

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

RELATOR'S REPLY BRIEF

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INTRODUCTION

Respondent's Brief does not refute Dr. Taylor's thorough and reasonable argument that extending official immunity to school superintendents like Dr. Taylor is appropriate under the law, sound as a matter of policy, and in the best interest of Missouri's schools. Unfortunately, Respondent's Brief improperly contains irrelevant and disputed facts, consists of *ad hominem* attacks against Dr. Taylor's counsel, and cites inapposite and overruled cases from other jurisdictions. Putting Respondent's puffery aside, the fact remains that no Missouri court has ever held that school superintendents like Dr. Taylor are not entitled to official immunity, and there is a consensus in other jurisdictions that school superintendents are immune from claims of negligence like Mr. Dydell's.

The test for official immunity announced by this Court in *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. 2008) (en banc), is a good one and clearly encompasses Dr. Taylor based on the facts alleged in Mr. Dydell's Amended Petition. To the extent previous Missouri case law is inconsistent with *Southers*, this Court should clarify that prior case law is overruled and that official immunity protects public employees, including school administrators, from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts. It makes little sense, as a matter of logic or policy, to treat school administrators differently than all other public employees when the policy motivations behind official immunity are equally implicated.

STATEMENT OF FACTS

Because Dr. Taylor challenges Respondent's refusal to grant his Motion For Judgment On The Pleadings, the only facts relevant to this proceeding are those alleged in Mr. Dydell's Amended Petition and certain procedural facts identifying the respective pleadings by the parties and related orders below. *See* Mo. R. Civ. P. 55.27(b); *State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo. 2000) (en banc).

Dr. Taylor accurately and objectively identified these relevant facts in his Petition In Prohibition. Respondent first improperly interjected extraneous facts into this proceeding when he attached to his Return and Answer Mr. Dydell's Suggestions In Opposition to Dr. Taylor's Motion For Summary Judgment. In Relator's Opening Brief, Dr. Taylor explained why the disputed facts from the summary judgment briefing are irrelevant to this proceeding and should never have been included in Respondent's Return And Answer. *See* Relator's Opening Brief at 4-5 & n.3.

Despite this exchange, Respondent's Brief is filled with disputed assertions of fact pulled from Mr. Dydell's summary judgment briefing and deposition exhibits.¹ Many

¹ Dr. Taylor argued to the Circuit Court that many of Mr. Dydell's assertions of fact in his summary judgment briefing misrepresented the record and were supported only by Mr. Dydell's own speculative conclusions and inappropriate hearsay. *See* Aplt. App. at 77-79. Indeed, to set the record straight, Dr. Taylor was forced to submit to the Circuit Court a 20-page spreadsheet identifying Mr. Dydell's misrepresentations of the evidence.

of Respondent's assertions of fact are argumentative and thus in violation of Mo. R. Civ. P. 84.04(c) (noting that the statement of facts shall be "fair and concise"). For example, Respondent makes the argumentative and disputed assertion that Central High School was "one of the School District's most dangerous schools." Respondent's Brief at 4.

Additionally, a significant number of Respondent's assertions of fact are irrelevant and several are inflammatory. For example, Respondent's Brief contains a detailed description of Dr. Taylor's compensation package, including a description of Dr. Taylor's allowed expense account. Respondent's Brief at 2. Needless to say, the details of Dr. Taylor's compensation are irrelevant to the legal issues in this case and Respondent's inclusion of them is a transparent attempt to prejudice this Court by portraying Dr. Taylor as undeserving of official immunity.

Given that Respondent's Statement Of Facts violates Mo. R. Civ. P. 84.04(c) and interjects irrelevant and disputed facts, this Court should strike Respondent's Statement Of Facts and adjudicate this case based on the facts contained in Dr. Taylor's Petition In Prohibition and Relator's Opening Brief. *See Elkins v. Elkins*, 257 S.W.3d 617, 618 (Mo. Ct. App. W.D. 2008) (dismissing a *pro se* litigant's appeal because his brief violated Mo. R. Civ. P. 84.04(c)); *Pattie v. French Quarter Resorts*, 213 S.W.3d 237, 239 (Mo. Ct. App. S.D. 2007) (noting that argumentative assertions of fact and references outside the record on appeal are improper in appellate briefs). Alternatively, this Court should

Dr. Taylor has included a copy of that spreadsheet in an abundance of caution. *See* Aplt. Reply App. 1-20

disregard all the assertions of fact in Respondent's Brief that are derived from any source other than Mr. Dydell's Amended Petition.

