

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 11
The Honorable W. Brent Powell, Circuit Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| <u>TABLE OF CONTENTS</u> | i |
| <u>TABLE OF AUTHORITIES</u> | v |
| <u>STATEMENT OF FACTS</u> | 1 |
| <u>POINTS RELIED ON</u> | 11 |
| <u>ARGUMENT</u> | 14 |

| | |
|---|----|
| I. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE THE TRIAL COURT RIGHTLY REJECTED TAYLOR’S OFFICIAL IMMUNITY DEFENSE IN THAT MISSOURI APPELLATE COURTS HAVE CONSISTENTLY REFUSED TO GRANT IMMUNITY TO PUBLIC SCHOOL ADMINISTRATORS AND TEACHERS FROM PERSONAL LIABILITY WERE THEIR NEGLIGENT CONDUCT CAUSES INJURY TO A STUDENT. | 14 |
| A. Standard of Review. | 14 |
| B. Twenty-Nine Years of Missouri Appellate Precedent Precludes Taylor From Invoking Official Immunity For His Admitted Failure to Supervise | 15 |

C. **Official Immunity Overview**17

D. **Official Immunity and Missouri Public School Administrators**.....17

II. **TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT 1 BECAUSE, AS SUPERINTENDENT OF THE KANSAS CITY, MISSOURI SCHOOL DISTRICT, TAYLOR DID NOT QUALIFY AS A PUBLIC OFFICIAL FOR PURPOSES OF OFFICIAL IMMUNITY IN THAT TAYLOR WAS SUBJECT TO THE CONTROL OF THE SCHOOL BOARD AND HIS AUTHORITY WAS NOT CREATED AND CONFERRED BY LAW**27

A. **Standard of Review**27

B. **Overview of the Public Official Requirement to the Official Immunity Doctrine in Missouri**28

C. **Application of the Public Official Requirement to Missouri Public School Administrators**31

III. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE THE SUPERVISORY DUTY OWED TO PLAINTIFF BY TAYLOR WHILE HE WAS SUPERINTENDENT OF THE SCHOOL DISTRICT WAS MINISTERIAL IN NATURE IN THAT IT INVOLVED AN OPERATIONAL FUNCTION BY A SCHOOL ADMINISTRATOR.37

A. Standard of Review37

B. The Supervisory Duty Owed to Dydell by Taylor While he was Superintendent of the School District was Ministerial in Nature37

IV. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINTS II AND III BECAUSE THERE IS NO ISSUE INVOLVING SOVEREIGN IMMUNITY IN THIS CASE IN THAT IT IS UNDISPUTED THAT PLAINTIFF HAS NEVER ASSERTED AND NEVER ATTEMPTED TO ASSERT AN OFFICIAL CAPACITY CLAIM AGAINST TAYLOR.42

A. Standard of Review42

B. **There is No Issue of Sovereign Immunity in This Proceeding Because an Official Capacity Claim Has Never Been Asserted By The Plaintiff Against Taylor**42

CONCLUSION.....44

CERTIFICATE OF COMPLIANCE AND SERVICE.....45

TABLE OF AUTHORITIES

| <u>State and Federal Cases</u> | <u>Pages</u> |
|--|--------------|
| <i>A.R.H. v. W.H.S.</i> | |
| 876 S.W. 2d 687 (Mo. App. 1994) | 25 |
| <i>Bolon v. Rolla Public Schools</i> | |
| 917 F. Supp. 1423 (E.D. Mo. 1996) | 32, 33, 34 |
| <i>Burns v. Board of Education of the City of Stamford</i> | |
| 638 A. 2d 1 (Conn. 1994) | 23, 24, 25 |
| <i>Copley v. Board of Education of Hopkins County</i> | |
| 466 S.W. 2d 952 (Ky. Ct. App. 1971) | 24 |
| <i>Davis v. Board of Education of City of St. Louis</i> | |
| 963 S.W. 2d 679 (Mo. App. 1998) | 21, 35, 36 |
| <i>Davis v. Lambert-St. Louis Int’l Airport</i> | |
| 193 S.W. 3d 760 (Mo. banc 2006) | 12, 17, 28 |
| <i>Esposito v. Emery</i> | |
| 249 F. Supp. 308 (E.D. Pa. 1965) | 23 |
| <i>Flornoy v. McComas</i> | |
| 488 P. 2d 1104 (Colo. 1971) | 24 |
| <i>Gray v. Wood</i> | |
| 64 A. 2d 191 (R.I. 1949) | 24 |

| | |
|---|------------------------|
| <i>Green v. Denison</i> | |
| 738 S.W. 2d 861 (Mo. banc 1987) | 17, 38 |
| <i>Green v. Lebanon R-III School District</i> | |
| 13 S.W.3d 278 (Mo. banc 2000) | 12, 28, 38, 39 |
| <i>Greider v. Shawnee Mission Unified School District No. 512</i> | |
| 710 F. Supp. 296 (D. Kan. 1989)..... | 12, 39 |
| <i>Jackson v. Roberts</i> | |
| 774 S.W. 2d 860 (Mo.App. 1989) | 11, 20, 22, 23, 31 |
| <i>Jungerman v. City of Raytown</i> | |
| 925 S.W. 2d 202 (Mo. banc 1996) | 39 |
| <i>Junior College District of St. Louis v. City of St. Louis</i> | |
| 149 S.W. 3d 442 (Mo. banc 2004) | 17 |
| <i>Kanagawa v. State ex rel. Freeman</i> | |
| 685 S.W. 2d 831 (Mo. banc 1985) | 39 |
| <i>Kansas City v. School District of Kansas City</i> | |
| 201 S.W. 2d 930 (Mo. 1947) | 26 |
| <i>Kerby v. Nolte</i> | |
| 164 S.W. 2d 1 (Mo. banc 1942) | 33 |
| <i>Kersey v. Harbin</i> | |
| 591 S.W. 2d 745 (Mo.App. 1979) | 11, 17, 18, 20, 22, 40 |

Larson v. Independence School District No. 314

289 N.W.2d 112 (Minn. 1980)12, 24, 25, 40

Lehman v. Wansing

624 S.W. 2d 1 (Mo. banc 1981) 11, 19, 20, 21, 22, 31, 32

McCleod v. Grant County School District No. 128

255 P. 2d 360 (Wash. 1953)24

Mosley v. Portland School District No. 1J

813 P. 2d 73 (Ore. Ct. App. 1991).....12, 24, 40

Rogger v. Voyles

797 S.W. 2d 844 (Mo. App. 1990)25, 40

Bolon v. Rolla Public Schools

917 F.Supp. 1423 (E.D. Mo. 1996)12, 31, 32, 33, 34

Ross v. Consumers Power Co.

363 N.W. 2d 641 (Mich. 1984)39

Rustici v. Wiedemeyer

673S.W. 2d 762 (Mo. banc 1984)17

S.B.L. v. Evans

80 F.3d 307 (8th Cir. 1996)20, 22, 31, 32

Selleck v. Board of Education of Central School District No. 1

94 N.Y.S. 2d 318 (Sup. Ct. App. Div. NY 1949).....24

| | |
|---|--------------------|
| <i>Smith v. Archbishop of St. Louis</i> | |
| 632 S.W. 2d 516 (Mo. App. 1982) | 25, 40 |
| <i>Smith v. Board of Education of County of Kanawha</i> | |
| 294 S.E. 2d 469 (W.Va. 1982) | 24 |
| <i>Smith v. Consolidated School District No. 2</i> | |
| 408 S.W. 2d 50 (Mo. banc 1966) | 18 |
| <i>Southers v. City of Farmington, Mo.</i> | |
| ___ S.W. 3d _____ (Mo. banc 2008) | 28, 29, 30, 43 |
| <i>Spearman v. University City Public School District</i> | |
| 617 S.W. 2d 68 (Mo. banc 1981) | 11, 18, 19, 20, 32 |
| <i>State ex rel. Carrollton School District v. Gordon</i> | |
| 133 S.W. 44 (Mo. 1910) | 26 |
| <i>State ex rel. Chassing v. Mummert</i> | |
| 887 S.W. 2d 573 (Mo. banc 1994) | 14 |
| <i>State ex rel. Div. of Motor Carrier and Railroad Safety v. Russell</i> | |
| 91 S.W. 3d 612 (Mo. banc.2002) | 14 |
| <i>State ex rel. Eli Lilly & Co. v. Gaertner</i> | |
| 619 S.W. 2d 276 (Mo. App. 1981) | 12, 28, 31, 33, 36 |
| <i>State ex rel. Howenstine v. Roper</i> | |
| 155 S.W. 3d 747 (Mo. banc 2005) | 30, 36, 37 |

