SC97427

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. CARLOS D. ALSUP,

Relator,

v.

THE HONORABLE JAMES F. KANATZAR,

Respondent.

PETITION FOR WRIT OF PROHIBITION TO THE MISSOURI SUPREME COURT FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI SIXTEENTH JUDICIAL CIRCUIT THE HONORABLE JAMES F. KANATZAR, JUDGE

RELATOR'S BRIEF

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INTRODUCTION

Relator Carlos D. Alsup ("Relator" or "Alsup") is the sole named Defendant in the matter of *Israel Mariano v. Carlos D. Alsup*, Case No. 1716-CV12316, currently pending in the Circuit Court of Jackson County, Missouri (hereafter, "Underlying Litigation"). Relator is an employee of the Independence School District ("District"), a Missouri public school district. At all relevant times, Relator was employed as an In-School Suspension Teacher at Independence Academy, an alternative school operated by the District. Relator enjoys immunity from suit as a public official performing discretionary acts. Plaintiff Israel Mariano was, at all relevant times, a student attending Independence Academy. He is the sole Plaintiff in the Underlying Litigation.

In Plaintiff's Second Amended Petition, Plaintiff asserted two negligence claims against Relator for personal injuries he allegedly sustained while being physically restrained by Relator. In short, Plaintiff alleges that Relator negligently physically restrained Plaintiff, thereby injuring Plaintiff's arm.

After two of his Motions to Dismiss were denied, Relator filed a Motion for Summary Judgment on the basis of official immunity with respect to both of Plaintiff's claims, since the uncontroverted facts established that he was a public official performing a discretionary act at the time Plaintiff was allegedly injured. Plaintiff did not effectively dispute the facts underlying Relator's Motion. Instead, Plaintiff attempted to redefine official immunity by asserting that although Relator had discretion to decide whether and how to restrain Plaintiff, he did not have discretion to "do so negligently." Plaintiff's position is clearly at odds with well-established Missouri precedent regarding official

immunity. In fact, Plaintiff's attempted redefinition of the Doctrine would swallow the rule; official immunity could and would never apply to any fact pattern. Plaintiff admits that "The Independence School District Policy 2770 provides guidelines regarding physical restraint, but it does not provide a step-by-step explanation considering all factors, when or how to use physical restraint." *See* Ex. F, Plaintiff's Response to Defendant's Motion for Summary Judgment, ¶ 14, R 067. That admission equates to an admission that Relator had discretion as to physical restraint.

Yet, on August 30, 2018, Respondent issued an Order erroneously denying Relator's Motion for Summary Judgment. On September 24, 2018, Relator filed with this Court a Petition for Writ of Prohibition seeking a writ barring responding Respondent from taking any further action other than vacating Respondent's Order denying Relator's Motion for Summary Judgment, and directing Respondent to enter an Order granting Relator's Motion for Summary Judgment. On October 2, 2018, this Court entered a Preliminary Writ of Prohibition. Relator respectfully request that this Court make its writ of prohibition permanent, barring responding Respondent from taking any further action other than vacating Respondent's Order denying Relator's Motion for Summary Judgment, and directing Respondent to enter an Order granting Relator's Motion for Summary Judgment.

JURISDICTIONAL STATEMENT

On September 24, 2018, Relator filed with this Court a Petition for Writ of Prohibition seeking a writ of prohibition barring responding Respondent from taking any further action other than vacating Respondent's Order denying Relator's Motion for Summary Judgment, and directing Respondent to enter an Order granting Relator's Motion for Summary Judgment. Relator incorporates his Petition for Writ of Prohibition by reference thereto. On October 2, 2018, this Court entered a Preliminary Writ of Prohibition. By this action, Relator seeks a permanent writ of prohibition.

The jurisdiction of the Missouri Supreme Court is limited by sections 3 and 4 of article V of the Missouri Constitution. *State ex rel. Wulfing v. Mooney*, 362 Mo. 1128, 1135, 247 S.W.2d 722, 724 (1952). "Section 3 gives this court exclusive appellate jurisdiction in certain cases, while under section 4 this court has original jurisdiction in remedial writs in exercising superintending control over inferior courts and tribunals." *Id*. Section 4 grants to the Missouri Supreme Court jurisdiction to hear and determine permanent writs of prohibition. *State ex rel. Bullington v. Mason*, 593 S.W.2d 224, 225 (Mo. banc 1980). The Court has jurisdiction to hear Relator's Petition for Writ of Prohibition pursuant to section 4 of article V of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff filed his Second Amended Petition, the operative pleading, on October 4, 2017. *See* Ex. A, Plaintiff's Second Amended Petition, R 001-005[1]. In Plaintiff's Second Amended Petition, he asserted two claims against Relator, both sounding in negligence, wherein he alleged that Relator physically restrained Plaintiff in an improper manner, thereby causing injury. *See id.*; *see also* Ex. F, Plaintiff's Response to Defendant's Motion for Summary Judgment, ¶ 12, R 066-067. Plaintiff's claims are based upon Defendant's alleged breach of duties contained in the "policies and training material" for the use of physical restraints. *See* Ex. A, Plaintiff's Second Amended Petition, ¶ 8, R 002.

