

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000313-MR

LUCY BURCHETT,  
AS NEXT FRIEND OF  
LARRY CALHOUN, JR.,  
A MINOR

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 99-CI-00349

FLOYD COUNTY BOARD OF EDUCATION  
THOMAS TACKETT;  
ELIZABETH FRAZIER; AND  
LINDA WRIGHT;

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: EMBERTON, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Lucy Burchett (Burchett) appeals the judgment entered by the Floyd Circuit Court which dismissed her claim against the Floyd County Board of Education, and individuals, Thomas Tackett, Elizabeth Frazier, and Linda Wright (collectively, the Appellees), for failing to enforce Kentucky Revised Statute (KRS) 159.140, the compulsory attendance law. The trial court ruled that the Appellees were protected from suit

by the doctrine of sovereign immunity. We agree and, therefore, affirm the judgment.

Burchett filed her complaint on April 6, 1999, as next friend of Larry Calhoun, Jr. (Larry), a minor, claiming that her son had been allowed to miss 78 (seventy-eight) days of school. As a result, he failed school that year. Burchett alleged that Floyd County Board of Education, its superintendent, Michael C. King, and the individuals, Thomas Tackett as principal of Prestonsburg High School, and Elizabeth Frazier and Linda Wright as teachers at Prestonsburg High School, failed to notify her of Larry's absenteeism, failed to properly supervise Larry, and failed to properly monitor Larry's absenteeism. Burchett further claimed that as a result of Larry's absenteeism, he failed school that year and that both she and Larry suffered past, present and future physical pain, suffering and anguish, future lost wages, medical and hospital bills, and other expenses and costs.

In response to the complaint, Appellees, jointly, filed a motion to dismiss on May 12, 1999, stating that the complaint failed to state a cause of action against them as a matter of law. Specifically, the motion claimed the Appellees were protected by the doctrines of sovereign immunity, official immunity, and that educational malpractice is not a recognized cause of action in Kentucky. Attached to the motion was a memorandum in support of the motion citing numerous cases pertaining to the doctrines of sovereign immunity, official immunity, and education negligence or malpractice.

No further pleadings were filed with the trial court. Subsequently, on January 4, 2000, the Floyd Circuit Court entered judgment dismissing the complaint based upon the following rationale:

The claims asserted by the plaintiff in the complaint against the individual defendants, as well as the school district, are barred inasmuch as the Kentucky appellate courts have refused to recognize negligence claims against either a school district or school teachers arising out of a claimed failure to properly educate or supervise the education of a student. Rich v. Kentucky Country Day, Inc., Ky. App., 793 S.W.2d 832 (1990). In addition, the claims against the defendants are barred by operation of the doctrine of sovereign immunity which applies not only to the school district, but to the individual defendants in this action who were, as alleged, acting within the course and scope of their employment and official duties with the school district. Clevinger v. Pike County Board of Education, Ky., 789 S.W.2d 5 (1990); Rose v. The Council for Better Education, Inc., Ky., 790 S.W.2d 186 (1989); Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997); Franklin County v. Malone, Ky., 957 S.W.2d 195 (1998).

This appeal followed.

It should be noted from the outset that Burchett concedes in her appeal that "[w]ith regard to sovereign immunity, the law is clear in Kentucky that at this time the Floyd County Board of Education has sovereign immunity[.]" However, Burchett continues to pursue her appeal as to Tackett, Frazier and Wright based upon her contention "that sovereign immunity has not been extended to its agents." We disagree. We believe the trial court correctly followed the applicable statutory and case law relative to the issue of sovereign immunity as applied to

individuals acting within their scope of employment and official duties with the school district. The cases cited by the trial court (see above), as well as the more recently released cases of Collins v. Com. Of Ky. Nat. Resources, Ky., 10 S.W.3d 122 (1999) and Angel v. Harlan County Bd. Of Ed., Ky. App., 14 S.W.3d 559 (2000), more than adequately addresses this issue, and we believe it pointless to further belabor this issue.

However, we also note that despite the school district's and individual's protection from civil liability, we do express our concerns over the Appellees' failure to adequately follow the mandates of KRS 159.140. KRS 159.140 provides:

The director of pupil personnel shall:

- (1) Devote his entire time to the duties of his office;
- (2) Enforce the compulsory attendance and census laws in the attendance district he serves;
- (3) Acquaint the school with the home conditions of the student, and the home with the work and advantages of the school;
- (4) Ascertain the causes of irregular attendance and truancy, and seek the elimination of these causes;
- (5) Secure the enrollment in school of all students who should be enrolled and keep all enrolled students in reasonably regular attendance;
- (6) Visit the homes of students who are absent from school or who are reported to be in need of books, clothing, or parental care;
- (7) Provide for the interviewing of students and the parents of those students who quit school to determine the reasons for the

decision. The interviews shall be conducted in a location that is nonthreatening for the students and parents and according to procedures and interview questions established by an administrative regulation promulgated by the Kentucky Board of Education. The questions shall be designed to provide data that can be used for local district and statewide research and decision-making. Data shall be reported annually to the local board of education and the Department of Education.

- (8) Report to the superintendent of schools in the district in which the student resides the number and cost of books and school supplies needed by any student whose parent, guardian, or custodian does not have sufficient income to furnish the child with the necessary books and school supplies.
- (9) Keep the records and make the reports that are required by law, by regulation of the Kentucky Board of Education, and by the superintendent and board of education.

Each child within the school district is entitled to an education. All three branches of government in the Commonwealth have made significant decisions to make education a priority within this state. However, it is the duty and responsibility of the local school boards and individual administrators, teachers, and school personnel to effectuate these mandates. The local authorities must follow the law and provide the guidance, supervision, attention, and discipline necessary to help each child attend school so as to receive an education. Without a proper education, the child, his family, the school district, the local community and, ultimately, the Commonwealth all suffer.

However, we would also be remiss if we did not include that the child's parent or parents also must take an active role in his or her child's education. Without the cooperation of the parents, a vital element is missing. The parent is the primary educator and must actively participate and encourage the child to achieve his or her educational goals.

Though we do find fault with Appellees' failure to insure that Larry attended school, we believe the trial court properly dismissed Burchett's complaint pursuant to Kentucky Rules of Civil Procedure 12.02(f). Therefore, the judgment of the Floyd Circuit Court dismissing Burchett's complaint is affirmed.

EMBERTON, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Jerry A. Patton  
Prestonsburg, KY

BRIEF FOR APPELLEE:

Jonathan C. Shaw  
Michael J. Schmitt  
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