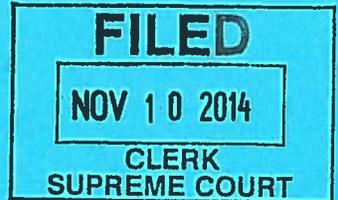


SUPREME COURT OF KENTUCKY
NO. 2013-SC-000560-D



ON REVIEW OF OPINION OF
COMMONWEALTH OF KENTUCKY COURT OF APPEALS
NO. 2012-CA-000598-MR
DATED: July 19, 2013

APPEAL FROM FLOYD CIRCUIT COURT
ACTION NO. 08-CI-00653
HON. JOHN DAVID CAUDILL, PRESIDING JUDGE

SHEILA PATTON, Administratrix of
The Estate of STEPHEN LAWRENCE
PATTON, Deceased

APPELLANTS

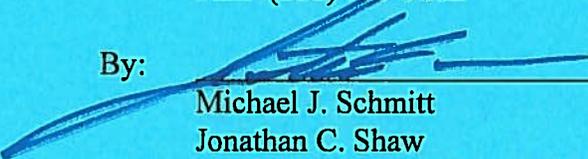
-vs-

**BRIEF FOR APPELLEES DAVIDA BICKFORD,
PAUL FANNING and RONALD "SONNY" FENTRESS**

DAVIDA BICKFORD; PAUL FANNING;
RONALD "SONNY" FENTRESS, JEREMY
HALL, ANGELA MULLINS, LYNN HANDSHOE
and GREG NICHOLS

APPELLEES

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response was served by mailing, postage prepaid, United States Mail, to: Ms. Susan Stokley Clary, Clerk of the Supreme Court, State Capitol, Room 209, 700 Capitol Avenue, Frankfort, Kentucky 40601 (10 copies); Vanessa B. Cantley, Esq., Bahe Cook Cantley & Nefzger PLC; 312 South Fourth Street, Louisville, Kentucky 40202; Neal Smith, Esq., Smith & Thompson, PLLC, P.O. Box 1079, Pikeville, Kentucky 41502; and Hon. John David Caudill, Judge, Division II, Floyd Circuit Court, Justice Center, 127 S. Lake Drive, Prestonsburg, Kentucky 41653, Mr. Douglas Hall, Clerk, Floyd Circuit Court, 127 South Lake Drive, Prestonsburg, KY 41653, this 7th day of November, 2014.


Jonathan C. Shaw

I. INTRODUCTION

This is a negligence action against school administrators and teachers brought by the estate of a student who committed suicide at home. The teachers, principal, and superintendents moved for summary judgment, which the trial court granted on two grounds: (1) the Teachers, Principal, and Superintendents were entitled to qualified official immunity and (2) Stephen's act of suicide was an intervening and superseding act which cut off any liability. This appeal followed.

Appellees Fanning, Fentress, and Bickford assert that the Findings of Fact, Conclusions of Law, Order and Judgment entered March 15, 2012 by the trial court and that the analysis of the Court of Appeals in the Opinion rendered July 19, 2013 were proper and sound as the Court correctly found suicide was not a foreseeable event under the circumstances of this matter. The Appellees believe that the Court of Appeals erred in finding that qualified official immunity would not otherwise act as a bar to the claims of Appellant.

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II. COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

The Appellees do not believe that oral argument is necessary given the nature of this appeal. However, the Appellees welcome the opportunity to engage in oral arguments in this matter if the Court believes argument would assist in the Court's analysis of this matter.

III. STATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Appellant Sheila Patton, as Administratrix of the Estate of Stephen Lawrence Patton, Deceased, initially filed the within action on June 2, 2008 and amended the Complaint on or about July 11, 2008 and November 20, 2008. This is a heart wrenching case wherein a young man, for whatever reason, decided to take his own life one morning in his bedroom. The child had multiple medical and psychological issues, including a long history of migraine headaches dating from the age of six and stomach issues, as well as other issues that were not reported to school officials until after his death (i.e. potential diagnosis of agoraphobia, family history issues, referrals for psychiatric consultation, etc.). The basis of the claim was a negligence action against the Appellees Davida Bickford, Paul Fanning, Ronald Fentress, Jeremy Hall, Angela Mullins, Lynn Handshoe, and Greg Nichols as being the cause of Stephen's suicide.

As is acknowledged by Appellant in the statement of case, Stephen was well liked by his classmates, having a good-natured and cheerful personality. Although thirteen years old, Stephen stood six foot three inches and weighed approximately 196 pounds. Contrary to the statements of counsel in Appellant's statement of the case (without any citation to the record), there is no proof of any "systematic failure", knowledge of any "constant harassment, bullying, and hazing" of Stephen Patton, nor any proof in the record that anyone was aware that this child was suicidal. Although it is claimed by Appellant that "they interviewed multiple students and adults who provided detailed information", Appellant failed on multiple occasions to provide any proof of self-serving statements (*i.e.* Apx. C1 and ROA 551 - 553, Exhibit 11 to Barbara Coloroso Deposition) made or to provide any evidentiary proof of what Appellant's counsel had provided to two experts as being alleged sworn testimony in this matter. (*See* Apx. B1 and ROA 951,