On June 5, 2018, Relator filed a Motion for Summary Judgment on the basis of official immunity, Suggestions in Support of Defendant's Motion for Summary Judgment, and Defendant's Statement of Uncontroverted Material Facts[2]. *See* Ex. B, Motion for Summary Judgment, R 006-007; *see also* Ex. C, Suggestions in Support of Defendant's Motion for Summary Judgment, R 008-016; *see also* Ex. D, Defendant's Statement of Uncontroverted Material Facts (with attached Exhibits A-F), R 017-059.

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[1] References to "Exhibit" or "Ex." shall refer to the exhibits attached to Relator's Petition for Writ of Prohibition, which are consecutively numbered "R ____."

[2] References to "Fact," "Facts," or "Fact No. ___" shall refer to those enumerated facts set forth in Defendant's Statement of Uncontroverted Material Facts.

On July 23, 2018, Plaintiff filed Suggestions in Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Response to Defendant's Motion for Summary Judgment, which consisted of Plaintiff's response to Defendant's Statement of Uncontroverted Material Facts, as well as a Statement of Additional Facts that Remain in Dispute[3]. *See* Ex. E, Plaintiff's Suggestions in Opposition to Defendant's Motion for Summary Judgment, R 060-063; *see also* Ex. F, Plaintiff's Response to Defendant's Motion for Summary Judgment (with attached Exhibits A-D), R 064-135.

On August 10, 2018, Relator filed his Reply Suggestions in Support of Defendant's Motion for Summary Judgment and his Reply Regarding Defendant's Statement of Uncontroverted Material Facts. *See* Ex. G, Reply Suggestions in Support of Defendant's Motion for Summary Judgment, R 136-141; *see also* Ex. H, Reply Regarding Defendant's Statement of Uncontroverted Material Facts (with attached Exhibits G-I), R 142-164.

In Plaintiff's Response to Defendant's Statement of Uncontroverted Material Facts, Plaintiff **expressly admitted** to the following Facts:

1) Relator is a public official. *See* Ex. F, ¶¶ 1-2, R 065.

[3] **None** of the "facts" set forth in Plaintiff's Statement of Additional Facts that Remain in Dispute were material or relevant to Defendant's Motion for Summary Judgment. That is, none of them had any bearing on Defendant's entitlement to official immunity. Moreover, all but one of them were plainly controverted.

2) On April 28, 2016, Plaintiff's mother physically struggled to get Plaintiff to go into school. *See id*., ¶ 4, R 065.

3) Once inside the school, Plaintiff's mother turned Plaintiff over to Relator and another District staff member, who took hold of Plaintiff. *See id*, ¶ 6, R 066.

    i. Though there is some disagreement regarding the verbiage, it is undisputed that Plaintiff alleges that while being physically restrained by Relator, his arm was injured. *See id*., ¶ 8, R 066.

4) Relator's physical restraint of Plaintiff was governed by District Board Policy 2770. *See id*, ¶ 9, R 066.

    i. Policy 2770 provides that physical restraint is only to be used in one of three situations:

        1. In an emergency situation, which is defined by Policy 2770 as "one in which a student's behavior poses a serious probable threat of imminent physical harm to self or others or destruction of property";
        2. When less restrictive measures have not effectively de-escalated a situation; or
        3. When otherwise specified in an IEP, Section 504 Plan or other potentially agreed-upon plan to address a student's behavior.

    ii. Policy 2770 further states that physical restraint is:

        1. Only to be used for **as long as necessary** to resolve the actual risk of danger or harm that warranted the use of the physical restraint;

2. To use no more that the **degree of force necessary** to protect the student or other persons from imminent physical harm [or to protect property].

See Ex. D, Defendant's Statement of Uncontroverted Material Facts, attached Exhibit E, Policy 2770, R 050-056.

5) Policy 2770 complies with Missouri law. *See id*, ¶ 10, R 066.

6) Relator's decision to physically restrain Plaintiff complied with Policy 2770 and Missouri law. *See id.*, ¶ 11, R 066.

7) Policy 2770 is **not** a step-by-step guide on when and how to physically restrain a student. *See id*, ¶ 15, R 067.

8) The District provides employees with training through the Crisis Prevention Institute ("CPI"), which has developed a nonviolent crisis intervention program. *See id.*, ¶ 17, R 068.

9) Relator received CPI training as part of his employment with the District. *See id.*, ¶ 18, R 068.

10) The CPI Program provides District employees with guidelines, strategies, and methods for deescalating emergency situations, as well as the use of physical restraint of a student. *See id.*, ¶ 19, R 068.

