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 REPLY BRIEF

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ARGUMENT

I. PLAINTIFF'S OPPOSITION TO RELATOR'S BRIEF DISREGARDS HIS OWN PRIOR ADMISSIONS AND THE UNCONTROVERTED FACTS OF THIS CASE.

In Plaintiff's brief, he argues **for the first time** that although Relator had discretion in deciding *whether* to physically restrain Plaintiff, Relator did not have discretion in deciding *how* to physically restrain Plaintiff. However, in Plaintiff's opposition to Relator's Motion for Summary Judgment, Plaintiff admitted to multiple facts that preclude the novel argument he is now attempting to make. Plaintiff specifically admitted the following facts, which are now conclusively settled:

- Policy 2770 is not a step-by-step guide on when **and how** to physically restrain a student. *See* Ex. F, Plaintiff's Response to Relator's Motion for Summary Judgment, ¶ 15, R 067 (emphasis added).
- 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.
- Relator received CPI training as part of his employment with the District. *See id*., ¶ 18, R 068.
- 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.

- 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.
- 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 (emphasis added).
- 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 (emphasis added).

In addition, Plaintiff failed to controvert the following facts, which are now deemed admitted by operation of law:

- 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.
- 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 (emphasis added).
- 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.

- 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 (emphasis added).

Finally, 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 independently admitted through the language of his own response that Relator's physical restraint was discretionary in nature.

Plaintiff's belated attempt to shift course and argue a new position is patently unsupported, not part of the record on summary judgment, and indeed contradicted by the uncontroverted facts of this case, which were long since settled by Plaintiff's own prior admissions.

II. THE CPI TRAINING MATERIALS DO NOT ESTABLISH A MINISTERIAL DUTY UPON WHICH PLAINTIFF'S CLAIMS CAN BE BASED.

a. The CPI Training Materials Do Not Constitute a Legal Mandate From Which a Ministerial Duty Can Be Derived Under Missouri Law.

Plaintiff's opposition is based upon the supposition that Relator's physical restraint of Plaintiff did not comply with duties allegedly arising from CPI training materials. Plaintiff's argument is flawed in multiple respects. As an initial matter, the CPI training manual is not a "legal mandate" for purposes of official immunity analysis.

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*. (emphasis added).

"Absent allegations averring **the existence of a statutory or departmentally-mandated duty** and a breach of that duty," a negligence claim against a public official fails as a matter of law. *Boever v. Special Sch. Dist. of St. Louis Cty*., 296 S.W.3d 487, 492 (Mo. App. E.D. 2009). In *Boever*, the Missouri Court of Appeals for the Eastern District explained the necessity of a duty imposed by a statute of regulation:

> In this case, plaintiffs did not allege the existence or breach of any statutory or regulatory duty, and therefore have not alleged facts establishing that an exception to the official immunity

> doctrine applies. The issue they do raise, whether the duty to give constant, individualized supervision is ministerial or discretionary, is not one we would reach if there is no allegation that the duty had been imposed by **statute or regulation**.

Id. (internal citations omitted) (emphasis added).

In this case, Plaintiff cites to RSMo. § 160.263, which imposes a duty on boards of education of each school district to "adopt a written policy that comprehensively addresses the use of restrictive behavioral interventions as a form of discipline or behavior management technique." Notably, however, while Section 160.263 imposes a duty on school boards of education to adopt physical restraint polices, it **does not impose *any* duties on public officials**, including Relator. It is uncontroverted that the District adopted Policy 2770 in compliance with Section 160.263.

As Relator previously demonstrated, Policy 2770 imposed duties on Relator that are plainly discretionary. For obvious reasons, Plaintiff glazes over Policy 2770 and instead attempts to rely on the CPI training materials. These materials are not policies, not regulations, not statutorily mandated, and Plaintiff has already admitted they are mere guidelines. Regardless, Plaintiff argues that Relator was required to physically restrain Plaintiff in a manner consistent with the CPI training materials, and that his alleged failure to do so constituted a breach of a ministerial duty imposed by the CPI training materials.

Plaintiff's argument is at odds with Missouri law, which provides that a ministerial duty must be established by a statute, regulation, or at a minimum, a "departmentally-

mandated duty." *See Boever*, 296 S.W.3d at 492. Plaintiff fails to cite – and undersigned counsel is unaware of – any authority for the proposition that a ministerial duty can be devised from a school district's training materials.

In sum, it is uncontroverted that Relator's physical restraint of Plaintiff was governed by Policy 2770. *See* Ex. F, Plaintiff's Response to Relator's Motion for Summary Judgment, ¶ 9, R 066. Pursuant to Missouri law, and specifically under the facts of this case, Policy 2770 – not the CPI training materials – is the relevant legal authority for determining whether Relator's physical restraint of Plaintiff was discretionary.

b. Policy 2770 Governed Relator's Physical Restraint of Plaintiff and Was Plainly Discretionary.

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**. Plaintiff has already admitted this and any new arguments fail to refute those admissions.

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 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. Again, 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." *See* Ex. F, Plaintiff's Response to Defendant's Motion for Summary Judgment, ¶ 14, R 067.

In sum, Plaintiff previously acknowledged that the plain language of Policy 2770 is discretionary, requiring Relator to use his personal judgment and discretion in determining whether and how to physically restrain Plaintiff. On that basis, Relator is entitled to official immunity with respect to Plaintiff's claims.

c. Even If a Ministerial Duty Could Be Derived From The CPI Training Materials, Such Materials Were Also Discretionary In Nature.

Even if we assume for the sake of argument that a ministerial duty *could be* derived from the CPI training materials, no such duty is found in this case. Plaintiff previously admitted that the CPI training merely "provides District employees with **guidelines, strategies, and methods** for deescalating emergency situations, as well as the use of

physical restraint of a student." Further, 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 **when and how** to physically restrain a student. Plaintiff further admitted that it is not an easy task for an employee, such as Relator, trained in CPI techniques, to decide whether and how to physically restrain a student.

In addition, Plaintiff failed to controvert the fact that although the 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 in employing those techniques. 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.

CONCLUSION

The uncontroverted material facts in this case establish that Relator has an absolute right to official immunity. 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 Reply Brief was served upon the below persons by electronic mail, on December 31, 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 2,217 exclusive of the cover, signature block, and certificates of service and compliance.

/s/ J. Drew Marriott