Susan Lipkins Deposition, p. 120, line 11; Apx. A3 and ROA 604, Barbara Coloroso, p. 201 lines 11 - 19; *see also* ROA 528, Motion to Compel). Defendants moved for summary judgment on September 12, 2011 (ROA 570) and renewed motion for summary judgment on November 17, 2011 (ROA 1083 – 1097). After several opportunities for supplemental proof and briefing (ROA 655, 1071, and 1111), the Court entered summary judgment on March 15, 2012 in favor of the Defendants on the basis that: (1) suicide was not a foreseeable event, and (2) qualified immunity acted as a bar to Appellant’s Complaint. (ROA 1198 - 1203). To save the Court’s time, Appellees adopt the Opinion of the Court of Appeals as if set forth fully herein and will distinguish the qualified immunity analysis in the argument below. Many of the facts contained in Appellant’s brief that are asserted as being relevant are unsupported by the record in this matter. In fact, the Court of Appeals, at page 3 of the opinion states that the Appellant’s appellate brief deviates from the format mandated by CR 76.12 because it fails to cite to the trial record. (*See* Opinion, p. 3).

ALLEGATIONS OF THE COMPLAINT

Appellant Sheila Patton, as Administratrix of the Estate of Stephen Lawrence Patton, Deceased, initially filed the within action on June 2, 2008 (*see* ROA 1, Complaint) and amended the Complaint on or about July 11, 2008 (ROA 50) and November 20, 2008 (ROA 228) claiming that her son, Stephen Patton, was subjected to continual harassment, hazing, and bullying at Allen Central Middle School (ACMS) that went undetected by two superintendents, the principal, the assistant principal and four classroom teachers. She further contends that this mistreatment became so severe that Stephen Patton committed suicide on November 28, 2007.

Specifically, the Complaint filed by the Pattons on June 2, 2008, alleged that two superintendents, the principal of ACMS, the assistant principal of ACMS and four teachers of ACMS were negligent in discharging their respective duties as school district employees. In addition, school board and School Based Decision Making Council (SBDMC) policies and procedures were alleged inadequate. The Appellant contends that the supervision practices at ACMS were insufficient. The Appellant further stated that administrators and staff should have known that Stephen was being harassed and bullied. The Appellant further questioned whether ACMS had effectively implemented a bullying/harassment prevention plan. Additionally, the Appellant contends that the ACMS staff failed to follow district and/or SBDMC policies and procedures in addressing bullying behaviors.

FACTS OBTAINED THROUGH DISCOVERY

The deposition of Stephen's mother, **Sheila Patton**, was taken on July 16, 2009. Ms. Patton testified that Stephen had suffered from migraine headaches since he was six years of age. (See Apx. A1 and ROA, included separately, Deposition of Sheila Patton at p. 15). At the time of his death, Stephen stood six foot three inches and weighed approximately 196 pounds. *Id.*, pp. 22-23. Stephen had complained to his mother that he did not like school because the school surroundings were too loud and too bright. *Id.*, p. 77. Ms. Patton testified that she has no knowledge of Paul Fanning or Sonny Fentress having any knowledge or information about Stephen personally or knowing that Stephen was having any difficulty with students in terms of hazing, bullying, or harassment at the schools. She never talked to Dr. Fanning, nor Mr. Fentress. *Id.*, p. 100. Ms. Patton testified that Stephen missed a lot of school and that she never wondered about his absenteeism prior to November 28, 2007. *Id.*, p. 106. Stephen would

complain to his mother that he had a headache or that his stomach hurt on days that he missed school. She was aware of and knew of the migraine headaches that Stephen suffered from and she had no reason not to believe him. *Id.*, p. 107. Stephen never owned a handgun, but he did have handguns in his room. One such gun, a 9 mm pistol he normally kept in his room, was involved in his suicide. *Id.*, p. 118.

Ms. Patton admits that she told Lynn Handshoe that Stephen's doctor thought he might have agoraphobia and that they were going to go see someone about it. Stephen passed away before they had a chance to seek the medical attention he needed for that issue. *Id.*, p. 132. Dr. Webb had told Ms. Patton that he would like for Stephen to undergo a psychiatric exam. *Id.*, p. 133. Prior to Stephen's death, neither Ms. Patton nor her husband had any idea that something like this could happen. *Id.*, pp. 91, 148 and 149. Ms. Patton testified that she had no knowledge and was not aware of any incidents of Stephen allegedly being bullied at school until after his death. *Id.*, 34 - 36. (*See* attached deposition excerpts of Sheila Patton attached hereto as Apx. A1).

The deposition of Appellee, **Davida Bickford**, was taken on November 16, 2009. Ms. Bickford is the principal at Allen Central Middle School. Ms. Bickford testified that there was a bullying policy in effect at the school and that this policy had been in effect since approximately 1999. (*See* ROA, included separately, Deposition of Davida Bickford at p. 49). Ms. Bickford testified that she never personally witnessed Stephen Patton being picked on or bullied in any way at Allen Central Middle School and that she was never informed by anyone that Stephen Patton was picked on or bullied in any way while at Allen Central Middle School. *Id.*, p. 90. (*See*

Apx. A2 and ROA 599-601, deposition excerpts of Davida Bickford attached as Exhibit 2 to Memorandum Brief in Support of Summary Judgment).

