

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 OPENING BRIEF

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JURISDICTIONAL STATEMENT

This writ proceeding arises from Respondent's denial of Dr. Taylor's Motion For Judgment On The Pleadings ("Motion"). Dr. Taylor filed his Motion on May 15, 2008, arguing that Plaintiff Craig Dydell's negligence claims against Dr. Taylor in his individual and official capacities were barred by official immunity and sovereign immunity. Respondent denied Dr. Taylor's Motion on June 18, 2008.

Dr. Taylor filed his Petition In Prohibition ("Petition") with the Missouri Court of Appeals, Western District on July 7, 2008. The Court of Appeals summarily denied Dr. Taylor's Petition on July 25, 2008. On August 26, 2008, this Court issued its Preliminary Writ Of Prohibition. Under Article V, Section 4, of the Missouri Constitution, this Court has jurisdiction to determine and issue remedial writs.

STATEMENT OF FACTS

On September 13, 2005, Mr. Dydell was attacked by another student, J.W., in the cafeteria at Central High School, a school in the School District of Kansas City, Missouri (“School District”). Ex. A, Amended Petition ¶ 23.¹ J.W. cut Mr. Dydell’s neck with a box-cutter knife. *Id.* ¶¶ 22-23. In his Petition, Mr. Dydell alleges that J.W. stole the box-cutter knife from one of the school’s art classrooms on an earlier date and snuck it back into the school in his shoe, circumventing the metal detectors operated by Central High School’s security staff. *Id.* ¶ 22. J.W.’s attack was unprovoked. *Id.* ¶¶ 22-23.

In January 2004, well over a year and a half before the attack against Mr. Dydell, J.W. was expelled from Westport Charter School² for attempting to bring a knife onto school grounds. *Id.* ¶ 12. In the summer of 2004, J.W. applied for enrollment in the School District of Kansas City, Missouri. *Id.* ¶ 14. The School District allowed J.W. to enroll and, after testing J.W. and determining that he had a learning disability, the School District’s Exceptional Education Department placed J.W. at Central High School. *Id.* ¶ 16. J.W. was enrolled as a student at Central High School for approximately one year prior to his attack on Mr. Dydell. *Id.* ¶¶ 14, 16 & 23.

¹ Dr. Taylor’s citations to exhibits refer to those exhibits accompanying the Petition In Prohibition, which form the record in this case.

² Westport Charter High School was a legally independent charter school. It was not a school controlled by the School District.

At all times relevant to Mr. Dydell's claims, Dr. Taylor was Superintendent of the School District, although he is not currently Superintendent. *Id.* ¶ 2. As part of his duties as Superintendent, Dr. Taylor was responsible for supervising the School District's Exceptional Education and Security Departments, teachers, and students. *Id.* ¶¶ 2, 4, 36. These duties were imposed upon Dr. Taylor by the nature of his office as Superintendent, by the laws of Missouri, and by School District policies and regulations. *Id.* ¶ 33.

Mr. Dydell alleges that Dr. Taylor proximately and directly caused Mr. Dydell's injuries by negligently failing to provide the School District's Exceptional Education Department with written guidelines or supervision regarding the placement of students like J.W., *id.* ¶ 30, failing to provide written directives or adequate supervision to Central High School's art teachers concerning the use of dangerous instruments like box-cutter knives, *id.* ¶ 21, failing to adequately supervise Central High School's security personnel, *id.* ¶ 36, failing to adequately supervise Mr. Dydell and J.W., *id.* ¶ 34, and failing to adequately care for the safety of Mr. Dydell, *id.* ¶ 35. Mr. Dydell's Amended Petition states that Mr. Dydell asserts causes of action against Dr. Taylor in both his individual and "former official capacit[y]." *Id.* at 1.

On May 15, 2008, Dr. Taylor filed a Motion For Judgment On The Pleadings asserting the defenses of official immunity and sovereign immunity, and arguing that Mo. R. Civ. P. 52.13(d) prevents Mr. Dydell from suing Dr. Taylor in his "former official capacity." Ex. B, Motion at 1-2. In his Suggestions In Support of his Motion, Dr. Taylor cited to three different cases from the Missouri Court of Appeals, all holding that school superintendents are entitled to official immunity from personal capacity suits arising from

discretionary acts. *See* Ex. C, Suggestions In Support at 6-7. Dr. Taylor noted that no case from this Court or the Missouri Court of Appeals has ever held that a school superintendent is *not* entitled to official immunity. *Id.* at 7.

Dr. Taylor also cited to multiple cases from the Missouri Court of Appeals holding that government employees are entitled to the protections of sovereign immunity for suits against them in their official capacities. *Id.* at 13-14. Because the School District is entitled to sovereign immunity from suits in negligence, Dr. Taylor argued that he was entitled to assert the School District's sovereign immunity as an absolute defense to Mr. Dydell's claims against him in his official capacity. *Id.* at 14. Dr. Taylor also argued that Mo. R. Civ. P. 52.13(d) bars suits against former public officials in their official capacities and thus prevents Mr. Dydell from bringing any official capacity suit against Dr. Taylor in his "former official capacity." *Id.* at 14-15.³

³ Dr. Taylor and co-defendant former Central High School Principal Mr. William McClendon filed a Motion For Summary Judgment on May 23, 2008, that remains pending. A30-A73. In that motion, Dr. Taylor and Mr. McClendon assert both the defenses of official and sovereign immunity and offer multiple other bases for why summary judgment on all of Mr. Dydell's claims is appropriate, including that Dr. Taylor and Mr. McClendon are entitled to statutory immunity under the Safe Schools Act, that Mr. Dydell's claims are preempted by federal law, and that Mr. Dydell cannot establish the elements of duty or causation as a matter of law. A49-A73.

Mr. Dydell filed his Suggestions In Opposition on May 27, 2008. *See* Ex. D, Suggestions In Opposition at 9. With regard to Dr. Taylor's official immunity argument, **Mr. Dydell did not dispute that the duties Dr. Taylor is alleged to have breached are discretionary in nature.** *See id.* at 4-6. Instead, Mr. Dydell argued that the Circuit Court was bound by a previous interlocutory ruling by Judge Scott O. Wright of the United States District Court for the Western District of Missouri, who chose to ignore

Dr. Taylor did not include a copy of his Motion For Summary Judgment in the Petition because it is not relevant to this proceeding. Respondent, however, attached Mr. Dydell's Suggestions In Opposition to the Motion For Summary Judgment to his Return and Answer. This is not appropriate given that Dr. Taylor moved for judgment on the pleadings. Respondent's inclusion of Mr. Dydell's Suggestions In Opposition is an admitted attempt on the part of Respondent to create a "factual record" for this Court to evaluate whether Dr. Taylor's duties were ministerial or discretionary. *See* Return and Answer at 20. As discussed *infra* at II.C.4, because Mr. Dydell did not contest that Dr. Taylor's duties are discretionary, he has waived the right to challenge those duties in this proceeding. In any event, and in an abundance of caution, Dr. Taylor has included a copy of his Statement of Uncontroverted Facts, Suggestions In Support of the Motion For Summary Judgment, and Reply Suggestions in the Appendix so that this Court may have a full statement of the material facts asserted and contested in the summary judgment briefing, should it decide to consider them.

this Court's precedent and held, while the case was removed to federal court, that Dr. Taylor was not entitled to official immunity.⁴

In briefing before the Circuit Court, Mr. Dydell admitted that his official capacity claim against Dr. Taylor was improper under Mo. R. Civ. P. 52.13(d). *Id.* at 6. Indeed, Mr. Dydell stated that his claim against Dr. Taylor in his former official capacity "was