ARGUMENT

I. REPLY TO RESPONDENT’S ARGUMENT I: THERE IS NO CATEGORICAL BAR TO SCHOOL ADMINISTRATORS’ RECEIVING OFFICIAL IMMUNITY; NO MISSOURI COURT HAS ENUNCIATED SUCH A RULE, AND THE FEDERAL AUTHORITY RELIED UPON BY RESPONDENT IS CONTRARY TO *SOUTHERS* AND SOUND PUBLIC POLICY

A. Standard Of Review

Dr. Taylor stands by the Standard of Review stated in Relator’s Opening Brief. Prohibition is an appropriate remedy where a circuit court denies a party an absolute defense, including the defenses of sovereign and official immunity. *State ex rel. Div. of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 615 (Mo. 2002) (en banc); *State ex rel. Mo. Dep’t of Ag. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985) (en banc).

B. No Missouri Cases Prohibit School Superintendents From Asserting Official Immunity

It is telling that the first authorities relied upon by Respondent for the notion that school superintendents are not entitled to official immunity are the challenged order in this case itself and the related order issued by Judge Wright² when this case was removed. *See* Respondent’s Brief at 14-15. Respondent then marches through the same

² Dr. Taylor included a copy of Judge Wright’s order as an exhibit to his Petition In Prohibition.

list of inapposite cases contained in his Return And Answer, claiming that these cases show “Twenty-Nine Years of Missouri Appellate Precedent” that precludes Dr. Taylor from claiming official immunity. Respondent’s Brief at 15. In Relator’s Opening Brief, Dr. Taylor explained how the Missouri cases relied upon by Respondent deal either with the issue of sovereign immunity or address the availability of official immunity for teachers or assistant principals, not superintendents. Relator’s Opening Brief at 25-26.

Respondent’s current analysis of *Kersey v. Harbin*, 591 S.W.2d 745 (Mo. Ct. App. S.D. 1979), requires further discussion. In his Return And Answer, Respondent stated that the “Missouri Court of Appeals in *Kersey v. Harbin* did not expressly analyze” whether school superintendents are “public officials” for purposes of official immunity. See Return And Answer at 16. In Respondent’s Brief, however, Respondent now claims that *Kersey* is the first Missouri case to hold that a school superintendent is not entitled to official immunity. Respondent’s Brief at 17-18.

Kersey does not address official immunity. The words “official immunity” are nowhere contained in the court’s opinion. Rather, *Kersey* involved a claim by school administrators that they were entitled to immunity from a negligence suit because they were performing a “governmental function.” *Kersey v. Harbin*, 531 S.W.2d 76, 81 (Mo. Ct. App. S.D. 1975). Thus, the claimed defense was for derivative sovereign immunity. Indeed, the court stated, “[i]nsofar as the arguments suggest the *school district* itself is immune, we agree” *Kersey*, 591 S.W.2d at 749 (emphasis added).

After misreading *Kersey*, Respondent explains that, in *Spearman v. University City Public School District*, 617 S.W.2d 68 (Mo. 1981) (en banc), this Court cited *Kersey*

with approval. Respondent's Brief at 19. As Respondent admits, however, *Spearman* was a case involving the defense of *sovereign immunity*. See *Spearman*, 617 S.W.2d at 72. Similarly, Respondent notes that this Court also relied on *Kersey* in *Lehmen v. Wansing*, 624 S.W.2d 1 (Mo. 1981), yet another *sovereign immunity* case. That this Court relied on *Kersey* in deciding two *sovereign immunity* cases illustrates that *Kersey* dealt with *sovereign immunity*, as opposed to official immunity. The only remaining Missouri case cited by Respondent is *Jackson v. Roberts*, 774 S.W.2d 860 (Mo. Ct. App. E.D. 1989), which held that a teacher and assistant principal were not entitled to official immunity. Thus, Respondent cites not a single case where a Missouri court refused to grant official immunity to a school superintendent.³

To the contrary, there are a number of cases that stand for the proposition that school administrators, including superintendents, are entitled to official immunity under Missouri law. *Davis v. Bd. of Educ. of City of St. Louis*, 963 S.W.2d 679, 688-89 (Mo. Ct. App. E.D. 1998); *Stevenson v. City of St. Louis Sch. Dist.*, 820 S.W.2d 609, 611 (Mo. Ct. App. E.D. 1991); *Webb v. Reisel*, 858 S.W.2d 767, 769-70 (Mo. Ct. App. E.D. 1993); *Padilla v. S. Harrison R-II Sch. Dist.*, 1995 WL 244405, at *4 (W.D. Mo. 1995) (Sachs, J.); *Brenner v. Sch. Dist. 47*, 1987 WL 18819, at *4 (E.D. Mo. 1987) (Filippine, J); *Doe*

³ Respondent does cite one federal decision holding that school superintendents in Missouri are not entitled to official immunity. *S.B.L. v. Evans*, 80 F.3d 307 (8th Cir. 1996). *Evans* is unpersuasive, however, given that it relies on the inapposite *sovereign immunity* cases *Lehman* and *Spearman*. *Id.* at 310.

