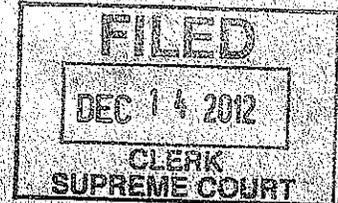


SUPREME COURT OF KENTUCKY
NO. 2012-SC-000139-D



ON REVIEW OF OPINION OF
COMMONWEALTH OF KENTUCKY COURT OF APPEALS
NO. 2010-CA-001404
DATED DECEMBER 2, 2011 AND ORDER DENYING PETITION FOR
REHEARING DATED FEBRUARY 2, 2012

APPEAL FROM KNOTT CIRCUIT COURT
CIVIL ACTION NO. 08-CI-000152
HON. JOHNNY RAY HARRIS, PRESIDING JUDGE

ROBERT POLLARD; HAROLD COMBS;
KIMBERLY KING; LANTRE COMBS;
REX SLONE; DENNIS JACOBS; RANDY COMBS;
ANNA DIXON; PATRICIA SLONE HACKWORTH;
CHARLES JONES; SHARON SMITH; DIANE HALL;
AND KNOTT COUNTY BOARD OF EDUCATION

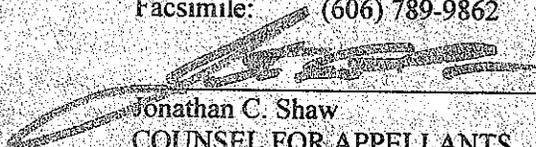
APPELLANTS

BRIEF FOR APPELLANT

GRACE PATTON

APPELLEE

PORTER, SCHMITT, BANKS & BALDWIN
327 Main Street, P.O. Drawer 1767
Paintsville, Kentucky 41240-1767
Telephone: (606) 789-3747
Facsimile: (606) 789-9862


Jonathan C. Shaw
COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

In accordance with CR 76.12(6), I certify that a copy of the Brief for Appellants has been served on December 12, 2012, by United States Mail, postage prepaid, upon: Hon. Adam P. Collins, Collins & Collins, PSC, P.O. Box 727, Hindman, KY 41822; Hon. Johnny Ray Harris, Special Judge, Knott Circuit Court, Justice Center, 127 S. Lake Drive, Prestonsburg, Kentucky 41653; Mr. Sam Givens, Jr., Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; Judy Watson Conley, Clerk, Knott Circuit Court, 1st Floor, Justice Center, P.O. Box 1317, Hindman, Kentucky 41822; and ten (10) copies of the original upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, State Capitol Building 700 Capitol Ave, Rm 209, Frankfort, Kentucky, 40601-3488. This is to further certify that the record on appeal was not removed from the Clerk's office.


Jonathan C. Shaw

I. INTRODUCTION

Appellant, KNOTT COUNTY BOARD OF EDUCATION, respectfully requests that the Court reverse that portion of the attached *opinion affirming in part and reversing in part* that was entered on December 2, 2011 reversing the trial court's entry of summary judgment in favor of the Board regarding Patton's state law retaliation claim under KRS 61.102 (Whistleblower Act) that were never raised by the parties nor addressed by the trial court. Appellants, ROBERT POLLARD, HAROLD COMBS, KIMBERLY KING, LANTRE COMBS, REX SLONE, DENNIS JACOBS, RANDY COMBS, ANNA DIXON, PATRICIA SLONE HACKWORTH, CHARLES JONES, SHARON SMITH, and DIANE HALL, further request that the Court reverse that portion of the opinion reversing the trial court's entry of summary judgment with respect to each of the individually named Appellants due to various misstatements of material fact and law that directly influenced the lower court's opinion. The opinion of the Court of Appeals places unprecedented individual risk and exposure to personal liability of individual site based counsel (SBDMC) members, including parent members, and individual school board members. For the reasons set forth below, the Opinion of the Knott Circuit Court which granted summary judgment to Appellants in this matter should have properly been affirmed. The Court of Appeals entered an order denying Appellant's petition for rehearing or modification or extension of opinion on February 2, 2012.