⁴ After Mr. Dydell filed his Initial Petition in the circuit court asserting a federal claim under 42 U.S.C. § 1983 and state negligence claims, Dr. Taylor and Mr. McClendon removed the case to federal court on June 21, 2007. *See Ex. E, Federal Court Order at 1.* In federal court, Dr. Taylor filed a motion to dismiss, asserting the defenses of qualified immunity for the federal claims and official immunity for the state claims. *Id.* at 3-14. While Judge Wright held that Dr. Taylor and Mr. McClendon were entitled to qualified immunity on the federal claims, he concluded that school superintendents and principals are not entitled to official immunity under Missouri law. *Id.* at 9. Judge Wright relied on inapposite Missouri cases holding that school officials may not assert *sovereign immunity* as a defense to personal capacity claims. *Id.* at 5-7. After he dismissed Mr. Dydell's federal claims, Judge Wright remanded the case back to the Circuit Court on August 14, 2007. *Id.* at 14. Mr. Dydell then filed his Amended Petition some eight months later, on April 11, 2008. *See Ex. A, Amended Petition.* Dr. Taylor filed his Motion For Judgment On The Pleadings on May 15, 2008, approximately one month after Mr. Dydell filed his Amended Petition. *See Ex. B, Motion For Judgment On The Pleadings.*

inserted solely for purposes of bringing the negligence allegations within any applicable insurance policy carried by the District.” *Id.* Mr. Dydell expressly agreed that “there is no such thing as a suit in former official capacity” and that Dr. Taylor could not be sued in his “former official capacity.” *Id.* Having already conceded the meritless nature of his official capacity claim under Mo. R. Civ. P. 52.13(d), Mr. Dydell did not respond to Dr. Taylor’s argument that Mr. Dydell’s official capacity claim was barred by sovereign immunity in any event.

On June 2, 2008, Dr. Taylor filed his Reply Suggestions. Ex. F, Reply Suggestions at 6. Dr. Taylor argued that the Circuit Court was not bound by the interlocutory ruling of the federal court denying official immunity. *Id.* at 2-3. Dr. Taylor also stressed to the Circuit Court that Mr. Dydell conceded that his official capacity claim was meritless. *Id.* at 4.

On June 16, 2008, Dr. Taylor hand-delivered a letter to the Circuit Court alerting it to the existence of this Court’s new opinion in *Southers v. City of Farmington*, -- S.W.3d --, 2008 WL 2346191 (Mo. 2008) (en banc), which holds that government *employees* are entitled to official immunity for negligence claims arising from discretionary acts. *See* Ex. G, Letter at 1. On June 18, 2008, the Circuit Court denied Dr. Taylor’s Motion For Judgment On The Pleadings in its entirety. *See* Ex. H, Order at 2. Although it correctly held that it was not bound to follow Judge Wright’s interlocutory order on official immunity, the Circuit Court did not reach its own determination of whether Dr. Taylor is

entitled to official immunity under Missouri law. *Id.* at 2.⁵ Instead, the Circuit Court adopted Judge Wright’s previous order “to promote judicial economy,” never discussing the new and controlling *Southers* opinion. *Id.* Additionally, the Circuit Court did not discuss Dr. Taylor’s arguments against Mr. Dydell’s official capacity claim, even though Mr. Dydell already conceded that his official capacity claim was meritless.

Dr. Taylor filed a Petition In Prohibition with the Missouri Court of Appeals, Western District on July 7, 2008. The Missouri Court of Appeals, Western District summarily denied Dr. Taylor’s Petition on July 25, 2008. Ex. I, Order Denying Petition In Prohibition. Dr. Taylor filed his Petition In Prohibition before this Court on July 31, 2008. This Court issued its Preliminary Order Of Prohibition on August 26, 2008.

⁵ Respondent denounces this fact as a “reckless slur.” Return and Answer at 7. Nothing could be further from the truth. The Circuit Court’s Order is included in the record and in the Appendix. *See* Ex. H; A94-A96. A cursory review reveals that the Circuit Court did nothing but adopt the federal court’s analysis to promote “judicial economy.” The Circuit Court gave no other basis for its holding.

POINTS RELIED ON

Point I: Relator is entitled to an order prohibiting Respondent from proceeding any further with Mr. Dydell's personal capacity⁶ claims against Dr. Taylor and prohibiting Respondent from refusing to enter judgment against Mr. Dydell because Dr. Taylor is entitled to the absolute defense of official immunity in that he was clearly a public employee exercising discretionary, policy-making authority over the 20,000-plus students School District of Kansas City Missouri, Mr. Dydell's negligence claims arise from Dr. Taylor's performance of discretionary acts in the course of his official duties, and there is no categorical bar to official immunity for school administrators if they otherwise satisfy the requirements for official immunity set forth in *Southers*.

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

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

Sherrill v. Wilson, 653 S.W.2d 661 (Mo. 1983) (en banc)

Webb v. Reisel, 858 S.W.2d 767 (Mo. Ct. App. E.D. 1993)

Point II: Relator is entitled to an order prohibiting Respondent from proceeding any further with Mr. Dydell's official capacity claims against Dr. Taylor and prohibiting

⁶ Throughout this brief, Dr. Taylor refers to Mr. Dydell's claims against him in his personal capacity as "personal capacity claims." Dr. Taylor refers to Mr. Dydell's claims against him in his "former official capacity" as "official capacity claims."

Respondent from refusing to enter judgment against Mr. Dydell because Dr. Taylor is entitled to share in the School District's sovereign immunity in that Mr. Dydell's official capacity claims against Dr. Taylor are really claims against the School District, and Dr. Taylor was an agent of the School District at the time of the events giving rise to Mr. Dydell's claims.

Edwards v. McNeill, 894 S.W.2d 678 (Mo. Ct. App. W.D. 1995)

Coleman v. McNary, 549 S.W.2d 568 (Mo. Ct. App. E.D. 1977)

Patterson v. Meramec Valley R-III Sch. Dist., 864 S.W.2d 14 (Mo. Ct. App. E.D. 1993)

Point III: Relator is entitled to an order prohibiting Respondent from proceeding any further with Mr. Dydell's official capacity claims against Dr. Taylor and prohibiting Respondent from refusing to enter judgment against Mr. Dydell because Dr. Taylor ceased to have official capacity prior to Mr. Dydell's lawsuit against him in that Mo. R. Civ. P. 52.13(d) makes clear that there cannot be a suit against an individual in his "former official capacity," but rather a plaintiff may only maintain an official capacity suit against an active public official.

Mo. R. Civ. P. 52.13

ARGUMENT

I. POINT I: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ANY FURTHER WITH MR. DYDELL'S PERSONAL CAPACITY CLAIMS AGAINST DR. TAYLOR AND PROHIBITING RESPONDENT FROM REFUSING TO ENTER JUDGMENT AGAINST MR. DYDELL BECAUSE DR. TAYLOR IS ENTITLED TO THE ABSOLUTE DEFENSE OF OFFICIAL IMMUNITY IN THAT HE WAS CLEARLY A PUBLIC EMPLOYEE EXERCISING DISCRETIONARY, POLICY-MAKING AUTHORITY OVER THE 20,000-PLUS STUDENTS SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, MR. DYDELL'S NEGLIGENCE CLAIMS ARISE FROM DR. TAYLOR'S PERFORMANCE OF DISCRETIONARY ACTS IN THE COURSE OF HIS OFFICIAL DUTIES, AND THERE IS NO CATEGORICAL BAR TO OFFICIAL IMMUNITY FOR SCHOOL ADMINISTRATORS IF THEY OTHERWISE SATISFY THE REQUIREMENTS FOR OFFICIAL IMMUNITY SET FORTH IN *SOUTHERS*.

A. Standard Of Review

A writ of prohibition is appropriate when: (1) “there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction,” (2) there is “a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated,” and (3) where the relator will otherwise suffer

some “absolute irreparable harm . . . if some spirit of justifiable relief is not made available to respond to a trial court’s order.” *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994) (en banc).