A. v. Special Sch. Dist. of St. Louis County, 637 F. Supp. 1138 (E.D. Mo. 1986) (Nangle, J.).

C. There Is No Missouri Statute Stating That “Educators” Are “Not Immune ‘From Their Negligent Acts’”

Despite this clear weight of authority, Respondent argues that Missouri case law on point is so clear that, in 1996, the Legislature included a specific provision in the Safe Schools Act stating that educators are not immune “from their negligent acts.” Respondent’s Brief at 23 (citing Mo. Rev. Stat. § 160.261.8). Respondent purports to quote Section 160.261.8, but there is no support for Respondent’s assertion in the language of the statute. The pertinent portion of Section 160.261.8 actually states:

Teachers and other authorized district personnel in public schools responsible for the care, supervision, and discipline of schoolchildren, including volunteers selected with reasonable care by the school district, shall not be civilly liable when acting in conformity with the established policy of discipline developed by each board under this section. . . .

Nothing in this section shall be construed to create a new cause of action against such school district, or to relieve the school district from liability for the negligent acts of such persons.

Mo. Rev. Stat. § 160.261.8 (emphasis added).

Respondent redrafts the last sentence of this section, claiming it imposes liability on “educators” for “their” negligent acts. However, the language in question clearly refers to a “school district” as an entity and not to any individual “educator.” Earlier

language in the same section expressly exempts teachers from liability. The language in question indicates that the Safe Schools Act does not prohibit a plaintiff from bringing a negligence action against a school district that otherwise falls within an exception to the school district's *sovereign immunity*. See Aplt. App. 83-84.

D. The Cases From Other Jurisdictions On Which Respondent Relies Are Inapposite Or Overruled

Respondent cites a number of cases from outside Missouri for the notion that “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.” Respondent’s Brief at 23. Of these cases, Respondent singles out *Burns v. Board of Education of the City of Stamford*, 638 A.2d 1 (Conn. 1994), and argues that this Court should follow *Burns* because Missouri law on compulsory education is similar to that of Connecticut. Respondent’s Brief at 24-25. In reality, however, *Burns* holds that superintendents are eligible for qualified immunity under Connecticut law.

In *Burns*, the Connecticut Supreme Court expressly held that school superintendents are entitled to qualified immunity for discretionary acts. *Id.* at 645 (noting that to recover, the plaintiff had to demonstrate “one of the exceptions to a municipal employee’s qualified immunity for discretionary acts”). One exception to qualified immunity under Connecticut law is when a public employee fails to prevent “imminent harm” to “a narrowly defined identified class[] of foreseeable victims.” *Id.* at 646. Although the superintendent in *Burns* was generally protected by qualified

immunity, the court held, on the facts of the case, that the plaintiff demonstrated an *exception* to qualified immunity because the superintendent failed to remedy a known, dangerous condition on school property that posed a risk of *imminent harm*—namely, an untreated sheet of ice on the school’s sidewalk. *Id.* at 650. Thus, *Burns* does not stand for the proposition that “public school superintendents, principals, and teachers” are categorically without official immunity. Indeed, *Burns* is distinguishable from the facts of this case. Unlike how the sheet of ice posed an *imminent* threat of harm to students, J.W.’s attack was, by Mr. Dydell’s own admission, unexpected—it was a “delusion attack” that was “unprovoked” because J.W. had never even met Mr. Dydell. Respondent’s Brief at 5.

Respondent similarly claims that *Larson v. Independent School District No. 314*, 289 N.W.2d 112, 120 (Minn. 1980) stands for the proposition that discretionary immunity “does not apply to a superintendent, in part, ‘because of the special status school children have in the eyes of the law.’” Respondent’s Brief at 25. Respondent misquotes *Larson* – this statement was in reference to a school teacher, not a superintendent. *Id.* at 120. In any event, *Larson* was recently criticized and discarded by the Minnesota Supreme Court itself. In *Anderson v. Anoka Hennepin Independent School District 11*, 678 N.W.2d 651 (Minn. 2004), the Minnesota Supreme Court admitted that, in *Larson*, it “conflated statutory immunity and common law official immunity standards in analyzing a common law official immunity issue.” *Id.* at 656. The court went on to state that “we cannot agree with the generalization . . . that the exercise of discretion by a teacher in controlling a classroom is ‘the essence of a ministerial function.’” *Id.* at 657 n.7. Under the law of

Minnesota today, even school teachers enjoy official immunity for discretionary acts. *Id.* at 660 (granting official immunity to a shop teacher).

Aside from *Burns* and *Larson*, Respondent cites a handful of other cases in an effort to support his claim that other states withhold official immunity from superintendents. Respondent's Brief at 23-24. These cases are unpersuasive for several reasons. *Esposito v. Emery*, 249 F. Supp. 308 (D. Pa. 1965) merely held that school officials were not entitled to *sovereign immunity*. *Id.* at 309. In any event, Pennsylvania now recognizes statutory immunity for all public school officials. *See Scott v. Willis*, 543 A.2d 165, 169-70 (Pa. Commw. Ct. 1988) (statutory immunity for superintendent and principal).