11) When an employee, such as Relator, is in a situation like the one subject to this lawsuit, he has to consider various factors in determining **whether and how** to physically restrain a student. *See id.*, ¶ 24 (emphasis added), R 069.

12) An employee, such as Relator, has to consider numerous factors in a relatively short amount of time before deciding whether and how to physically restrain a student. *See id.*, ¶ 26, R 070.

13) It is not an easy task for an employee, such as Relator, to decide whether and how to physically restrain a student. *See id.*, ¶ 27, R 070.

In addition to expressly admitting the above Facts, although Plaintiff facially "denied" a number of Facts clarifying and confirming the discretionary nature of Relator's actions, he did so improperly. In sum, he failed to actually controvert the stated Facts, but instead, repeatedly responded with the generic statement that Relator "did not have discretion to use improper restraint techniques that resulted in an injury to the Plaintiff." *See id.*, ¶¶ 20-23, 28, R 068-071. Plaintiff's response – *even if it were true* – did not controvert any of the stated Facts. As such, Plaintiff failed to controvert the following Facts, and they are therefore deemed admitted:

1) Although CPI training course provides strategies and methods regarding the use of physical restraints, an employee must still rely on his own personal judgment and discretion. *See id.*, ¶ 20, R 068.

2) An employee must still assess the particular facts of the situation to determine whether a physical restraint is necessary, which particular hold or restraint to utilize, and how to approach the student and implement a restraint. *See id.*, ¶ 21, R 068.

3) Two employees trained in CPI, confronted with the same exact situation, may assess and approach the situation differently. The difference in approach does

not mean that one or both of the employees have failed to follow CPI policies. There is more than one way for an employee to handle an emergency situation using the strategies and techniques learned during the CPI training. *See id*., ¶ 22, R 069.

4) An employee's handling of an emergency situation is inherently based upon that employee's assessment of the situation and personal judgment regarding the best course of action. *See id*., ¶ 23, R 069.

5) An employee should have good judgment and the ability to use their discretion in deciding whether and how to physically restrain a student. *See id*., ¶ 28, R 070.

Based on these uncontroverted facts[4], there is no genuine dispute that Relator is entitled to summary judgment on the basis of official immunity, in that he is a public official, who is alleged to have negligently injured Plaintiff while physically restraining him – an act which all parties agree was discretionary in nature. Moreover, the express language of Policy 2770 makes it clear that Relator's physical restraint of Plaintiff was discretionary.

[4] In fact, Relator believes that even based solely upon the facts expressly admitted by Plaintiff, Relator is entitled to summary judgment on the basis of official immunity, as more fully discussed in the Relator's Suggestions in Support filed contemporaneously herewith.

In Plaintiff's response to Relator's Statement of Uncontroverted Material Facts, Plaintiff expressly admitted, "The Independence School District Policy 2770 provides guidelines regarding physical restraint, but it does not provide a step-by-step explanation considering all factors, when or how to use physical restraint." *See* Ex. F, Plaintiff's Response to Defendant's Motion for Summary Judgment, ¶ 14, R 067. In other words, Plaintiff admits through the language of his own response that Defendant's physical restraint had to be discretionary in nature.

Despite Relator's clear entitlement to summary judgment, on August 30, 2018, Respondent issued an Order denying the Motion for Summary Judgment. *See* Exhibit I, Order Denying Defendant's Motion for Summary Judgment, R 165-66. Respondent did not provide a detailed explanation for the denial. *See id*. Instead, he set forth the standard for summary judgment and stated, "Defendant has failed to establish that there is no material genuine issue as to the facts pertaining to the Plaintiff's claims." He based his Order on "the reasons stated herein, **as well as the reasons set forth in Plaintiff's pleadings**." *See id*. (emphasis added).

On September 19, 2018, Relator filed a Petition for Writ of Prohibition with the Missouri Court of Appeals for the Western District, wherein he sought the same relief sought herein. That same day, the Missouri Court of Appeals for the Western District issued an Order denying Relator's Petition.

Relator filed the Petition for Writ of Prohibition on September 24, 2018. On October 2, 2018, this Court issued a preliminary writ of prohibition, for which this matter is now before the Court.

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT, BECAUSE RELATOR DEMONSTRATED HE IS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF OFFICIAL IMMUNITY, IN THAT IT IS UNCONTROVERTED THAT RELATOR IS A PUBLIC OFFICIAL, WHO IS ALLEGED TO HAVE NEGLIGENTLY INJURED PLAINTIFF WHILE ENGAGING IN THE DISCRETIONARY ACT OF PHYSICALLY RESTRAINING PLAINTIFF.

Davis v. Lambert–St. Louis Int'l Airport, 193 S.W.3d 760, 763 (Mo. banc 2006)

A.F. v. Hazelwood Sch. Dist., 491 S.W.3d 628, 631 (Mo. App. E.D. 2016)

Woods v. Ware, 471 S.W.3d 385, 391 (Mo. App. W.D. 2015)

McCoy v. Martinez, 480 S.W.3d 420, 423 (Mo. App. W.D. 2016)

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT, BECAUSE AN ORDER IN PROHIBITION IS THE ONLY ADEQUATE REMEDY, IN THAT OFFICIAL IMMUNITY CONNOTES NOT ONLY IMMUNITY FROM JUDGMENT BUT ALSO IMMUNITY FROM SUIT.