Where a defendant is entitled to immunity, “prohibition is the appropriate remedy to forbear patently unwarranted and expensive litigation, inconvenience and waste of time and talent.” *State ex rel. Div. of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 615 (Mo. 2002) (en banc). “Prohibition is particularly appropriate when the trial court, in a case where the facts are uncontested, wrongly decides a matter of law thereby depriving a party of an absolute defense.” *Id.* Prohibition is appropriate in cases where a defendant correctly asserts both official immunity and sovereign immunity. *See State ex rel. Mo. Dep’t of Ag. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985) (en banc) (involving the defenses of official immunity and sovereign immunity).

B. The Absolute Defense Of Official Immunity Extends To Public Employees Exercising Discretionary Authority.

In *Southers v. City of Farmington*, -- S.W.3d --, 2008 WL 2346191 (Mo. 2008) (en banc), this Court sitting *en banc* clearly stated the standard for official immunity in the State of Missouri: “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 *3 (emphasis added). As this Court explained, “[o]fficial immunity is intended to provide protection for individual government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties.” *Id.* “Its goal is also to permit

public employees to make judgments affecting public safety and welfare without concerns about possible personal liability.” *Id.*

Although no published Missouri state cases have yet to discuss the standard articulated by this Court in *Southers*, two federal decisions have. These cases illustrate that the *Southers* standard is a simple and clear, two-part test: (1) Is the defendant a public employee? and (2) Were the alleged acts of negligence committed during the course of the defendant’s official duties for the performance of discretionary acts? *See Lingo v. Burle*, 2008 WL 2787703, at *7 (E.D. Mo. July 15, 2008) (“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. Vessell*, 2008 WL 2559424, at *4 (E.D. Mo. June 23, 2008) (same).⁷

1. There Is No “Public Official” Element To The Official Immunity Test.

In its Order denying Dr. Taylor’s Motion, the Circuit Court did not discuss *Southers*. Instead, the Circuit Court concluded that Missouri case law was unclear as to whether school superintendents are entitled to official immunity, and it adopted the previous holding of the federal district court “to promote judicial economy.” Ex. H, at

⁷ Respondent accuses Dr. Taylor of “misrepresenting” the test for official immunity, but Dr. Taylor merely quotes this Court’s express holding in *Southers*. Return and Answer at 10.

14. The Circuit Court’s actions in this regard are a clear abuse of discretion, insofar as the federal district court evaluated Dr. Taylor’s argument for official immunity under the pre-*Southers* standard and the Circuit Court refused to analyze Dr. Taylor’s argument under the controlling standard articulated by this Court.

More importantly, the federal court’s analysis upon which the Circuit Court relied, incorrectly found that the test for official immunity includes a third element—whether the defendant is a “public official.” *See* Ex. E, at 4. Respondent continues to advocate for this flawed test, despite this Court’s clear articulation in *Southers* of the two-part standard for official immunity. Respondent argues that, before a defendant can invoke the two-part *Southers* standard for official immunity, he must first satisfy the court that he is a “public official.” Respondent offers no guidance on what this nebulous “public official” standard entails, except to say that it is “dependent upon the legal and factual circumstances involved.” Return and Answer at 11.

To be sure, in some opinions prior to *Southers*, this Court did state that “[o]fficial immunity protects public officials from liability for alleged acts of ordinary negligence committed during the course of their official duties for the performance of discretionary acts.” *See, e.g., Davis v. Lambert-St. Louis Intern. Airport*, 193 S.W.3d 760, 763 (Mo. 2006) (en banc). But in *Southers*, this Court removed the “public official” language, substituting into the test the word “public employees.” Respondent suggests this Court’s use of “public employees” in *Southers* was simply a “casual[] use” of the word with no consequence. Return and Answer at 10.

To the contrary, this Court’s revision of the official immunity test in *Southers* is a tremendous step toward clarifying the doctrine of official immunity in this State. According to Respondent,⁸ to invoke official immunity prior to *Southers* a defendant had to show: (1) that he was a public official; (2) that he was performing discretionary acts; and (3) that he was performing discretionary acts in the course of his official duties. But the first and third elements of this alleged pre-*Southers* test are redundant—in other words, if a defendant has official duties to perform, he is, by definition, a public official. This redundancy caused some lower courts to apply the “public official” element in an *ad hoc* and unpredictable fashion—deciding on a case-by-case basis whether particular job

⁸ Dr. Taylor does not concede that the “public official” standard has ever been part of the test for official immunity. Indeed, in previous cases addressing official immunity, this Court never conducted a “public official” analysis. Instead, after identifying that the defendant was a public employee, this Court moved directly to an analysis of the discretionary/ministerial nature of the public employee’s duties. *See, e.g., Davis*, 193 S.W.3d at 763; *Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278, 284-85 (Mo. 2000) (en banc); *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 537 (Mo. 1988) (en banc); *Kanagawa v. State*, 685 S.W.2d 831, 836-37 (Mo. 1985) (en banc), *overruled on other grounds by Alexander v. State*, 756 S.W.2d 539 (Mo. 1988) (en banc). This suggests that, even before *Southers*, the “public official” component was simply a descriptive phrase used to refer to public employees exercising discretionary authority, and nothing more.

categories (like school superintendents) are “public officials.” If the court determined that a particular job category was not a “public official,” then the official immunity analysis ended and the court did not evaluate whether the defendant was engaging in discretionary acts in the performance of her official duties.

Respondent’s official immunity test is a bad one because it applies official immunity on an *ad hoc* basis depending on the court’s determination of whether a particular job category constitutes a “public official.” But the law is meant to create general principles and standards that can be applied through judicial reasoning to arrive at an answer. Respondent’s test provides no such principles or standards. There are *thousands*, if not *tens of thousands* of job categories of public employees in the State of Missouri. Under Respondent’s view of the law, a public employee would only be entitled to argue for official immunity if she could first point to a previous Missouri case where a court held the exact job category to constitute a “public official.” Indeed, Respondent’s principal argument in his Return and Answer illustrates the point: He claims that because there is no Missouri case holding school superintendents are entitled to official immunity, Dr. Taylor is not entitled to official immunity and, consequently, there is no need to analyze whether Dr. Taylor was performing discretionary acts.

Respondent’s arbitrary and unpredictable standard cannot be the law. As this Court stated in *Southers*, “[o]fficial immunity is intended to provide protection for individual government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties.” 2008 WL 2346191, at *3. “Its goal is also to permit public employees to make judgments affecting public safety

and welfare without concerns about possible personal liability.” *Id.* The key to official immunity is not where a public employee falls on some hierarchy of governmental authority—the key is whether she is forced to exercise judgment in difficult situations for the public benefit.

In some cases, this means that first-line government employees like police officers, social workers, and computer programmers may be entitled to official immunity. *See, e.g., Conway v. St. Louis County*, 254 S.W.3d 159, 164 (Mo. Ct. App. E.D. 2008) (official immunity to police officers); *Brummitt v. Springer*, 918 S.W.2d 909, 912 & n.2 (Mo. Ct. App. S.D. 1996) (official immunity to social workers); *Edwards v. McNeill*, 894 S.W.2d 678, 681-83 (Mo. Ct. App. W.D. 1995) (official immunity to computer programmer). In other cases, this means that official immunity may extend to high-level governmental officers like the heads of state agencies. *See, e.g., Cox v. Dep’t of Nat. Resources*, 699 S.W.2d 443, 448 (Mo. Ct. App. W.D. 1985) (official immunity to the director of the Department of Natural Resources). The decisive question in all such cases is what type of power the public employee was exercising when she committed the acts giving rise to the plaintiff’s claims—discretionary or ministerial—not whether she is at the top or bottom of the bureaucratic food chain.

