

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001239-MR

ANTHONY ADDISON

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 05-CI-00174

TERRY GREENE, AS PARENT,
GUARDIAN, AND NEXT FRIEND OF TARA GREENE;
DORIS GREENE, AS PARENT, GUARDIAN, AND
NEXT FRIEND OF TARA GREENE

APPELLEES

OPINION AND ORDER

(1) AFFIRMING APPEAL

(2) DENYING THE APPELLEES' MOTION TO DISMISS

(3) DENYING THE APPELLEES' MOTION FOR AN *EN BANC* HEARING

** ** * ** * **

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Anthony Addison (Addison) filed a motion for summary judgment seeking dismissal based on qualified official immunity. The circuit court

denied that motion, and it is from that denial that Addison now appeals. Terry and Doris Greene, as parents, guardians, and next friends of Tara Greene, (the Greens) filed a motion to dismiss Addison's appeal, arguing that it was not taken from a final and appealable order. The Greens have also moved this Court to hear this matter *en banc*. For the following reasons, we affirm the appeal and deny the motions.

FACTS

The underlying facts are not in dispute. On September 29 and 30 2003, Daniel Oliver (Oliver), then 17 years old, and Tara Greene (Tara), then five years old, were riding on a Todd County school bus. Oliver sexually abused Tara on both days and ultimately pled guilty to charges arising from those incidents. The Greens filed suit on October 21, 2005, naming as defendants in their individual capacity: Addison, the bus driver; Glenn Wilson (Wilson), the director of student transportation for the school system; Charles Adams (Adams), the principal of the high school Oliver attended; and David Eakles (Eakles), the superintendent of the school system (hereinafter collectively referred to as the School System Defendants).

In March 2007, the School System Defendants joined Oliver as a third party defendant. Oliver did not file a response to the third party complaint and the court issued a default judgment against him in August 2007.

The parties undertook extensive discovery which revealed, in part, that Oliver had a troubled childhood including a history of sexually inappropriate

behavior. Because of this and other inappropriate behaviors, Oliver had received treatment at a number of facilities prior to the events in question. Based on that history, the Greenes amended their complaint in October 2007 adding Donna Monroe, a social worker with the Cabinet for Health and Family Services, and Pennyroyal Regional Mental Health-Mental Retardation Board, Inc., both of whom provided services to Oliver.

On April 15, 2008, the School Board Defendants and Monroe filed motions for summary judgment, asserting that they were entitled to qualified official immunity. The School Board Defendants and Monroe argued that they were acting within the scope of their employment, that they did not act in bad faith, and that their actions were discretionary. Furthermore, the School Board Defendants noted that they had no knowledge of Oliver's past inappropriate behavior. The Greenes, in their response, admitted that Wilson, Adams, and Eakles had immunity and agreed that summary judgment in their favor was appropriate. However, the Greenes argued that Addison's and Monroe's actions were ministerial rather than discretionary, thus exempting them from entitlement to immunity.

The court granted summary judgment to Wilson, Adams, Eakles, and Monroe. However, the court denied the motion for summary judgment as to Addison. In its order denying Addison's motion, the court stated that:

It has been determined from representations of counsel for Plaintiff that Plaintiff's claims against Anthony Addison allege the violation of specific ministerial duties

or rules that placed upon Anthony Addison the duty of prohibiting children on the bus from moving about while the bus was in motion and from talking to the driver while the bus was in motion. Assuming there are specific written rules to this effect, and assuming that Anthony Addison failed to enforce these rules, the duty to enforce these rules would likely be considered ministerial duties not involving the exercise of discretion. Allegations of negligence in the performance of ministerial duties would not trigger the protection of the doctrine of qualified official immunity. Plaintiff alleges that, but for, the breach of these ministerial duties, the injury in this case would have been prevented.

Counsel for Anthony Addison has pointed out the difficulties Plaintiff faces with proving proximate cause between breaches of the ministerial duties to the injury based upon the current state of the discovery. Even so, no fact or circumstance has rendered it impossible for Plaintiff to prove proximate cause and prevail at trial and summary judgment is not appropriate.

The Court finds that Anthony Addison is not protected from civil claims by the doctrine of qualified official immunity as long as the Plaintiff is limited to claims involving breach of the specific ministerial duties mentioned above. To this extent, the motion for summary judgment is denied.

It is from this order that Addison appeals. We note that the Greenes have not appealed the orders dismissing Wilson, Adams, Eakles, and Monroe. We will set forth additional facts as necessary to analyze the issues raised on appeal.

ANALYSIS

1. Finality of Order

We first address the Greenes' motion to dismiss. The Greenes argue that the order denying Addison's motion for summary judgment is not final and

appealable because it does not dispose of all of the parties or of all of the claims, nor does it recite the language required by Kentucky Rules of Civil Procedure (CR) 54.02(1). Addison agrees, however, he argues that claims involving immunity differ from other claims and are not subject to the normal rules of finality.