State ex rel. Heart of Am. Council v. McKenzie, 484 S.W.3d 320, 324 (Mo. banc 2016), reh'g denied (May 3, 2016)

State ex rel. Hill v. Baldridge, 186 S.W.3d 258, 259 (Mo. banc 2006)

New Liberty Hosp. Dist. V. Pratt, 687 S.W.2d 184, 187 (Mo. banc 1985)

State ex rel. Missouri Dep't of Agric. v. McHenry, 687 S.W.2d 178, 181 (Mo. 1985)

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT, BECAUSE RELATOR DEMONSTRATED HE IS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF OFFICIAL IMMUNITY, IN THAT IT IS UNCONTROVERTED THAT RELATOR IS A PUBLIC OFFICIAL, WHO IS ALLEGED TO HAVE NEGLIGENTLY INJURED PLAINTIFF WHILE ENGAGING IN THE DISCRETIONARY ACT OF PHYSICALLY RESTRAINING PLAINTIFF.

a. Relator's Petition for Writ of Prohibition Is Reviewed De Novo, Without Any Deference to the Trial Court.

If the party moving for summary judgment is a defendant, as is the case here, a *prima facie* case for summary judgment can be made by one of three methods: (1) showing undisputed facts negating any of the required elements of plaintiffs' claim; (2) showing that plaintiff could not, after adequate time for discovery, produce evidence sufficient to find one of their required elements; or (3) showing that there is no genuine dispute as to each fact necessary to support an affirmative defense properly pled by defendants. *ITT Commercial Finance Corp. v. Mid America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993).

The key to summary judgment is the undisputed right to judgment as a matter of law. *ITT Commercial*, 854 S.W.2d at 376. When requesting summary judgment, the movant is required to state with particularity the grounds for the motion. *Id.* (citing Rule

74.04(c)). Insofar as the movant's right to judgment as a matter of law depends upon the presence or absence of certain facts, the movant must also establish, by reference to the record when appropriate, that there is no genuine dispute about those material facts. *Id.* When a party files a motion for summary judgment properly supported by affidavit(s) or other evidence, the non-moving party may not then rest on his pleadings to defeat the motion, but must set forth specific facts showing that there is a genuine issue for trial. *Stokes v. Steak-N-Shake, Inc.*, 791 F.Supp. 235, 236 (Mo. App. 1992) (citation omitted). The non-moving party must do more than just show that there is some doubt as to the facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

When considering a petition for writ of prohibition regarding a trial court's denial of summary judgment, the trial court's decision is reviewed de novo, with no deference to the trial court. *State ex rel. Polaris Indus., Inc. v. Journey*, 505 S.W.3d 370, 374 (Mo. App. W.D. 2016), reh'g and/or transfer denied (Dec. 15, 2016). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (internal citations omitted). "The propriety of summary judgment is purely an issue of law." *Id.* "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id.*

b. It Is Uncontroverted that Relator Was Performing a Discretionary Act at the Time Plaintiff Was Allegedly Injured. [5]

In responding to Relator's Motion for Summary Judgment, Plaintiff expressly admitted facts sufficient to establish that Relator was performing discretionary acts at the time Plaintiff was allegedly injured. Plaintiff admitted that Relator is a public official, whose restraint of Plaintiff was governed by District Board Policy 2770. The plain language of Policy 2770 reflects that that an employee is required to exercise personal discretion and judgment in both determining **whether** to physically restrain a student and in determining **how to do so**.

First, Policy 2770 provides that an employee can physically restrain a student under the following circumstances:(1) an emergency situation, which is defined by Policy 2770 as "one in which a student's behavior poses a serious probable threat of imminent physical harm to self or others or destruction of property"; (2) when less restrictive measures have not effectively de-escalated a situation; or (3) when otherwise specified in an IEP, Section 504 Plan or other potentially agreed-upon plan to address a student's behavior. An

[5] Plaintiff does not dispute the facts necessary to establish judgment in Defendant's favor. Instead, Plaintiff attempts to redefine official immunity by claiming, without citing any authority, that Relator "did not have discretion to physically restrain Plaintiff incorrectly," and therefore, he is not entitled to official immunity. Such an erroneous application would do away with official immunity.

employee is clearly required to exercise personal discretion in assessing a situation to determine whether physical restraint is appropriate under the circumstances.

Policy 2770 further states that physical restraint is: (1) only to be used for **as long as necessary** to resolve the actual risk of danger or harm that warranted the use of the physical restraint; and (2) to use no more that the **degree of force necessary** to protect the student or other persons from imminent physical harm [or to protect property]. Again, an employee's personal discretion and judgment is inherently required to evaluate the necessary degree of force and duration of restraint necessary to resolve the risk and protect the student and other persons from the risk of harm.

