency room.

For the purpose of summary judgment, we assume the truth of Madden's deposition testimony insofar as it is based upon his personal knowledge; falls within some exception to the rule against hearsay; or would otherwise be admissible.[5] That said, what Madden has related does not take issue with Thompson's failure to supervise his students in the face of *known* and *recognized* misbehavior. Madden did not file suit against Thompson for failing to address Forsyth's alleged use of foul language or lengthy staring—the only instances of alleged misbehavior that Thompson could have known or recognized while he was charged with supervising Madden and Forsyth. Indeed, Madden does not contest that elsewhere in his deposition, as pointed out by the appellants, he actually

[5] There are, of course, drastically different versions of these events from several other witnesses. Nevertheless, the appellants do not contest that the above is an accurate reflection of what Madden related in his deposition—the transcript of which the appellants themselves frequently cite but failed to include with the certified record.

testified he thought the actions taken by Thompson while he was supervising them (*i.e.*, telling both Madden and Forsyth to "stop their verbal exchange"; excusing Madden to the restroom to "sort of calm himself down"; and allowing Madden to leave class five minutes early) were sufficient to diffuse the situation in Thompson's classroom.

Instead, what Madden has related takes issue with how Thompson acted to prevent a situation that originated in his classroom, and was from all accounts controlled in his classroom, from potentially escalating *outside* his classroom. As Madden postulated in his response to the appellants' motion for summary judgment:

> [S]ince when did an initially-proper response to a known and recognized danger entitle Defendant Thompson or any other Defendant to completely abdicate their subsequent and ongoing duties to provide at least some modicum of adult supervision or separation between fighting or bullying students when they later move to other areas of the schoolhouse, such as the lunchroom or, even worse, within the hidden walls of the boys' restroom?

Thus, Madden urges that a ministerial duty of post-incident supervision was owed by Thompson. But, he does not cite any policy or rule of law that would have required Thompson to abandon his classroom and follow Madden and Forsyth for the remainder of the school day, in and out of the library, lunchroom, and restrooms, in an effort to insure the two remained separated. He does not argue that Forsyth should have been placed in isolation or expelled from school for any grounds relating to his conduct in Thompson's classroom, or that

Thompson had any sort of authority to make that happen. Madden concedes that other school personnel were charged with the duty of supervising students in the library and lunch room—the locations he visited over the course of the hours between when he left Thompson's classroom and was assaulted at the school picnic. Moreover, Madden makes no allegation that Thompson was assigned any kind of duty to supervise students at the school picnic.

To the extent that Thompson could have owed any sort of duty under the circumstances, the duty in question was explained by Principal Rowe in his deposition in this matter over the course of the following series of questions and answers:

> MADDEN'S COUNSEL: Are teachers required to report to [the administration] when they have physical altercations or things that are close to physical—you know, sometimes there's fights almost happen, people get roared up and, you know, maybe push around each other, maybe not get into each other, somebody holds them back, but are teachers required to report those sort of things to you?
>
> . . . .
>
> ROWE: If they *think* it's a disciplinary action that needs to be taken care of by the administration then they would contact us.
>
> MADDEN'S COUNSEL: But also, not necessarily just disciplinary, but sort of preventative measures too. They can call on you for preventative measures like there ain't a fight happened yet but I think there's going to be a fight happen, why don't you, you know, keep this, you know, put a lid on this thing to keep it from boiling over. They have your access to keep things from getting to a heightened stage too, don't they?

> ROWE: Our staff, you know, they can, *they put out a lot of fires during the day* and they can notify a counselor or an administrator. Usually administrator if they really *feel* like there's going to be a fight. But sometimes the students need to go to a counselor and they may notify a counselor.
>
> . . . .
>
> APPELLANTS' COUNSEL: Let me just ask you a couple of questions just for my information. Would you consider Mr. Thompson's duty or any other teacher's duty on reporting incidents to be something that's discretionary in their observation as to whether it warrants further reporting to an administrator?
>
> . . . .
>
> ROWE: Yes. We have a good staff, *they do put out a lot of fires and things every day that don't get reported to the office because they can take care of it in-house*.
>
> APPELLANTS' COUNSEL: Every comment with Johnny and Joe and Sally and Emily, they don't have to call down to the administrator and say somebody had an argument?
>
> ROWE: That's correct.

