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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001090-MR

CARLA GIBSON — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 08-CI-00553

DONNA K. HICKS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Carla Gibson appeals from an order of the Perry Circuit Court denying her motion for summary judgment in an action filed against her by Donna K. Hicks alleging negligence for Gibson's failure to initiate an investigation under the Kentucky Adult Protection Act, Kentucky Revised Statutes (KRS) Chapter 209. The issues are: (1) whether the action is precluded by the doctrine of *res judicata*; (2) whether Gibson owed a common law duty to Hicks; (3) whether

Gibson is entitled to qualified official immunity; and (4) whether Gibson is entitled to statutory immunity. We conclude that Gibson was erroneously denied summary judgment.

In 2008, Hicks filed an action in the Perry Circuit Court against multiple defendants, including the Cabinet and Gibson in her individual and official capacities. For brevity, we limit our discussion to the claims against the Cabinet and Gibson.

The facts underlying Hicks's claim are admittedly tragic. In September 2007, Rachel Hatton spoke to Steve Everidge, a Cabinet social worker, and informed him that 45-year-old Hicks was being abused or neglected by her housemates, Penny R. Ford, Billy R. Crawford, Charlotte Crawford, and Billy R. Williams. However, Hatton did not provide any information that Hicks was under an order of guardianship or otherwise physically or mentally incapacitated. Hicks was not in the Cabinet's custody, and the Cabinet had no prior reports of her neglect or abuse or information regarding her mental or physical condition.

Pursuant to existing Cabinet procedure, Everidge interviewed Hatton and completed a Cabinet referral form, DSS-115. On the preprinted form, Everidge wrote the name of the alleged victim as "Donna Hicks" and her age as "45." The form contained the following instructions to social workers:

> Describe nature/extent/causes of abuse/neglect/dependency, or exploitation. List witnesses and/or collateral contacts, previous incident or reports. Describe behavior of adult victim and of alleged perpetrator (dangerous?)

In the space provided after the instruction, Everidge wrote the following narrative:

> Donna Hicks lives in Perry County with Penny Crawford & Billy Crawford. They have been physically abusing her, taking her SSI check and prescribed medication. Donna sometimes lives with Charlotte Crawford. She is abused there in the same way.

After completing the interview, Everidge gave the DSS-115 form to Gibson, his supervisor. Gibson reviewed the document and made the following notation: "Not Referral." On the back of the form, Gibson wrote, "did not meet age physical/mental/dysfunction."

No further action was taken by the Cabinet. Eventually, the abuse and neglect of Hicks was discovered by law enforcement and Hatton's allegations substantiated. The individuals who held Hicks captive were indicted and pleaded guilty.

In her civil complaint, Hicks alleged that she was held captive and physically abused and neglected by her housemates. She further alleged that the Cabinet and its employees, including Gibson, failed to respond to and/or investigate Hicks's situation. The complaint sought damages against the Cabinet and its employees in their individual and official capacities for negligence, gross negligence, violation of a statute, and negligence per se.

The Cabinet and Gibson, in her official capacity, filed a motion for summary judgment arguing that sovereign immunity precluded Hicks's claim against them. The circuit court dismissed the Cabinet but denied the motion as to

Gibson, in her official capacity. In an unpublished opinion, this Court reversed holding that Gibson, in her official capacity, was entitled to immunity. *Cabinet for Health and Family Services v. Hicks*, 2010 WL 3604161 (Ky.App. 2010)(2009-CA-002186-MR). However, this Court noted that whether Gibson, in her individual capacity, was entitled to qualified official immunity depended upon whether her acts were discretionary or ministerial, an issue not then before this Court.

After this Court reversed, Hicks filed a claim against the Cabinet in the Kentucky Board of Claims. The Board of Claims granted the Cabinet's motion for summary judgment because the social workers, including Gibson, were performing discretionary acts and did not breach any legal duty owed Hicks. Although Hicks appealed to the Perry Circuit Court, her appeal was dismissed by an agreed order.

For reasons not pertinent to this appeal, Gibson was not served with process in the circuit court case until March 10, 2011. On March 23, 2011, Gibson filed a motion to dismiss or for summary judgment. She presented defenses, including *res judicata*, a lack of a legal duty owed to Hicks, qualified official immunity, and statutory immunity.[1] She attached her affidavit acknowledging that she received a report alleging that Hicks was abused but that based on the

[1] Gibson also alleged that because she was not timely served with process, the complaint against her should be dismissed. Although the circuit court rejected her claim, she does not present it as an issue to this Court.

information received, she determined that Hicks did not meet the criteria of an "adult" because she did not have a known mental or physical dysfunction.

