

IN THE MISSOURI SUPREME COURT

Case No. SC97427

STATE OF MISSOURI *ex rel.* CARLOS ALSUP,

Relator,

v.

**THE HONORABLE JAMES F. KANATZAR,
CIRCUIT JUDGE, CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,**

Respondent.

Circuit Court of Jackson County, Missouri, Case No. 1716-CV12316

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF PROHIBITION

BOSLER LAW FIRM, PC

By: /s/ Timothy H. Bosler Jr.

Timothy H. Bosler #23442

Timothy H. Bosler Jr. #57846

14 South Main Street

Liberty, MO 64068

Telephone: (816) 781-0085

Telecopier: (816) 792-1817

E-mail: bosler@greenhills.net

ATTORNEYS FOR PLAINTIFF

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JURISDICTIONAL STATEMENT

On August 30, 2018 Respondent denied Relator's Motion for Summary Judgment. *See* Respondent's Order, A001-002. Respondent held that Relator failed to establish there is no material genuine issue as the facts pertaining to Plaintiff's claims. *See Id.* On September 19, 2018 Relator filed a Writ of Prohibition in the Western District Court of Appeals and that Writ of Prohibition was denied by Order of the Presiding Judge, Writ Division, The Honorable Cynthia L. Martin, with the Honorable Anthony Rex Gabbert concurring. *See* Order from Western District Court of Appeals, A003-004.

On September 24, 2018 Relator filed a Writ of Prohibition with this Court, and on October 2, 2018 a Preliminary Writ was issued by this Court. This Court has jurisdiction to hear and decide Relator's Petition for Writ of Prohibition pursuant to Article V, Section 4.1 of the Missouri Constitution, as an original remedial writ.

STATEMENT OF FACTS

This case involves the claim of Plaintiff Israel Mariano against Relator Carlos Alsup, a public school official, employed by the Independence School District. Plaintiff claims that on or about April 28, 2016, Relator broke Plaintiff's arm at the Independence Academy School, in the Independence School District. The legal issue presented before this Court is whether the physical restraint technique used by Relator was a discretionary or ministerial act.

On May 30, 2017, Plaintiff filed suit against Relator, Carlos Alsup, a School Official working for the Independence School District. *See* Plaintiff's Second Amended Petition, the operative pleading, A005-009. Relator contended in his dispositive motion that Relator is entitled to official immunity for his actions while physically restraining Plaintiff. *See* Relator's Motion for Summary Judgment, A010-011.

On July 23, 2018, Plaintiff responded to Relator's dispositive motion arguing that Relator was not entitled to official immunity because Plaintiff proffered evidence through expert testimony that Relator performed the restraint techniques improperly. *See* Plaintiff's Suggestions in Opposition to Defendant's Motion for Summary Judgment, A012-015. Plaintiff argued that how restraint techniques are performed by school officials is not a discretionary act, but rather a ministerial act which must be performed in a certain way, once the decision is made to physically restrain the student. *See Id.*

On August 30, 2018 Respondent denied Relator's Motion for Summary Judgment. *See* Respondent's Order, A001-002. Respondent held that Relator failed to establish there is no material genuine issue as the facts pertaining to Plaintiff's claims. *See Id.*

PLAINTIFF'S RESPONSE TO RELATOR'S POINTS RELIED UPON

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT, BECAUSE RELATOR HAS NOT ESTABLISHED THAT HE IS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF OFFICIAL IMMUNITY, IN THAT RELATOR WAS PERFORMING A MINISTERIAL ACT IN RESTRAINING PLAINTIFF

A. Respondent Properly Denied Relator's Motion for Summary Judgment Because Relator was Performing a Ministerial Act When Performing a Restraint on Plaintiff

Employees of a school district, like other public employees are entitled to official immunity for discretionary acts. *A.F. v. Hazelwood Sch. Dist.*, 491 S.W.3d 628, 631 (Mo. Ct. App. E.D. 2016). However, official immunity does not extend to public employees in their performance of ministerial acts. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). A ministerial act is one that the public employee must perform under a given set of facts, in a prescribed manner, in obedience to a mandate of legal authority. *Id.* A public employee is liable, and is not protected by official immunity, for conduct that violates a duty imposed by statute, regulation, or departmentally mandated duty. *Id.* Determining whether an act is discretionary or ministerial is made on a case-by-case basis considering: (1) the nature of the public employees duties; (2) the extent to which the act involves policymaking or exercise of professional judgment; and (3) the consequences of not applying official immunity. *Id.*