The deposition of Appellant's disclosed bullying expert, **Barbara Coloroso** was taken August 24, 2011. Although Appellant has provided Rule 26 disclosures stating that Ms. Coloroso had formed an expert opinion that the Appellees were negligent, Ms. Coloroso testified that **she had been provided insufficient information in this matter to prepare a report, form an expert opinion, and that "there's no expert opinion here"**. (See Apx. A3 and ROA 602-608, deposition excerpts of Coloroso at pp. 200, 246, 281, 320 and 321 attached as Exhibit 3 to Memorandum Brief in Support of Summary Judgment). During the deposition of Coloroso, Appellant first disclosed what was attached to the deposition as Exhibit 11. (See also ROA 528, 551 and 1087). The exhibit appeared to contain a listing of witnesses identified by letters A through Q, along with a summary of **alleged testimony** - some of which are designated as employees of the Floyd County Board of Education. Ms. Coloroso admitted that this was the sole source of information provided to her that contained any alleged testimony demonstrating possible negligence on the part of the Appellees.

As for the testimony of Susan Lipkins, Dr. Lipkins testified as follows:

- A. What I remember is, first of all, **I've been told there is testimony** that several students admit to observing Stephen being bullied repeatedly from the 6th grade and that the bullying continued to get worse through the 8th grade, and that he was continuously bullied because of his stutter, because of his height and size, his facial hair, the boots that he wore, that he was a target because he was extremely quiet, I would say shy and introverted, that he wore a hoodie and would often put his head down on the desk, that

his lunch was raided on a daily basis, and I assume that he was jumped on and in some way attacked, and that I'm assuming there were other forms of teasing that took place.

Q. Those different instances or warning signs that you mentioned, what documentation are you relying on for that information?

A. **That which the attorney, Miss Cantley, will provide.**

(See Apx. B1 and ROA, included separately, Deposition of Susan Lipkins, p. 140)

Q. I mean, you don't know, other than what Appellant's counsel has told you, and from the hearsay that was provided by Sheila Patton, the extent of bullying or in fact that he even was bullied, is that true?

A. **That is true.**

Id., p. 120

Q. All right, now, please I know you've gone through a lot of information. You have been furnished documents and so forth. From what source did you obtain information that Stephen Patton had been the object of bullying for a number of years?

A. **From my conversations with Miss Cantley.**

Q. Did you ever interview or speak with Sheila Patton, Stephen's mother?

A. No.

Q. Did you ever speak with the father?

A. No.

Q. Did you ever speak with anyone who

worked at the school or in the school district?

A. No.

Q. Did you ever speak with any students or adults or anyone who told you or claimed they had witnessed Stephen Patton being bullied?

A. No.

Q. Have you furnished any written statements from students or from adults or anyone that said that Stephen Patton had been subjected to bullying?

A. Only that which was contained in those....Notebooks (depositions).

Id. at pp 53 - 55.

Here, Appellant's experts relied upon what Appellant's counsel told them as opposed to a review of testimony and evidence of record. Thus, their opinions are based upon inadmissible hearsay and arguments and are therefore tainted. Appellees' expert, Jon Akers, reviewed the evidence of record and formed an opinion. His affidavit correctly notes what activities, procedures and programs were implemented by Allen Central Middle School administrators in developing and implementing the SBDMC anti-bullying policy. Each item listed is documented in the sworn testimony or evidence of record in this matter. Regardless of Mr. Akers' opinion, the affidavit assists in succinctly showing that by participating in and implementing the mentioned activities, policies, procedures, and programs, that good faith efforts were made by school administrators to provide a very reasonable standard of care for the children who attend Allen Central Middle School - *i.e.* they acted as opposed to doing nothing to implement the

district policy and those actions are discretionary. (See Apx. A4 and ROA 609 - 632, affidavit of Jon Akers with supporting CV and report attached as Exhibit 4 to Memorandum in Support).

Based on the documents and the rationale that Akers was provided, it is his opinion that Superintendents Fanning and Fentress, Principal Bickford and Assistant Principal Goodman:

a.) did not fail to comply with or follow any stated policies, procedures, or rules in this matter;

b.) did not know that Stephen Patton was being bullied and therefore are not negligent in discharging their duties as employees of the Floyd County School System; and

c.) did, to the best of their ability, provide ample protection and established a reasonable standard of care for all students who attend Allen Central Middle School.

