IN THE SUPREME COURT OF MISSOURI
NO. SC89490

STATE OF MISSOURI, *ex rel.*, DR. BERNARD TAYLOR, JR.,

Relator

v.

THE HONORABLE W. BRENT POWELL

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit, Division No. 11
The Honorable W. Brent Powell, Circuit Judge

BRIEF OF AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

MSBA is a nonprofit professional association of school board members in the State of Missouri. The stated mission of MSBA is advancing excellence in public education through school board leadership. Almost seventy-five percent of Missouri's public school districts, including The School District of Kansas City, Missouri, are members of MSBA and support that mission. MSBA, as an educational leader, speaks for its members and all public schools to secure and protect the interests of public education for the benefit of Missouri school children. MSBA seeks to file this brief on behalf of its member school districts because employees of each will be affected by this Court's ruling.

MASA is a statewide association of superintendents and school administrators. It represents approximately 817 school administrators in 479 of Missouri's 524 school districts. Relator Dr. Taylor was a member of MASA at the time of the events giving rise to this litigation. MASA was organized prior to 1900 and has a long history as the professional representative of public school administrators. MASA members serve as school district and building administrators with primary responsibility for management and day-to-day oversight of our public schools, including development, supervision, and implementation of school district policies and budgets. MASA is the voice of these administrators. MASA seeks to file this brief on behalf of its members that are not parties to this action, but will nevertheless be affected by the Court's ruling.

JURISDICTIONAL STATEMENT

The Missouri School Boards' Association and the Missouri Association of School Administrators adopt the jurisdictional statement contained in Dr. Taylor's Opening Brief.

STATEMENT OF FACTS

The Missouri School Boards' Association and the Missouri Association of School Administrators adopt the statement of facts contained in Dr. Taylor's Opening Brief.

POINTS RELIED ON

Point I: Relator is entitled to an order prohibiting Respondent from proceeding any further with Mr. Dydell's personal capacity claims against Dr. Taylor and prohibiting Respondent from refusing to enter judgment against Mr. Dydell because superintendents and other school administrators who are sued in negligence for failing to prevent student-on-student violence are entitled to official immunity in that such defendants are public employees and decisions concerning school security policies and procedures are clearly discretionary and performed in the course of official duties.

Southers v. City of Farmington, --S.W.3d--, 2008 WL 2346191 (Mo. 2008) (en banc)

Kanagawa v. Freeman, 685 S.W.2d 831 (Mo. 1985) (en banc)

Jackson v. Wilson, 581 S.W.2d 39 (Mo. Ct. App. 1979)

ARGUMENT

1. **POINT I: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ANY FURTHER WITH MR. DYDELL'S PERSONAL CAPACITY CLAIMS AGAINST DR. TAYLOR AND PROHIBITING RESPONDENT FROM REFUSING TO ENTER JUDGMENT AGAINST MR. DYDELL BECAUSE SUPERINTENDENTS AND OTHER SCHOOL ADMINISTRATORS WHO ARE SUED IN NEGLIGENCE FOR FAILING TO PREVENT STUDENT-ON-STUDENT VIOLENCE ARE ENTITLED TO OFFICIAL IMMUNITY IN THAT SUCH DEFENDANTS ARE PUBLIC EMPLOYEES AND DECISIONS CONCERNING SCHOOL SECURITY POLICIES AND PROCEDURES ARE CLEARLY DISCRETIONARY AND PERFORMED IN THE COURSE OF OFFICIAL DUTIES.**

A. Standard Of Review

A writ of prohibition is appropriate where a circuit court wrongly holds that a defendant is not entitled to the absolute defense of official immunity as a matter of law. *State ex rel. Div. of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 615 (Mo. 2002) (en banc); *see also State ex rel. Mo. Dep't of Ag. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985) (en banc).

B. Official Immunity Is Available To All Public Employees Exercising Discretionary Authority In The Course Of Their Official Duties.

Official immunity "protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts." *Southers v. City of Farmington*, --S.W.3d--, 2008 WL 2346191, *3 (Mo. 2008) (en banc). Because Dr. Taylor is indisputably a "public employee,"[1] the only real issue is whether the acts of negligence alleged by Mr. Dydell were discretionary acts committed during the course of Dr. Taylor's official duties as superintendent.

C. Dr. Taylor And Other Superintendents Exercise Discretionary Authority.

Courts must consider three factors in determining whether an act is discretionary or ministerial: "(1) the nature of the duties; (2) how much policymaking or professional expertise and judgment the act involves; and (3) the consequences of withholding immunity." *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. 2006) (en banc). Considering these three factors, it is unquestionable that, in carrying out their

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[1] Although Mr. Dydell contends that official immunity only protects "public officials" and that Dr. Taylor and superintendents in general do not fall within this category of governmental actor, this contention is wholly without merit. *See, e.g.*, *Brummit v. Springer*, 918 S.W.2d 909, 912 n.2 (Mo. Ct. App. 1996) (stating that official immunity "applies to public 'employees' . . . not just to 'higher public officials'").

responsibilities to the school districts they oversee, superintendents' acts—especially the acts at issue in this case—are discretionary.