The Independence School District is required to adopt policies for the use of physical restraints. Mo. Rev. Stat. § 160.263. The Independence School District created and adopted Policy 2770 which sets forth the requirement that school officials, such as Relator, must be trained in physical restraint techniques. *See* Policy 2770, Bates Labeled “Mariano 000001-000008,” A016-023. Relator was trained, every year he was employed at the Independence Academy School, by the Independence School District in the Crisis Prevention Institute (hereinafter referred to a “CPI”) Nonviolent Crisis Intervention Training Program. *See* Relator’s Depo. 13:12-13; 14:1-2, A024-029. In this training, Relator was taught the approved techniques for physically restraining students. *See* Relator’s Depo. 42:23-43:21, A024-029.

Relator’s expert witness, Dr. Kevin Huckshorn, testified that once the decision is made to perform a physical restraint hold the school official must perform the restraint hold as they are taught in the CPI Training and the CPI Manual. *See* Huckshorn Depo. 23:5-11 and CPI Training Materials, Bates Labeled “ISD 000173-000176, A030-033 and A034-037. Dr. Huckshorn further testified that there are only so many ways you can safely hold a person and that there is no discretion involved in the way a particular restrain technique is performed. *See* Huckshorn Depo. 23:14-18, 43:10-11, A030-033.

Therefore, when Relator was restraining Plaintiff he was without discretion on **how** to restrain Plaintiff. There was a clear set of rules on **how** to restrain Plaintiff. Those rules are required by the State of Missouri. And those rules were adopted and taught to Relator by his governmental employer. Accordingly, Respondent correctly

determined in denying Relator's Motion for Summary Judgment that Relator was performing a ministerial duty when restraining Plaintiff.

**B. Respondent Properly Denied Relator's Motion for Summary Judgment
Because Plaintiff has Proffered Evidence that Relator did not Restrain
Plaintiff in the Legally Mandated Manner**

Plaintiff's expert witness, Dr. James Monk, testified that Relator did not have discretion to use improper techniques that resulted in an injury to the Plaintiff. *See* Monk Depo. 101:5-17, A038-041. After viewing the video of Relator physically restraining Plaintiff, Dr. Monk testified that Relator improperly exercised the team control position. *See* Monk Depo 72:20-22 and CPI Training Materials, Bates Labeled "ISD 000174," A038-041 and A034-037. Dr. Monk further testified that had the Relator exercised the team control position properly, Plaintiff's arm would not have been broken. *See* Monk Depo. 72:22-23 and CPI Training Materials, Bates Labeled "ISD 000174," A038-041 and A034-037.

Therefore, Respondent properly denied Relator's Motion for Summary Judgment because Plaintiff put forth evidence that Relator did not restrain Plaintiff in the legally mandated manner.

**II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING
RESPONDENT FROM DENYING RELATOR'S MOTION FOR
SUMMARY JUDGMENT BECAUSE RESPONDENT PROPERLY
DETERMINED THAT GENUINE ISSUES OF MATERIAL FACT EXIST
CONCERNING RELATOR'S CLAIM OF OFFICIAL IMMUNITY.**

A. Respondent Properly Determined that Genuine Issues of Material Fact Exist Concerning Relator's Claim of Official Immunity.

Summary judgment is only appropriate when the moving party has demonstrated, on the basis of the facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The standard of review for a denial of summary judgment is *de novo*. *Id.*

Relator has set forth numerous facts concerning his official immunity that are clearly in dispute. **What is in dispute is whether the acts of Relator were discretionary or ministerial.** This issue has been in dispute from the beginning of this litigation. It forms the basis of this Writ of Prohibition, and has been considered by two (2) lower courts. Relator asserting that a fact is undisputed does not make it so, no matter how many times it is repeated.

Respondent properly determined that genuine issues of material fact exist, and that Relator's Motion for Summary Judgment should be denied.

B. Respondent Properly Relied Upon Plaintiff's Pleadings in Determining that Genuine Issues of Material Fact Exist Concerning Relator's Claim of Official Immunity.

Following Relator's filing of his Motion for Summary Judgment, Plaintiff filed a Response to Relator's Motion for Summary Judgment, which set forth each of Relator's statements of fact, and denied or admitted each and every fact. *See* Plaintiff's Response to Relator's Motion for Summary Judgment, A042-051. Each denial was supported by

specific references to the discovery, exhibits, or affidavits that demonstrated that there were genuine factual issues for trial. *See Id.* and Mo. R. Civ. P. 74.04(c)(2). Plaintiff also set forth additional facts that remained in dispute as allowed by Mo. R. Civ. P. 74.04(c)(2). *See* Plaintiff's Response to Relator's Motion for Summary Judgment, A042-051. Furthermore, Plaintiff filed Suggestions in Opposition to Relator's Motion for Summary Judgment which set forth legal and factual reasons why Relator's Motion for Summary Judgment should be denied. *See* Plaintiff's Suggestions in Opposition to Relator's Motion for Summary Judgment, A012-015.

