

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-002132-MR

VIOLA THOMAS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM EVANS LANE, JUDGE  
ACTION NO. 08-CI-90328

DONALD SCHNEIDER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

COMBS, JUDGE: Viola Thomas, a former social studies teacher at Camargo Elementary School, appeals from a summary judgment entered by the Montgomery Circuit Court in favor of Donald Schneider, the school's former principal. Thomas contends that the trial court erred by concluding that Schneider was entitled to judgment as a matter of law. Having carefully considered counsels' arguments in light of the record, we affirm.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Thomas was working at Middle Fork Elementary School in Magoffin County under a continuing service contract (commonly understood as tenure) in 2006 when she met with Principal Schneider at Camargo Elementary School in Montgomery County. Several weeks later, Thomas was formally interviewed by Schneider and the school's site-based decision-making council. On Thursday, April 27, Schneider offered Thomas a teaching position at Camargo Elementary for the 2006-2007 academic year.

On Monday, May 1, Thomas sent Schneider an e-mail message thanking him for the offer and inquiring about the district's pay scale. Thomas also asked, "Will I have tenure there?" Schneider responded by e-mail. He explained that he could not make any predictions for the next school year without an official salary schedule but indicated that Thomas would likely earn about \$45,000.00. With respect to the tenure question, Schneider advised as follows:

You would have a limited contract your first year with us. Your second year would begin your tenure year. This is the way every district works. *You will get your tenure back.*

(Emphasis added). On Friday, May 5, Thomas drafted a formal notice of resignation from Middle Fork Elementary.

On May 31, 2006, Thomas signed a "limited contract of employment" (a non-tenured status) with the Montgomery County School District. The contract expressly provided that it would remain in effect "for one school year." It also provided that it was subject to renewal by the superintendent. Thomas did not

object to the contract terms. On April 23, 2007, Thomas received timely notice from the superintendent that her limited contract would not be renewed for the 2007-2008 school year.

On September 15, 2008, Thomas filed a civil action against Schneider, who had by then retired as principal. Thomas alleged that by failing to re-hire her, Schneider breached his contract and violated the assurances that he made both orally and in his e-mail message of May 1, 2006.<sup>2</sup> As part of her relief, Thomas sought reinstatement and recovery of lost wages. After the parties were deposed, Schneider filed a motion for summary judgment.

In his memorandum in support of the motion for summary judgment, Schneider argued that the language of the e-mail did not amount to a contract and that he did not intend to make an unqualified promise to Thomas about attaining continuing contract status (tenure) in the district. Instead, he intended to convey to Thomas that her continuing contract status (tenure) was governed by statute and district policy – and that she would serve a probationary year of employment before any decision was made with regard to her continuing contract status. He wanted to reassure her that if and when her contract were renewed in Montgomery County, she would be entitled to resume her continuing contract status. The pertinent statute is Kentucky Revised Statute(s) (KRS) 161.740, which provides as follows:

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<sup>2</sup> Like fraud, allegations of negligent misrepresentation must be pled with particularity. Thomas did not allege the time, place, or specific content of any oral communications that she allegedly shared with Schneider. None of those alleged misrepresentations was considered by the trial court, and we have not been asked to address them here.

When a teacher has attained continuing contract status in one district and becomes employed in another district, the teacher shall retain that status. However, a district may require a one (1) year probationary period of service in that district before granting that status.

Schneider argued that Thomas could not show that she had justifiably relied on his e-mail to her detriment since she admitted in her deposition that she knew that she would have to work for one year on a probationary basis. Schneider also argued that she had no reason to believe that he intended to bypass or ignore Kentucky statutes or the district's policy when she accepted the position in Camargo. She also understood that the district's superintendent would be the final authority with respect to the renewal or non-renewal of her limited contract after the probationary year regardless of Schneider's impressions or his recommendation. In the alternative, Schneider argued that he was entitled to qualified official immunity from liability.