Here, there is no proof of daily bullying, harassment, or torment that any of the named parties were put on notice of. Further, there is absolutely no proof of record that this child committed suicide due to any alleged harassment, bullying or hazing as is repeatedly argued thought Appellant's Brief. (See i.e. Brief for Appellant at p. 1 – 3). Although it is claimed in the brief that multiple students and adults were interviewed – the only proof ever introduced were the briefs submitted after summary judgment oral arguments were held. Contrary to statements at pages 8 – 13 of the brief, there is no showing in these affidavits what was reported, when reported, who the alleged bullies were, nor any showing outside of speculative statements from the vantage point of a student that any complaints made were not addressed. Additionally, it is clear that faculty and staff would have the discretion to decide what events constitute bullying as opposed to horseplay (i.e. peanut butter on the door knob). Further, and most importantly, **none of the cases from other jurisdictions cited at pages 25 – 33 of the Complaint support any**

argument that a teacher or other individual may be held liable for negligently causing a self-inflicted injury or death by a student while at home and with no prior notice that the child may harm himself.

Although Appellant makes statements in her brief to arguing that: (1) multiple students and adults who were interviewed provided detailed information about bullying and a systematic failure for years on the part of administrators and teachers to supervise (p. 1), and (2) that there is a wealth of documents and testimony (p. 2), the record is devoid of any proof to support Appellant's claims. In response to a motion for summary judgment, the respondent must present at least some affirmative evidence showing the existence of a genuine issue of material fact. *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007). Appellant failed to do so in her response and during the oral arguments in this matter. It is clear that although Appellant represented to the court, to counsel, and to her own experts that she had testimony from seventeen (17) witnesses identified as A through Q, she, in fact, did not. Although Appellant's counsel represented to the court on September 23, 2011 that she had testimony that was claimed as "work product" which would defeat Appellees' motions, she did not. (See VR, 09-23-2011 hearing, 10:24:30-10:26:27 a.m.) The affidavits attached to Appellant's brief were not obtained until afterwards in October 2011. Appellant's counsel did not have testimony in her possession to defeat Appellees' motions and, as addressed by the Court of Appeals, the after-acquired affidavits obtained did not create an issue of fact. (ROA 1200-1201).

Appellees Fanning, Fentress, and Bickford assert that the Findings of Fact, Conclusions of Law, Order and Judgment entered by the trial court and that the analysis of the Court of Appeals were proper and sound as the Court correctly found suicide was not a foreseeable event

under the circumstances of this matter. The Appellees believe that the Court of Appeal erred in finding that qualified official immunity would not otherwise act as a bar to the claims of Appellant.

V. ARGUMENT

Pursuant to Civil Rule 76.12(4)(v), Appellees' arguments were raised and preserved as an affirmative defense in the answer filed in this matter and at all stages during briefing before the Circuit and Appellate Court.

A. ARGUMENTS AND STATEMENTS OF COUNSEL WITHOUT ANY SUBSTANTIVE PROOF OF RECORD IN SUPPORT DOES NOT ESTABLISH AN ISSUE OF MATERIAL FACT.

It is a fundamental principal of trial practice that counsel is allowed great latitude in commenting upon evidence and in drawing reasonable deductions therefrom. *See Arnett v. Dalton*, 257 S.W.2d 585, 587, Ky. 1953. However, argument must be confined to facts shown by competent evidence and should not concern matters outside the record. *See Triplett v. Napier*, 286 S.W.2d 87, 90, Ky. 1955. Here, the record is devoid of any proof to support alleged facts relied upon by Appellant's experts or arguments made in the brief of the Appellant. Further, this Court is not obligated to consider these cursory arguments at all due to a complete failure to cite to their location in the record. *See Hallis v. Hallis*, 328 S.W.3d 694, 698 (Ky. App. 2010).

In response to a motion for summary judgment, the respondent must present at least some affirmative evidence showing the existence of a genuine issue of material fact. *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007). Appellant failed to do so in her response and during the oral arguments in this matter. It is clear that although Appellant represented to the

court, to counsel, and to her own experts that she had **testimony** from seventeen (17) witnesses identified as A through Q, she, in fact, did not. Although Appellant's counsel represented to the court on September 23, 2011 that she had **testimony** that was claimed as "work product" which would defeat Appellees' motions, she did not. (*See* VR, 09-23-2011 hearing, 10:24:30 - 10:26:27 a.m.) The four affidavits attached to Appellant's brief were not obtained until afterwards in October 2011. Appellant's counsel did not have testimony in her possession to defeat Appellees' motions and, as addressed by co-defendants' counsel, the after-acquired affidavits obtained did not create an issue of fact. (ROA 1200 -1201).

The Court of Appeals, although acknowledging at page 3 of the opinion that the Appellants had failed to cite to the record, determined that because the case rests on a judgment of law that citation to the record was not crucial. Although true concerning the issue of whether or not suicide is considered an intervening and superseding act that cuts off liability, an analysis of the facts is needed to properly analyze the qualified immunity raised by Appellees Bickford, Fanning and Fentress. Here, although there may have been mixed duties that were both ministerial and discretionary, there is no proof to establish that any administrators violated any ministerial duties owed to the decedent.

B. THE COURT OF APPEALS CORRECTLY HELD THAT SUICIDE IS AN INTERVENING AND SUPERSEDING ACT AS THERE WAS NO PRIOR NOTICE TO ANYONE THAT THIS CHILD WAS SUICIDAL.