In fact, in Plaintiff's response to Relator's Statement of Uncontroverted Material Facts, Plaintiff expressly stated, "The Independence School District Policy 2770 provides guidelines regarding physical restraint, but it does not provide a step-by-step explanation considering all factors, when or how to use physical restraint." He also admitted that the training provided to employees through the Crisis Prevention Institute ("CPI") merely "provides District employees with **guidelines, strategies, and methods** for deescalating emergency situations, as well as the use of physical restraint of a student."

Plaintiff admitted that when an employee, such as Relator, is in a situation like the one subject to this lawsuit, he has to consider various factors in a relatively short amount of time in determining **whether and how** to physically restrain a student. Plaintiff further admitted that it is not an easy task for an employee, such as Relator, to decide whether and how to physically restrain a student.

In addition, although Plaintiff facially "denied" certain Facts demonstrating the discretionary nature of Relator's actions, he did so improperly by ignoring the substance of the stated Fact, and instead he repeatedly responded with the generic statement that Relator "did not have discretion to use improper restraint techniques that resulted in an injury to the Plaintiff." This response – *even if it were true* – did not controvert any of the stated Facts to which it was addressed.

As such, Plaintiff effectively admits that although CPI training course provides strategies and methods regarding the use of physical restraints, an employee must still rely on his own personal judgment and discretion. An employee must still assess the particular facts of the situation to determine whether a physical restraint is necessary, which particular hold or restraint to utilize, and how to approach the student and implement a restraint. Further, an employee's handling of an emergency situation is inherently based upon that employee's assessment of the situation and personal judgment regarding the best course of action.

In sum, there is no genuine dispute that Relator is entitled to summary judgment on the basis of official immunity, as it is uncontroverted that he is a public official, who is alleged to have negligently injured Plaintiff while physically restraining Plaintiff – an act which is indisputably discretionary in nature.

c. Relator Is Entitled To Summary Judgment On The Basis Of Official Immunity, Because There Is No Dispute That He Was A Public Official Performing A Discretionary Act At The Time Plaintiff Was Allegedly Injured.

Employees of a public school district are, like other public employees, entitled to official immunity. *See Woods v. Ware*, 471 S.W.3d 385, 391 (Mo. App. W.D. 2015). Official immunity is a judicially-created doctrine that "protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of *discretionary* acts." *A.F. v. Hazelwood Sch. Dist.*, 491 S.W.3d 628, 631 (Mo. App. E.D. 2016). The official immunity doctrine does not provide immunity for torts committed when acting in a *ministerial* capacity. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008).

Whether an act is discretionary or ministerial depends on the "degree of reason and judgment required" to perform the act. *McCoy v. Martinez*, 480 S.W.3d 420, 425 (Mo. App. W.D. 2016). An act is discretionary when it requires "the exercise of reason in the adaption of means to an end, and discretion in determining how or whether an act should be done or a course pursued." *Id.* (internal citations omitted).

Conversely, a ministerial duty is "of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, **without regard to his own judgment or opinion** concerning the propriety of the act to be performed." *Id.* (emphasis added). Put differently, "[a] ministerial act is defined as an act that law directs the official to perform upon a given set of facts, **independent of what the officer may think of the propriety or impropriety of**

doing the act in a particular case." *Rhea v. Sapp*, 463 S.W.3d 370, 376 (Mo. App. W.D. 2015) (emphasis added). To prescribe a ministerial duty, "the statute or regulation must be mandatory and not merely directory." *Id.*

In this case, the uncontroverted material facts show that Relator is a public official, who is alleged to have injured Plaintiff's arm while physically restraining him – an act which is unquestionably discretionary in nature. Relator was authorized by District Policy 2770 to physically restrain students. Policy 2770 complies with Missouri law. Policy 2770 provides guidelines on the use of physical restraint. However, it is not a step-by-step guide on when and how to physically restrain a student. In fact, Plaintiff admits, "The Independence School District Policy 2770 provides guidelines regarding physical restraint, but it does not provide a step-by-step explanation considering all factors, when or how to use physical restraint." *See* Ex. F, Plaintiff's Response to Defendant's Motion for Summary Judgment, ¶ 14, R 067.

Relator's decision to restrain Plaintiff complied with both District policy and Missouri law.

The express language of Policy 2770 in unquestionably discretionary in nature. It provides that physical restraint is only to be used in one of three situations: (1) in an emergency situation, which is "one in which a student's behavior poses a serious probable threat of imminent physical harm to self or others or destruction of property"; (2) when less restrictive measures have not effectively de-escalated the situation; or (3) when otherwise specified in an IEP, Section 504 Plan, or other potentially agreed-upon plan to address the student's behavior. Policy 2770 further provides that a physical restraint is

only to be used "for as long as necessary to resolve the actual risk of danger or harm that warranted the use of the physical restraint," and that the employee should use "no more than the degree of force necessary to protect the student or other persons from imminent physical harm [or to protect property]."