1. **Superintendents Exercise Statutorily Conferred Discretion To Maintain A Safe Learning Environment.**

Missouri's school boards are vested with general authority to manage and supervise the public schools. But members of the school boards, like the members of the boards of most corporations, typically do not have the time or expertise to oversee the day-to-day operations of public schools and their employees. School boards are therefore authorized by statute to hire superintendents to serve as chief executive officers to fill this role. *See* Mo. Rev. Stat. §§ 168.191, 168.201, 168.211. In school districts like The School District of Kansas City, Missouri, the school board is authorized by statute to delegate its authority to the superintendent. *See* Mo. Rev. Stat. § 168.201 (stating that the board of education may "prescribe [the superintendent's] powers [and] duties").

In addition to whatever discretion the school board confers on a superintendent, several statutes confer discretion on superintendents to make critical decisions of the kind at issue in the present case—namely, decisions affecting the safety of students and staff. For example, although each school board must establish a written policy of discipline for students who bring a weapon to school, and the policy must provide for at least a one-year suspension from school, a superintendent "may modify such suspension on a case-by-case basis." Mo. Rev. Stat. § 160.261.5.

Superintendents also have discretion to intervene when a non-resident student seeks admission to the school district and the superintendent has reason to believe the

student "will create an immediate danger to the safety of other pupils and employees of the district." Mo. Rev. Stat. § 167.020.2(2) (giving the superintendent discretion to convene a hearing and "determine whether or not the pupil may register"). In all other circumstances, the non-resident student's admission decision is committed to the board of education or to a committee of the board. Mo. Rev. Stat. § 167.020.3. These statutes evince a legislative judgment that superintendents *can and should* exercise discretion in making decisions affecting the safety of both students and employees. Such a legislative policy makes sense given that each situation will present unique circumstances that require a superintendent's experience and expertise to tailor the outcome in order to best achieve the objective of maintaining a safe and productive learning environment.

In addition to the statutory evidence that superintendents are expected to utilize their experience and expertise in matters regarding school safety, the United States Supreme Court has acknowledged that high-level school administrators face discretionary decisions in managing similar types of school affairs. In *Morse v. Frederick*, --U.S.--, 127 S. Ct. 2618, 2621 (2007), a high school principal saw some of her students unfurl a large banner conveying a message she regarded as promoting illegal drug use. The principal directed the students to take down the banner. *Id.* When one student refused to do so, the principal confiscated the banner and suspended the student. *Id.* In ruling that the action did not violate the student's First Amendment freedom of speech, the Court noted that "School principals have a difficult job, and a vitally important one. When [the student] suddenly and unexpectedly unfurled his banner, [the principal] had to decide to act—or not act—on the spot." *Id.* at 2629. "It was reasonable for [the principal] to

conclude that the banner promoted illegal drug use . . . and that failing to act would send a powerful message to the students in her charge, including [the student], about how serious the school was about the dangers of illegal drug use." *Id.* In other words, the Court acknowledged that the school principal had a choice whether to act, and in choosing to do so, she exercised her discretion in the manner she calculated would best stamp out illegal drug use on campus.

Similarly, the allegations against Dr. Taylor clearly involve actions and decisions that required the exercise of discretion—and would require the exercise of discretion *by any superintendent in any school district*. Mr. Dydell asserts that his injuries were the direct and proximate result of Dr. Taylor's failure to provide directives to and adequate supervision of various employees of the district; to provide specific instruction to a specific teacher about the use of a box cutter by students; to adequately supervise Central High School's security personnel; to adequately supervise Mr. Dydell and J.W. and to adequately care for Mr. Dydell's safety. There are no statutory or regulatory guidelines instructing superintendents on how to best accomplish the goal of keeping students and staff safe. The *only* way to accomplish this goal is through the exercise of a superintendent's professional expertise and judgment.

Furthermore, Mr. Dydell's allegations against Dr. Taylor exemplify why the doctrine of official immunity is necessary in these situations. If a superintendent could be subject to liability on these bases, Dr. Taylor would be required to become the personal steward for each and every individual student and staff member in the entire School District of Kansas City, Missouri—a task that is clearly impossible.

2. **Decisions Regarding Maintaining The Safety Of School Districts Are Uniquely Based On Superintendents' Experience and Professional Expertise And Their Need To Allocate Available Funds In A Manner That Provides Adequate Educational Opportunities For All Students.**

A ruling that superintendents could be subject to liability for acts of the kind alleged in this case would ignore the fact that superintendents have limited financial resources and personnel and must make policy decisions about how to best put to use such funding and personnel. School districts receive money through state, local, and federal funds. Each year, superintendents prepare or oversee the preparation of a budget, which is approved by the board of education. To create and implement these budgets, superintendents draw from their expertise and make decisions about the needs of each school within the school district and of the school district as a whole.