The Court's opinion in this matter is sound in holding that the student's suicide was an intervening and superseding act that cut off liability as there was no prior notice to anyone that this child was suicidal. (*See* COA Opinion, p. 9). Further the Court correctly found that the facts of this matter did not meet any of the recognized exceptions under Kentucky law to the general

rule. See COA Opinion, p. 9). It has been clearly established in Kentucky that the chain of causation may be broken by “facts [that] are legally sufficient to constitute an intervening [superseding] cause.” Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 780 (Ky.1984). If an intervening act is not a “normal response” to the original tortious act, it is an “extraordinary” act which breaks the chain of causation. See RESTATEMENT SECOND OF TORTS § 444. Ultimately, if the act consists of facts “of such ‘extraordinary rather than normal’ or ‘highly extraordinary’ nature, unforeseeable in character, [it will] relieve the original wrongdoer of liability to the ultimate victim.’ ” Montgomery Elevator, 676 S.W.2d at 780 (quoting House v. Kellerman, 519 S.W.2d 380, 382 (Ky.1974)).

As addressed by the trial court, when a suicide is claimed to be an injury in a negligence action, the issue of foreseeability is analyzed under the rubric of “supervening cause” and the general rule is that a negligent actor is not liable for the victim's decision to take his own life. The suicide is said to be a supervening cause of the victim's loss of his life, breaking the chain of responsibility that would otherwise link the loss to the negligent act. See e.g., Jutzi-Johnson v. United States, 263 F.3d 753, 755 (7th Cir. 2001); Scoggins v. Wal-Mart Stores, Inc., 560 N.W.2d 564 (Iowa 1997); Beul v. ASSE Int'l, Inc., 233 F.3d 441, 445-47 (7th Cir.2000); McMahon v. St. Croix Falls School District, 228 Wis.2d 215, 596 N.W.2d 875, 879 (Wis. App. 1999); Wyke v. Polk County School Board, 129 F.3d 560, 574-75 (11th Cir.1997); Bruzga v. PMR Architects, P.C., 141 N.H. 756, 693 A.2d 401 (N.H.1997); Edwards v. Tardif, 240 Conn. 610, 692 A.2d 1266, 1269 (Conn. 1997); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44, p. 311 (5th ed.1984). (See Summary Judgment, ROA 1200).

As shown above, facts sufficient to constitute an intervening cause “are facts of such ‘extraordinary rather than normal,’ or ‘highly extraordinary,’ nature, unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim.” *Id.*, quoting *House v. Kellerman*, 519 S.W.2d 380, 382 (Ky. 1974). “The question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury.” *House v. Kellerman*, 519 S.W.2d at 382. Here, Stephen's suicide is an intervening superseding cause that precludes liability in this matter.

Additionally, it is well established in Kentucky that a public school teacher can be held liable for injuries caused by the negligent supervision of her students. *Williams v. Kentucky Dep't. of Educ.*, 113 S.W.3d 145 (Ky. 2003) citing *Yanero v. Davis*, 65 S.W.3d 510 (2001). The ‘special relationship’ thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students. *Williams, supra*, at 148. The affirmative duty mandated exists only if a threat is reasonably foreseeable.

Courts have long been reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act. *See, e.g.*, *Scheffer v. Washington City V.M. & G.S.R.R.*, 105 U.S. 249, 26 L.Ed. 1070 (1882). Generally speaking, it has been said, the act of suicide is viewed as “an independent intervening act which the original tortfeasor could not have reasonably [been] expected to foresee.” *Stasiof v. Chicago Hoist & Body Co.*, 50 Ill.App.2d 115, 122, 200 N.E.2d 88, 92 (1st Dist. 1964), *aff'd sub nom.* *Little v. Chicago Hoist & Body Co.*, 32 Ill.2d 156, 203 N.E.2d 902 (1965), as quoted in *Jarvis v. Stone*, 517 F.Supp. 1173, 1175 (N.D. Ill. 1981).

There are several exceptions to the general rule. Where a person known to be suicidal is placed in the direct care of a jailer or other custodian, for example, and the custodian negligently fails to take appropriate measures to guard against the person's killing himself, the act of self-destruction may be found to have been a direct and proximate consequence of the custodian's breach of duty. Sudderth v. White, 621 S.W.2d 33 (Ky. App.1981). The Kentucky Workers' Compensation Act is liberally construed so as to effectuate the beneficent intent of the legislature in enacting it, the suicide of an employee covered by workers' compensation may be compensable if an injury sustained in the course of the worker's employment causes a mental disorder sufficient to impair the worker's normal and rational judgment, where the worker would not have committed suicide without the mental disorder. Wells v. Harrell, 714 S.W.2d 498 (Ky. App.1986).

Outside the workers' compensation area, and beyond the situation where someone with known suicidal tendencies is placed in the care of a custodian who is supposed to guard against suicide, exceptions to the general rule have been recognized where a decedent was delirious or insane and either incapable of realizing the nature of his act or unable to resist an impulse to commit it. Restatement (Second) of Torts § 455; cf. Jamison v. Storer Broadcasting Co., 511 F. Supp. 1286, 1291 (E.D. Mich.1981), *aff'd in relevant part and reversed in part on other grounds*, 830 F.2d 194 (6th Cir.1987), and the authorities there cited. Here, Appellant points to no facts suggesting that the suicide of Stephen Patton came within any such recognized exception. Stephen was not known to be suicidal and if Stephen's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to the named Appellees. (See Apx. A1 and ROA, included separately, Deposition of Sheila Patton at p. 148).

