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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000309-MR

NELSON COUNTY BOARD OF
EDUCATION AND ANTHONY ORR — APPELLANTS

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 11-CI-00516

CURT D. HAUN — APPELLEE

OPINION AND ORDER DISMISSING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND JONES, JUDGES.

DIXON, JUDGE: Appellant, the Nelson County Board of Education ("Board") and Anthony Orr, in his individual capacity and representative capacity as Superintendent of Nelson County Schools, appeal from an interlocutory order of the Nelson Circuit Court denying their motion for summary judgment on grounds

which included governmental and official immunity. For the reasons discussed herein, we conclude that this appeal must be dismissed.

In 2009, Haun was employed by the Board under a "Limited Contract" to serve as Principal of Nelson County High School for the 2009-10 school year. The contract was executed by then-Superintendent Dr. Janice Lantz. Dr. Lantz subsequently conducted Haun's evaluations during his first year, giving him "Meets"[1] performance ratings in all areas except "Instructional Leader," in which Haun received a "Growth Needed" rating. Despite apparent concerns as to Haun's instructional leadership, Dr. Lantz renewed his limited one-year contract for the 2010-2011 school year.

Subsequently, Dr. Lantz resigned and Orr became the Superintendent of Nelson County Schools on July 1, 2010. On December 9, 2010, Orr had a meeting with Haun during which he expressed concern about the need for better instructional leadership at the high school and that he did not see in Haun the leadership qualities he felt were necessary to take the school where it needed to be. Orr informed Haun during the meeting that his contract would not be renewed for the 2011-12 school year.

Despite the December 9th meeting with Haun, on February 1, 2011, Orr conducted Haun's evaluation, giving him "Meets" ratings in all six areas. Nevertheless, on March 24, 2011, Haun was given formal written notice that his contract would not be renewed. On that same day, Haun made a request pursuant

[1] The scale of formative evaluations is "Meets," "Growth Needed," and "Does Not Meet" performance ratings.

to KRS[2] 161.750(2) for a statement of grounds upon which the nonrenewal of his contract was based. On April 8, 2011, Orr responded in a letter as follows:

> In response to your request dated March 24, 2011, I am writing to describe the grounds upon which your contract is not being renewed for the 2011-12 school year. As you know, yours is a year to year contract, so there is no guarantee of a renewal. In the case of an annual contract, no specific cause need be given for the decision of non-renewal.
>
> As you and I discussed on December 9, 2010, I am grateful for the work you have done to restore a strong school culture and sense of structure at Nelson County High School since becoming head principal in 2009. I believe that your leadership has built momentum within the school community to allow further improvement in the academic achievement of the students at Nelson County. You have made a significant contribution to the school and students and I share in the appreciation of your accomplishments.
>
> The next step for Nelson County High School is to address the quality of teaching and learning in a focused and effective manner. As you and I have agreed in previous conversation, instructional leadership must come from the head principal. It is my responsibility as superintendant to ensure the opportunity is provided for that to occur.
>
> Thank you for the professionalism that you have and will continue to demonstrate in an uncomfortable situation.

Thereafter, Haun attempted to reapply for the Principal position by submitting an application to the school's site-based decision-making council ("SBDM"). However, Orr subsequently informed him via email that the SBDM was interviewing "only external candidates for the NCHS Principal position."

[2] Kentucky Revised Statutes.

On June 28, 2011, Haun filed an action in the Nelson Circuit Court against the Board seeking damages for breach of contract, violation of Kentucky law regarding teacher/administrator contracts, and the failure to comply with KRS 161.750. The Board filed its answer which included the affirmative defense that it was entitled to sovereign immunity. Several months later, the Board filed a motion for summary judgment asserting that, pursuant to KRS 160.370 and KRS 161.750, it was not the proper party. Haun then amended his complaint to add Orr as a party. Haun's amended complaint alleged that (1) he was eligible for a continuing service contract but was only provided a limited employment contract for the 2010-11 school year; (2) Orr and the Board failed to provide him with the reasons for his nonrenewal; (3) Orr and the Board failed to provide him with notice and a hearing on his termination; and (4) the SBDM unlawfully refused to consider his application for the principal position after his contract was not renewed.

Following discovery and two rescheduled trial dates, the Board and Orr filed a renewed motion for summary judgment in November 2013, arguing that (1) Haun conceded he was not entitled to a continuing service contract; (2) Orr's April 8, 2011 letter to Haun provided the grounds for non-renewal of his contract, namely his lack of instructional leadership qualities; (3) Haun was not entitled to a hearing as his contract was not terminated but rather simply not renewed; and (4) Haun's reapplication for the Principal position was properly considered by SBDM. In response to the summary judgment motion, Haun asserted that (1) Orr's letter failed to give a detailed explanation in violation of KRS 161.750(2); (2) even if the

letter was sufficient, Haun was entitled to establish that the reason given for his non-renewal was untrue; and (3) the Board was a proper defendant. The Board and Orr then filed a reply brief wherein they argued for the first time in-depth that they were entitled to governmental and qualified immunity. The trial court denied the summary judgment motion by order entered February 13, 2015. The order contained no findings or grounds for the denial. This appeal ensued.

Our standard of review on appeal of a 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). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR[3] 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

Generally, the denial of a motion for summary judgment is not appealable. However, sovereign immunity entitles its possessor to be free from the

[3] Kentucky Rules of Civil Procedure.

burdens of not only liability, but also of defending the action. *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). *See also Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). Therefore, an order denying a claim of sovereign immunity is immediately appealable. As our Supreme Court enunciated in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 888 (Ky. 2009):

> [U]nlike other defenses, immunity is meant to shield its possessor not simply from liability but from the costs and burdens of litigation as well. An order denying a substantial claim of immunity is not meaningfully reviewable, therefore, at the close of litigation, and that fact leads us to conclude, as has the Supreme Court of the United States, that an interlocutory appeal is necessary in such cases notwithstanding the general rule limiting appellate jurisdiction to "final" judgments.

However, although a party is permitted to immediately appeal from the denial of a motion to dismiss or summary judgment based upon immunity, "most other substantive defenses must wait for adjudication by a final order." *Commonwealth v. Samaritan Alliance, LLC*, 439 S.W.3d 757, 760 (Ky. App. 2014).

Unlike the instant case, the trial court in *Prater* expressly determined the issue of immunity. 292 S.W.3d at 885. Herein, however, the trial court made no specific findings or rulings on any issue presented in the motion for summary judgment, including whether the Board and Orr were or were not entitled to immunity. Perhaps, by denying the motion in its entirety, the trial court may have already determined that there is a genuine issue of material fact as to whether immunity exists. Nevertheless, we cannot impute such meaning to the order. In the

absence of any language in its order, there is simply no indication that the trial court even considered the immunity issue.[4] We would further note that neither the Board nor Orr requested further findings or clarification of the trial court's ruling. Thus, since no specific determination has been made regarding immunity, this appeal is interlocutory and not ripe for review.[5]

ALL CONCUR.

_____
Donna L. Dixon, Judge

BRIEF FOR APPELLANT:
Jason P. Floyd
John Douglas Hubbard
Bardstown, Kentucky

BRIEF FOR APPELLEE:
Mark S. Fenzel
Rebecca Grady Jennings
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[4] We would additionally point out that no hearing was held on the motion, so there are no oral comments from the trial judge to indicate the grounds for denial.

[5] This Court reached a similar conclusion in the unpublished decision *Adair County v. Stearman*, 2010-CA-001953 (September 16, 2011).