| | |
|--|----------------|
| <i>State ex rel. Mo. Dept. of Agriculture v. McHenry</i> | |
| 687 S.W. 2d 178 (Mo. banc 1985) | 15 |
| <i>State ex rel. Morasch v. Kimberlin</i> | |
| 654 S.W. 2d 889 (Mo. banc 1983) | 14 |
| <i>State ex rel. Pickett v. Truman</i> | |
| 64 S.W. 2d 105 (Mo. banc 1935) | 33 |
| <i>State ex rel. Webb v. Pigg</i> | |
| 249 S.W. 2d 435 (Mo. banc 1952) | 12, 34, 36 |
| <i>Stevenson v. City of St. Louis School District</i> | |
| 820 S.W. 2d 609 (Mo. App. 1991) | 21, 22 |
| <i>Webb v. Reisel</i> | |
| 858 S.W. 2d 767 (Mo. App. 1993) | 21, 23, 35, 36 |
| <u>Other Authorities</u> | |
| <i>Mo. Const. art 9, § 1(a)</i> (Vernon 1995) | 11, 25 |
| <i>Mo. Ann. Stat. § 160.261.8</i> (Vernon 2000) | 11, 23 |
| <i>Mo. Ann. Stat. § 162.471</i> (Vernon 2000) | 12, 34 |
| <i>Mo. Ann. Stat. § 162.621</i> (Vernon 2000) | 12, 34 |
| <i>Mo. Ann. Stat. § 167.031</i> (Vernon 2000) | 11, 25 |
| <i>Mo. Ann. Stat. § 168.211</i> (Vernon 2000) | 35 |
| <i>67 Mo. L. Rev.</i> 127, 137 (Winter, 2002) | 23 |

STATEMENT OF FACTS

Plaintiff Craig Dydell (“Dydell”) is an African-American young man. A1. He resides in Kansas City, Missouri. A1. Defendant/Relator Dr. Bernard Taylor, Jr. (“Taylor”) is now a resident of the State of Michigan. A1. At all times relevant to the Amended Petition, Taylor was the Superintendent of the Kansas City, Missouri School District (the “School District”). A1-2. As such, he had control and supervisory responsibilities over Dydell, a fellow student named J.W., the School District’s Security Department and its Exceptional Education Department, as well as the premises of Central High School, one of the high schools owned and operated by the School District. A2.

In June, 2001, Taylor was appointed by the Board of Directors (“School Board”) of the School District as Superintendent, a position he held until June 30, 2006. A59. As Superintendent, Taylor was the chief administrative officer and administrative head of all divisions and departments of the School District. A59. Taylor was responsible to the School Board for the execution of its policies, rules and regulations. A59. He was tasked as the School Board’s representative to which all directives from the School Board to its employees or students were communicated. A59. Taylor’s duties included making internal operational decisions regarding the School District and the various functions of the school district. A60.

Taylor's employment contract with the School District was made on March 23, 2004. A88. It was for two years. A89. During the first year of his contract, Taylor was paid a base salary of \$180,000, plus incentives. A91. In addition, Taylor was provided a tax-sheltered annuity in the amount of \$13,000, health insurance, a retirement plan, life insurance in the amount of \$300,000, disability insurance, twenty days of sick leave, twenty days of vacation leave, an unlimited expense allowance and a leased automobile for his exclusive use. A92-94. In addition, Taylor's contract provided that the School District would defend and indemnify him "from any and all demands, claims, suits, actions, and legal proceedings brought against Superintendent in his individual capacity, or in his official capacity as agent and employee of the School District, provided that the incident arose while the Superintendent was acting within the scope of his employment...." A94.

In January, 2004, J.W. was a student at Westport Charter School in Kansas City, Missouri. A3. J.W. attempted to bring a 7 ½ inch long knife into the Westport School, but his weapon was detected by the metal detectors. A3. J.W. was expelled from Westport Charter School and was placed on home-bound detention for one year. A3.

In connection with his arrest for carrying a concealed weapon and his expulsion from Westport Charter School, juvenile authorities had J.W. admitted to Two Rivers Psychiatric Hospital on January 12, 2004. A65. According to his

juvenile officer, J.W. “has exhibited dangerous behaviors at school and [he] has ongoing problems at home with verbal and physical aggression.” A65. While he was at Two River Psychiatric Hospital, J.W. disclosed and described a history of mood and behavior disorder, including auditory and visual hallucinations since September, 2000. A65. He had been receiving treatment for his mental condition at South Kansas City Mental Center. A65-66. At the time of his admission to Two Rivers Psychiatric Hospital, J.W. continued to report hallucinations of hearing crowds of people, seeing faces and hearing people behind his back. A66. Following his admission to McCune Boys Home for treatment of his mental condition, J.W. was eventually discharged by Two Rivers in late January, 2004. A66. At the time of his discharge, J.W. was taking numerous psychotropic medications. A66.

In February, 2004, J.W.’s mother sought to enroll him with the School District. A66. In connection with that effort, Taylor and the School District became aware of J.W.’s criminal record. A66. The School District cleared J.W. for enrollment in the School District. A66. In connection with that clearance, the School District received authorizations to acquire, and it did acquire, the psychiatric records from Two Rivers Psychiatric Hospital, as well as J.W.’s criminal record. A66.

At the time J.W. was cleared for enrollment in the School District, he was assigned to the Special Education Department of the School District as a special education student. A67. When a special education student transfers into the School

District, a transfer meeting is held. A67. The personnel in the School District's Special Education Department had received no guidance or direction from Taylor as to what should be covered at such a meeting. A67. Even though the Special Education Department should have taken J.W.'s criminal and psychiatric records into account in making its placement decision, those records were ignored because the personnel in that department had been given no supervision or guidance from Taylor to do so. A67.

Eventually, J.W. was placed by the Special Education Department at Central High School, one of the School District's most dangerous schools. A68. That placement was made without regard to J.W.'s criminal and psychiatric records. A68. No plan was put in place by Taylor to prevent J.W. from repeating what he had done at Westport Charter School. A68. Also, none of the teachers or staff at Central High School were made aware of his criminal record and his disturbing mental condition. A67-71. In 2004 and 2005, Central High School was a dangerous place. A69. During the period 1994 to 2005, there were 52 separate incidents involving possession or use of a firearm or a weapon at the school. A69.

Against his mother's wishes, Dydell began the fall semester of 2005 as a new student at Central High School. A5, 76. He was a good student with a promising future. A5.

On or about September 12, 2005, J.W. was given a box cutter by teacher Julia Hook during J.W.'s drafting class at Central High School. A62. J.W. then took the box cutter home and brought it back to Central High School on September 13, 2005; he easily entered the school with the box cutter in his shoe because the metal detectors at Central High School had not been properly tested or properly calibrated, and the only person maintaining those metal detectors had not received any direction, supervision or guidance. A62-72. While Dydell was seated in the cafeteria at Central High School with his cousin, he was attacked from behind by J.W.. A63. J.W. proceeded to slice Dydell's neck wide open with the box cutter that had been given to him by his teacher. A5. The delusional attack was unprovoked, as Dydell had never met J.W.. A63.