This language establishes that Policy 2770 not only permitted, but **required** Relator to use judgment and discretion in both determining whether to physically restrain Plaintiff, and then (2) how to physically restrain Plaintiff. Specifically, Policy 2770 required Relator to assess the situation and answer the following questions:

- Is this an emergency situation? Does Plaintiff's behavior pose a serious probable threat of physical harm to self, others, or property? Is that threat "imminent?"
- Are there less restrictive means available to resolve the situation?
- What degree of force is necessary under the circumstances to protect Plaintiff and other persons from imminent physical harm or to protect property?
- At what point is physical restraint no longer necessary to resolve the actual risk of danger or harm?

Personal judgment and discretion were undoubtedly required of Relator as he determined whether and how to physically restrain Plaintiff under Policy 2770. On that basis alone, Relator is entitled to summary judgment on the basis of official immunity.

Even if the Court's analysis extends to the specific training provided to Relator, the uncontroverted facts still establish that Relator's physical restraint of Plaintiff was discretionary. Although Relator received training with regarding to physically restraining students, he was still required to assess the particular facts of the situation to determine

whether a hold or restraint is necessary, which particular hold or restraint to utilize, and how to approach the subject, among other things. This is apparent from the plain language of Policy 2770, which authorizes an employee to physically restrain a student if "the student's behavior poses a serious, probable threat of imminent physical harm to self or others or destruction of property." An employee would inherently have to assess the facts of a situation, the actions of the student, and a multitude of other factors to determine if the student's behavior posed a risk, as defined by Policy 2770. Those assessments and determinations equate to discretion. Employees would certainly perceive such situations differently, with varying degrees of risk, depending on their own personal background, their own prior experiences with and knowledge of the student.

Plaintiff's own expert witness, Dr. James Monk, testified that when an employee, such as Defendant, is in a situation like the one subject to this lawsuit, he has to consider various factors in determining whether and how to use physical restraint. Dr. Monk went on to provide a non-exhaustive list of those factors, which include: (1) circumstances of the situation; (2) words expressed by the student during the interaction; (3) whether or not other adults are present; (4) any disabilities of the student, including how those disabilities manifest in the student's behavior; (5) the employee's historical encounters with that student; (6) the student's home; and (7) perceptions of the student by the student's teacher.

Dr. Monk testified that an employee, such as Relator, has to consider numerous factors in a relatively short amount of time before deciding whether and how to use a physical restraint. Dr. Monk readily admitted that it is not an easy task for an employee, such as Relator to decide whether and how to use a physical restraint. Dr. Monk ultimately

concluded that an employee should have good judgment and the ability to use their discretion in deciding whether and how to use physical restraint.

Although there are no Missouri cases involving a public official's physical restraint of a student, immunity cases regarding emergency responders are instructive. Emergency responders are generally entitled to official immunity when driving in emergency situations. *Davis v. Lambert–St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. banc 2006). In *Davis*, the Missouri Supreme Court explained that in an emergency situation, the first responder "must use discretion regarding how fast he or she can safely drive in response to the call, the route he or she must take based on the amount of traffic, and the location of the problem." *Id.* Without official immunity, an officer may be overcautious and not act decisively. *Id*. (citing *Brown v. Tate,* 888 S.W.2d 413, 415 (Mo. App. W.D.1994)). "We grant them immunity in order that they may act decisively, even though they might afterwards, by hindsight, be adjudged to have acted negligently." *Id.*

The rationale in *Davis* applies here. In emergency situations, public officials must feel free to use their best judgment and discretion in deciding how to act. Likewise, a public official's decision whether and how to physically restrain a student is inherently made in the context of an emergent situation. Is the student a flight risk? Did the mother just have to physically drag the student from her vehicle into the school? Is the student a danger to himself, others, or property? Instances of physical restraint of a student arise when the safety of other students, school employees, and even the subject student are potentially in jeopardy. In those situations, public officials must be encouraged to act

decisively, without undue fear of potential civil liability. That is the point of official immunity.

d. Plaintiff's Opposition To Summary Judgment Was Based Solely Upon An Unsupported Attempt At Redefining Official Immunity In A Way That Would Effectively Eliminate The Doctrine.

The thrust of Plaintiff's argument in opposition to summary judgment is that although Relator had discretion when making decisions during his encounter with Plaintiff, including **whether and how to restrain Plaintiff**, he did not have discretion to do so negligently. That is not how official immunity works. The whole reason for official immunity is that when a public official is engaging in activity that requires the exercise of discretion and judgment, he or she may end up doing so negligently. *Davis v. Lambert–St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. banc 2006) ("We grant them immunity in order that they may act decisively, even though they might afterwards, by hindsight, be adjudged to have acted negligently."). Plaintiff's counter to this would swallow the entire doctrine of official immunity and negate the well-established law and public policy supporting official immunity.

