

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001463-MR

LETCHER COUNTY BOARD OF EDUCATION  
AND CHRISTY AKERS

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE SAMUEL T. WRIGHT, III, JUDGE  
ACTION NO. 07-CI-00403

JEFFREY L. TACKETT AND  
ESTHER K. WRIGHT

APPELLEES

OPINION  
AFFIRMING IN PART AND REVERSING IN PART

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BEFORE: VANMETER AND WINE, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: The Letcher County Board of Education (“the Board”) and Christy Akers appeal from a denial of summary judgment for absolute and qualified governmental immunity. The Board and Akers argue that, as

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<sup>1</sup> Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

instrumentalities operating for the sole purpose of administering the state system of public education, they are shielded from civil claims by the doctrine of governmental immunity. While we agree as to the Board, we disagree with respect to Akers and reverse the order of the Letcher Circuit Court in part and affirm in part.

This appeal arises from a March 22, 2007, motor vehicle accident which occurred on U.S. Highway 119 in Letcher County, Kentucky. In attempting to make a left turn onto U.S. Highway 119 from Jim Banks Road, Esther Wright pulled out directly in the path of travel of Jeffrey Tackett, who was traveling north on U.S. Highway 119. A school bus owned by the Board had pulled off of U.S. Highway 119 and was parked on the shoulder of the roadway to allow children to disembark. At the time, the bus's flashing lights and stop sign were not activated. Tackett suffered serious injuries, including permanent scarring. Tackett filed suit against Wright alleging that Wright had negligently operated her vehicle in such a way to cause the collision between Wright and Tackett. In addition, Wright filed a third party complaint against the Board and an unknown bus driver. Wright alleges the school bus obstructed her view of oncoming traffic, including Tackett's vehicle. Through discovery, the implicated parties learned the operator of the school bus was Christy Akers, an employee of the Board. Tackett amended his complaint seeking damages against the Board and Akers. The Board moved for summary judgment on the basis that absolute governmental immunity applied to the Board and Akers. On July 22, 2009, the Letcher Circuit Court entered an

Order denying that motion. It is from that Order that the Board and Akers now appeal.

The standard of review of a trial court's grant of summary judgment 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 judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment in the context of qualified official immunity "'play[s] an especially important role', as the defense renders one immune not just from liability, but also from suit itself." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010), *citing Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985).

The threshold issue in this case is whether this Court has jurisdiction to consider the Board and Akers's appeal. In *Breathitt County Bd. of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009), the Supreme Court of Kentucky 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." Despite the general rule limiting appellate jurisdiction to final judgments, an interlocutory appeal is necessary in these cases. *Id.* at 888.

Under the theory of sovereign immunity, a state is immune from tort liability because of its sovereign character. 33 A.L.R.3d. 703 (1970).

Furthermore, instrumentalities of the state, such as public agencies, institutions, and political subdivisions, are likewise afforded immunity when engaged in governmental functions, rather than proprietary functions, for the benefit of the state. *Id.* These entities enjoy “what is termed ‘governmental immunity’ from civil damages actions.” *Breathitt, supra*, at 887. Governmental immunity is premised on the concept that “courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy.” *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). Of crucial importance is the distinction made between public acts of a governmental entity to the extent the act serves a governmental function that is integral to the state. Proprietary acts –non-integral undertakings of a sort private persons or businesses might engage in for profit –are not cloaked with governmental immunity. *Yanero, supra*, at 519.

A board of education is an agency of the state and is entitled to governmental immunity. *Grayson County Bd. of Education v. Casey*, 157 S.W.3d 201, 202-03 (Ky. 2005); *Wallace v. Laurel County Bd. of Education*, 287 Ky. 454, 153 S.W.2d 915 (1941). In determining whether a particular act pertaining to public schools is governmental rather than proprietary, the test is whether the activity is in direct furtherance of education. *Breathitt*, 292 S.W.3d at 887.

The transportation of pupils is a governmental action because it is a necessary part of the school program of a county board of education. *Bronaugh v.*

*Murray*, 294 Ky. 715, 172 S.W.2d 59 (1943). Under Kentucky Revised Statute (“KRS”) 158.110, “[b]oards of education may provide transportation from their general funds or otherwise for any pupil of any grade to the nearest school to the pupil’s residence within the district if the pupil does not live within a reasonable walking distance to such nearest school of appropriate grade level.” In *Wallace*, the Court held that the act of furnishing transportation is a governmental function where there is a statute providing that any board of education may provide transportation from its general fund. *Wallace*, 153 S.W.2d at 917.

In this case, the operation of the school bus was a governmental act in direct furtherance of the Board’s educational purpose. Therefore, the Board enjoys governmental immunity and is entitled to judgment as a matter of law.

We next address whether Akers is afforded absolute official immunity. An officer or employee of a governmental agency is afforded absolute official immunity when sued in his representative capacity. *Yanero*, 65 S.W.3d at 521. If the officer or employee is sued in their official capacity, then he enjoys official immunity as long as the acts in question were performed in the exercise of his governmental function. *Yanero v. Davis*, 65 S.W.3d at 521; *Nelson County Board of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011).