Missouri courts also granted official immunity to a wide variety of public employees in varied job categories, illustrating that the nature of a job category is not decisive. Missouri courts have granted official immunity to members of school boards and employees of the Missouri Board of Chiropractor Examiners alike because a decision regarding the manner in which to accept a bond is discretionary, as is a decision about

how to conduct a chiropractor’s disciplinary investigation. *Edwards v. Gerstein*, -- S.W.3d --, 2006 WL 3770819, at *4 (Mo. Ct. App. W.D. 2006)⁹; *George Weis Co., Inc. v. Dwyer*, 956 S.W.2d 335, 338 (Mo. Ct. App. E.D. 1997). A director of a school district’s department of transportation may be immune, just as a director or superintendent of a state mental health facility is—making decisions ensuring the safe transport of thousands of Missouri children and formulating policies to care for thousands of Missouri residents suffering from mental illness or retardation are both discretionary functions that require expertise and judgment. *Webb*, 858 S.W.2d at 770; *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. Ct. App. E.D. 1981).

Neither does the magnitude of a public employee’s decision factor into the official immunity analysis: whether the action is a mere administrative decision affecting subordinate employees’ placement or duties or a prison safety policy that could mean life or death to inmates, prison guards, and citizens, such difficult, discretionary judgments are protected by official immunity. *Charron v. Thompson*, 939 S.W.2d 885, 887 (Mo. 1996) (en banc) (assistant prison superintendents’ decision concerning how to dispose of seized contraband was an exercise in discretion based on prison safety concerns); *Bates v. State*, 664 S.W.2d 563, 565-66 (Mo. Ct. App. E.D. 1983) (administrative policy decisions in developmental disability treatment center are “discretionary decisions which go to the essence of governing.”).

⁹ Reversed in part on other grounds by *Edwards v. Gerstein*, 237 S.W.3d 580 (Mo. 2007) (en banc).

Applying Respondent’s “public official” test leads to absurd results. Under Respondent’s test, police officers, social workers, computer programmers, and doctors,¹⁰ are “public officials” and are thus entitled to official immunity from liability arising from their discretionary acts, but school superintendents, who supervise 20,000-plus students and thousands of employees at a public school district, are not “public officials” and are categorically barred from receiving official immunity in any case. There is no rational or principled explanation for this disparate treatment. The policies behind official immunity articulated in *Southers* apply equally to all public employees exercising discretionary authority—not just to a few job categories chosen on an *ad hoc* basis.

2. Even If There Is A “Public Official” Test, Dr. Taylor Was A Public Official Because He Supervised The 20,000-Plus Student School District Of Kansas City, Missouri.

Even if this Court determines that there is a “public official” element to official immunity, Dr. Taylor was clearly a public official at the time of the acts giving rise to Mr. Dydell’s claims. As Superintendent, Dr. Taylor was obligated by the laws of Missouri and the regulations and policies of the School District to supervise the operations of the School District, its staff, and its students.

The Missouri Court of Appeals described the test for whether an individual is a “public official” in *Webb v. Reisel*, 858 S.W.2d 767 (Mo. Ct. App. E.D. 1993):

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

¹⁰ *Sherill v. Wilson*, 653 S.W.2d 661 (Mo. 1983) (en banc).

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.

Id. at 768.

In this case, Mr. Dydell's Amended Petition makes clear that, as Superintendent, Dr. Taylor had the right, duty, and authority created and conferred by law to supervise the operations of the School District, its staff, and its students. For example, the Amended Petition states that Dr. Taylor was "responsible for carrying out the laws of the State of Missouri." Ex. A, Petition ¶ 6. The Amended Petition goes on to allege that Dr. Taylor had responsibility for the supervision of the School District's Exceptional Education and Security Departments, personnel working at Central High School, and Mr. Dydell and J.W. as students of Central High School. Ex. A, Petition ¶¶ 2-4.

The Amended Petition further alleges that these duties were imposed upon Dr. Taylor, *inter alia*, by "the laws of the State of Missouri, policies and regulations of the District, [and] duties arising from his position as Superintendent of the District." *Id.* ¶ 33. Thus, the Amended Petition concedes that Dr. Taylor had a "right, authority and duty" to supervise and control these various departments and individuals, and that such power and duty was "conferred by law." *See Webb*, 858 S.W.2d at 768. Based on the allegations in the pleadings (which are the only relevant facts for this Motion), Dr. Taylor is a "public official."

Moreover, because the School District is a "political subdivision" of the State of Missouri, and the School Board that hired Dr. Taylor is an "instrument, or arm, of the

state government,” there is no question that Dr. Taylor was delegated some portion of the sovereign functions of the government. *See Hughes v. Civil Serv. Comm’n of City of St. Louis*, 537 S.W.2d 814, 815 (Mo. Ct. App. E.D. 1976) (“School directors, members of boards of education *and their employees* owe their official existence to and derive their election, appointment or employment from the authority of the laws of the state, and perform *duties prescribed by the laws of the state.*”) (emphasis added).

Indeed, several Missouri Court of Appeals cases explicitly or implicitly held that school superintendents are “public officials” for purposes of official immunity. *See Davis v. Bd. of Educ. of City of St. Louis*, 963 S.W.2d 679, 688-89 (Mo. Ct. App. E.D. 1998) (affirming dismissal of case against superintendent based on doctrine of official immunity); *Stevenson v. City of St. Louis Sch. Dist.*, 820 S.W.2d 609, 611 (Mo. Ct. App. E.D. 1991) (affirming dismissal of case against superintendent and principal); *see also Webb*, 858 S.W.2d at 769-70 (holding school district’s director of pupil transportation to be a “public official” protected by the doctrine of official immunity because he was exercising authority delegated from the superintendent, who also had official immunity). Moreover, there is no case from either the Missouri Supreme Court or the Missouri Court of Appeals holding that a school superintendent is not a public official for purposes of official immunity.¹¹

¹¹ There are previous decisions of this Court holding that the doctrine of *sovereign immunity* does not protect school officials from suits in their personal capacity. *See, e.g., Lehmen v. Wansing*, 624 S.W.2d 1 (Mo. 1981) (en banc); *Spearman v. Univ. City*

The analysis in *Davis* is particularly instructive. The plaintiff in *Davis* was a tenured physical education teacher who was alleged to have sexually abused certain students. *Davis*, 963 S.W.2d at 682. As a result of these allegations, the school superintendent temporarily reassigned the plaintiff to a non-teaching position pursuant to school board regulations. *Id.* After conducting additional investigation, the superintendent suspended the plaintiff without pay and submitted a formal list of charges to the school board, recommending the plaintiff's termination. *Id.* at 683. The school board conducted a hearing and concluded that the plaintiff had not engaged in the alleged abuse. *Id.* at 683. The plaintiff then filed suit against the superintendent for malicious prosecution. *Id.* at 684. On summary judgment, the trial court found that the superintendent was protected from suit by the doctrine of official immunity, and the plaintiff appealed. *Id.*

The Court of Appeals affirmed, noting that “[u]nder the doctrine of official immunity, public officials acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions.” *Id.* at 688. The Court of

Pub. Sch. Dist., 617 S.W.2d 68 (Mo. 1981) (en banc). Sovereign immunity, however, is a distinct concept from official immunity. *Southers*, 2008 WL 2346191, at *2. The Missouri Court of Appeals has obviously concluded that both *Lehman* and *Spearman* are irrelevant to the issue of official immunity, because the Missouri Court of Appeals cases finding superintendents to be protected by official immunity are more recent than both *Spearman* and *Lehman*.

Appeals relied on an affidavit submitted by the superintendent in the trial court in which the superintendent stated that he had general supervisory authority over the school district and that he had statutory authority to present written charges seeking a teacher's termination. *Id.* at 689. Finding that the plaintiff failed to present any genuine issue of material fact with regard to the issue of official immunity, the Court of Appeals affirmed the trial court's ruling. *Id.* at 690.

