

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002563-MR

PAMELA AND KENNETH SEYMOUR

APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE PAUL W. ROSENBLUM, SPECIAL JUDGE
ACTION NO. 06-CI-01450

BOONE COUNTY BOARD OF EDUCATION
AND DEBORAH ROSENHOFFER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Boone Circuit Court dismissing the appellants' action against the Boone County Board of Education ("the Board") and Deborah Rosenhoffer, a teacher employed by the Board at North Pointe Elementary School. The trial court dismissed the action against these two

defendants based upon immunity principles. We will affirm the trial court's decision.

FACTUAL SUMMARY

Appellant Pamela Seymour slipped and fell on water in the halls of North Pointe Elementary School. She was on the premises prior to the fall opening of the school in an effort to ready the school for the upcoming year. Ms. Seymour is the wife of appellant Kenneth Seymour. The appellants contend that a young boy, Missy Bell's son, was asked to retrieve a bucket of water by Ms. Rosenhoffer and that during the carrying of the bucket of water back to the classroom, it spilled and Ms. Seymour fell as a result of encountering the water on the floor.

The trial judge dismissed the action against the Board and Ms. Rosenheffer. The appellants contend that this was in error.

STANDARD OF REVIEW

Whether immunity applies to the Board and Ms. Rosenhoffer is a question of law. As such, we must provide a *de novo* review. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921 (Ky. 1997).

DISCUSSION

Appellants first argue that the trial court erred in granting a judgment on the pleadings since they asserted that the Board and Ms. Rosenhoffer were not entitled to immunity in their pleadings. Kentucky Rules of Civil Procedure (CR) 12.03 sets forth that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” While factual

assertions are deemed admitted for the purposes of this rule, *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757 (Ky. 2003), legal assertions are not. *Blythe v. Transportation Cabinet of the Commonwealth*, 660 S.W.2d 668-69 (Ky. 1983). Thus, the trial court did not err in deciding the legal issue of immunity based on the pleadings.

It is appellants' contention that governmental immunity does not apply to a function such as the cleaning of the schools. We agree, however, with the argument of the appellees, that the cleaning of the school in preparation for the upcoming school year would be a necessary function. “[G]overnmental immunity’ is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency. . . .[A] state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function.” *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (citations omitted). In *Autry v. Western Kentucky University*, 219 S.W.3d 713, 718 (Ky. 2007), the Kentucky Supreme Court held that providing a dorm was a necessary function of a university. Appellees contend that the custodial services needed to run a school are similar in that they are necessary for the school to function as an institution of learning. We agree. Clearly, the classrooms and facilities would need to be regularly cleaned in order for a school to provide a facility in which students could congregate and be taught. Getting a school ready for the upcoming school year, as well, would be a

necessary function of the Board. Thus, the Board is entitled to immunity. We must now examine whether Ms. Rosenhoffer is also entitled to the defense.

“‘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.” *Yanero*, 65 S.W.3d at 521 (citation omitted). “[W]hen an . . . employee of a governmental agency is sued in his/her representative capacity, the . . . employee’s actions are afforded the same immunity, if any, to which the agency, itself, would be entitled[.]” *Id.* at 522. When sued individually, however, public employees are only entitled to qualified official immunity.

Qualified official immunity applies to the negligent performance by a public . . . 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. *Id.* (citations omitted).

The appellants contend that the activities of cleaning a class room for an upcoming school year are ministerial in nature and, thus, not entitled to the cloak of immunity. Appellants also argue that since they set forth in their complaint that Ms. Rosenhoffer’s acts were ministerial, the trial court should have accepted them as true for purposes of a motion under CR 12.03. We disagree.

In Kentucky, we use “a ‘liberal construction’ rule, [which] requires that a pleading be judged according to its substance rather than its label or form.” *McCullum v. Garrett*, 880 S.W.2d 530, 533 (Ky. 1994). Since all the claims asserted against Ms. Rosenhoffer appear to be as an employee of the Board, we believe a common sense approach to the interpretation of this pleading requires us to hold that the allegations made against her were in her official capacity. Thus, since the Board had immunity, so does Ms. Rosenhoffer. Regardless, however, the activities of Ms. Rosenhoffer would have entitled her to official immunity as they were discretionary in nature.

For the foregoing reasons, we will affirm the decision of the Boone County Circuit Court in dismissing the claims against the Boone County Board of Education and Deborah Rosenhoffer.

ACREE, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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