While he was Superintended in 2004 and 2005, Taylor never sent or caused to be sent to the Special Education Department of the School District any directives or guidance about the "types of students who might be better suited at the alternative high school rather than Central." A69. While he was Superintendent in 2004 and 2005, Taylor never sent or caused to be sent to the Special Education Department any directives or guidelines about how to deal with special education students, like J.W.. A69.

While he was Superintendent of the School District, Taylor had access to every file maintained by the School District, including J.W.'s file. A73. That file contained

J.W.'s psychiatric and criminal records. A73. While he did not receive every incident report in the School District, Taylor did receive internal statistics circulated by the School District about student incidents, including those involving weapons at Central High School. A73. While he was Superintendent of the School District, Taylor never attempted to reorganize the School District in any manner that involved the safety of students or the Special Education Department. A73. While he was Superintendent of the School District, Taylor did not meet regularly with the heads of the various departments of the School District. A73. Taylor never read any portion of the Missouri Safe Schools Act. A73. While he was Superintendent of the School District, Taylor never attempted to reorganize or change protocol so that he and teachers and case managers would receive information on criminal offences of District students that were reportable to him under the Missouri Safe School Act. A74. The case manager assigned to J.W. stated that teachers and case managers working with J.W. should have been made aware of his criminal record. A75.

While he was Superintendent, Taylor never had any discussions with any of the department heads in the School District regarding "dangerous special education students." A74. While he was Superintendent of the School District, Taylor never reviewed "any of the policies and procedures regarding transfers of special education students into the District." A74. While Taylor knew that School District employees "needed guidelines to help the staff and teachers do their jobs well," he never caused

any revision of nor did he cause to be issued any appropriate handbooks or any other guides for the School District's Special Education Department. A74. In 2005, the School District had one handbook for its Special Education Department. A74. There was nothing in that handbook which mentioned, directed or cautioned the Special Education Department about how to handle a special education transfer student with a criminal or psychiatric record. A74.

While he was Superintendent of the School District, Taylor never had regular reports from or meetings with the Director of District Security. A74. In addition, Taylor never discussed with the Principal of Central High School the dissemination of criminal records on any particular students at Central High School. A74. While he was Superintendent of the School District, Taylor never sent or caused to be sent any guidelines or directives recommending that case managers review the files of special education students under their supervision so that they would be aware of such student's criminal or psychiatric records. A75. From the time that J.W. was enrolled in the School District in June of 2004, to the time that he attacked Dydell on September 13, 2005, Taylor "never implemented or caused to be implemented any type of program to decrease or eliminate J.W.'s dangerous behavior." A75.

After the attack on Dydell, the School District admitted that J.W.'s placement at Central High School was not the "correct setting" because J.W. needed "to be in a smaller school setting to meet his emotional and educational needs." A76.

Dydell was eventually discharged from medical care, but he was too afraid and too incapacitated to return to Central High School to complete his education. A6. As a result of the foregoing attack, Dydell not only suffered considerable pain and discomfort, but he continues to suffer significant headaches, twitching, anxiety, depression, sleep difficulty and other ailments. A6.

Procedural Background

The underlying action was filed in the Circuit Court of Jackson County, Missouri on May 9, 2007. The original Petition essentially alleged that Taylor failed to use ordinary care to see that J.W. and Dydell were properly supervised, that he failed to make Central High School reasonably safe in the fall of 2005, and that he otherwise failed to use ordinary care to protect Dydell from the foregoing attack.

Taylor himself caused the United States District Court for the Western District of Missouri to first address the issue of official immunity when he removed this case to federal court on June 21, 2007. The case was assigned to the Honorable Scott O. Wright. On that same day, Taylor filed a Motion to Dismiss, therein arguing, among other things, that the negligent claim asserted against him was barred by the Missouri doctrine of official immunity.

The Motion to Dismiss was fully briefed by the parties. Plaintiff opposed all arguments advanced by Taylor, including his argument about the alleged discretionary nature of his duty to supervise. A16-18. On August 14, 2007, Judge

Wright entered his order. In a lengthy and thoughtful opinion, Judge Wright denied the Motion to Dismiss as to the negligent claims against Defendants Taylor and McClendon. A25. Judge Wright held that “Defendants Taylor and McClendon are not shielded by official immunity in this case and may be liable for these [negligent] acts.” A33. Judge Wright did not retain jurisdiction over the case. Instead, he remanded it back to the Circuit Court for all further proceedings. Taylor made no effort to seek any interlocutory review of that ruling by timely seeking an extraordinary writ from any appellate court.

On May 15, 2008, approximately eleven months after removing this case to federal court, Taylor filed a Motion for Judgment on the Pleadings in the Circuit Court. In that motion, Taylor asked the Respondent Judge to ignore Judge Wright’s order, and rule that he was shielded from negligence liability on the basis of official immunity. Taylor raised no new legal issues, nor did he cite any new legal authority in support of his argument. Respondent Judge Powell denied the motion on June 18, 2008. A40. Taylor then raised the *same issues* yet a *third time* when he filed his Motion for Summary Judgment on May 23, 2008. Again, he cited no new arguments or legal authority to support his argument. That motion has been fully briefed and is awaiting ruling.

On July 8, 2008, Taylor filed a Petition in Prohibition with the Missouri Court of Appeals for the Western District. Respondent filed Suggestions in Opposition. On

July 25, 2008, the Court of Appeals summarily denied Taylor's request for an extraordinary writ. On July 30, 2008, Taylor filed the same Petition in Prohibition with this Court. Following the filing of Suggestions in Opposition by Respondent, this Court issued its preliminary writ on August 26, 2008.

POINTS RELIED ON

I. **TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE THE TRAIL COURT RIGHTLY REJECTED TAYLOR'S OFFICIAL IMMUNITY DEFENSE IN THAT MISSOURI APPELLATE COURTS HAVE CONSISTENTLY REFUSED TO GRANT IMMUNITY TO PUBLIC SCHOOL ADMINISTRATORS AND TEACHERS FROM PERSONAL LIABILITY WHERE THEIR NEGLIGENT CONDUCT CAUSES INJURY TO A STUDENT ON SCHOOL PREMISES.**

Lehman v. Wansing, 624 S.W. 2d 1 (Mo. banc 1981)

Spearman v. University City Public School District, 617 S.W. 2d 68
(Mo. banc 1981)

Jackson v. Roberts, 774 S.W. 2d 860 (Mo. App. 1989)

Kersey v. Harbin, 591 S.W. 2d 745 (Mo. App. 1979)

Mo. Const. art. 9, §1(a) (Vernon 1995)

Mo. Ann. Stat. § 160.261.8 (Vernon 2000)

Mo. Ann. Stat. § 167.031 (Vernon 2000)

II. **TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE, AS SUPERINTENDENT OF THE KANSAS CITY, MISSOURI SCHOOL DISTRICT, TAYLOR DID NOT QUALIFY AS A PUBLIC OFFICIAL FOR PURPOSES OF OFFICIAL IMMUNITY IN THAT**

**TAYLOR WAS SUBJECT TO THE CONTROL OF THE SCHOOL BOARD
AND HIS AUTHORITY WAS NOT CREATED AND CONFERRED BY LAW.**

Davis v. Lambert-St. Louis Int'l Airport, 193 S.W. 3d 760 (Mo. banc 2006)

State ex rel. Webb v. Pigg, 249 S.W. 2d 435 (Mo. banc 1952)

State ex rel. Eli Lilly & Co. v. Gaertner, 619 S.W. 2d 276 (Mo. App. 1981)

Bolon v. Rolla Public Schools, 917 F.Supp. 1423 (E.D. Mo. 1996)

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Mo. Ann. Stat. § 162.621 (Vernon 2000)

**III. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER
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Mosley v. Portland School District No. 1J, 813 P.2d 73 (Ore. Ct. App. 1991)

Larson v. Independence School District No. 314, 289 N.W. 2d 112 (Minn. 1980)

IV. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINTS II AND III BECAUSE THERE IS NO ISSUE INVOLVING SOVEREIGN IMMUNITY IN THIS CASE IN THAT IT IS UNDISPUTED THAT PLAINTIFF HAS NEVER ASSERTED AND NEVER ATTEMPTED TO ASSET AN OFFICIAL CAPACITY CLAIM AGAINST TAYLOR.