Relator appears to believe that if Respondent relied upon Plaintiff's pleadings in ruling on Relator's Motion for Summary Judgment that must be in error. This conclusion is simply based upon the fact that Relator did not agree with Plaintiff's factual assertions contained in Plaintiff's responsive pleadings. Relator's Brief clearly argues that Plaintiff is not characterizing the facts in the same way as Relator characterizes the facts.

This is **the primary reason** why summary judgement was not appropriate in this case, specifically, whether Relator's actions were discretionary or ministerial. Therefore, Respondent properly relied upon Plaintiff's pleadings in determining that genuine issues of material fact exist. Accordingly, Respondent's order denying Relator's Motion for Summary Judgment upon official immunity was proper.

ARGUMENT

This case involves the Relator, a school official of the Independence School District, improperly executing a restraint method that was approved by the School District. The improper execution of the restraint method resulted in the Plaintiff's arm being broken. If the restraint had been properly executed, pursuant to the District's policy and training, the Plaintiff's arm would not have been broken.

Official immunity is a judicially created doctrine that protects public employees from liability when they are performing discretionary actions. *Reed v. Conway*, 20 Mo. 22, 53 (1854). The question of whether a public official is entitled to the affirmative defense of official immunity is a matter of law. *See, Nguyen v. Grain Valley R-5 School Dist.*, 353 S.W.3d 725, 730 (Mo. Ct. App. W.D. 2011). The goal of official immunity is to protect the public official from the threat of personal liability when making judgments affecting the public safety and welfare. *Davis v. Lambert-St. Louis Intern. Airport*, 193 S.W.3d 760, 765 (Mo. banc 2006).

However, when the actions of the public official are governed or controlled by a mandate of legal authority there is no judgment required by the public official. *Southers*, 263 S.W.3d at 610. The public official is without discretion concerning the propriety of the actions and the actions must be performed in the prescribed manner. *Id.* In those situations, the public official is performing a ministerial act, and is not protected by the doctrine of official immunity. *J.M. v. Lee's Summit School Dist.*, 545 S.W.3d 363, 372 (Mo. Ct. App. W.D. 2018).

This Court developed a case-by-case analysis to determine if the public official's actions were discretionary or ministerial. *Southers*, 263 S.W.3d at 610. The following should be considered: (1) the nature of the public employee's duties; (2) the extent to which the act involved policymaking or exercise of personal judgment; and (3) the consequences of not applying official immunity. *Id.*

(1) The Nature of the Public Employee's Duties

Relator was a public school official that had been trained in the proper techniques to use when restraining a student. *See* Relator Depo. 13:12-13; 14:1-2; 42:23-43:21, A024-029. Relator's job title was In-School Suspension Teacher, which was categorized by the Independence School District as a Secondary Classroom Teacher. *See* Relator's Responses to Plaintiff's First Interrogatories, Paragraph 1 and Independence School District Job Description for Relator, A052-059 and A060. Accordingly, Relator was in a position that carried with it the responsibility to be trained in the CPI Techniques.

(2) The Extent to Which the Act Involves Policymaking or Exercise of Professional Judgment

Relator did not participate in any policymaking when he restrained Plaintiff. Relator was simply reacting to the situation that was presented to him utilizing all of the factors listed in Independence School District's guidelines concerning **when** to use physical restraint. *See* Policy 2770, Bates Labeled "Mariano 000001-000008," A016-023.

However, when the decision was made to restrain Plaintiff, that is when Relator's personal judgment became irrelevant on the issue of **how** to restrain Plaintiff. Once the

decision is made to perform a physical restraint hold the staff members are to perform the restraint as they are taught in the CPI Training. *See* Huckshorn Depo. 23:5-11 and CPI Training Materials, Bates Labeled “ISD 000173-000176, A030-033 and A034-037.

(3) The Consequences of Not Applying Official Immunity

If official immunity is not applied in this case, the consequences will be that the CPI Training that is provided to school officials will be meaningless. As a matter of fact, when any training or basic safety rules are not enforced all of those safety rules become irrelevant. If any public official is given training on how to perform a particular task, utilizing that training will minimize risk to the public, but the training itself will also allow the public official to act decisively and without concern for personal liability. *Davis*, 193 S.W.3d at 763.