The irrationality of Plaintiff's argument is truly revealed when attempting to apply it to prior Missouri cases analyzing official immunity. For example, in *Davis*, the Missouri Supreme Court held that a police officer driving in an emergency situation "exercises judgment and discretion and is entitled to official immunity." 193 S.W.3d at 760. The Court reasoned:

> Initially, Powell's duties require the exercise of discretion. The accident occurred while Powell was responding to an "officer-in-need-of-aid" emergency call. Powell exercised judgment in determining which route to take based on the amount of traffic in the area and the location of the officer in need. He further exercised judgment and professional expertise in determining the speed he could safely travel. Imposing liability upon the officer in these cases might delay responses to emergency calls, thereby adversely affecting officers or citizens in need of emergency assistance.

Id. (finding the police officer immune from liability for negligence).

Under Plaintiff's version of official immunity, the police officer would have had discretion in deciding whether to respond to the call. In fact, he would have had discretion to choose the route and even exceed the speed limit, but in doing so, he would not have had discretion to "drive negligently." Thus, the police officer in *Davis*, under Plaintiff's theory, would be immune from liability in every decision and action leading up to the collision, but somehow lose that immunity at the moment of the collision. The immunity, which encouraged him to act decisively in responding to the emergency without delay, would vanish at the very moment it was actually needed. Such an application would strip officials from such protections and discourage officials from ever acting decisively in emergency situations.

We see similarly troubling results when applying Plaintiff's misguided interpretation of official immunity in *McCoy v. Martinez*, 480 S.W.3d 420, 423 (Mo. App. W.D. 2016). There, plaintiff was a seventh grade student, who slipped and fell into a lunch table during her physical education class. *Id*. at 423. Plaintiff filed a series of negligence claims against the physical education teacher. *Id*. Plaintiff alleged that the defendant was negligent "in that he failed to remove the metal tables from the gymnasium floor; he instructed students to perform a physical exercise in close proximity to the metal tables; he instructed students to run toward the metal tables and stop abruptly; and he did not take proper precautions to ensure that students would not be injured by the metal tables." *Id*.

The Court found that defendant was entitled to dismissal on the basis of official immunity, since there was no evidence of a ministerial duty which defendant could have breached. *Id*. at 427. However, the Court went further, stating that even if there had been a policy governing the defendant's actions, it would not have been enough. *Id*. "[E]ven in the most detailed "school policy" concerning safety or gym class, we cannot imagine [defendant's] acts or omissions in supervising students during an exercise activity were "ministerial" rather than discretionary in nature, requiring the exercise of the teacher's judgment." *Id*. Quoting a prior case:

> 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. (internal citation omitted).

First, it should be noted that if a teacher supervising a gym class is exercising discretion and personal judgment, then certainly a teacher responding to an emergency situation exercises even greater discretion and judgment before restraining a student. Continuing under Plaintiffs' version of the rule, the teacher would have discretion in supervising the class, but he would not have discretion to do so negligently. He would have discretion to direct the children through their various activities, but he would not have discretion to do so in a way which causes them harm. Thus, as soon as the student was injured, defendant's official immunity would wither away, leaving him exposed to liability for clearly discretionary actions. Plaintiff's analysis would mean that official immunity never applies to any situation—this is contrary to Missouri law.

These results demonstrate why Plaintiff's proposed interpretation of official immunity simply does not work, and why official immunity applies to Plaintiff's claims. Plaintiff does not dispute that Relator is a public official entitled to official immunity when performing discretionary acts. He does not dispute that Defendant in this incident had to consider a variety of factors in a relatively short amount of time when determining whether and how to physically restrain Plaintiff. Indeed, Plaintiff admits that it was not an easy task for Relator to decide whether and how to physically restrain Plaintiff.

Plaintiff admits that "[t]he Independence School District Policy 2770 provides guidelines regarding physical restraint, but **it does not provide a step-by-step**

explanation, considering all factors, when or how to use physical restraint." *See* Plaintiff's Response to Fact No. 14 (emphasis added), R 067. In other words, Plaintiff does not dispute that Relator's physical restraint of Plaintiff was discretionary in nature. Plaintiff's admission ends the inquiry and establishes Relator's right to official immunity. Plaintiff attempts to undercut Relator's obvious entitlement to official immunity by crafting a new rule (that swallows the actual rule) arguing that Relator did not have discretion to perform those discretionary acts "negligently." Again, that is simply not how official immunity works, and it does nothing to alter Relator's immunity from Plaintiff's claims.

Plaintiff's opposition to Relator's Motion was predicated solely upon an attempt to completely redefine official immunity, and to do so in a way which would eliminate it. If official immunity is withheld from officials making real-time decisions regarding students in emergency situations, they will, in the future, be less decisive, overly cautious, and it may result in physical harm to the subject student, other students and educators in the area, and the teacher charged with addressing the student's conduct.