The trial court correctly held that:

"As demonstrated by Plaintiff's Notice of Filing (*ROA 1113*), there is no case in this jurisdiction nor any other jurisdiction holding that a teacher or other individual may be held liable for negligently causing self-inflicted injury or death of a student (or another) outside of the two exceptions to the general rule as previously argued to the Court. Here, the student was not known to be suicidal. See *Sudderth v. White*, 621 S.W.2d 33, 35 (Ky. App.1981). The facts of this case as applied to Stephen's suicide does not fall within any such recognized exception and Plaintiff fails to cite to any legal authority which establishes that suicide (*unless the exception applies*) is a foreseeable act for which the plaintiff may recover under the laws of this or any other jurisdiction. In fact, one of the three cases cited by Plaintiff in her notice of filing was subsequently overturned by that state's supreme court holding that the teacher and school district were immune from suit. See *Brooks v. Logan (Brooks II)*, 130 Idaho 574, 944 P.2d 709 (1997) (*Teacher and school district were immune from liability based on failure to use reasonable care in supervising student, to prevent him from committing suicide*)."

See Summary Judgment at ROA 1201. Appellees responded to the above cited notice of filing addressing the lack of support concerning the argument that this was a foreseeable event. (See Apx. D and ROA 177 - 1180).

C. **THE ALLEGED CONDUCT OF APPELLEES DAVIDA BICKFORD, PAUL FANNING, AND RONALD FENTRESS DID NOT CAUSE STEPHEN PATTON'S SUICIDE.**

A causal connection between the alleged negligence and the injury must be established beyond the point of speculation or conjecture. A mere possibility of causation is not enough. To recover damages for personal injury, there must be some competent evidence from which active negligence charged may be fairly and reasonably inferred to have caused injury. *McKamey v. Louisville & N. Ry. Co.*, 271 S.W.2d 902, Ky.1954. In negligence actions, evidence merely

furnishing basis of conjecture, surmise, or speculation does not establish proximate cause with certitude, sufficient upon which to rest a verdict. *Fitch v. Mayer*, 258 S.W.2d 923, Ky.1953.

Here, there is no direct evidence that this child's suicide was a result of any alleged bullying. There were no suicide notes, statements to others, or any proof to support the allegations made. Jurors will be required to speculate when examining what, if any, causal relationship exists between the incident at issue in this case and the Appellant's medical condition. Clearly, such speculation by a jury is not permitted under Kentucky law. See *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992).

D. THE COURT OF APPEALS ERRED IN REVERSING THE FINDING OF THE TRIAL COURT THAT THE CLAIMS AGAINST THE APPELLEES IN THEIR INDIVIDUAL CAPACITY WERE BARRED BY OPERATION OF THE DOCTRINE OF QUALIFIED OFFICIAL IMMUNITY.

The proof in this case revealed that the district had adopted a bullying policy, that a policy was adopted at the school level, that action was taken to educate the students and employees about the policies, that there were remedial steps taken by placing posters, having a bullying box, and presentation of programs geared towards both faculty and staff. The record indicates that the named Appellees (two superintendents and one principal) did not perform or fail to perform any act or function in any manner that could be construed as negligent.

Of concern to the Appellees in this matter is the fact that the Court of Appeals correctly found at page 7 of the opinion that "Respondents' duties were both ministerial and discretionary in nature" and, based upon the finding that there were ministerial duties involved, refused to apply the qualified immunity analysis and without explanation held that qualified official immunity was improperly granted without any analysis as to how any of the Respondents violated (breached) a ministerial duty. (See opinion at p. 8). The Court merely explained that:

“That being said, even if it could be proven that the Teachers and Principal breached their duty of care to Stephen, under Kentucky law, an act of suicide is considered an intervening and superseding act that cuts off liability”. (Id. at p. 8). It is clear under Kentucky law that “an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act”. See Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001). In the analysis of whether or not qualified immunity would apply or whether or not the respondents were negligent there must be some showing that someone “negligently performed a ministerial act” and the record in this matter is devoid of any proof that any of the named respondents breached any ministerial duty owed to the Movant.