When an on duty police officer is responding to an emergent situation, the officer exercises discretion and judgment on how to proceed. *Id.* That is clearly a discretionary act, in that choosing the route, choosing the speed, etc...all requires the officer to use personal judgment and professional expertise. *Id.*

When a school official has the responsibility of conducting and supervising a football practice, that school official must exercise discretion on how best to accomplish that task. *Elias v. Davis*, 535 S.W.3d 737, 744 (Mo. Ct. App. W.D. 2017). The football coach must use his judgment, and absent a rule, regulation, policy, or direct order of a superior violated in exercising that judgment, the coach’s actions are discretionary and protected by official immunity. *Id.*

A public school official, who is a wrestling coach, uses his discretion to determine how best to supervise and conduct a wrestling practice. *Woods v. Ware*, 471 S.W.3d 385, 393 (Mo. Ct. App. W.D. 2015). Even if the policies for the wrestling coach state that the practice should be “properly supervised,” if there are no specific policies or rules concerning weight restrictions of wrestlers or how to pair wrestlers during practice, then the actions of the coach are discretionary, and official immunity applies. *Id.*

However, when a school official, in charge of supervising a softball game, does not follow a rule that requires a student playing the catcher position in a softball game to wear a protective mask and chest protector, that public official was performing a ministerial act that allowed no judgment or discretion. *Lee’s Summit School Dist.*, 545 S.W.3d at 372-373. While none of the school policies specifically defined what is required to supervise a softball game, if the school official is given **specific instruction** on the required use of protective catcher equipment, there is absolutely no discretion involved in not following that rule. *Id.*

CONCLUSION

Relator has not established that there is no genuine issue of material fact concerning his right to official immunity. To the contrary, the Relator's technique he used in physically restraining Plaintiff was a ministerial duty he owed to Plaintiff. Once the decision was made to physically restrain Plaintiff, Relator did not have discretion on what physical restraint technique to utilize. He was required by Independence School District Policy and Training he received from the Independence School District to utilize those approved physical restraint techniques he was taught in his yearly CPI Training.

If Relator, or any public school official, is not required to use approved physical restraint techniques, then public school officials could use whatever means they wanted to physically restrain children. The Missouri Legislature requires school districts to adopt policies concerning physical restraint for the protection children and prevention of their harm. Allowing official immunity to extend to those situations where expert testimony has been proffered, that an improper technique was used that caused harm, would completely defeat the purpose of the policies and the training that the Legislature requires.

For the foregoing reasons, Plaintiff respectfully requests this Court quash its preliminary writ of prohibition, deny Relator's request for permanent writ of prohibition, and uphold the Respondent Honorable James F. Kanatzar's order denying Relator's Motion for Summary Judgment.

Respectfully submitted,

BOSLER LAW FIRM, PC

By: /s/ Timothy H. Bosler Jr.
Timothy H. Bosler #23442
Timothy H. Bosler Jr. #57846
14 South Main Street
Liberty, MO 64068
Telephone: (816) 781-0085
Telecopier: (816) 792-1817
E-mail: bosler@greenhills.net

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), I hereby certify that this Brief is typed in Times New Roman, thirteen (13) point type. According to the Microsoft Word computer program, this Brief contains 3,369 words, which is in compliance with the limitations contained in Mo. R. Civ. P. 84.06(b).

BOSLER LAW FIRM, PC

By: /s/ Timothy H. Bosler Jr.
Timothy H. Bosler #23442
Timothy H. Bosler Jr. #57846
14 South Main Street
Liberty, MO 64068
Telephone: (816) 781-0085
Telecopier: (816) 792-1817
E-mail: bosler@greenhills.net

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 21st day of December, 2018, the foregoing was filed using the Missouri eFiling system, which will send a notice of electronic filing to all registered attorneys of record, including:

J. Drew Marroitt, Esq.
EDCOUNSEL, LLC
201 North Forest Ave., Suite 200
Independence, MO 64050
dmarriott@edcounsel.law

Ryan VanFleet, Esq.
EDCOUNSEL, LLC
201 N Forest Avenue, Suite 200
Independence, MO 64050
rvanfleet@edcounsel.law

Honorable James F. Kanatzar
Jackson Co Div 5
308 W. Kansas Ave.
Independence, MO 64050

/s/ T.H. Bosler
T.H. Bosler