ARGUMENT

I. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE THE TRAIL COURT RIGHTLY REJECTED TAYLOR’S OFFICIAL IMMUNITY DEFENSE IN THAT MISSOURI APPELLATE COURTS HAVE CONSISTENTLY REFUSED TO GRANT IMMUNITY TO PUBLIC SCHOOL ADMINISTRATORS AND TEACHERS FROM PERSONAL LIABILITY WHERE THEIR NEGLIGENT CONDUCT CAUSES INJURY TO A STUDENT ON SCHOOL PREMISES.

A. Standard of Review

Prohibition should be reserved for extraordinary circumstances. *State ex rel. Morasch v. Kimberlin*, 654 S.W. 2d 889, 891-92 (Mo. banc 1983). It ‘is not a writ of right and should not be employed for correction of alleged or anticipated judicial errors, and does not lie for grievances which may be adequately redressed in the ordinary course of judicial proceedings.’ *State ex rel. Div. of Motor Carrier and Railroad Safety v. Russell*, 91 S.W. 3d 612, 615-616 (Mo. banc 2002). “If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.” *State ex rel. Chassing v. Mummert*, 887 S.W. 2d 573, 577 (Mo. banc 1994). When the issue for interlocutory review is one of immunity and that issue “depends on factual issues which cannot be effectively determined short of trial,” prohibition is not appropriate.

State ex rel. Mo. Dept. of Agriculture v. McHenry, 687 S.W. 2d 178, 181 (Mo. banc 1985).

B. **Twenty-Nine Years of Missouri Appellate Precedent Precludes Taylor From Invoking Official Immunity For His Admitted Failure to Supervise**

Two independent rulings of law on the same issue of official immunity by *two* different trial judges have been made in this case. On August 14, 2007, the Honorable Scott O. Wright, Senior District Judge for the United States District Court for the Western District of Missouri, ruled that “defendants Taylor and McClendon are not shielded by official immunity in this case and may be liable for these [negligent] acts.” A33. Judge Wright never reached the question whether Taylor and McClendon were public officials, nor did he decide whether the negligent supervision claims against the two defendants implicated discretionary or ministerial duties. Judge Wright did not retain jurisdiction over the case. Instead, he remanded the case back to the Circuit Court of Jackson County, Missouri.

Approximately ten-months and numerous depositions later, Respondent was called upon to decide the same official immunity question that had previously been ruled by Judge Wright. The issue was again fully briefed by the parties. On June 18, 2008, Respondent Judge Powell independently concluded that the defendants were not protected by official immunity. In doing so, Judge Powell noted that “Missouri law has yet to definitely determine whether school superintendents and principals

qualify for official immunity.” A41. Like Judge Wright, Judge Powell did not address whether defendants Taylor and McClendon were public officials for purposes of the official immunity doctrine, nor did he decide whether the negligent supervision claims against them involved ministerial or discretionary duties. Sovereign immunity was never discussed.

Taylor ignores the foregoing rulings by Judge Wright and Judge Powell. In fact, he did not even include Judge Wright’s order in his Appendix. More importantly, Taylor does *not* even address in his Opening Brief *the* central issue in this proceeding.¹ That issue is: Did the trial court error in *twice* ruling that the defendant principal and defendant superintendent are not protected by official immunity for their personal tortious conduct on school premises? As hereinafter shown, Missouri appellate courts have consistently held for the past twenty-nine years that public school administrators (like Taylor) cannot invoke official immunity for negligent conduct that causes injury to a student on school premises.

¹ Taylor lightly touches this central issue with this *single* sentence: “No Missouri court has ever held that school superintendents are not entitled to official immunity.” (Relator’s Opening Brief, at p. 25). As hereinafter shown, that is one of *many* misrepresentations of Missouri law made by Taylor in his Opening Brief.

C. **Official Immunity Overview**

Traditionally, the common law has protected the state and its entities with sovereign immunity from all tort liability. *Junior College District of St. Louis v. City of St. Louis*, 149 S.W. 3d 442, 447 (Mo. banc 2004). The judicially-created doctrine that protects some of the persons who work for or on behalf of the state and its entities is called the official immunity doctrine. *Rustici v. Wiedemeyer*, 673 S.W. 2d 762, 768-69 (Mo. banc 1984). This doctrine generally protects “public officials” from liability for acts of ordinary negligence that are “strictly related to the performance of discretionary duties.” *Green v. Denison*, 738 S.W. 2d 861, 865 (Mo. banc 1987). “The aim of official immunity is to allow officials to ‘make judgments affecting the public safety and welfare’ without being burdened by ‘[t]he fear of personal liability.’” *Davis v. Lambert-St. Louis International Airport*, 193 S.W. 760, 765 (Mo. banc 2006); *Green v. Denison, supra* at 865.

D. **Official Immunity and Missouri Public School Administrators**

Kersey v. Harbin, 591 S.W. 2d 745 (Mo.App. 1979) appears to be the first case where a Missouri appellate court decided whether a Missouri public school principal, superintendent and teacher can invoke official immunity when charged with

negligence.² The negligence allegation in *Kersey* was that the individual defendants failed to properly supervise the decedent student and his student attacker. The defendants moved to dismiss, asserting that “as officers of the school district, they are clothed with a species of immunity and cannot be held liable except for commission of an intentional tort.” *Id.* at 748. The trial court dismissed the defendants, but the Missouri Court of Appeals for the Southern District reversed. In doing so, the Appeals Court emphasized that it had “found no rule of law, no line of authority, which clothes any of the defendants with immunity from liability for his negligent acts.” *Id.* at 749. The phrase “sovereign immunity” was never mentioned in the opinion.

Two years after *Kersey*, this Court reviewed for the first time the issue of immunity from negligence with regard to a Missouri teacher. In *Spearman v. University City Public School District*, 617 S.W. 2d 68 (Mo. banc 1981), this Court was asked to review a ruling by the trial court that the negligence action against a school district and a physical education instructor was barred by the doctrine of sovereign immunity. In its analysis, this Court examined the *overall* immunity of teachers from negligence that injures a student. As a result of that analysis, this Court

² In *Smith v. Consolidated School District No. 2*, 408 S.W. 2d 50, 55 (Mo. banc 1966), this issue was raised but this Court did not reach it, holding instead that the negligence allegations were insufficient.

concluded that “no line of authority clothes school teachers with immunity from liability for their negligent acts.” *Id.* at 71. This Court went on to review and *expressly* approve *Kersey*. The opinion then held that “if the trial court sustained the defendant’s motions to dismiss solely on the ground that defendant instructors were clothed with sovereign immunity, the trial court erred.” *Id.* at 72. In this Court’s approval of *Kersey*, there was *no* reference made to “sovereign immunity.”

The companion case to *Spearman* is *Lehmen v. Wansing*, 624 S.W. 2d 1 (Mo. banc 1981). This was a negligence action by a student and his parents against a board of education, a teacher, a principal and a superintendent to recover damages in connection with an eye injury. Summary judgment was granted to all the defendants based on the doctrine of sovereign immunity. Upon transfer, this Court held that “[b]ecause plaintiffs apparently are attempting to state a cause of action against each of these [individual] defendants for his alleged individual tortious conduct, the trial court erred in granting summary judgment based on sovereign immunity.” *Id.* at 2. In an apparent attempt to signal to the parties the view of the Court with regard to official immunity, the opinion went on to conclude in a footnote that the “tenets” in *Spearman* were fully applicable “to principals and superintendents charged with liability for their personal fault for nothing appears immunizing these officials from actions for their direct tortious acts.” *Id.* at fn2. In support of that conclusion, this

Court cited *Kersey*, as well as decisions from Kentucky, Pennsylvania, Rhode Island and New York.