However, Akers was sued in her individual capacity. An officer or employee of a governmental agency is afforded qualified official immunity, rather than official immunity, when sued in his individual capacity. *Yanero*, 65 S.W.3d at 521. Qualified official immunity applies to a negligent act or omission by a

public officer or employee for their “(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.” *Id.* at 522, citing Restatement (Second) of Torts § 895D. Qualified immunity does not extend to the negligent performance of ministerial acts. *Id.* at 522. ■

An officer or employee of a governmental agency enjoys no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*,

An officer or employee [of a governmental agency] 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. That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature.

*Yanero*, 65 S.W.3d at 522, citing Restatement (Second) of Torts, § 895D (internal citations omitted).

Determining the nature of an act demands a probing analysis as “few acts are ever purely discretionary or purely ministerial.” *Haney*, 311 S.W.3d at 240. An analysis should focus on the dominant nature of the act. *Id.*

Driving a motor vehicle is thought to be “one of the most intensely regulated, trained, tested, and supervised activities that an individual may perform.” *Id.* at 246. Because of that, operating a vehicle is thought to be a ministerial act. In *Jones v. Lathram*, 150 S.W.3d 50, 53 (Ky. 2005), the Supreme

Court of Kentucky held that a police officer's commute to a scene in response to an emergency call was a ministerial act. Even though the officer "was required to constantly reassess his position on the road and make reactive decisions based on his assessment of roadway danger," these decisions are not truly discretionary acts. *Jones* at 53. *Jones* held that "the act of safely driving a police cruiser, even in an emergency, is not an act that typically requires any deliberation or the exercise of judgment. Rather, driving a police cruiser requires reactive decisions based on duty, training, and overall consideration of public safety." *Id.*

Similarly, the operation of a school bus is heavily regulated. Boards of education have full power to determine the transportation route, rules, and regulations under KRS 158.110. *See, Board of Ed. of Clay County v. Bowling*, 312 Ky. 749, 229 S.W.2d 769, 752 (1950) ("KRS 158.110 recognizes the State Board's right to make rules and regulations dealing with transportation.").

The operation of a school bus is a ministerial act because it involves the mere execution of a specific act designated to the bus driver. Similar to a police officer driving a police cruiser, a school bus driver must evaluate the roadway and make reactive decisions in the operation of the bus. Akers's training examination stipulates a school bus driver "will make close to 20 major decisions every mile." However, the rules regulating pupil transportation are sufficiently detailed to constrain an operator's exercise of discretion and judgment. Akers's actions in completing the bus route were guided by the rules and instructions

regulating her, and any discretion she exercised when determining exactly where and when to stop is not sufficient to raise the act to the level of discretionary.

To establish a negligence claim against a public official or employee, the complaint must allege a violation of a special duty owed to a specific, identifiable person, and not merely a breach of general duty to the public at large. *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995). See, *Whitt v. Reed*, 239 S.W.2d 489 (Ky. 1951) (holding a public officer is generally answerable to private persons sustaining special damage as a result of negligent performance of an officer's ministerial duties.).

When the rule of immunity is inapplicable by virtue of statute or judicial decision, some courts have adopted the view that a school district or other governmental agency or authority which operates a bus under an authorizing statute for the conveyance of children to and from school, as well as the driver thereof, is required to exercise the highest degree of care consistent with the practical operation of the bus and the same degree as that required of common carriers of passengers generally . . .

160 A.L.R. 7 (1946). Failure to exercise this highest degree of care constitutes negligence. *Id.*

The Appellees' claim sufficiently alleges negligence to survive a motion for summary judgment. As there can be no immunity for the negligent performance of a ministerial act, Akers is not entitled to judgment as a matter of law.

Section 112(5) of the Kentucky Constitution does not authorize a transfer of primary and exclusive jurisdiction over tort claims against a non-



immune agency, officer, or employee to the Board of Claims. *See, Yanero*, 65 S.W.3d at 525 (“To the extent that this statute attempts to transfer jurisdiction over non-immune agencies, officers and employees from the circuit court to the Board of Claims, it is unconstitutional.”). Thus, this action is properly before this Court.

In the absence of statutory regulation providing otherwise, the procurement of liability or indemnity insurance does not waive the governmental immunity of a school board. *See Grayson County Bd. of Education v. Casey*, 157 S.W.3d at 206 (stating that the statute, KRS 160.310, authorizing the Board of Education to purchase a policy of liability insurance against negligence of drivers or operators of school buses or other vehicles owned or operated by the Board did not waive Board of Education’s governmental immunity from suit.). Thus, the fact that the Letcher County Board of Education, like many school districts, has liability insurance does not operate as a waiver of liability.

Thus, the trial court’s denial of summary judgment is affirmed as to Akers because there is no immunity from tort liability for the negligent performance of a ministerial act, and reversed as to the Board, because the Board was acting in furtherance of its governmental purpose.

ALL CONCUR.

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