Regarding Gibson's claim of qualified official immunity, Hicks responded that summary judgment was premature and additional discovery could reveal that Gibson was not entitled to immunity. After oral argument, the circuit court denied Gibson's motion. The circuit court found that based on the record, it was unable to determine whether she had a special relationship with Hicks or whether Gibson's acts were discretionary or ministerial. The circuit court included the finality language pursuant to Kentucky Rules of Civil Procedure (CR) 54.02(1) and Gibson appealed.

Although not an issue presented, we clarify a procedural point. A denial of summary judgment is generally interlocutory and not appealable. However, a denial of summary judgment that constitutes adjudication on the merits or based purely on a matter of law is reviewable on appeal. *Ford Motor Credit Co. v. Hall*, 879 S.W.2d 487, 489 (Ky.App. 1994). The questions presented in this case are purely questions of law and, therefore, the denial of summary judgment is properly before this Court.[2]

Having made our prefatory comments, we set forth our standard of review. Summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

[2] See *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), holding that a denial of summary judgment on the basis of governmental immunity is immediately appealable. Although that case involved governmental immunity, its reasoning is equally applicable to this case involving qualified official immunity.

law." CR 56.03. To defeat a properly supported motion, the nonmoving party must present "at least some affirmative evidence that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). However, "[t]he record must be viewed in a light most favorable to the party opposing the motion and all doubts are to be resolved in his favor." *Id*. at 480.

We begin with Gibson's claim that the action against her is precluded by the doctrine of *res judicata*.

> The doctrine of *res judicata* stands for the principle that once the rights of the parties have been fully determined, litigation should end. It is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine is comprised of two subparts: claim preclusion and issue preclusion.

Coomer v. CSX Transp., Inc., 319 S.W.3d 366, 371 (Ky. 2010) (internal footnotes and quotations omitted).

To apply, claim preclusion requires an identity of the parties and causes of action and a resolution on the merits. *Id*. Issue preclusion prevents a party from relitigating an issue "actually litigated and finally decided in an earlier action." *Buis v. Elliot*, 142 S.W.3d 137, 140 (Ky. 2004) (quoting *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). "[D]ecisions of administrative agencies acting in a judicial capacity are entitled to the same res judicata effect as a judgment of a court." *Godbey v. University Hospital of the Albert B. Chandler Medical Center, Inc.*, 975 S.W.2d 104, 105 (Ky.App. 1998).

Although Gibson's contention might appear alluring, it is dispelled by our Supreme Court's decision in *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617 (Ky. 2011). In that case, a claim was filed against the Nelson County Board of Education in circuit court and a "protective action" in the Board of Claims. After the Board of Claims dismissed the action and after an unsuccessful appeal to this Court, our Supreme Court accepted discretionary review partly for the purpose of resolving the question of primacy of jurisdiction between a circuit court and the Board of Claims. *Id*. at 620. The Court resolved the issue by holding that the circuit court must first decide whether a state actor is entitled to immunity and, if so, only then may the action be properly filed in the Board of Claims. *Id*. at 623.

In this action, the circuit court determined that the Cabinet was entitled to immunity and this Court affirmed. However, as noted in this Court's prior opinion, the question of Gibson's immunity in her individual capacity was not presented. In accordance with *Forte*, Gibson's qualified official immunity was properly before the circuit court and not precluded by the doctrine of *res judicata*. *Id*. We address Gibson's defenses.

Gibson contends that she had no common law or statutory duty to Hicks and, further, that she is shielded by the doctrine of qualified official immunity. Although distinct, the existence of a duty and the application of qualified official immunity are intertwined. We first discuss whether Gibson had a common law duty to protect Hicks from her abusers.

Essential elements of any common law negligence action are that the defendant must have a duty to the plaintiff and have breached that duty. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003). Whether a legal duty exists is a question of law. "If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence." *Ashcraft v. Peoples Liberty Bank & Trust Co., Inc*., 724 S.W.2d 228, 229 (Ky.App. 1986).