Approximately eight years after the rulings by this Court in *Lehmen* and *Spearman*, the Missouri Court of Appeals for the Eastern District was called upon to address the applicability of official immunity to a public school teacher and an assistant principal. *Jackson v. Roberts*, 774 S.W. 2d 860 (Mo. App. 1989) involved injuries sustained by a student who had walked between two parked school buses. The trial court granted the defendants' motion to dismiss based on the doctrine of official immunity. The Court of Appeals began its analysis by noting that "[t]he parties have not cited, nor has our research disclosed, any Missouri case deciding whether public school teachers or principals are 'public officers.' There is, however, a substantial line of authority in other jurisdictions denying the status of 'public officers' to teachers." *Id.* at 860-861. After pointing out that no Missouri court had ruled whether teachers are public officials under the official immunity doctrine, the Appeals Court opined that "it is clear that teachers are not immune from liability for their negligent acts or omissions." *Id.* at 861. The opinion then went on to specifically hold that the teacher and the assistant principal were "not immune from suit by reason of the doctrine of official immunity." *Id.*

The United States Court of Appeals for the Eighth Circuit, applying Missouri law, has followed this Court's decision in *Lehmen*. See, e.g., *S.B.L. v. Evans*, 80 F.3d

307 (8th Cir. 1996). In *Evans*, two elementary students sued a school principal and a superintendent for negligent supervision of another student who sexually assaulted the plaintiffs. The defendants argued that they were protected by official immunity. The trial court easily rejected that argument. The Eighth Circuit agreed with the trial court and affirmed. In doing so, the federal appellate court observed that, while this Court “did not expressly decide the question whether a principal or superintendent was a public official, the [Missouri Supreme] Court made ‘clear that teachers [principals and superintendents] are not immune from liability for their negligent acts or omissions.’” *Id.* at 310. The federal appeals court specifically rejected the defendants’ reliance on *Webb v. Reisel*, 858 S.W. 2d 767 (Mo. App. 1993), aptly noting that “*Webb* ‘ignores’ *Lehmen*.” *S.B.L. v. Evans, supra*.

In his Opening Brief, Taylor essentially ignores the foregoing twenty-nine years of Missouri appellate precedent. Instead, Taylor tries to find support from the following three decisions by the Missouri Court of Appeals: *Davis v. Board of Education of City of St. Louis*, 963 S.W. 2d 679 (Mo. App. 1998); *Stevenson v. City of St. Louis School District*, 820 S.W. 2d 609 (Mo. App. 1991); and *Webb v. Reisel*, 858 S.W. 2d 767 (Mo. App. 1993). Contrary to Taylor’s misrepresentations about these three cases, *none* of them support the argument made by Taylor in Point I.

The *Davis* case involved intentional tort claims. There was *no* analysis or any discussion by the Court of Appeals whether the superintendent in that case qualified

as a “public official” for official immunity purposes. The Court of Appeals *assumed* (without discussion) that the superintendent was a public official *so that* it could quickly get to its holding that the intentional tort claims asserted against the superintendent were insufficient. In the *Stevenson* case, the Court of Appeals *never* discussed or reached the issue of official immunity for the superintendent because plaintiffs “abandoned any claim of error with respect to the liability of the individual defendants.” *Stevenson v. City of St. Louis School District, supra* at 611. *Webb* was an action against the director of pupil transportation for St. Louis public schools. There was *no* issue or discussion in that case whether a school superintendent is a public official or whether a school superintendent is otherwise immune from claims of negligence under the official immunity doctrine. Most importantly, the *Webb* decision ignored *Lehmen, Kersey* and *Jackson*.

The foregoing Missouri appellate decisions (beginning with *Kersey* and ending with *Evans*) stand for the proposition that Missouri has historically not allowed public school teachers, superintendents or principals to invoke official immunity if any such persons are charged in their personal capacity with negligent conduct that injures a student on school premises. By implication, these same cases do not appear to apply to situations involving vicarious liability. Also, the foregoing Missouri appellate decisions seem to be saying that the “public official” criteria for official immunity

does not even need to be addressed in negligence cases involving public school teachers, principals or superintendents.

Admittedly, the Eastern District decision in *Webb* does not appear to follow the foregoing Missouri appellate precedent. That, however, is explained by the fact that the *Webb* decision *ignores* the foregoing precedent *without explanation*. One of the precedents ignored by *Webb* is the *Jackson* decision, which was issued by the *same* court. Another important factor which distinguishes *Webb* is that a director of pupil transportation (the position at issue) has no role in the education of students. Also, the accident in *Webb* did *not* occur on school property. It is also worth noting that the *Webb* decision has never been cited with approval by any Missouri appellate court.

It would appear that the Missouri legislature was aware of the foregoing appellate precedent in 1996. That is the only way to explain the statement in Section 160.261.8 of the Missouri Safe Schools Act, that educators are *not* immune “from [their] negligent acts.” That 1996 Act was “intended to send Missouri schools, citizens, and courts the message that violent and disruptive students would not be tolerated.” 67 Mo. L. Rev. 127, 137 (Winter, 2002).

Missouri is not the only state which has decided to withhold official immunity from public school teachers, principals and superintendents for negligent conduct that injures students on school premises. *See, e.g., Burns v. Board of Education of the City of Stamford*, 638 A. 2d 1, 4-6 (Conn. 1994); *Esposito v. Emery*, 249 F. Supp.

308, 311 (E.D. Pa. 1965); *Selleck v. Board of Education of Central School District No.1*, 94 N.Y.S. 2d 318 (Sup. Ct. App. Div. NY. 1949); *Gray v. Wood*, 64 A. 2d 191, 192 (R.I. 1949); *McCleod v. Grant County School District No. 128*, 255 P. 2d 360, 362 (Wash. 1953); *Mosley v. Portland School District No. 1J*, 813 P. 2d 71, 73 (Or. Ct. App. 1991); *Smith v. Board of Education of County of Kanawha*, 294 S.E. 2d 469, 470 (W.Va. 1982); *Larson v. Independence School District No. 314*, 289 N.W. 2d 112, 121 (Minn. 1980); *Flornoy v. McComas*, 488 P. 2d 1104, 1106 (Colo. 1971); *Copley v. Board of Education of Hopkins County*, 466 S.W. 2d 952, 953 (Ky. Ct. App. 1971).

Missouri appellate courts have not set forth the policy considerations for refusing to provide official immunity to public school superintendents, principals and teachers for negligence on school premises. Such policy consideration were, however, delineated by the Connecticut Supreme Court in *Burns v. Board of Education of the City of Stamford, supra*. There, the plaintiff argued that a “school child was a member of a foreseeable class of victims to whom the superintendent owed a special duty of care and, thus, the defense of governmental immunity should not lie.” *Burns v. Board of Education of the City of Stamford, supra* at 4. The Connecticut Supreme Court agreed. In support of that conclusion, it noted that “statutory and constitutional mandates demonstrate that school children attending public schools during school hours are intended to be the beneficiaries of certain

duties of care.” *Id.* The Court went on to conclude that “[t]he result of this network of statutory and constitutional provisions is that the superintendent of schools bears the responsibility for failing to act to prevent the risk of imminent harm to school children as an identifiable class of beneficiaries of his statutory duty of care.” *Id.* at 5. In a similar vein, the Minnesota Supreme Court has held that its “doctrine of discretionary immunity” does not apply to a superintendent, in part, “[b]ecause of the special status school children have in the eyes of the law.” *Larson v. Independent School District No. 314*, 289 N.W. 2d 112, 120 (Minn. 1980).