Similarly, *Smith v. Board of Education of Kanawha County*, 294 S.E.2d 469 (W.Va. 1982), did not address the availability of official immunity for a superintendent. Rather, it held that individual members of a school board were not entitled to "governmental immunity from suit." *Id.* at 472. In any event, *Smith* has been superseded. Under West Virginia law today, school officials enjoy blanket immunity from negligence suits so long as they act within the scope of their employment and their actions are not malicious, made in bad faith, or wanton or reckless. *See Moore by and through Knight v. Wood County Bd. of Educ.*, 489 S.E.2d. 1, 5 (W. Va. 1997) (statutory immunity for principal in case of student-on-student violence).

Likewise, *Mosley v. Portland School District No. 1J*, 813 P.2d 71 (Or. Ct. App. 1991), did not even decide whether a superintendent was entitled to official immunity. Rather, it held that a school district was not liable for policy decisions regarding student

safety but could be liable for failing to stop a knife attack because such action was a “routine decision[] made by employees in the course of their day-to-day activities.” *Id.* at 72. Needless to say, the alleged negligence of Dr. Taylor goes to his failure to make certain policy-based decisions. He was not at Central High School when J.W.’s attack occurred and so could not even make a routine decision to stop the attack. In any event, *Mosley* was reversed by the Oregon Supreme Court on the very point relied on by Respondent. *See Mosley v. Portland Sch. Dist. No. 1J*, 843 P.2d 415, 419-21 (Or. 1992) (finding that the acts in question were discretionary).

Two additional cases cited by Respondent are no longer good law. *Flournoy v. McComas*, 488 P.2d 1104 (Colo. 1971), has been superseded by statute. As the more recent case, *Castaldo v. Stone*, 192 F. Supp. 2d 1124 (D. Colo. 2001), illustrates, Colorado educators now enjoy broad immunity from suits in negligence where there is student-on-student violence. *Id.* at 1163-66 (statutory immunity for principal, assistant principal, school counselor, and teachers for claims stemming from the Columbine attacks). Likewise, *Copley v. Board of Education of Hopkins County*, 466 S.W.2d 952 (Ky. Ct. App. 1971), has been overruled. Under Kentucky law today, school officials enjoy discretionary immunity from suits in negligence. *M.W. ex rel. T.W. v. Madison Bd. of Educ.*, 262 F. Supp. 2d 737, 746-47 (E.D. Ky. 2003) (“good faith” discretionary immunity for principal) (*citing Yanero v. Davis*, 65 S.W.3d 510, 529 (Ky. 2002)).

E. The Weight Of Authority From Other Jurisdictions Holds That School Officials Are Entitled To Some Form Of Discretionary Immunity

Contrary to the handful of cases cited by Respondent, there are numerous opinions from other jurisdictions illustrating that superintendents and even lower-level school employees are entitled to “official immunity,” “discretionary immunity” or derivative sovereign immunity. *See, e.g., Carroll ex rel. Slaughter v. Hammett*, 744 So.2d 906, 911 (Ala. 1999) (discretionary-function immunity for assistant principal); *Burns*, 638 A.2d at 645-46 (Connecticut) (superintendent eligible for qualified immunity); *Durso v. Taylor*, 624 A.2d 449, 459-60 (D.C. 1993) (discretionary immunity for school principal); *Guthrie v. Irons*, 439 S.E.2d 732, 736 (Ga. Ct. App. 1993) (discretionary immunity for school principal and teacher); *Madison Bd. of Educ.*, 262 F. Supp. 2d at 746-47 (Kentucky) (“good faith” discretionary immunity for principal); *Anderson*, 678 N.W.2d at 662 (Minnesota) (official immunity for shop teacher); *Gunter v. Anders*, 441 S.E.2d 167, 170-71 (N.C. Ct. App. 1994) (official immunity for superintendent and principal); *Vandriest v. Midlem*, 1982 WL 2943, at *3 (Ohio Ct. App. 1982) (derivative sovereign immunity for superintendent); *Truitt v. Diggs*, 611 P.2d 633, 635 (Okla. 1980) (discretionary immunity for principal, vice principal, security chief, and school security guards); *Tucker v. Kershaw County Sch. Dist. and Bd. of T.*, 279 S.E.2d 378, 379 (S.C. 1981) (derivative sovereign immunity for superintendent, principal, and teacher)⁴; *Gasper v. Freidel*, 450 N.W.2d 226, 230-34 (S.D. 1990) (derivative sovereign immunity for superintendent and coaches); *Russell v. Edgewood Indep. Sch. Dist.*, 406 S.W.2d 249, 251-52 (Tex. Ct. App.