Webb goes beyond *Davis*, holding that official immunity extends to school superintendents, *as well as* department heads who have been delegated authority by a school superintendent. The plaintiff in *Webb* was injured when he was struck by an automobile after stepping off a school bus. 585 S.W.2d at 768. The plaintiff sued the director of pupil transportation for the school district for negligence, alleging that the director failed to adequately specify a safe "debussing" location, failed to adequately supervise the debussing of passengers, failed to establish guidelines for the supervision of debussing, and failed to have passengers debus on a sidewalk. *Id.* The director filed a motion for summary judgment on the basis of official immunity, which the trial court granted. *Id.*

The Court of Appeals concluded that the director was a public official and that his choice of debussing procedures was a discretionary act protected by official immunity. *Id.* at 770. The Court of Appeals noted that state law vests each school district with the general authority to manage and supervise the public schools and their employees. *Id.* Some of that broad authority, noted the Court of Appeals, is **delegated** by the school board to a school superintendent who "possesses general supervision powers over the

school system, including its various departments and physical properties, course of instruction, discipline and conduct of the schools” *Id.* (citing Mo. Rev. Stat. § 168.211.2 (1986)). The superintendent is in turn empowered to delegate authority to other officers of the district. *Id.* The Court of Appeals noted:

[The] Director was necessarily acting on behalf of the *superintendent* and board in exercising that power delegated to them and is immunized from liability to the same extent as the officials on whose behalf he acts.

Id. (emphasis added). The Court of Appeals went on to hold that the director engaged in a discretionary function in selecting debussing procedures because the “Director’s responsibilities primarily required the exercise of his professional judgment, rather than the performance of routine tasks.” *Id.*

Like the defendants in *Davis* and *Webb*, Dr. Taylor was vested with authority both by state law and by the relevant policies and regulations of the School District to supervise the operation of the School District, its schools, its students, its teachers, its security staff, and its exceptional education staff. Dr. Taylor engaged in these duties on behalf of and for the benefit of the public in his position as Superintendent. Under Missouri law, he is a public official entitled to official immunity.

In his Return and Answer, Respondent contests this proposition, claiming that “this Court and the Missouri Court of Appeal [sic], along with the federal appellate court sitting in Missouri, have consistently and uniformly held that Missouri public school superintendents, principals, and teachers have absolutely no immunity from personal liability for their negligent conduct.” Return and Answer at 8. This statement is a canard

that Dr. Taylor has repeatedly debunked. **No Missouri court has ever held that school superintendents are not entitled to official immunity.**¹²

The Missouri state cases cited by Respondent are inapposite and all pre-date *Southers*. The first, *Spearman v. University Public School District*, 617 S.W.2d 68 (Mo. 1981) (en banc), involved claims by two **teachers** that they were entitled to **sovereign immunity**. *Lehmen v. Wansing*, 624 S.W.2d 1 (Mo. 1981) (en banc) also involved the defense of **sovereign immunity**. *Kersey v. Harbin*, 591 S.W.2d 745 (Mo. Ct. App. S.D. 1979) dealt with a claim of immunity based on the fact that the defendant superintendent was performing a “governmental function,” not that he was exercising discretionary authority. Thus, *Kersey* also involved a claim for derivative sovereign immunity, rather than official immunity. *Jackson v. Roberts*, 774 S.W.2d 860 (Mo. Ct. App. E.D. 1989) held that a **school teacher and assistant principal**¹³ were not public officials for

¹² Further, as discussed *infra*, Mr. Dydell is estopped from arguing that Dr. Taylor is not a public official, given that Mr. Dydell maintains a claim against Dr. Taylor in his “former official capacity.”

¹³ Based on *Southers*, *Jackson* is now clearly bad law. Teachers and principals may be entitled to official immunity, depending on whether their acts are discretionary or ministerial. No class of public employees is categorically barred from seeking official immunity.

purposes of official immunity. It never addressed whether a superintendent is entitled to sovereign immunity.¹⁴

3. There Is No Requirement That A Public Employee Must Be A Statutory Employee To Receive Official Immunity.

In his Return and Answer, Respondent suggests that official immunity only extends to public employees whose job duties are expressly defined by statute. *See* Return and Answer at 13-17. Respondent argues that Missouri law vests control over the School District exclusively in a school board of six directors and, therefore none of the school board's agents or delegates is entitled to official immunity. Based on this argument, Respondent attempts to distinguish *Webb* and *Davis*, because both involved the superintendent of the St. Louis School District, whose duties as superintendent of a metropolitan school district are expressly defined by Mo. Rev. Stat. § 168.211.

¹⁴ Respondent also relies on the federal cases *S.B.L. v. Evans*, 80 F.3d 307 (8th Cir. 1996), and *Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Mo. 1996). Obviously, these cases pre-date *Southers* and are not controlling in any event. Moreover, **more** federal cases expressly hold that school superintendents **are** entitled to official immunity. *See, e.g., 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. Jan 12, 1987) (Filippine, J); *Doe A. v. Special Sch. Dist. of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986) (Nangle, J.).

However, official immunity is a judicially created doctrine designed to protect all public employees from liability in negligence for the performance of discretionary acts in the course of their official duties. *See Southers*, 2008 WL 2346191, at *4 (noting that official immunity is a “judicially-created” doctrine). Thus, official immunity is not limited by whether the Missouri legislature expressly defines a public employee’s job description by statute. The policies behind official immunity are not furthered by granting immunity to the superintendent of the St. Louis School District, while categorically denying it to every other superintendent in the state.

Further, no Missouri case holds that a public employee’s job description must be defined by statute to be eligible for official immunity. This Court’s previous decision in *State ex rel. Howenstine v. Roper*, 155 S.W.3d 747, 752-53 (Mo. 2005) (en banc)¹⁵ illustrates the point. In *Howenstine*, this Court held that a medical doctor supervising a public health clinic was entitled to official immunity from a claim that she failed to set adequate protocols for training and supervision of the clinic’s nursing staff. *Id.* at 749. As this Court explained, “Dr. Howenstine’s position as medical director existed to discharge **the city, county, and state obligations** to improve the health of the public. The **health department** was delegated this authority by law.” *Id.* at 751 (citing Mo. Rev. Stat. § 205.050) (emphasis added).

Dr. Howenstine’s position was not created by statute, but by an agreement between the City of Columbia and the University of Missouri. Nonetheless, this Court held that fact to be “not consequential to the determination” of whether Dr. Howenstine

¹⁵ *Abrogated on other grounds by Southers*, 2008 WL 2346191, at *6.

was entitled to official immunity. *Id.* The Court went on to hold that Dr. Howenstine was entitled to official immunity, despite that no provision of Missouri law expressly defined the duties of her particular position. *Id.* at 755.

Under the holding in *Howenstine*, even if Missouri statutes vest control over the School District in the hands of the School Board, Dr. Taylor, as the School Board’s agent and delegate, is entitled to claim official immunity because his position was created to “discharge” the duties of the School Board. *Id.* at 751. This Court did not require that Dr. Howenstine’s duties be enumerated by statute—in fact, it declared as inconsequential the fact that she was hired by private agreement. *Id.* So too, whether Dr. Taylor’s duties were expressly defined by statute is irrelevant to the determination of official immunity in this case.

Unlike in *Howenstine*, however, Missouri law *does* expressly authorize school boards to hire superintendents and delegate their authority to them. Mo. Rev. Stat. § 168.201 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 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). Thus, there is no question that Dr. Taylor was exercising authority “created and conferred by law.” *Webb*, 858 S.W.2d at 768.

C. Mr. Dydell's Claims Arise From Dr. Taylor's Performance Of Discretionary Duties.

This Court identified three factors that courts must consider in determining whether an act is ministerial or discretionary: (1) the nature of the duties; (2) how much policymaking or professional expertise and judgment the act involves; and (3) the consequences of withholding immunity. *See Davis*, 193 S.W.3d at 763. All three factors indicate that Dr. Taylor's actions were discretionary.

1. As A Superintendent, Dr. Taylor Exercised Policymaking Authority That Required Specialized Training And Expertise.

First, with respect to the nature of the duties, the nature of maintaining safety and supervision in a large urban school district is a highly specialized responsibility. To be assigned responsibility for a task of this nature, an individual is required to have substantial education and experience in the field. There are no statutes, regulations, or guidebooks to tell an official how to keep a school safe; rather, each school is unique and requires application of general principles and experience to the individual needs of that particular school, necessitating that school officials exercise considerable discretion in weighing a host of relevant factors. *See Webb*, 858 S.W.2d at 770 (concluding that the director of transportation's duties were discretionary because "[p]erformance of these duties in a safe and efficient manner necessarily involved the consideration of many factors").