Like Connecticut, Missouri constitutionally guarantees “free public schools” to “all persons in this state within ages not in excess of twenty-one years as prescribed by law.” Mo. Const. art. 9, §1(a) (Vernon 1995). Like Connecticut, Missouri compels children seventeen years and younger to attend school. Mo. Ann. Stat. §167.031 (Vernon 2000). And like Minnesota, Missouri recognizes the special status of school children in the eyes of the law. *See, e.g., A.R.H. v. W.H.S.*, 876 S.W. 2d 687, 691 (Mo. App. 1994); *Smith v. Archbishop of St. Louis*, 632 S.W. 2d 516, 522 (Mo. App. 1982); *Rogger v. Voyles*, 797 S.W. 2d 844, 846 (Mo. App. 1990). Finally, Missouri courts recognize that public schools are different from all other state governmental entities. A “school district is in no sense a municipal corporation with diversified powers, but is a quasi public corporation, ‘the arm and instrumentality of the state for one single and noble purpose, viz. to educate the children of the district.’”

Kansas City v. School District of Kansas City, 201 S.W. 2d 930, 933 (Mo. 1947), citing *State ex rel. Carrollton School District v. Gordon*, 133 S.W. 44, 51 (Mo. 1910).

It is undisputed that public school teachers, principals and superintendents are not charged with overseeing the safety of the general public as part of their jobs, as are police officers. School administrators supervise and have custody of a defined and limited class of individuals, those being the children assigned to the schools under their control and supervision. Public school principals, superintendents and teachers are not charged with making daily judgments affecting the “public safety and welfare” of the general public, as are police officers. Such judgments are the precise and intended focus of the official immunity doctrine. Also, public school administrators and teachers have special duties to and special relationships with their students which are not shared by any other government employee.

Public educators are charged with providing a decent and free public education to children who are totally at the mercy of teachers and school administrators for their safety. Students cannot lawfully bring weapons to a high school to protect themselves. They, as well as their parents, must rely completely on school superintendents, principals and teachers to keep their children safe from foreseeable harm. Granting a public school administrator (like Taylor) official immunity for *not* supervising students (as in this case) under his care and custody does great violence to the entire concept of compulsory public education. If one has a constitutional right to

a free public education in Missouri, that right can have little meaning if public school administrators have no *enforceable* legal duty to provide a safe learning environment to the children under their care and custody. If this Court turns it back and refuses to protect disadvantaged African-American students who are trapped in dangerous inner-city high schools, like Craig Dydell, then *who* will?

The foregoing twenty-nine years of appellate precedent in Missouri should not be abandoned by this Court. Children *must* come first. Taylor should not be allowed to invoke official immunity and escape responsibility for failing to do his job as Superintendent when that failure brought about Craig Dydell's debilitating injuries.

II. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE, AS SUPERINTENDENT OF THE KANSAS CITY, MISSOURI SCHOOL DISTRICT, TAYLOR DID NOT QUALIFY AS A PUBLIC OFFICIAL FOR PURPOSES OF OFFICIAL IMMUNITY IN THAT TAYLOR WAS SUBJECT TO THE CONTROL OF THE SCHOOL BOARD AND HIS AUTHORITY WAS NOT CREATED AND CONFERRED BY LAW.

A. Standard of Review

The standard of review for this Point is the same standard review for Point I.

B. Overview of the Public Official Requirement to the Official Immunity Doctrine in Missouri

If this Court does not accept the argument set forth in Point I herein, then this Court must address the first criteria for satisfaction of the official immunity doctrine in Missouri. That criteria is that a person cannot invoke official immunity until he or she first proves that they are a “public official” or a “public officer” within the meaning of that doctrine. *Davis v. Lambert-St. Louis Int’l Airport*, 193 S.W. 3d 760, 763 (Mo. banc 2006); *Green v. Lebanon R-III School District*, 13 S.W. 3d 278, 284 (Mo. banc 2000). Whether a person qualifies as a public officer or public official for official immunity purposes is “dependent upon the legal and factual circumstances involved.” *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W. 2d 276, 764 (Mo. App. 1981).

Before analyzing and applying this first criteria, Respondent must address the argument made by Taylor at pages 13 through 19 of his Opening Brief. There, Taylor takes the incredible position that this Court supposedly overturned decades of established Missouri law as a result of the use of *two words* in *Southers v. City of Farmington, Mo.*, ____ S.W. 3d _____ (Mo. banc 2008). Those two words are “public employees.” These words were casually used in the following sentence: “This judicially-created doctrine protects *public employees* from liability for alleged acts of negligence committed during the course of their official duties for the

performance of discretionary acts.” *Id.* at 10 (emphasis added). From this one simple sentence, Taylor “extrapolates” that this Court thereby “removed the ‘public official’ language, substituting into the [official immunity] test the word [sic] ‘public employees.’” (Relator’s Opening Brief, at p. 14).³ Noticeably absent from Taylor’s argument is any page citation or reference to any language from the *Southers* opinion which might give *any* indication that this Court actually *intended* to abrogate decades of established Missouri law by replacing the long-standing criteria of “public official” with the term “public employees.”

Attorneys can professionally advocate the reversal of existing law if a good faith argument to do so can be presented. Conversely, attorneys do not have the professional discretion to make false statements of law or otherwise misrepresent the holding of a decision. While Taylor could have attempted a good faith argument to reverse existing law, Taylor instead decided to misrepresent this Court’s holding in *Southers*. There was *no* issue nor any briefing in *Southers* involving the public official criteria for the simple reason that a police officer was involved. Police

³ It is truly amazing that Amici Curia MSBA actually agrees with Taylor. (Brief of Amici Curia, at p. 6). Adopting such a “new” test would virtually eliminate the protection of the official immunity doctrine for *all* school board members in Missouri because such *uncompensated* individuals could never qualify as “employees” of the districts they serve.

officers are universally deemed public officials or public officers for purposes of the official immunity doctrine in Missouri. The primary focus of *Southers* was the Missouri public duty doctrine. That doctrine provides that “a public employee is not civilly liable for the breach of a duty owed to the general public, rather than a particular individual – even for breach of a ministerial duty.” *Southers v. City of Farmington Mo., supra*. That immunity, as opposed to official immunity, “does not require that the individual be a public official.” *State ex rel. Howenstine v. Roper*, 155 S.W. 3d 747, 752 (Mo. banc 2005). This may explain this Court’s casual use of the phrase “public employees” in *Southers*. Taylor’s reliance on *Southers* is not only misplaced, but it is grossly misleading.⁴

⁴ Taylor’s misrepresentations of Missouri law are not confined to *Southers*. At footnote 8, page 15 of his Opening Brief, Taylor boldly pronounces that “in previous cases addressing official immunity, this Court *never* conducted a ‘public official’ analysis.” (Emphasis added). In *State ex rel. Howenstine v. Roper, supra*, a “public official” analysis *was* conducted by this Court. What is even more outrageous is that Taylor later cites and relies on *Roper* and that *very* analysis at pages 27 and 28 of his Opening Brief.

C. Application of the Public Official Requirement to Missouri Public School Administrators

A most thorough analysis of the public official or public officer criteria was made in *State ex rel. Eli Lilly v. Gaertner, supra*. There, Judge Simon gave numerous examples of state employees who are not considered public officers, as well as examples of those who are considered public officers and the reasons therefore. Because Missouri appellate precedent has precluded the invocation of the official immunity doctrine by public school superintendents, principals or teachers in negligence cases, there are necessarily *no* reported school cases in Missouri where this criteria was analyze and applied. The only Missouri cases that have *mentioned* this criteria with respect to school administrators and teachers are *Jackson v. Roberts*, *S.B.L. v. Evans*, and *Bolon v. Rolla Public Schools*, 917 F.Supp. 1423 (E.D.Mo 1996). *None* of these cases support Taylor.

Jackson was a negligence action by a student against a teacher and an assistant principal. The Missouri Court of Appeals noted in passing that there is “a substantial line of authority in other jurisdictions denying the status of ‘public officers’ to teachers.” *Jackson v. Roberts, supra* at 861. The Court of Appeals never reached the issue whether the defendant teacher and assistant principal were public officials because *Lehmen* provided that they could not invoke official immunity.