⁴ *Overruled on other grounds by McCall by Andrews v. Batson*, 329 S.E.2d 741, 743 (S.C. 1985).

1966) (derivative sovereign immunity for superintendent); *Burnham v. West*, 681 F. Supp. 1169, 1174-75 (E.D. Va. 1988) (derivative sovereign immunity for principal and teachers).

II. REPLY TO RESPONDENT’S ARGUMENT II: DR. TAYLOR IS A “PUBLIC OFFICIAL” BECAUSE HE EXERCISES DISCRETIONARY DUTIES CONFERRED BY MISSOURI STATUTES AND THE REGULATIONS OF THE SCHOOL BOARD

A. Standard Of Review

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

B. The *Southers* Standard Does Not Contain A “Public Official” Requirement

Respondent takes issue with Dr. Taylor’s reliance on the plain language of *Southers* and implies that Dr. Taylor’s counsel was unprofessional in arguing, based on the plain language of *Southers*, that there is no longer a “public official” element to official immunity in Missouri. Respondent’s Brief at 28-29. As this Court stated in *Southers*, 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*, 263 S.W.3d at 610.⁵ As Dr. Taylor argued in Relator’s

⁵ Respondent finds it “truly amazing” that *amici curia* agree with the *Southers* test because school board members are uncompensated and “could never qualify as ‘employees’ of the districts they serve.” Respondent’s Brief at 29 n.3. However, as

Opening Brief, this clear test, enunciated by this Court *en banc*, does not contain a “public official” element. Unwilling to take this Court at its word, Respondent suggests that this Court was sloppy in its use of language and had no intention of removing the “public official” element from the official immunity analysis. Respondent’s Brief at 30.

If Dr. Taylor misinterpreted the meaning behind the *Southers* official immunity test, then he is in good company. Every decision to apply *Southers* has applied the official immunity test exactly as this Court articulated it—without a “public official” element. *See Kern v. City of Gerald*, 2008 WL 4831775, at *3 (E.D. Mo. 2008) (Perry, J.) (“Official immunity is a judicially-created doctrine that ‘protects public employees from liability for acts of negligence committed during the course of their official duties for the performance of discretionary acts.’”); *Rohrbough v. Hall*, 2008 WL 4722742, at *9 (E.D. Mo. 2008) (Webber, J.) (same); *Lingo v. Burle*, 2008 WL 2787703, at *7 (E.D. Mo. 2008) (Shaw, J.) (“Under the Missouri doctrine of official immunity, public employees are protected from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.”); *King v.*

discussed, *infra*, under Missouri law school board members exercising authority over a school district are considered subdivisions of the state and are entitled to *sovereign immunity* from liability for suits involving student injuries. *See, e.g., Lehmen*, 624 S.W. 2d at 2 (1981); *Dale by and through Dale v. Edmonds*, 819 S.W.2d 388, 390 (Mo. Ct. App. E.D. 1991). Given that school board members enjoy *sovereign immunity* from suits like Mr. Dydell’s, the position of *amici curia* is not at all surprising.

Vessell, 2008 WL 2559424, at *4 (E.D. Mo. 2008) (Perry, J.) (same). Not one of the cases applying *Southers* analyzed any “public official” element as part of the official immunity test.

As Dr. Taylor explained in Relator’s Opening Brief at pages 17-19, the key test for official immunity is not where some defendant falls in the hierarchy of governmental authority. Missouri cases extend official immunity to a myriad of governmental employees, from the most “blue collar” employees to the heads of state agencies. Compare *Brummitt v. Springer*, 918 S.W.2d 909, 912 & n.2 (Mo. Ct. App. S.D. 1996) (social workers), with *Cox v. Dep’t of Nat. Resources*, 699 S.W.2d 443, 448 (Mo. Ct. App. W.D. 1985) (director of Department of Natural Resources). That official immunity has been applied to such a wide range of public employees illustrates there is no *ad hoc* “public official” threshold that a defendant must satisfy before he is eligible for the official immunity.⁶

⁶ In footnote 8 of his Opening Brief, Dr. Taylor listed several pre-*Southers* cases where this Court never engaged in a “public official” analysis. Opening Brief at 15. Respondent accuses Dr. Taylor of representing that this Court has *never* engaged in a “public official” analysis and points to *State ex rel. Howenstine v. Roper*, 155 S.W.3d 747 (Mo. 2005) (en banc), which includes such a discussion. But Dr. Taylor readily conceded that this Court had, on occasion, used the “public official” language before *Southers*. Relator’s Opening Brief at 14. That this Court did not apply a “public official” analysis in many cases, suggests that the “public official” element was redundant of a