There is no universal duty for every person to protect others against foreseeable injuries. Although *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987), is "cited often by parties advocating a theory of liability or a cause of action where none previously existed and legal authority is otherwise lacking," the universal duty concept has been repeatedly rejected. *James v. Wilson*, 95 S.W.3d 875, 891 (Ky.App. 2002).

Public employees, like ordinary citizens, do not have a common law duty to protect individuals from crime. Often referred to as the public duty doctrine, absent a special relationship to the victim, public officials have a duty to the public at large, not to individual crime victims. *Ashby v. City of Louisville*, 841 S.W.2d 184, 189 (Ky.App. 1992).

The "special relationship" test has been explained by our Supreme Court. In *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995), the Court reiterated the prevailing view that "[i]n order to establish an affirmative duty on public officials in the performance of their official duties, there must exist a special relationship between the victim and the public officials." The Court held that the

"special relationship" requirement applies to federal civil rights cases and to ordinary tort cases. *Id*. It approved a two-part test. "It must be demonstrated that the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor." *Id*. (quotations omitted). Although recognizing that the result is often harsh, in *Collins v. Hudson*, 48 S.W.3d 1, 6 (Ky. 2001), the Court emphasized that the test is based in logic and public policy. Because Hicks was not in the Cabinet's custody or otherwise restrained by Gibson or the Cabinet at the time she was neglected and abused, she cannot meet the *Fryman* test.

Hicks contends that even absent a common law duty, Gibson had a duty imposed by statute. She refers this Court to KRS Chapter 209, the Kentucky Adult Protection Act, and its related regulation, 922 Kentucky Administrative Regulations (KAR) 5:070. Gibson responds that her decision to not refer the allegation of abuse and neglect was a discretionary act and, therefore, she is entitled to qualified immunity.

Qualified official immunity is not a mere defense but provides immunity from a claim. In *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), the Court explained the scope of protection afforded government officials:

> [A]n official sued in his or her individual capacity enjoys only qualified official immunity, which affords protection for good faith judgment calls made in a legally uncertain environment. Thus, officials are not liable for bad guesses in gray areas, and most government officials are not expected to engage in the kind of legal scholarship normally associated with law professors and

> academicians. Thus, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. [Internal quotations and citations omitted].

Whether Gibson is entitled to qualified official immunity is a question of law subject to *de novo* review. *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

In *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), the Court pronounced that qualified official immunity requires a classification of the particular acts or functions in question as either discretionary or ministerial. However, as noted by the circuit court, the distinction between discretionary and ministerial acts is often blurred and subject to a divergence of judicial opinion.[3] To clarify the law and offer further guidance, in *Haney,* the Court explained the distinction:

> Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. Discretionary acts are, generally speaking, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment. It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. On the other hand, ministerial acts or functions—for which there are no immunity—are those that require 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.

[3] In his concurring opinion in *Caneyville Volunteer Fire Dep't. v. Green's Motorcycle Salvage, Inc*., 286 S.W.3d 790, 813 (Ky. 2009), Chief Justice Minton referred to immunity as a "judge-made swamp" that should be drained.

Haney, 311 S.W.3d at 240 (internal quotations and citations omitted).

There are no allegations that Gibson acted in bad faith or outside the scope of her employment. Thus, our decision depends upon whether her acts were discretionary or ministerial.

Gibson's notation on the DSS-115 form mirrored the language in KRS 209.020(4), which defines an "adult" as used in Kentucky's Adult Protection Act:

> "Adult" means a person eighteen (18) years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services[.]

KRS 209.030 (2) provides:

> Any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having *reasonable cause* to suspect that *an adult* has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death. [Emphasis added].

Upon receipt of a neglect and abuse report, KRS 209.030(5) directs that the Cabinet:

> (a) Notify within twenty-four (24) hours of the receipt of the report the appropriate law enforcement agency. If information is gained through assessment or investigation relating to emergency circumstances or a potential crime,

> the cabinet shall immediately notify and document notification to the appropriate law enforcement agency;
>
> (b) Notify each appropriate authorized agency. The cabinet shall develop standardized procedures for notifying each appropriate authorized agency when an investigation begins and when conditions justify notification during the pendency of an investigation;
>
> (c) Initiate an investigation of the complaint; and
>
> (d) Make a written report of the initial findings together with a recommendation for further action, if indicated.

Consistent with its enabling statutes, 922 KAR 5:070 provides that "adult" is defined by KRS 209.020. The regulation further states that a report that does not meet the statutory definition of "adult" does not require an adult protective service investigation. 922 KAR 5:070(9)(a)(1).