The *Evans* case was an action against a school principal and superintendent for negligent supervision of another student. The defendants invoked official immunity, asserting that they were public officials. The United States Court of Appeals for the Eight Circuit noted in passing that this Court “did not expressly decide the question whether a principal or a superintendent was a public official” in the *Spearman* and *Lehmen* decisions. *S.B.L. v. Evans, supra* at 310. The Eight Circuit went on to hold that Missouri precedent made it ‘clear that teachers [principals and superintendents] are not immune from liability for their negligent acts or omissions.’ *S.B.L. v. Evans, supra*.

The only analysis by a Missouri court of the question whether a Missouri public school administrator is a “public official” for official immunity purposes was made in *Bolon v. Rolla Public Schools*. This was a negligence action against the members of a school board, the superintendent and principal in connection with the alleged sexual misconduct of a teacher toward a student. As to the principal and superintendent, Judge Perry agreed “that the Missouri Supreme Court [in *Lehmen*] has refused to grant immunity to superintendents and principals for their negligent acts, and [this Court] is bound by that holding.” *Bolon v. Rolla Public Schools, supra* at 1432. As to the defendant school board members, however, Judge Perry observed that “Missouri law is not as clear with respect to school board members, which this Court finds are distinguishable from teachers, superintendents and principals...” *Id.*

Judge Perry began his analysis of the public officer or public official criteria by quoting the following long-standing Missouri test:

A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is the public officer. That portion of the sovereign's power delegated to the officer must be exercised independently, with some continuity and without control of a superior power other than the law.

Bolon v. Rolla Public Schools, supra; see also State ex rel. Eli Lilly & Co. v. Gaertner, supra at 764; *State ex rel. Pickett v. Truman*, 64 S.W. 2d 105, 106 (Mo. banc 1935); *Kerby v. Nolte*, 164 S.W. 2d 1, 8 (Mo. banc 1942). In applying the foregoing accepted test to the board members, Judge Perry pointed out the *critical* difference between school board members, and principals and superintendents. He noted that Missouri law grants members of school boards general and supervising control, government and management of the public schools. Conversely, superintendents, principals and teachers are “subject to the control of the school board.” *Bolon v. Rolla Public Schools, supra*. Judge Perry concluded that “[t]his degree of control renders members of school boards ‘public officials’ for official

immunity purposes.” *Bolon v. Rolla Public Schools, supra*. The importance of this control element was made apparent by this Court in *State ex re. Webb v. Pigg*, 249 S.W. 2d 435, 441 (Mo. banc 1952) (Clerk of Springfield Court of Appeals held not to be a “public officer” because he was “subject to the supervision, direction and control of the court by whom he is appointed and whom he serves.”).

As shown by the above analysis, the question whether Taylor is a public official for official immunity purposes turns on (1) whether his superintendent position and duty to Dydell were “created and conferred by law,” and (2) whether he was otherwise subject to the control of the Kansas City, Missouri School Board.

A cursory review of the record in this proceeding and applicable statutes establishes that Taylor’s duty to Dydell, as well as his authority as Superintendent, were *not* created or conferred by law. In that respect, Missouri law provides that “[t]he government and control of an urban school district is vested in a board of six directors....” Mo. Ann. Stat. §162.471 (Vernon 2000). Section 162.621 of the Revised Statutes of Missouri goes on to provide that the school board “shall have general and supervisory control, government and management of the public schools and public school property of the district in the city and shall exercise all powers in the administration of the public school system therein.”

There is absolutely no provision in Missouri law whereby the Superintendent of the Kansas City, Missouri School District is given any general or supervisory

control, government or management of the Kansas City, Missouri School District. Moreover, the superintendent position for the Kansas City, Missouri School District is not even defined by Missouri law. Because Taylor had no duties statutorily designated, he did not exercise any portion of the sovereign powers given to the District's School Board. Furthermore, there can be no dispute that Taylor was subject to the control of the School District's School Board. Accordingly, Taylor does not qualify as a public official for official immunity purposes.

Taylor relies exclusively on the decisions in *Webb v. Reisel* and *Davis v. Board of Education of City of St. Louis* to argue that his former status as the Superintendent of the Kansas City, Missouri School District qualifies him as a public official for official immunity purposes. Taylor's reliance on these two cases is misplaced because, among other reasons, both cases involved the City of St. Louis School District. You ask: What does that matter? It matters because that particular school district and its superintendent are treated differently from any other school district or superintendent in Missouri, including the Kansas City, Missouri School District.

For unknown reasons, the Missouri legislature decided to set forth the broad general powers and authority of the Superintendent of the City of St. Louis School District. According to Section 168.211, the Superintendent of that district "shall have general supervision" of "the school system," as well as supervision over "all school buildings" and all other operations of all the schools in that district. These statutory

powers are expressly referenced in the *Webb* decision. No such power-conferring statutes exist or govern all other superintendents in Missouri, including the Superintendent of the Kansas City, Missouri School District. This distinction might explain the oddity of the *Webb* decision, and the fact that no appellate court in Missouri has ever followed it or cited it with approval.

Taylor's reliance upon *Davis* is particularly inappropriate. There was *no* analysis or *any* discussion by the Court of Appeals whether the superintendent in that case qualified as a "public official" for official immunity purposes. The Court of Appeals *assumed* (without discussion) that the superintendent was a public official so that the Appeals Court could quickly get to its holding that the intentional tort claims asserted against the superintendent were insufficient.

Taylor also seeks support from this Court's recent decision in *State ex rel. Howenstine v. Roper*. At first glance, the public official analysis in *Roper* appears to support Taylor's argument. That first glance, however, is misplaced. As clearly indicated by the foregoing long-standing test, to qualify as a public official the power delegated to the official must be exercised "independently" and "without the control of a superior power, other than the law." *State ex rel. Webb v. Pigg, supra; State ex rel. Eli Lilly & Co. v. Gaertner, supra* and cases cited therein. In the *Roper* case, it is apparent that Dr. Howenstine operated independently as the Medical Director of the Department of Health for the State of Missouri. The same cannot be said for Taylor.

It is undisputed that Taylor was subject to the control of the Kansas City, Missouri School Board. Accordingly, *Roper* does not support Taylor's public official argument.

Taylor's position as the former Superintendent of the Kansas City, Missouri School District does not qualify him as a public official for purposes of the official immunity doctrine. Accordingly, he is not entitled to any relief in prohibition.

III. **TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINT I BECAUSE THE SUPERVISORY DUTY OWED TO PLAINTIFF BY TAYLOR WHILE HE WAS SUPERINTENDENT OF THE SCHOOL DISTRICT WAS MINISTERIAL IN NATURE IN THAT IT INVOLVED AN OPERATIONAL FUNCTION BY A SCHOOL ADMINISTRATOR**

A. **Standard of Review**

The standard of review for this Point is the same as the standard of review for the prior Points.

B. **The Supervisory Duty Owed to Dydell by Taylor While He Was Superintendent of the School District Was Ministerial in Nature.**

The Amended Petition alleges that Taylor negligently failed to provide supervision to the School District's Exceptional Education Department, that he failed to provide supervision for the placement of transfer students like J.W., that he failed to provide supervision to Central High School's art teachers concerning the use of

dangerous instruments like box cutters, that he failed to supervise Central High School's security personnel, and that he failed to supervise Dydell and J.W. so as to provide a safe learning environment for Dydell. The factual support for Taylor's gross failure to supervise is set forth in Respondent's Appellate Appendix at pages A65 to A76.

According to Missouri's official immunity doctrine, "a public official is not liable to members of the public for negligence that is *strictly* related to the *performance* of discretionary duties." *Green v. Lebanon R-III School District, supra* at 284; *Green v. Denison*, 738 S.W. 2d 861, 865 (Mo. banc 1987) (emphasis added). When public officials perform ministerial duties, they may be held liable. In this case, *all* of the allegations supporting the single negligence claim against Taylor involve the *nonperformance* by Taylor of his supervisory duty to Dydell and his attacker, rather than the *performance* of any duty or function by Taylor. This *alone* should preclude Taylor from invoking official immunity.