C. Even If There Is A “Public Official” Element To Official Immunity, Dr. Taylor Was A Public Official Because He Was Exercising Discretionary Authority Conferred By Missouri Law And Delegated By The School Board Through Its Policies

Respondent argues that Dr. Taylor was not a public official because he was subject to supervision by the School Board and there is no Missouri statute enumerating the scope of Dr. Taylor’s duties. Respondent’s first point is a red herring because **the School Board is, itself, a division of state government.** *Hughes v. Civil Serv. Comm’n of City of St. Louis*, 537 S.W.2d 814, 815 (Mo. Ct. App. E.D. 1976) (“[A] school board is an instrument, or arm, of the state government.”) (citing *Dick v. Bd. of Educ. Of City of St. Louis*, 238 S.W. 1073, 1074 (Mo. 1922); *Krueger v. Bd. of Educ. Of City of St. Louis*, 274 S.W. 811, 814 (Mo. 1925)). Indeed, that is why members of school boards are entitled to *sovereign immunity* from suits in negligence. *See, e.g., Lehmen*, 624 S.W. 2d at 2; *Edmonds*, 819 S.W.2d at 390. Under Respondent’s argument, no public employee could ever be a public official because public employees are always subject to supervision by the state as an entity.⁷

finding of discretionary action and, at worst, indicates that pre-*Southers* case law was simply muddled on the point.

⁷ Respondent relies on *Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Mo. 1996), which implied that superintendents are not public officials because they are supervised by the school board. *Id.* at 1423. The *Bolon* court, however, never recognized

Indeed, Respondent's argument makes no sense. Police officers are subject to supervision from their police chiefs and city councils. Unelected heads of state agencies are subject to supervision by the Governor. Social workers are subject to supervision by their superiors. Yet, all of these individuals are entitled to official immunity under Missouri law. As a superintendent, Dr. Taylor was supervised by no one other than the state, acting through its subdivision, the school board. Yet, police officers, social workers, and even the heads of state departments are all supervised by other state employees and, so, are less independent than was Dr. Taylor.

The more persuasive, and reasonable, analysis is that contained in *Webb*. In that case, the court held that a public school transportation director was entitled to official immunity because he was exercising authority delegated by the school board, to the superintendent, and eventually to the transportation director, to manage the transportation of children. *Webb*, 585 S.W.2d at 770. Thus, the key to the analysis in *Webb* was not whether the transportation director was subject to supervision generally. Instead, the decisive analysis was whether he was *delegated discretionary authority*. *Id.* at 770.

There is no case from this Court holding that a "public official" cannot be subject to supervision. The Missouri Supreme Court case that Respondent cites for this supposed rule of law, *State ex rel. Webb v. Pigg*, 249 S.W.2d 435 (Mo. 1952) (en banc), is not even an official immunity case. *Pigg* decided whether the clerk of the Missouri Court of

that the school board is a subdivision of the state under Missouri law, rather than a collection of individual public officials. Thus, *Bolon* is unpersuasive.

Appeals was a “state, county, or municipal officer[.]” as those terms are used in Section 13, Article VII of the Missouri Constitution, which prohibits salary increases during such officer’s “term of office.” *Id.* at 437.⁸

To be sure, the degree of supervision experienced over a public employee may bear on whether the public employee is truly exercising discretionary authority or whether he performs only ministerial tasks. But Respondent does not contest that the School Board delegated broad policy making responsibilities and powers to Dr. Taylor, as every school board does with every superintendent.

The Missouri legislature, recognizing that school boards cannot possibly manage the day-to-day operation of school districts, has approved the delegation of sovereign power to superintendents. Mo. Rev. Stat. § 168.201, which Respondent ignores, states:

The board of education **in all districts** except metropolitan districts may employ and contract with a superintendent for a term not to exceed three

⁸ Respondent also relies on *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. Ct. App. E.D. 1981). The court in *Gaertner* required the defendants to prove legislative intent that they be entitled to official immunity. *See id.* at 764. This requirement makes no sense, given that official immunity is a judicially created doctrine. In any event, *Gaertner* held that the defendants in that case did not exercise “the sovereign’s power” and did not perform discretionary acts. *Id.* at 764-65. Thus, *Gaertner* is clearly distinguishable from this case, where the School Board, as an entity of the State, delegated considerable policy-making authority to Dr. Taylor.

years from the time of making the contract, and employ such other servants and agents as it deems necessary, and **prescribe their powers, duties,** compensation and term of office or employment which shall not exceed three years.

Mo. Rev. Stat. § 168.201 (emphasis added).

Through its regulations and policies and Dr. Taylor's contract, the School Board has, pursuant to Section 168.201, prescribed Dr. Taylor's powers and duties. Because the School Board is a subdivision of the state, its policies in this regard have the force of law, just as a city's regulations regarding the exercise of power by its police officers have the force of law. Thus, contrary to Respondent's assertion, Missouri law, in the form of Section 168.201 and the policies and regulations of the School Board, as a subdivision of the state, create and confer Dr. Taylor's duties.