Hicks contends the statutes and the cited regulation mandated that Gibson investigate or refer for investigation Hatton's allegations. Under her interpretation of the statute, the term "adult" is used broadly. She argues that the protections and services provided by the Act are afforded to any person eighteen years or older and, therefore, Gibson had no discretion to determine that its provisions were not applicable to Hicks. The statutory language is contrary to Gibson's argument. We conclude that the clear and unambiguous language does not mandate a Cabinet employee to investigate all allegations of abuse and neglect of a person eighteen years of age or older.

"Adult" as defined by KRS 209.020 is limited not only by age but by the mental and physical condition of the alleged victim. Pursuant to KRS 209.030,

Gibson had a duty to initiate an investigation only if she had "reasonable cause" to suspect that Hicks was an "adult" who suffered abuse, neglect, or exploitation. Gibson had no personal knowledge of Hicks's mental or physical condition and, therefore, had to make a threshold determination regarding whether Hicks was an "adult" as narrowly defined by statute based exclusively on the information conveyed by Hatton. Although Hatton indicated that Hicks received social security benefits and was on medication, she did not indicate that she was mentally or physically incapacitated. In different statutory contexts, our Courts have addressed qualified immunity in analogous situations.

In *Stratton v. Commonwealth*, 182 S.W.3d 516 (Ky. 2006), Cabinet employees placed a young child back into a home where the child died as a result of caretaker abuse. The administrator of the child's estate filed an action against the Cabinet in the Board of Claims alleging that if the Cabinet employees had followed regulations requiring them to interview certain witnesses, the tragedy would have been prevented. The Court held that the Cabinet's determination regarding what action, if any, should be taken to resolve each claim was discretionary "just as in police investigations." *Id*. at 521.

More recently, in *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011), the Court held that a teacher was entitled to qualified official immunity when it was alleged that she failed to report sexual abuse of a kindergarten student by a five-year-old classmate. Noting that KRS 620.030 requires that abuse be reported to appropriate authorities if a person knows or has reasonable cause to believe that a child is

abused, the Court held that absent actual or personal knowledge of the alleged abuse, the determination that there is reasonable cause involves the exercise of discretion. *Id*. at 877-878. The Court again emphasized the rationale behind the qualified official immunity doctrine:

> Since Turner did not have actual or personal knowledge of the events alleged, the only other basis upon which she was required to make a report would be the development of a "reasonable cause to believe" that one of the children had been abused. Making such a determination clearly involves the exercise of discretion. It is similar to a judicial decision that there is or is not probable cause to support an asserted proposition. The very purpose of the doctrine of qualified official immunity is to protect government officials exercising discretion from second-guessing of their good faith decisions made in difficult situations such as this. The essence of reaching a determination as to whether reasonable cause exists would require discretion. This requires that Turner make reasonable inquiry into the facts, weighing the credibility of each child and then using her judgment and experience of a teacher of kindergarten level students, to reach a decision as to whether there was reasonable cause to believe that sexual abuse had occurred.

Id.

The reasoning expressed in *Turner* is persuasive. The General Assembly did not intend that the Cabinet investigate every case of alleged abuse against an adult. The majority of such cases necessarily remain within the realm of law enforcement. Instead, as a threshold to the application of the Adult Protection Act, the alleged victim must be eighteen years of age or older and suffer from a mental

or physical dysfunction that impairs his or her ability to manage his or her resources, perform daily activities, or protect against neglect or abuse.

Because Gibson did not have actual or personal knowledge of Hicks's mental or physical condition, she was required to initiate an investigation only if there was reasonable cause to believe that Hicks was an adult as defined in the statute. "Making such a determination clearly involves the exercise of discretion." *Id*. Therefore, as a part of the screening process, Gibson was required to exercise her professional judgment, based on training and experience, to determine whether the allegations of abuse met the statutory and regulatory criteria. We hold that Gibson is entitled to qualified official immunity.

Gibson's allegation that she is entitled to statutory immunity under KRS 209.050 and KRS 44.070(1) is rendered moot by our decision that she was entitled to summary judgment.

Based on the foregoing, the Perry Circuit Court's order denying Gibson's motion for summary judgment is reversed and the case remanded for entry of an order granting Gibson summary judgment.

ALL CONCUR.

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