2. Maintaining The Safety of An Urban School District Requires A Great Deal Of Experience And Expertise.

Second and similarly, maintaining safety in an urban school district involves substantial judgment and professional expertise. The nature of Missouri's Safe Schools Act, Mo. Rev. Stat. § 167.171, exemplifies this. Under the statute, a student is not necessarily expelled for any violation of the Act; rather, school district officials are required to exercise judgment and discretion in dealing with students who commit offenses under the Act.¹⁶ In a similar case, the Missouri Court of Appeals noted that the allegations in the petition illustrated the discretionary nature of the defendants' actions inasmuch as they were required to "exercise[e] their professional judgment in

¹⁶ Under the Safe Schools Act, a school board *may* authorize the summary suspension of pupils by the superintendent for a period not to exceed 180 school days for an act of school violence. Mo. Rev. Stat. § 167.171.1. The student may subsequently be readmitted following a conference with the student's parent or guardian and appropriate school officials. *Id.* § 167.171.3. A student may not be readmitted under the statute if he or she has been adjudicated to have committed certain enumerated offenses. *Id.* However, this statute does not apply to a student with a disability, nor does it prohibit a school district from enrolling the student in an alternative education program "if the district determines such enrollment is appropriate." *Id.* Clearly, the Safe Schools Act is not a directive but must be enforced in accordance with the discretion of public school officials.

determining how or whether they should act and in attempting to determine what course of action should be pursued.” *Brummit*, 918 S.W.2d at 913. Indeed, as the Missouri Court of Appeals stated in *Jackson v. Wilson*, 581 S.W.2d 39 (Mo. Ct. App. W.D. 1979):

At first blush it might appear that the duty to keep the school grounds ‘safe’ is ministerial in character, but it is apparent on closer analysis that a great many circumstances may need to be considered in deciding what action is necessary to do so, and such decisions involve the exercise of judgment or discretion rather than the mere performance of a prescribed task.

Id. at 44 (quoting and citing with approval *Meyer v. Carman*, 73 N.W.2d 514, 515 (Wis. 1955)); *see also Cox*, 699 S.W.2d at 448 (concluding that the duties of various park administrators to keep portions of the state park system “safe” are discretionary duties).

3. Withholding Official Immunity In This Case Would Have Disastrous Policy Consequences On Public Schools And Public School Administrators.

The third factor, the consequences of withholding immunity in a case like this, also weighs heavily in favor of Dr. Taylor. This is not a case in which Dr. Taylor is alleged to have directly harmed Mr. Dydell. This is not even a case in which an employee of the School District is accused of directly harming Mr. Dydell. Rather, this is a case in which a special education student¹⁷ at Central High School used a concealed

¹⁷ Withholding official immunity for placement decisions is particularly burdensome on school officials for claims concerning the placement of special education students.

weapon to injure Mr. Dydell on School District premises. Mr. Dydell's Amended Petition states that the attack was unprovoked. Ex. A, Amended Petition ¶ 23.

Withholding immunity in cases such as this places school officials at risk of being sued every time there is a physical altercation at school—indeed, in the case of a superintendent like Dr. Taylor—any time there is a physical altercation at any school, be it an elementary, middle, or high school anywhere in the sprawling school district. It will be open season for filing negligence claims against school officials for every act of student-on-student violence. School officials cannot possibly be expected to perform their jobs with the proverbial Sword of Damocles (in the form of a lawsuit) dangling above their heads.

Under the federal Individuals With Disabilities In Education Act (“IDEA”), school administrators are required to place special education students in regular schools to the maximum extent possible. *See* 20 U.S.C. § 1412(a)(5). As Dr. Taylor discussed in his Suggestions In Support of his Motion For Summary Judgment, this law prevents school administrators from segregating special education students into alternative schools as Mr. Dydell would like. A54-A61. Thus, school administrators are in an impossible position, which is why Mr. Dydell's claims are preempted by federal law. A54-A61.

4. Respondent Waived Any Argument That Dr. Taylor's Duties Are Ministerial.

In his Suggestions In Opposition to Dr. Taylor's Motion For Judgment On The Pleadings, Mr. Dydell did not contest that Dr. Taylor's duties were discretionary. *See* Ex. D, Suggestions In Opposition To Motion For Judgment On The Pleadings. In its Order denying Dr. Taylor's Motion For Judgment On The Pleadings, the Circuit Court did not even analyze whether Dr. Taylor's duties were discretionary. *See* Ex. H, Order. In his Suggestions In Opposition to Dr. Taylor's Petition For Prohibition before the Court of Appeals for the Western District, Respondent did not contest that Dr. Taylor's duties were discretionary. In his Suggestions In Opposition to Dr. Taylor's Petition For Prohibition before this Court, Respondent again did not contest that Dr. Taylor's duties were discretionary. *See* Suggestions In Opposition To Petition In Prohibition at 6-12. Only after this Court issued its Preliminary Writ of Prohibition, did Respondent finally argue, in his Return and Answer, that Dr. Taylor's duties were ministerial.

In an attempt to excuse his failure to contest that Dr. Taylor's duties were discretionary, Respondent claims that "Dydell did not address the question whether the claim against Taylor implicated a ministerial or discretionary duty to Dydell because the primary issue was whether Taylor was a public official who was even entitled to official immunity." Return and Answer ¶ 11. This excuse is disingenuous. As the analysis in virtually every official immunity case illustrates, whether or not a public employee's duties are discretionary or ministerial is the decisive component of the official immunity analysis. In all the briefing below, Dr. Taylor expressly argued that his duties were

discretionary. Mr. Dydell and Respondent had multiple opportunities to address Dr. Taylor's arguments, and they chose instead to ignore them. Clearly, Respondent waived any opposition to Dr. Taylor's argument that his duties were discretionary.

5. Even If Dr. Taylor Had A Tort-Law Duty To Supervise Mr. Dydell, That Duty Was Discretionary For Purposes Of Official Immunity.

In another effort to avoid the discretionary nature of Dr. Taylor's duties, Respondent argues that because Dr. Taylor had a duty to supervise¹⁸ Mr. Dydell under tort law, Dr. Taylor's supervision was, by definition, ministerial. This is the tail wagging the dog. Respondent conflates the common-law "duty" element of negligence with the analysis of whether a duty is discretionary or ministerial. This Court articulated the distinction in *Southers*:

A finding that a public employee is entitled to official immunity does not preclude a finding that he or she committed a negligent act because the official immunity does not deny the existence of the tort of negligence, but

¹⁸ Dr. Taylor does not concede that he had a tort-law duty to supervise Mr. Dydell and J.W. Rather, as Dr. Taylor argued in his Suggestions In Support of the Motion For Summary Judgment, only those employees directly and personally responsible for supervising students (like teachers) have a tort-law duty and, in any event, no one owed a duty to protect Mr. Dydell from the unprovoked attack of J.W. because such attack was totally unforeseeable. *See* A89-A92.

instead provides that an officer will not be liable for damages caused by his negligence.

Southers, 2008 WL 2346191, at *4.

In other words, every public employee that has official immunity also has some duty that subjects the public employee to claims for negligence; otherwise the public employee would have no need of official immunity in the first place. Respondent misses this distinction and seems to think that “discretionary” equals “optional.” Yet, in his Return and Answer, Respondent admits that whether a duty is discretionary or ministerial turns not on whether the duty is mandatory in the sense that it must be performed, but whether it is mandatory in the *manner* in which it must be performed. *See* Return and Answer at 18 (noting that ministerial acts are those that must be performed in a “prescribed manner . . . *without* regard to an employee’s own judgment or opinion”).