Respondent's second argument, that a "public officer's" duties must be expressly defined by statute, is contrary to the express holding of *Howenstine*. *Howenstine*, 155 S.W.3d at 754 (holding that a doctor supervising a health clinic was entitled to official immunity even though her office was created by a contract between the City of Columbia and the University of Missouri). To the extent Respondent tries to distinguish *Howenstine* by claiming that the doctor in that case "operated independently," Respondent misreads the case. *See* Respondent's Brief at 36. The doctor in *Howenstine* was supervised by both the City Manager of Columbia, Missouri, and the Director of Public Health, who was appointed by the Boone County Commission. *Id.* at 751 n.7.

III. REPLY TO RESPONDENT’S ARGUMENT III: DR. TAYLOR’S DUTIES WERE FAR FROM MINISTERIAL; HE EXERCISED BROAD, POLICY-MAKING AUTHORITY OVER A 20,000+ STUDENT SCHOOL DISTRICT

A. Standard Of Review

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

B. Respondent Improperly Conflates The “Duty” Requirement Of Negligence With The Discretionary/Ministerial Test For Official Immunity

Respondent first argues that Dr. Taylor is not entitled to official immunity because the Amended Petition alleges that Dr. Taylor *failed* to perform a duty to supervise the School District’s Exceptional Education Department, security personnel, and teachers and because Dr. Taylor *failed* to adequately supervise Mr. Dydell and J.W. Respondent’s Brief at 38. Although Dr. Taylor refuted this argument in Relator’s Opening Brief, Respondent persists in raising it, despite the fact that, if true, it would render the official immunity doctrine dead letter.

As Dr. Taylor explained, Respondent’s argument is the tail wagging the dog. Official immunity exists to protect defendants from liability for negligence. The failure to perform a tort-law duty is a prerequisite to official immunity, in the sense that, without such a failure, a defendant would not be liable for negligence and would never need official immunity in the first place. *Southers*, 263 S.W.3d at 611.

Respondent’s assertions to the contrary, this is not a case where Dr. Taylor is alleged to have done absolutely nothing to protect Mr. Dydell. The Amended Petition

itself alleges that the School District had a Security Department and an Office of Student Discipline. *See* Aplt. App. at 4, 7. The Amended Petition also alleges that Central High School had metal detectors to prevent students from bringing weapons to school. *See* Aplt. App. at 5. The Amended Petition simply does not allege that Dr. Taylor abdicated his duties as Superintendent—it alleges that he did not do *enough* to ensure Mr. Dydell’s safety. If a plaintiff needed only to allege that a defendant should have taken additional action to defeat official immunity, the doctrine will quickly become dead-letter.

In any event, official immunity extends to claims of *nonfeasance*, as well as claims of *misfeasance*. *See, e.g., State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 537 (Mo. 1988) (en banc) (failure to prevent plaintiffs from swimming in dangerous part of river, failure to post warning signs, and failure to remove dangerous conditions); *Kanagawa v. State*, 685 S.W.2d 831, 836-37 (Mo. 1985) (en banc) (failure to ensure that prison was adequately secured)⁹; *Webb*, 858 S.W.2d at 768 (failure to designation safe “debussing location,” failure to supervise debussing, and failure to establish guidelines for debussing); *Cox*, 699 S.W.2d at 446 (failure to maintain swimming area, failure to post warning signs, and failure to remove dangerous conditions). Thus, even if Mr. Dydell’s Amended Petition can be construed to state claims of nonfeasance, official immunity still applies because the decision about whether and to what extent to take *particular* actions regarding student safety is, itself, discretionary.

⁹ *OVERRULED ON OTHER GROUNDS BY Alexander v. State*, 756 S.W.2d 539 (Mo. 1988) (en banc).

The cases on which Respondent relies are not to the contrary. First, Respondent relies on *Greider v. Shawnee Mission Unified School District No. 512*, 710 F. Supp. 296 (D. Kan. 1989), for the proposition that “teachers owe a duty to supervise students and take reasonable steps to protect students.” Respondent’s Brief at 39. Dr. Taylor was not a teacher. He was a superintendent supervising 20,000+ students and thousands of employees. He cannot possibly have a duty to personally supervise each and every student in the School District given all the other duties he possessed as Superintendent. His duty, quite obviously, is to make policy decisions for the School District at large.

Two other cases relied on by Respondent are also unconvincing. Respondent cites *Mosley v. Portland School District No. 1J*, 813 P.2d 73 (Or. Ct. App. 1991), and *Larson v Independence School Dist. No. 314*, 289 N.W.2d 112, 121 (Minn. 1980), for the notion that the failure to supervise students does not constitute the exercise of discretion. Respondent’s Brief at 40. First, these cases are at odds with the Missouri authorities cited *supra*, where official immunity applied in cases of *nonfeasance*. Second, as discussed *supra* at 10-12, both cases have been discarded by their respective state supreme courts.