Only judgments entered pursuant to a final order may be reviewed on appeal. CR 54.01. Generally, an order overruling a motion for summary judgment is interlocutory and not appealable. However, when a trial court's denial of summary judgment constitutes an adjudication on the merits or is based purely on a matter of law, the order is reviewable on appeal. *Ford Motor Credit Co. v. Hall*, 879 S.W.2d 487, 489 (Ky. App. 1994); *see also Gumm v. Combs*, Ky., 302 S.W.2d 616 (1957).

At the time the parties filed their briefs, there were no published opinions in Kentucky directly on point. However, there were four unpublished opinions from this Court that addressed whether denial of summary judgment on the issue of immunity was appealable, three holding that it was and one holding that it was not. While this case has been pending on appeal, the Supreme Court of Kentucky took one of this Court's opinions under discretionary review. In *Breathitt County Bd. of Educ. v. Prater*, ___ S.W.3d ___, 2009 WL 2706655 (Ky. 2009) the Supreme Court held that a trial court's "order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Id.* at *6. In doing so, the Supreme Court reiterated its holding that immunity not only shields the immune from liability but also from "the burdens of

defending the action.” *See Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006). In order for that shield to be effective, an immune party must be able to appeal a denial of summary judgment, based on a claim of absolute immunity, prior to incurring the expenses associated with fully litigating a case to conclusion.

We recognize that the school board in *Breathitt County* claimed governmental immunity while Addison is claiming qualified immunity. However, we believe this is a distinction without a difference. The purpose of immunity, to shield from liability and the expense of litigation, is the same for both governmental and qualified immunity. Therefore, we hold that Addison’s appeal of the trial court’s denial of summary judgment is properly before us, and we deny the Greene’s motion to dismiss.

2. Entitlement to Immunity

In their briefs, the parties agree that the only immunity at issue herein is qualified official immunity. Therefore, we will not discuss the other types of immunity.

Public employees are shielded from liability for negligence by the doctrine of qualified immunity but only insofar as they are performing discretionary acts. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). That immunity does not extend to negligent performance of ministerial acts. *Id.* Ministerial acts are merely routine duties while discretionary acts involve the exercise of judgment within the scope of the employee’s authority. *Id. See also*

Collins v. Commonwealth of Kentucky Natural Res. & Env't Prot. Cabinet, 10 S.W.3d 122, 126 (Ky. 1999).

The Greenes presented proof that school system regulations/rules state that students should: remain in their seats while the bus is moving; avoid activity that might distract the bus driver; avoid loud talking, laughing, and unnecessary confusion; and refrain from talking to the bus driver. Furthermore those regulations/rules state that the bus driver is responsible for maintaining order on the bus in accordance with the regulations/rules. The September 29 and 30 videotapes from the bus show students talking to Addison, changing seats, and walking in the aisle while the bus is moving. The Greenes argue that Addison's enforcement of the regulations/rules was ministerial not discretionary, and that the videotapes show that Addison did not perform his ministerial duties. Addison argues that his enforcement of the rules was discretionary, not ministerial.

Having reviewed the record, we agree with the trial court that Addison's enforcement of the rules was ministerial. In *Yanero*, a student-athlete, suffered a head injury when struck by a baseball during batting practice. At the time, the school had a rule requiring student-athletes to wear helmets during batting practice. The Supreme Court of Kentucky held that dismissal of a number of parties was appropriate; however, the Court permitted the student-athlete's claim against the coaches to proceed. In doing so, the Court held that the coaches owed a duty of care to the student-athlete, commensurate with the "degree of care that ordinarily prudent teachers or coaches engaged in the supervision of students

of like age as the plaintiff would exercise under similar circumstances.” *Yanero*, at 529. The Supreme Court then stated that performance of the duty “was a ministerial, rather than a discretionary, function in that it involved only the enforcement of a known rule requiring that student athletes wear batting helmets during baseball batting practice. The promulgation of such a rule is a discretionary function; the enforcement of it is a ministerial function.” *Id.*

As in *Yanero*, while promulgation of the regulations/rules with regard to behavior on a school bus may be discretionary, enforcement of those rules is ministerial. The delegation of enforcement of the regulations/rules to Addison may have been discretionary as well; however, as previously noted, enforcement of these known regulations/rules was ministerial. Therefore, we hold that the trial court correctly determined that Addison is not entitled to qualified official immunity.

Having made that determination, we must note that we agree with the trial court that it is not a foregone conclusion that there is a causal connection between Addison’s apparent failure to enforce the regulations/rules and Tara’s injuries. We also agree with the trial court that, at this point, it is not impossible for the Greenes to make that connection. Therefore, we affirm the trial court’s denial of Addison’s motion for summary judgment.

3. *En Banc* Hearing

Based on the preceding there is no need for an *En Banc* hearing. Therefore, we deny the Greenes’ motion requesting same.

CONCLUSION

For the reasons set forth above, we hold that Addison's appeal of the trial court's denial of summary judgment is properly before us. Furthermore, we affirm the trial court's denial of summary judgment, and deny the Greene's motions

to dismiss and for an *En Banc* hearing.

ALL CONCUR.

ENTERED: October 30, 2009

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Michael A. Owsley
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Casey A. Hixson
Bowling Green, Kentucky