This fact is nowhere more obvious than in the way superintendents fulfill their duty to keep school grounds safe. A superintendent's often-difficult decisions include the type of security equipment a certain school should utilize based upon needs, available funds, personnel needed to operate any such equipment, as well as a host of other related issues. Even the Missouri Court of Appeals has recognized that maintaining a safe environment involves consideration of a complex set of circumstances. *See Jackson v. Wilson*, 581 S.W.2d 39, 44 (Mo. Ct. App. 1979) (stating that "a great many circumstances may need to be considered in deciding what action is necessary [to keep school grounds 'safe'], and such decisions involve the exercise of judgment or

discretion"). Interfering with these complex decisions by subjecting superintendents to personal liability would run counter to sound public policy, and would wreak havoc on the development and implementation of budgets that strive to allocate available funds in a manner that provides adequate educational opportunities for all students.

Furthermore, there are no "how-to" books to guide superintendents in effectively managing a school district. Nor can superintendents apply a "one-size-fits-all" philosophy to problem-solving. Different superintendents may respond differently to a particular issue due to variances in the sizes of school districts, student demographics, region of the state, expectations of the community, and many other factors. Even at the local level, a superintendent confronted with similar issues at two different schools within the same district may respond differently at each location due to variances in the sizes of the buildings, student demographics, community expectations, as well as other factors. Superintendents must be free to adapt decisions to meet specific needs at a specific time without fear of individual liability and without requiring a legal assessment as to all possible risks before making each and every decision.

3. Withholding Immunity Would Damage School Boards' Ability To Attract And Retain Qualified Superintendents At A Time When Missouri Is Already Experiencing Difficulty Doing So.

Official immunity is intended to promote the vigorous and effective administration of public affairs by removing the threat of personal liability from those public employees who must exercise their best judgment in conducting the public's business. *Kanagawa v. Freeman*, 685 S.W.2d 831, 836 (Mo. 1985) (en banc). "If an officer is to be put in fear of

financial loss at every exercise of his official functions, manifestly the interest of the public will inevitably suffer from the too complacent attitude thus engendered." *Id.* at 836. The consequence of carving out an exception to well-established Missouri law suggesting that superintendents are entitled to official immunity for their discretionary acts would seriously impact school districts' ability to attract and retain qualified individuals to serve in that capacity.

School districts across the country are currently facing a superintendent hiring challenge. According to a report by the American Association of School Administrators, annually, 16.9% of school boards face the prospect of hiring a new superintendent. *See* Thomas E. Glass and Louis A. Franceschini, The State of American School Superintendency, A Mid-decade Study (Rowman & Littlefield Education, 2007). The situation in Missouri is slightly worse. Vacancy information provided by the Missouri Department of Elementary and Secondary Education reveals that more than 20% of Missouri's 523 school districts advertised for a new superintendent in 2007, and more than one-half of those hired were first-time superintendents.

Indeed, in urban districts such as The School District of Kansas City, Missouri, the average tenure of a superintendent is slightly over 3 years. *See Urban School Superintendents: Characteristics, Tenure, and Salary Fifth Survey and Report*, 8 Urban Indicator 1 (June 2006) p. 2. More than 76% of superintendents nationwide are over 50 years old—which is not alarming until one considers that the mean tenure for a superintendent is only six years, which puts a large percentage of superintendents at or

near retirement age. *See* Glass, *The State of American School Superintendency*, at pp. 6 & 15.

These statistics reveal that it is already difficult to find qualified individuals to fill superintendent vacancies. A ruling by this Court that superintendents are not entitled to official immunity for their discretionary acts would further impact the ability of school districts in Missouri to recruit and maintain well-qualified administrators.

Withholding official immunity in the present case would have the ripple effect of forcing superintendents throughout the state to repeatedly defend against frivolous claims resulting from student altercations that occur on a daily basis in school districts throughout the state. With more than 20,000 students in The School District of Kansas City, Missouri, the superintendent could face claims on a daily basis— thus leaving no time to oversee and manage the various operations of the school district. It would be impossible for one person to supervise 20,000—or even 200—students on a daily basis (let alone teachers and staff). Yet, withholding of official immunity would dictate such a result if a superintendent desired to avoid personal liability for an injury that might befall a student.

The superintendency is a difficult and demanding profession that requires specialized training, education, and sacrifice. These committed public servants should be allowed to practice their profession without the lurking fear of individual liability. Denying official immunity for discretionary decisions such as those rendered by Dr. Taylor would discourage the most highly qualified from entering the profession and overseeing the education of our children.

CONCLUSION

The Missouri School Boards' Association and the Missouri Association of School Administrators urge this Court to reaffirm that prior court decisions grant the protection of official immunity to superintendents, and prohibit the Circuit Court from refusing to enter judgment against Mr. Dydell on the basis that Dr. Taylor is protected from any personal capacity suit by official immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage pre-paid, on this _____ day of October 2008 to the following:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in S.Ct. Rule 84.06(b) and S.Ct. Rule 55.03. The undersigned further certifies that the brief contains 3,440 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of this brief has been scanned for viruses and is virus-free.

_____

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APPENDIX

Thomas E. Glass and Louis A. Franceschini, The State of American School Superintendency, A Mid-decade Study (Rowman & Littlefield Education, 2007) A-1

Urban School Superintendents: Characteristics, Tenure, and Salary Fifth Survey and Report, 8 Urban Indicator 1 (June 2006) A-7