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT, BECAUSE AN ORDER IN PROHIBITION IS THE ONLY ADEQUATE REMEDY, IN THAT OFFICIAL IMMUNITY CONNOTES NOT ONLY IMMUNITY FROM JUDGMENT BUT ALSO IMMUNITY FROM SUIT.

"Prohibition is a discretionary writ that only issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra jurisdictional power." *State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764, 768 (Mo. banc

2014). The Missouri Supreme Court has held that a "writ of prohibition is appropriate in the context of summary judgment to prevent unnecessary, inconvenient and expensive litigation." *State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320, 324 (Mo. banc 2016), reh'g denied (May 3, 2016). A writ of prohibition is uniquely appropriate in order to correct an erroneous denial of a dispositive motion on the basis of official immunity, including motions to dismiss and motions for summary judgment. *State ex rel. Hill v. Baldridge*, 186 S.W.3d 258, 259 (Mo. banc 2006) (prohibition appropriate to correct trial court's erroneous denial of a summary judgment on the basis of official immunity); *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 444 (Mo. 1986) (prohibition appropriate to correct trial court's erroneous denial of a motion dismiss or, in the alternative, for summary judgment on the basis of official immunity); *see also State ex rel. New Liberty Hosp. Dist. V. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985).

There are two primary reasons why prohibition is appropriate and necessary in the context of an erroneous denial of official immunity. First, "[i]mmunity connotes not only immunity from judgment but also **immunity from suit**." *State ex rel. Missouri Dep't of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985). Second, immunity claims also have **jurisdictional aspects**, which make a writ of prohibition critically necessary. *Id.* Furthermore, the wastefulness "in taking time and money for the ritual of trial and appeal is [] apparent." *New Liberty Hosp. Dist.*, 687 S.W.2d at 187.

In this case, Respondent abused his discretion and exceeded his jurisdiction by erroneously entering an Order denying Relator's Motion for Summary Judgment[6]. Adequate relief cannot be afforded to Relator by a future appeal, or by any other measure, as such measures would not protect Relator from ongoing litigation and trial, from which

[6] Respondent did not provide a detailed explanation for the denial. Instead, he set forth the standard for summary judgment and stated, "Defendant has failed to establish that there is no material genuine issue as to the facts pertaining to the Plaintiff's claims." *See* Exhibit I, Order Denying Defendant's Motion for Summary Judgment, R 165-66 (emphasis added). He also based his Order on "the reasons stated herein, **as well as the reasons set forth in Plaintiff's pleadings**." *Id.*

"[W]hen a motion for summary judgment is made and supported by affidavits, an adverse party may not rest upon the mere allegations or denials of his pleadings." *Lay v. St. Louis Helicopter Airways, Inc.*, 869 S.W.2d 173, 178 (Mo. App. E.D. 1993) (citing Rule 74.04(e)). "Instead, the adverse party must respond by setting forth specific facts showing there is a genuine issue for trial." *Id.* "If [the adverse party] does not so respond, summary judgment, if appropriate, shall be entered against [that party]." *Id.*

As demonstrated herein, Plaintiff did ***not*** set forth specific facts, supported by evidence, showing a genuine issue for trial. To the extent Respondent relied upon unsupported allegations in Plaintiff's pleadings in denying Relator's Motion for Summary Judgment, he did so improperly.

he is clearly immune. Therefore, a writ of prohibition is the only adequate remedy to prevent irreparable harm from Respondent's excess of jurisdiction and unwarranted, expensive, and inconvenient litigation.

CONCLUSION

The uncontroverted material facts in this case establish that Relator has an absolute right to official immunity. Respondent has deprived him of that right by erroneously denying his Motion for Summary Judgment. Relator's right to official immunity includes "not only immunity from judgment but also immunity from suit." *State ex rel. Missouri Dep't of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985). Adequate relief cannot be afforded to Relator by a future appeal, or by any other measure, as such measures would not protect Relator from ongoing litigation and trial, from which he is clearly immune. Therefore, a writ of prohibition is the only adequate remedy to prevent irreparable harm from Respondent's excess of jurisdiction and unwarranted, expensive, and inconvenient litigation.

For the forgoing reasons, Relator respectfully requests that this Court make permanent its writ of prohibition barring responding Respondent from taking any further action other than vacating Respondent's Order dated August 30, 2018 denying Relator's Motion for Summary Judgment, and directing Respondent to enter an Order granting Relator's Motion for Summary Judgment.

CERTIFICATE OF SERVICE

The undersigned certifies that a true a correct copy of Relator's Brief was served upon the below persons by electronic mail, on December 3, 2018:

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/s/ J. Drew Marriott

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Relator's Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06(c).

The undersigned further certifies that the total number of words contained in the Relator's Brief is 7,688, exclusive of the cover, signature block, and certificates of service and compliance.

/s/ J. Drew Marriott