When sued in their individual capacities, public officers and employees under state law enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of: (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee’s authority. See Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001). It is well established in Kentucky that a public school teacher can be held liable for injuries caused by the negligent supervision of her students. Williams v. Kentucky Dep’t. of Educ., 113 S.W.3d 145 (Ky.2003) *citing Yanero v. Davis*, 65 S.W.3d 510 (2001). The ‘special relationship’ thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students. Williams, supra, at 148. In taking “all reasonable steps”, the defendant is not required to take any action until he knows or

has reason to know that the plaintiff is endangered, or is ill or injured. The affirmative duty mandated exists only if a threat is *foreseeable*. The Court of Appeals in a recent unpublished opinion affirmed dismissal of an action based upon qualified official immunity, holding that "the supervision of students is a discretionary act" and cited as published authority Turner v. Nelson, 342 S.W.3d 866, 876 (Ky. 2011); James v. Wilson, 95 S.W.3d 875, 905 (Ky. App. 2002); S.S. v. Eastern Kentucky University, 431 F. Supp.2d 718, 734 (E. D. Ky. 2006); Flynn v. Blavatt, 2010 WL 4137478 (Ky. App. 2010). See also Rowan County v. Sloas, 201 S.W.3d 469, 475 (Ky. 2006) (where the supervision of prisoners during a work release program was held to be discretionary); and Haney v. Monsky, 311 S.W.3d 235, 240 (Ky. 2010) (where the supervision of children during a camp hike was held to be discretionary).

As recently explained by Justice Venters in Knott County Bd. of Educ. v. Patton:

“it may reasonably be concluded that members of the SBDMC at Knott County Central High School had the statutory duty to establish a school curriculum and to adopt a policy for assessing curriculum needs. The failure to comply with that duty can fairly be characterized as a “ministerial” action *because it is “an identifiable deviation from an ‘absolute, certain, and imperative’ obligation—whatever its source—such that it requires ‘only obedience’ or ‘merely execution of a specific act from fixed and designated facts.’*”

see Knott County Bd. of Educ. v. Patton, 415 S.W.3d 51, 58 (Ky. 2013) citing Haney v. Monsky, 311 S.W.3d 235, 245 (Ky.2010) (quoting Yanero, 65 S.W.3d at 522).

The Court went on to explain that:

“clearly, *deciding* what course should be taught is purely an *exercise of judgment* and is a *discretionary act*. In other words, the SBDMC's duty to adopt a curriculum is a ministerial duty because the council is directed by statute to do so. But *deciding* whether the curriculum should include Spanish rather than French, or one course instead of another where neither is specifically mandated by law, is an “*exercise of discretion* and judgment, or personal deliberation decision, and judgment” that is plainly discretionary”.

See *Id.* at 59 citing *Yanero*, 65 S.W.3d at 522. Similarly, Justice Scott has previously explained (in a somewhat similar case involving a prisoner work release program) that the supervision of prisoners in a prison work program was a discretionary activity that entitled an officer to qualified immunity after an inmate was injured in a worksite accident. The inmate claimed that the guard was negligent in his oversight of the work crew. *Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 479–80 (Ky.2006). In *Sloas*, this Court held that qualified immunity was appropriate because the officer had to use his judgment in determining how best to supervise. *Id.* at 480. Similarly, Justice Scott has previously explained that the instructions that a camp supervisor ensure that campers stayed in the middle of the path during a night hike implicated a discretionary function because the counselor had “a general and continuing supervisory duty to keep the children on the middle of the path which depended on constantly changing circumstances[.]” *Haney v. Monsky*, 311 S.W. 3d 235, 243 (Ky. 2010).

As Justice Noble has recently explained in *Marson v. Thomason*:

The distinction between ministerial and discretionary, of course, is where courts and litigants seem to have the most trouble. The decision “rests not on the status or title of the officer or employee, but on the function performed.” *Id.* at 521. Indeed, most “immunity issues are resolved by examining ‘the nature of the functions with which a particular official or class of officials has been lawfully entrusted.’ ” *Id.* at 518 (quoting *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)).

At its most basic, a ministerial act is “one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Id.* at 522. “That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature.” *Id.* (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky.1959)). And an act is not necessarily outside the ministerial realm “just because the officer performing it has some discretion with respect to the means or method to be employed.” *Id.*; see also 63C Am.Jur.2d *Public Officers and Employees* § 319 (updated through Feb. 2014) (“Even a ministerial act requires some discretion in its performance.”). In

reality, a ministerial act or function is one that the government employee must do “without regard to his or her own judgment or opinion concerning the propriety of the act to be performed.” 63C Am.Jur.2d *Public Officers and Employees* § 318 (updated through Feb. 2014). In other words, if the employee has no choice but to do the act, it is ministerial.

On the other hand, a discretionary act is usually described as one calling for a “good faith judgment call[] made in a legally uncertain environment.” *Yanero*, 65 S.W.3d at 522. It is an act “involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” *Id.* Given the volume of litigation on the subject, it is clear that these definitions are not a model of clarity. No doubt, this is due to their having been written in general, somewhat sweeping terms.

But at their core, discretionary acts are those involving quasi-judicial or policy-making decisions. Indeed, the premise underlying extending the state’s own immunity down to its agencies and, in some instances, officers and employees is “that courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy.” *Id.* at 519. But the discretionary category is still somewhat broader, encompassing “the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level.” 63C Am.Jur.2d *Public Officers and Employees* § 318 (updated through Feb. 2014). The operational level, of course, is not direct service or “ground” level.

The distinction between discretionary acts and mandatory acts is essentially the difference between making higher-level decisions and giving orders to effectuate those decisions, and simply following orders. Or, as we have stated, “Promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function.” *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 150 (Ky.2003).