Indeed, Respondent cannot seriously contend that Dr. Taylor was not required to use his own judgment and opinions in managing the safety of the 20,000-plus students of the School District. There was no manual that told Dr. Taylor what actions to take. There was no policy or statute that told him in what school to place J.W. in or how to best protect Mr. Dydell from unanticipated third-party attacks. Apparently, Respondent would have Dr. Taylor *personally* supervise the safety of every student in the School District. Needless to say, it is physically impossible for Dr. Taylor to have a ministerial duty to supervise student safety—he cannot possibly be personally responsible for directly ensuring the safety of 20,000-plus students, at dozens of schools, all at the same time. Respondent’s arguments defy reality and common sense.

Respondent’s attempt to claim that Dr. Taylor “abdicated” his supervisory obligations is also unavailing. Clearly, Dr. Taylor took some action to protect Mr. Dydell’s safety—the Amended Petition itself alleges that Central High School had metal detectors and security procedures in place. *See* Ex. A, Amended Petition ¶ 31. The Amended Petition also alleges that the School District had an entire department responsible for student safety—the Security Department. *See* Ex. A, Amended Petition ¶ 33. It is totally appropriate, and common, for superintendents of huge school districts to delegate responsibility for student safety to employees like assistant principals, school security officers, and teachers, all of whom see students on a daily basis and interact with them directly.

6. Whether Dr. Taylor’s Duties Were Discretionary Or Ministerial Is A Legal Question Not Appropriate For The Jury.

In a final attempt to avoid the obvious conclusion that Dr. Taylor’s supervision and management of over 20,000-plus students was discretionary, Respondent claims that the question is better left for the jury, and that Dr. Taylor is trying to “usurp” Mr. Dydell’s constitutional right to a jury trial. Return and Answer at 21. Mr. Dydell forgets that Dr. Taylor moved for judgment on the pleadings, and it is the allegations in Mr. Dydell’s Amended Petition themselves that establish Dr. Taylor was performing discretionary acts. There is no need for further fact-finding or a jury determination.

More importantly, treating the discretionary/ministerial distinction as a question of fact for the jury undercuts the entire purpose of official immunity. Official immunity protects certain public employees from *suit*, not just from judgment. *See Kanagawa*, 685

S.W.2d at 835 (“The issue before us is whether respondents are protected from *suit* by official immunity.”) (emphasis added). Thus, there is a strong presumption against allowing a jury to determine the propriety of the official immunity defense. As the United States Supreme Court explained:

[R]equiring an official with a colorable immunity claim to defend a suit for damages would be peculiarly disruptive of effective government and would work the very distraction from duty, inhibition from discretionary action, and deterrence of able people from public service that qualified immunity was meant to avoid.

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 871 (1994).

Indeed, courts consistently grant official immunity on the basis of the pleadings alone. *See, e.g., Barthelette*, 756 S.W.2d at 538 (motion to dismiss); *Warren v. State*, 939 S.W.2d 950, 953 (Mo. Ct. App. W.D. 1997) (motion to dismiss); *Brummitt*, 918 S.W.2d at 913 (motion to dismiss); *Cox*, 699 S.W.2d at 448 (motion for judgment on the pleadings). Granting Dr. Taylor official immunity prior to trial does not infringe Mr. Dydell’s constitutional rights. Further, Mr. Dydell has offered no viable factual basis to dispute that Dr. Taylor’s duties were discretionary—his conflation of the tort-law “duty” requirement with official immunity is legal in nature. Thus, this Court may readily dispose of the issue and grant Dr. Taylor official immunity. *McHenry*, 687 S.W.2d at 181 (“It is not always satisfactory to leave a case pending against a public agency or public office, with prospects for burdensome discovery and trial, simply because the circuit court has overruled a motion to dismiss.”).

D. Cases From Other Jurisdictions Explicitly Recognize That School Administrators Such As Superintendents And Principals Are Entitled To Official Immunity From Negligence Claims Resulting From A Failure To Prevent Student-On-Student Violence.

Contrary to Respondent’s suggestions, the notion that Dr. Taylor is protected by official immunity is unremarkable. A substantial body of authority from other jurisdictions indicates that school administrators are consistently held to be immune from negligence claims resulting from a failure to prevent student-on-student violence. For example, where a student died from injuries sustained after another student attacked, beat, and violently kicked him in the school’s hallway, the Georgia Court of Appeals affirmed the grant of summary judgment on the ground of official immunity in favor of a **school principal and a teacher**. *Guthrie v. Irons*, 439 S.E.2d 732 (Ga. Ct. App. 1993). The student’s parents alleged that the principal and teacher failed to protect their son and to properly supervise students. *Id.* at 735. In affirming the lower court’s grant of official immunity, the Georgia Court of Appeals relied heavily on the discretionary nature of supervising students. *Id.* at 736 (“[M]aking decisions requiring the means used to supervise school children is a discretionary function of a school principal.”).

The court analogized principals to police officers who daily exercise discretion in discharging their duty to protect citizens and are rightfully entitled to official immunity. *Id.* (explaining that the principal and teacher were “exercising what amounts to a policing function”). As a matter of law, the court ruled that school administrators who must daily exercise discretion in making difficult “judgment calls dealing with supervision of

students” are entitled to official immunity. *Id.* Georgia’s test for official immunity is remarkably similar to that set forth in *Southers*, protecting “public agents from personal liability for discretionary acts taken within the scope of their official authority.” *Id.* at 734.

In another case of student-on-student violence in Alabama, the plaintiff student brought an action against **the assistant principal**, alleging negligent or wanton supervision. *Carroll ex rel. Slaughter v. Hammet*, 744 So.2d 906, 908 (Ala. 1999). The assistant principal had been warned of threats to the plaintiff from the attacker and spoke with both students to investigate but, in his discretion, he took no further action to alert teachers because he believed the matter was under control. *Id.* at 909. Although the aggressor student promised not to fight, he ambushed the plaintiff, knocked him to the ground, and repeatedly kicked him in the face and head. *Id.*

The Alabama Supreme Court affirmed the grant of summary judgment in favor of the assistant principal on the basis of “discretionary function” immunity because “it is well established that the supervision of students is a discretionary function.” *Id.* at 911. The court also relied on sound policy reasons: “Shorn of their historic authority, often intimidated by unruly and violent elements, including their students, teachers . . . are under siege. To hold them under the specter of lawsuits, as the result of unforeseen acts of violence . . . would only unduly add to the evergrowing woes of teachers today” *Id.* at 910.

In *Truitt v. Diggs*, 611 P.2d 633 (Okla. 1980), the Oklahoma Supreme Court held that the individual members of a school board, a **school principal**, a **vice principal**, the

chief of school security, and school security guards were all immune from wrongful death claims in a case where a student was shot to death by another student on school grounds during school hours. *Id.* at 634. The plaintiff alleged, just as Mr. Dydell does in this case, that the defendants failed to provide adequate security at the school. *Id.* at 635. As the Oklahoma Supreme Court explained:

The decisions required to be made by the School Board and its employees and agents called for legitimate judgment calls. The facts pled, as opposed to conclusions, do not indicate that the Board or its agents or employees were acting in bad faith or acted in a willful and wanton way. Accordingly, we hold that the facts alleged did not state a cause of action against them.

Id. at 635.

There are other cases holding that school officials are immune from claims arising from student-on-student violence. *See, e.g., Knight v. Wood County Bd. of Educ.*, 489 S.E.2d 1 (W.Va. 1997) (school principal); *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162 (Utah 1993) (junior high principal and teacher). Perhaps the most famous of these cases is *Castaldo v. Stone*, 192 F. Supp. 2d 1124 (D. Colo. 2001), where the United States District Court for the District of Colorado held that a principal, assistant principal, school counselor, and teachers were all immune under Colorado law from ordinary negligence claims stemming from the Columbine shootings, even though the court assumed that the defendants had some prior knowledge of Harris and Klebold's dangerous tendencies. *Id.* at 1163-66.