In her response to the motion, Thomas essentially abandoned the contract claim that had been asserted in her complaint and argued that she had established a tort case of negligent misrepresentation and estoppel.<sup>3</sup> She contended that she had relied upon Schneider's unconditional, written representation that she would be granted continuing contract status (tenure) when she decided to forfeit her tenured position in Magoffin County. She also argued that the facts and circumstances did not support Schneider's contention that he was immune from

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<sup>3</sup> Neither Schneider nor the trial court raised a question as to this argument-shift regarding the nature of the underlying cause of action.

liability; and that his alleged failure to act in good faith stripped him of any ability to claim immunity.

The trial court concluded that Schneider was entitled to judgment as a matter of law. The court stated that “[t]he statement in that e-mail that ‘you will get your tenure back’ is not a basis for misrepresentation, but only a reasonable belief that things would work out positively in a general sense.” From her deposition testimony, the court determined that Thomas had accepted the teaching position at Camargo Elementary “with the full knowledge that her transfer of tenure was conditioned upon the first year in the Montgomery County School system being on probationary status as set forth by state law and as referenced by the e-mail from [Schneider].” Order at 1. The trial court also rejected Thomas’s argument that Schneider was not immune from liability. “[N]o facts have been proffered to suggest bad faith in any manner that would abrogate the immunity.” *Id.* at 2. The court entered summary judgment in Schneider’s favor, and this appeal followed.

On appeal, Thomas presents two issues for our review. First, she contends that the trial court erred by concluding as a matter of law that Schneider had not supplied her with false information concerning her ability to secure continuing contract status (tenure) in the Montgomery County school district. Next, Thomas contends that the trial court erred by concluding that Schneider was entitled to qualified official immunity.

Summary judgment serves to terminate litigation where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Kentucky Rule[s] of Civil Procedure 56. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment “is proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.*, citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985).

On appeal, we consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). Since summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court’s decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*.

In *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575 (Ky. 2004), the Supreme Court of Kentucky adopted the tort of negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552. The Restatement provides, in relevant part, as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552 (1977). In order to prevail on a claim of negligent misrepresentation, a plaintiff must prove by clear and convincing evidence that he or she justifiably relied on false information that the defendant supplied without the exercise of reasonable care in obtaining or communicating it. *Id.* The equitable doctrine of estoppel is at the heart of the tort of negligent misrepresentation.

Our review of the record does not undermine the reasoning of the trial court in concluding that Thomas could not show that she justifiably relied on the information provided to her by way of Schneider's e-mail so as to render his communication actionable. Although Thomas contended that Schneider's e-mail contained false information, she admitted that she *knew* "that when you move or change districts, . . . you have to work one year on a probationary period." Deposition of Viola Thomas at 28-29. She also admitted that she *knew* that the final decision with respect to the renewal or non-renewal of her limited contract rested with the district's superintendent and not with Principal Schneider, who could merely make a recommendation regarding her status.

Requiring a plaintiff to prove that she justifiably relied on the misrepresentation means that she must show her actual reliance on the communication with good reason. *Wilson v. Henry*, 340 S.W.2d 449 (Ky.1960); *Ann Taylor, Inc. v. Heritage Ins. Services, Inc.*, 259 S.W.3d 494 (Ky.App 2008). The issue of whether a party's reliance on another's fraudulent misrepresentation is justified or unjustified is nearly always a question of fact for the jury. *See Western Leasing, Inc. v. Acordia of Kentucky, Inc.*, \_\_\_ S.W.3d \_\_\_, 2010 WL 1814959 (Ky.App. 2010). Nevertheless, if it appears absolutely clear from the record that the party did not or could not rely justifiably on the communication, summary judgment may be appropriate. *See Ann Taylor, supra.*

The Restatement (Second) of Torts § 541 provides that one to whom a fraudulent misrepresentation is allegedly made “is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.” Restatement (Second) of Torts § 541 (1977). Thomas's admissions as to her knowledge of her probationary status and its attendant risks render summary judgment appropriate on the issue of justifiable reliance. Our analysis as to this issue renders moot any inquiry on the issue of official immunity.

We conclude that the trial court correctly determined that there were no genuine issues of material fact and that Schneider was entitled to judgment as a matter of law.

The judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.



BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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