Thus, a ministerial act is a direct and mandatory act, and if it is properly performed there simply is no tort. But if such an act is omitted, or performed negligently, then that governmental employee has *no* immunity, and can be sued individually for his failure to act, or negligence in acting that causes harm. Of course, whether a ministerial act was performed properly, i.e., non-negligently, is a separate question from whether the act is ministerial, and is usually reserved for a jury. Qualified immunity applies only to discretionary acts. And that immunity is more than just a defense; it alleviates the employee’s or officer’s need even to defend the suit, which is to be dismissed.

See *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014).

The proof in this case revealed that the district had adopted a bullying policy, that a policy was adopted at the school level, that action was taken to educate the students and employees about the policies, that there were remedial steps taken by placing posters, having a bullying box, and presentation of programs geared towards both faculty and staff. The record indicates that the named Appellees (two superintendents and one principal) did not perform or fail to perform any act or function in any manner that could be construed as negligent. The claims of the Appellant herein against the named Appellees fails to state a viable negligence claim. Additionally, there was no proof of record that the named individual administrators or teachers failed to supervise or protect the child from a foreseeable threat. Contrary to statements at pages 8 – 13 of the brief, there is no showing in these affidavits what was reported, when reported, who the alleged bullies were, nor any showing outside of speculative statements from the vantage point of a student that any complaints made were not addressed. It is clear that faculty and staff would have the discretion to decide what events constitute bullying as opposed to horseplay (i.e. peanut butter on the door knob, taking cheese spray to start a food fight, piggy-backing, etc.). Qualified immunity should have properly been granted in this matter.

E. THE PAUL D. COVERDALE TEACHER PROTECTION ACT OF 2001 ACTS AS A BAR TO THIS MATTER.

The Paul D. Coverdell Teacher Protection Act of 2001 was passed along with the No Child Left Behind as a condition of federal funding under 20 U.S.C. 6731 – 6738. The purpose of the Act as is stated under 20 U.S.C. 6732 is “to provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment”. Under 20 U.S.C. 6735, the Act applies to “States

that receive funds under this chapter, and *shall* apply to such a State as a condition of receiving such funds”. See 20 U.S.C. 6735. 20 U.S.C. 6735(a) explains that the Act “**preempts the laws of any State to the extent that such laws are inconsistent** with this subpart, except that this subpart shall not preempt any State law that provides *additional* protection from liability relating to teachers”. Previously, state law appeared to provide consistent protection from tort liability relating to teachers and other school employees through the application of qualified immunity.

Under 20 U.S.C. 6736(a), civil immunity is granted to individual teachers and no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if:

- (1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;
- (2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;
- (3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;
- (4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and
- (5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—

(A) possess an operator's license; or

(B) maintain insurance.

Under 20 U.S.C. 6736(d)(1), none of the exceptions to the Act are applicable here as there is no allegation that the actions of Hamilton constitute (a) a crime of violence, or terrorism; (b) involves a sexual offense; (c) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or (d) where the defendant was under the influence of intoxicating drugs or alcohol at the time of the event.

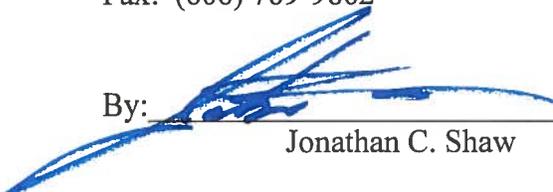
Although not previously addressed by the Kentucky Courts (to the best of undersigned's knowledge), the actions of the Appellees would seem to meet the federal standard for Coverdale immunity as this is a case of simple negligence as opposed to harm "caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher". See *i.e.* Husk v. Clark County School Dist., 281 P.3d 1183 (Nev. 2009) (applying Coverdale immunity upon motion to dismiss claims of simple negligence in supervision); Dydell v. Taylor, 332 S.W.3d 848 (Mo. 2011) (applying Coverdale immunity in a failure to supervise claim where student's neck was sliced open as a result of a knife attack by classmate); M.W. ex rel. T.W. v. Madison County Board of Educ., 262 F. Supp.2d 737 (E.D. Ky 2003) (Judge Forester explained in footnote analysis that Coverdell defense was not valid due to allegations that individuals were not compliant with state law and because the Act does not protect from gross negligence and flagrant indifference to the rights of others).

VI. CONCLUSION

The claims of the Appellant herein against the Appellees are barred by operation of the doctrines of qualified official immunity and due to the fact that the allegations contained in the complaint are wholly unsupported and fail to state a proper claim of negligence under Kentucky law. Judge Caudill's' Findings of Fact, Conclusions of Law, Order and Judgment entered by the trial court and that the analysis of the Court of Appeals were proper and sound as the Court correctly found suicide was not a foreseeable event under the circumstances of this matter. The Appellees believe that the Court of Appeal erred in finding that qualified official immunity would not otherwise act as a bar to the claims of Appellant. Accordingly, Appellees request that the Court affirm the judgment of the Floyd Circuit Court.

Respectfully submitted,

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