These cases illustrate that this Court's test for official immunity set forth in *Southers* is consistent with the law of other jurisdictions and has a sound public policy basis. This Court should apply *Southers*, follow the lead of other courts that have granted official immunity to school officials in similar circumstances, and hold clearly that, under Missouri law, Dr. Taylor and other school employees like him are entitled to official immunity for negligence claims arising from the performance of discretionary acts during the exercise of their official duties.

II. POINT II: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ANY FURTHER WITH MR. DYDELL'S OFFICIAL CAPACITY CLAIMS AGAINST DR. TAYLOR AND PROHIBITING RESPONDENT FROM REFUSING TO ENTER JUDGMENT AGAINST MR. DYDELL BECAUSE DR. TAYLOR IS ENTITLED TO SHARE IN THE SCHOOL DISTRICT'S SOVEREIGN IMMUNITY IN THAT MR. DYDELL'S OFFICIAL CAPACITY CLAIMS AGAINST DR. TAYLOR ARE REALLY CLAIMS AGAINST THE SCHOOL DISTRICT AND DR. TAYLOR WAS AN AGENT OF THE SCHOOL DISTRICT AT THE TIME OF THE EVENTS GIVING RISE TO MR. DYDELL'S CLAIMS.

A. Standard Of Review

A writ of prohibition is appropriate when: (1) “there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction,” (2) there is “a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated,” and (3) where the relator will otherwise suffer some “absolute irreparable harm . . . if some spirit of justifiable relief is not made available to respond to a trial court’s order.” *See Chassaing*, 887 S.W.2d at 577.

Where a defendant is entitled to immunity, “prohibition is the appropriate remedy to forbear patently unwarranted and expensive litigation, inconvenience and waste of time and talent.” *Russell*, 91 S.W.3d at 615. “Prohibition is particularly appropriate when the trial court, in a case where the facts are uncontested, wrongly decides a matter of law thereby depriving a party of an absolute defense.” *Id.* Prohibition is appropriate in cases where a defendant correctly asserts both official immunity and sovereign immunity. *See McHenry*, 687 S.W.2d at 181 (involving the defenses of official immunity and sovereign immunity).

B. Sovereign Immunity Bars Suits Against Public Employees In Their Official Capacity.

Mr. Dydell’s Amended Petition expressly states that he brings causes of action against Dr. Taylor in both his “individual and former official capacities.”¹⁹ However,

¹⁹ Despite this express language, Respondent claims that the Amended Petition “never asserted a negligence or any other claim against Taylor in his ‘former official

Missouri law is quite clear that the doctrine of *sovereign* immunity bars suits against public officials in their official capacities unless there is a statutory waiver of sovereign immunity. *See Coleman v. McNary*, 549 S.W.2d 568, 570 (Mo. Ct. App. E.D. 1977) (noting that the sovereign immunity of a governmental entity “extends to its agents when they are acting in their representative capacities”); *see also McNeill*, 894 S.W.2d at 682 (“Therefore, the immunities available to the defendant in an official capacity action seeking damages are those the governmental entity enjoys.”). Because the School District enjoys sovereign immunity against negligence actions, *Patterson v. Meramec Valley R-III Sch. Dist.*, 864 S.W.2d 14, 15 (Mo. Ct. App. E.D. 1993), and no waiver of sovereign immunity is implicated, any suit against Dr. Taylor in his official capacity as Superintendent of the School District is similarly barred by sovereign immunity. Accordingly, Respondent should have entered judgment in favor of Dr. Taylor on Mr. Dydell’s official capacity claims.

Misunderstanding the nature of official capacity, Mr. Dydell’s Amended Petition attempts to assert a claim against Dr. Taylor in his “former official capacit[y].” *Id.* at 2. But, as Mr. Dydell conceded to the Circuit Court, there is no such thing as a suit in “former official capacity.” “When a cause of action is stated against a state official in his

capacity.” Return and Answer at 5. However, Mr. Dydell did not seek leave to file a Second Amended Petition to remove the express claim against Dr. Taylor in his “former official capacity.” Therefore, Dr. Taylor does not withdraw his argument on this issue.

official capacity, the action is one against the state.” *McNeill*, 894 S.W.2d at 682. Logically, if a public official is no longer employed by the state, he ceases to have any official capacity.

Mr. Dydell’s recent change of heart regarding his official capacity claim is not surprising. Even Mr. Dydell realizes that he cannot claim that Dr. Taylor is not a “public official” for purposes of official immunity and at the same time maintain a claim against Dr. Taylor in his “former official capacity.” Simply put, Mr. Dydell cannot have it both ways. But Mr. Dydell’s change of heart comes too late. Because Mr. Dydell’s Amended Petition still claims that Dr. Taylor is a public official for purposes of being sued in his official capacity, Mr. Dydell is barred by judicial estoppel from claiming that Dr. Taylor is not a public official for purposes of official immunity. *See, e.g., Dick v. Children’s Mercy Hosp.*, 140 S.W.3d 131, 141 (Mo. Ct. App. W.D. 2004) (noting that “[a]s a general rule, a party is bound by allegations or admissions of fact in his own pleadings” and that “judicial estoppel is often invoked to prohibit parties from deliberately changing positions according to the exigencies of the moment”) (internal citations and quotations omitted).

Alternatively, Mr. Dydell’s attempt to sue Dr. Taylor in his official capacity constitutes a binding judicial admission that Dr. Taylor was, in fact, a public official. *See Wehrli v. Wabash R. Co.*, 315 S.W.2d 765, 773 (Mo. 1958) (“The pleadings in a cause, for the purposes of use in that suit, [are] not mere ordinary admissions, but judicial admissions, i.e., they are not a means of evidence, but a waiver of all controversy . . . and therefore a limitation on the issues.”). Thus, judicial estoppel and/or Mr. Dydell’s

judicial admission prevents Mr. Dydell from challenging Dr. Taylor's contention that he performed official duties for purposes of official immunity at the times relevant to this lawsuit.

III. POINT III: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ANY FURTHER WITH MR. DYDELL'S OFFICIAL CAPACITY CLAIMS AGAINST DR. TAYLOR AND PROHIBITING RESPONDENT FROM REFUSING TO ENTER JUDGMENT AGAINST MR. DYDELL BECAUSE DR. TAYLOR CEASED TO HAVE OFFICIAL CAPACITY PRIOR TO MR. DYDELL'S LAWSUIT AGAINST HIM IN THAT MO. R. CIV. P. 52.13(D) MAKES CLEAR THAT THERE CANNOT BE A SUIT AGAINST AN INDIVIDUAL IN HIS "FORMER OFFICIAL CAPACITY" BUT RATHER A PLAINTIFF MAY ONLY MAINTAIN AN OFFICIAL CAPACITY SUIT AGAINST AN ACTIVE PUBLIC OFFICIAL.

Mr. Dydell's claim against Dr. Taylor in his "former official capacity" is also barred by Mo. R. Civ. P. 52.13(d). Under that rule, when a public officer ceases to hold office, any suit against him in his official capacity transfers to his successor:

When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the successor is automatically substituted as a party.

Mo. R. Civ. P. 52.13.

This rule clearly prohibits Mr. Dydell from maintaining suit against Dr. Taylor in any “former official capacity.”

IV. CONCLUSION

Respondent should have applied the test articulated by this Court in *Southers* and granted Dr. Taylor’s Motion. Dr. Taylor is a public employee, and he clearly was engaging in discretionary acts during the performance of his official duties at the times giving rise to Mr. Dydell’s claims. Respondent’s arguments to the contrary, extending official immunity to school superintendents makes perfect sense, both as a matter of legal reasoning and as a matter of sound judicial policy. 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 9,954 words/ 824 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 October 22, 2008 and found to be free of viruses; and that one copy of the CD-ROM and two copies of Respondents' Opening Brief were mailed this 22nd day of October, 2008 to:

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