(Emphasis added.)

In short, Thompson's duty to report to the administration, as explained by Principal Rowe, parallels the reporting duty of another teacher that was explained in *Turner*, 342 S.W.3d at 877-878:

> Since Turner did not have actual or personal knowledge of the events alleged, the only other basis upon which she was required to make a report would be the development of a "reasonable cause to believe" that one of the children had been abused. Making such a determination clearly

> involves the exercise of discretion. It is similar to a judicial decision that there is or is not probable cause to support an asserted proposition. The very purpose of the doctrine of qualified official immunity is to protect government officials exercising discretion from second-guessing of their good faith decisions made in difficult situations such as this. The essence of reaching a determination as to whether reasonable cause exists would require discretion. This requires that Turner make reasonable inquiry into the facts, weighing the credibility of each child and then using her judgment and experience of a teacher of kindergarten level students, to reach a decision as to whether there was reasonable cause to believe that sexual abuse had occurred.
>
> As the trial court recognized, this typifies a "legally uncertain environment." *Yanero*, 65 S.W.3d at 522 ("[Q]ualified official immunity ... affords protection from damages liability for good faith judgment calls made in a legally uncertain environment.").

To be sure, Thompson's reporting duty at issue in this matter did not involve ascertaining whether some form of misconduct had already occurred or addressing misconduct he witnessed or should have witnessed; it involved making a prediction—whether he *thought* or *felt* that he had sufficiently "put out a fire in-house." This, in turn, required Thompson to consider what he had witnessed between Madden and Forsyth during his class; how he had addressed it; and to use his judgment and experience as a teacher of teenage students to reach a decision as to whether there was probable cause to believe that, in spite of how he had addressed it, some other serious misconduct would occur in the imminent future.

The proposition that Thompson *knew* that there was a "potential problem" between Madden and Forsyth, or that he *recognized* "the danger that

their close proximity to each other posed" is, of course, speculation on Madden's part regarding another person's mental processes. It is as likely, if not more so, that Thompson separated them because their "disparaging comments toward one another"[6] had created a classroom environment that prevented Thompson from performing his primary duty: teaching. Moreover, even Madden's description of the events leading up to his assault—particularly his statement to Forsyth that they could fight after prom and his description of how he was caught utterly off-guard by Forsyth in a restroom (even though he knew Forsyth was in the immediate vicinity of the restroom)—indicates he *also* believed that if any fight was going to happen, it was not going to happen on that day.

In any event, Thompson clearly had discretion in this matter. He exercised it when he decided not to make any report to the administration, instead deeming his actions sufficient enough to resolve the situation he had witnessed between Madden and Forsyth. As such, it was Madden's burden to produce evidence demonstrating that Thompson's actions were indicative of bad faith. Madden failed to argue Thompson's actions were indicative of bad faith and likewise failed to produce any evidence in that regard at the summary judgment

[6] Tommy Thompson's affidavit regarding what he knew of these events is of record in this matter. In relevant part, it states:

> On or about May 6, 2008, I was employed as a classroom teacher by the Pike County School District. During my morning class period, Eric Madden and Tommy Forsyth were making disparaging comments toward one another. I instructed both students to stop the verbal insults and other gestures. I later gave Eric permission to go to the restroom. Subsequent to his return to class I allowed him to leave early for lunch so as to avoid further comments between Eric Madden and Tommy Forsyth. . . .

phase. Therefore, the circuit court's failure to grant summary judgment in favor of Thompson was erroneous.

For these reasons, we REVERSE the Pike Circuit Court and direct it to enter an order dismissing the balance of Madden's claims against the appellants.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Neal Smith
Todd P. Kennedy
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Adam P. Collins
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