It has been stated that a discretionary act requires the exercise of reason and the adaptation of means to an end, and discretion in determining how or whether an act should be done or course pursued. *Id.* In contrast, ministerial acts have been defined as those which require certain duties to be performed "upon a given state of facts, in a prescribed manner, in obedience to the mandate of the legal authority, without regard to an employee's own judgment or opinion concerning the propriety of the act to be

performed.” *Id.*; *Jungerman v. City of Raytown*, 925 S.W. 2d 202, 205 (Mo. banc 1996). The determination whether a public official’s duties are discretionary or ministerial rests upon the facts of each particular case. *Kanagawa v. State ex rel. Freeman*, 685 S.W. 2d 831, 836 (Mo. banc 1985).

Because *no* Missouri court has *ever* held that a Missouri public school superintendent, principal or teacher is immune for their negligent conduct, there are necessarily *no* reported appellate decisions in Missouri on whether the failure of a superintendent to supervise his or her students involves a ministerial or discretionary duty. Cases from other states have, however, addressed this very issue.

In *Greider v. Shawnee Mission Unified School District No. 512*, 710 F. Supp. 296 (D. Kan. 1989), a Kansas federal court addressed (in the context of official immunity) whether “teachers owe a duty to properly supervise students and to take reasonable steps to protect students’ safety.” *Id.* at 299. The court had little difficulty in finding that the defendants “were under a legal duty to properly supervise [the student] in the woodworking class and to take reasonable steps to protect his safety.” *Id.* Accordingly, the court held that the defendants were not immune because their duties and functions were not discretionary. Similarly, the Michigan Supreme Court held in *Ross v. Consumers Power Co.*, 363 N.W. 2d 641, 675-676 (Mich. 1984) that “instruction and supervision are essentially ministerial-operational activities for which there is no immunity from tort liability.”

In this case, the base allegation against Taylor is that he essentially abdicated his supervisory duty under conditions where supervision was absolutely necessary in order to protect the safety of Dydell. Failure to supervise and an otherwise complete abdication of one's duty to supervise *does not* involve decision-making. *Mosley v. Portland School District No. 1J*, 813 P. 2d 73 (Ore. Ct. App. 1991) ('a school principal's failure to take any precautions...is not an exercise of policy discretion'). Such abdication disqualifies a school administrator from immunity. *Larson v. Independence School District No. 314*, 289 N.W. 2d 112, 121 (Minn. 1980) (a principal who "abdicated" his responsibilities was "never engaged in decision-making").

It is simply preposterous to argue that safety supervision by a school superintendent is a discretionary duty that may or may not be discharged at the whim of each superintendent. Such a position would encourage even more violence in Missouri public schools. Moreover, the law is clear in Missouri that when a minor (which Dydell was in September, 2005) is entrusted to the custody of a school and its superintendent, the superintendent has a duty to that student to protect he or she by supervising the student and his or her surroundings. *Rogger v. Voyles*, 797 S.W. 2d 844, 846 (Mo. App. 1990); *Smith v. Archbishop of St. Louis*, 632 S.W. 2d 516, 522 (Mo. App. 1982); *Kersey v. Harbin*, 591 S.W. 2d 745, 749 (Mo. App. 1979).

Desperate for something to argue, Taylor asserts that Respondent somehow “waived” the right to address the discretionary/ministerial duty issue because Plaintiff did not address that issue in his Suggestions in Opposition to Taylor’s Motion for Judgment on the Pleadings. (Relator’s Opening Brief at pp. 33-34). Taylor cites no authority for this new theory of “waiver.” The record is undisputed that Plaintiff did address this issue in his Suggestion in Opposition to Defendants’ Motion to Dismiss, which is the first time Taylor ever raised official immunity as a defense. A13. That issue was never reached by Judge Wright. When Taylor raised the same issue in his Motion for Judgment on the Pleadings, Plaintiff did not address the issue because the central issue then and now is whether Missouri law even allows a public school superintendent to invoke official immunity when charged with negligence that results in injury to a student on school premises. Respondent Judge Powell also never reached that issue. Briefing and pleading are two different things. Taylor’s “waiver” argument, like Points II and III of Taylor’s Opening Brief, are figments of someone’s imagination. They do *not* belong in an argument to this Court.

Taylor argues that maintaining the safety of an urban School District requires a great deal of experience and expertise, and that policy-making is involved. If the allegation against Taylor in this case was that the metal detectors at Central High School should have been of a different kind, then Taylor’s argument would make sense, because such an allegation would involve discretionary judgment. In this case,

however, Taylor *completely* abdicated his supervisory duty to maintain safety with regard to J.W. and Dydell. There is *no* decision-making going on when someone needs to do something but does *nothing*.

The supervisory duty that Taylor owed to Dydell was clearly ministerial in nature. Thus, Taylor has no immunity and relief in prohibition is not warranted.

IV. TAYLOR IS NOT ENTITLED TO RELIEF IN PROHIBITION UNDER HIS POINTS II AND III BECAUSE THERE IS NO ISSUE INVOLVING SOVEREIGN IMMUNITY IN THIS CASE IN THAT IT IS UNDISPUTED THAT PLAINTIFF HAS NEVER ASSERTED AND NEVER ATTEMPTED TO ASSERT AN OFFICIAL CAPACITY CLAIM AGAINST TAYLOR

A. Standard of Review

The standard of review for this Point is the same as the standard of review for the prior Points.

B. There is No Issue of Sovereign Immunity in This Proceeding Because an Official Capacity Claim Has Never Been Asserted By the Plaintiff Against Taylor.

The Amended Petition asserts a *single* claim for negligent supervision against Taylor in his individual and personal capacity. Plaintiff has *never* asserted or attempted to assert any “official capacity” claim against Taylor. Accordingly, there can be no sovereign immunity issue in this proceeding. In fact, the preliminary writ

issued by this Court expressly stated that it was only directed to the question of “official immunity.”

Taylor has done the exact thing in Points II and III of his Opening Brief that he did with respect to his treatment of this Court’s opinion in *Southers v. City of Farmington, Mo.* In an attempt to create something that does not exist, Taylor has taken two isolated phrases from the Amended Petition and “extrapolated” from those two phrases in an attempt to create a non-existent “official capacity” claim.

In numbered paragraph 5 of the Amended Petition, it is alleged that Defendants Taylor and McClendon “acted in both their individual capacity and their respective official capacities.” The phrase “their respective official capacities” was inserted solely for purposes of bringing the single negligence claim against Taylor within the one million dollar insurance policy carried by the School District on Taylor. That was, admittedly, a clumsy way of stating that the acts and omissions of Taylor were performed in the course and scope of his respective employment with the School District. Respondent and Plaintiff both acknowledge that there is no such thing as a suit in “former official capacity.” Plaintiff advised the trial court on numerous occasions of this very thing, noting that the phrase “can be ignored.” A79.

Taylor goes on to argue that the phrase “official capacities” in the *caption* and in numbered paragraph 5 of the Amended Petition somehow constituted an admission by the Plaintiff that Taylor was a “public official” for purposes of Missouri’s official

immunity doctrine. Taylor's attempt to create something out of nothing is of no avail. The phrase "public official" cannot be found *anywhere* in the Amended Petition.

Points II and III of Taylor's Opening Brief are beyond frivolous. They are blatant misrepresentations of the record, and they should be summarily struck by this Court for violating the directive of this Court in its preliminary writ.

CONCLUSION

For one or more or all of the foregoing separate and independent reasons, Relator Taylor is not entitled to any relief in prohibition. The preliminary writ issued by this Court should be quashed forthwith.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with the provisions of Rule 55.03; that it contains 9,647 words/ 815 lines and complies with the word/line limitations contained in Rule 84.06(b); that a CD-ROM was scanned for viruses and found to be free of viruses; and that one copy of the CD-ROM and two copies of Respondent's Brief were mailed this 18th day of November, 2008, to:

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