C. **Respondent Waived Any Argument That Dr. Taylor’s Duties Are Ministerial**

Respondent offers no excuse for his and Mr. Dydell’s repeated failure to argue that Dr. Taylor’s duties were ministerial. Both in briefing before the Circuit Court and during the writ proceeding before the Missouri Court of Appeals, Dr. Taylor argued adamantly that his duties were discretionary in nature. Yet, before the Circuit Court, the Missouri

Court of Appeals, and this Court, Mr. Dydell and Respondent never contested that Dr. Taylor's duties were discretionary until after this Court granted its Preliminary Order Of Prohibition.

It is a well-recognized principle that the failure to respond to arguments raised in a motion in a trial court or in a brief before an appellate court constitutes waiver of the point. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (appellee waived argument in opposition to appellant's sufficiency of the evidence challenge by not addressing it in its brief); *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 847 (11th Cir. 2004) (same); *Wojtas v. Cap. Guardian T. Co.*, 477 F.3d 924, 926 (7th Cir. 2007) (failure to offer any opposition to an argument constitutes acquiescence and waiver). This Court should not allow Respondent to re-argue an issue that was previously waived.

D. Respondent Does Not Address The Policy Consequences Of Denying Official Immunity To Superintendents

As Dr. Taylor discussed in Relator's Opening Brief, one of the factors that this Court must consider in determining whether Dr. Taylor's duties were discretionary or ministerial is "the consequences of withholding immunity." *See Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. 2006) (en banc). Dr. Taylor and *amici curiae* explained that withholding immunity from school administrators like Dr. Taylor may deter qualified individuals from entering public service, force school administrators to focus all of their attention on school safety to the detriment of all their other duties, and place school administrators at risk of being sued every time there is a student-on-student

altercation at any school in a school district. *See* Relator’s Opening Brief at 31-32. Respondent largely ignores these powerful arguments and instead implies that Dr. Taylor was not concerned with the welfare of African-American students. Respondent’s Brief at 27. To the extent Respondent implies that Dr. Taylor was not concerned with the well-being of African-American students, that suggestion is baseless. Dr. Taylor and co-defendant Mr. McClendon are themselves African-American. In any event, superintendents, like Dr. Taylor, must exercise discretion in planning for the safety of **all** students, not just a distinct segment of the school population.

IV. REPLY TO RESPONDENT’S ARGUMENT IV: THE AMENDED PETITION CURRENTLY STATES A CLAIM AGAINST DR. TAYLOR “IN HIS FORMER OFFICIAL CAPACITY”; IF MR. DYDELL DOES NOT WISH TO ASSERT SUCH A CLAIM, HE SHOULD SEEK LEAVE TO FILE A SECOND AMENDED PETITION

A. Standard Of Review

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

B. Mr. Dydell’s Amended Petition Currently States A Claim Against Dr. Taylor In His “Former Official Capacity”; Such Claim Is Barred By Sovereign Immunity

Mr. Dydell’s Amended Petition states claims against Dr. Taylor and co-defendant Mr. McClendon in their “former official capacities.” Aplt. App. at 1. Respondent apparently concedes that any claim against Dr. Taylor in his former official capacity is barred by sovereign immunity and Mo. R. Civ. P. 52.13(d). Because Mr. Dydell refuses

to amend his Amended Petition to remove this language, this Court should prohibit Respondent from proceeding any further with Mr. Dydell's official capacity claim.

Respondent did not address Dr. Taylor's argument that Mr. Dydell's attempt to sue Dr. Taylor in his former "official capacity" constitutes a waiver of Mr. Dydell's argument that Dr. Taylor is not a "public official" for purposes of official immunity. *See* Relator's Opening Brief at 44-45. That being the case, should this Court conclude that Mr. Dydell's Amended Petition does attempt to state a claim against Dr. Taylor in his former official capacity, such claim constitutes a waiver of Mr. Dydell's ability to contest Dr. Taylor's status as a "public official."

V. CONCLUSION

Respondent should have applied the clear holding of *Southers* and granted Dr. Taylor's Motion For Judgment On The Pleadings. This Court should make the Preliminary Order Of Prohibition Absolute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief fully complies with the provisions of Rule 55.03; that it contains 7,662 words/734 lines and complies with the word/line limitations contained in Rule 84.06(b); that a CD-ROM of this brief is included herewith in Microsoft Word format; that the CD-ROM was scanned for viruses using McAfee VirusScan Enterprise 8.0.0, updated November 28, 2008 and found to be free of viruses; and that one copy of the CD-ROM and two copies of Relator's Reply Brief were mailed this 28th day of November, 2008 to:

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