INDEX

	Page
I. INTRODUCTION	ii
II. STATEMENT CONCERNING ORAL ARGUMENT	iv
III. STATEMENT OF POINTS AND AUTHORITIES	v
IV. STATEMENT OF THE CASE	1-7
V. ARGUMENT	7-16
A. THE COURT OF APPEALS ERRED BY IMPROPERLY ANALYZING THE WHISTLEBLOWER ACT AS IT APPLIES TO THE INSTANT CASE.	8
1. THE EVIDENCE OF RECORD DOES NOT DEMONSTRATE THAT APPELLEE ATTEMPTED TO REPORT OR DISCLOSE A SUSPECTED VIOLATION OF STATE OR LOCAL LAW	9
2. REGARDLESS, PATTON FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES CONCERNING ANY ALLEGED EXERCISE OF STATUTORY RIGHT AND THIS ALONE ACTS AS A BAR TO HER KRS 61.102 RETALIATION CLAIM AGAINST THE KNOTT COUNTY BOARD OF EDUCATION.	11
B. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT WITH RESPECT TO EACH OF THE INDIVIDUAL DEFENDANTS IN FINDING A MINISTERIAL DUTY WHERE NONE PREVIOUSLY EXISTED.	12
VI. CONCLUSION	16
APPENDIX	18

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellants respectfully requests the Court to hold oral argument in this matter.

III. STATEMENT OF POINTS AND AUTHORITIES

<u>STATEMENT OF THE CASE</u>	1-7
<u>ARGUMENT</u>	7-16
A. THE COURT OF APPEALS ERRED BY IMPROPERLY ANALYZING THE WHISTLEBLOWER ACT AS IT APPLIES TO THE INSTANT CASE.	8
KRS 61.102	8
<i>Davidson v. Commonwealth, Dept. of Military Affairs</i> , 152 S.W. 3d 247 (Ky. App. 2004)	8
1. THE EVIDENCE OF RECORD DOES NOT DEMONSTRATE THAT APPELLEE ATTEMPTED TO REPORT OR DISCLOSE A SUSPECTED VIOLATION OF STATE OR LOCAL LAW	9
KRS 161.155	9
KRS 161.155(1)(c)	9
<i>Davidson v. Commonwealth, Dept. of Military Affairs</i> , 152 S.W. 3d 247 (Ky. App. 2004)	10
2. REGARDLESS, PATTON FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES CONCERNING ANY ALLEGED EXERCISE OF STATUTORY RIGHT AND THIS ALONE ACTS AS A BAR TO HER KRS 61.102 RETALIATION CLAIM AGAINST THE KNOTT COUNTY BOARD OF EDUCATION.	11
<i>Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet</i> , 133 S.W. 3d 456 (Ky. 2004).....	11
<i>Kentucky Retirement Systems v. Lewis</i> , 163 S.W. 3d 1 (Ky. 2005)	11

<i>Board of Regents of Murray State University v. Curris</i> , 620 S.W. 2d 322 (Ky. App. 1981).....	11
<i>Neiman v. Yale University</i> , 270 Conn. 244, 851 A.2d 165, (Conn. 2004)	12
<i>Bridge v. F.H. McGraw & Co.</i> , 302 S.W. 2d 109 (Ky. 1957)	12
 B. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT WITH RESPECT TO EACH OF THE INDIVIDUAL DEFENDANTS IN FINDING A MINISTERIAL DUTY WHERE NONE PREVIOUSLY EXISTED.	12
KRS 160.345	12
<i>Hubble v. Johnson</i> , 841 S.W.2d 169 (Ky. 1992) (citing <i>Steelvest</i>)	15
<i>O'Bryan v. Cave</i> , 202 S.W. 3d 585 (Ky. 2006)	15
<i>Hallahan v. The Courier Journal</i> , 138 S.W. 3d 699 (Ky. App. 2004)	15
Rules Civ. Proc., Rule 56.01	15
<i>Haugh v. City of Louisville</i> , 242 S.W. 3d 683, Ky. App., 2007	15
<i>Beecham v. Com.</i> , 657 S.W. 2d 234 (Ky. 1983)	16
<i>Phelps v. Louisville Water Co.</i> , 103 S.W. 3d 46 (Ky. 2003)	16
 <u>CONCLUSION</u>	16
 <u>APPENDIX</u>	18

IV. STATEMENT OF THE CASE

Appellee filed this action on April 16, 2008 alleging that the Appellants, and each of them, individually, violated *nonspecific* duties arising under constitution, statute, common law, policy, procedure, construction and practice concerning employment actions taken. (ROA 1, Complaint *at numerical paragraph 3; see also Appendix 1*). It was alleged that as a result of the alleged nonspecific violations that the Appellee has been injured or damaged and that the acts of the Appellants were grossly negligent, wanton, reckless, and done in utter disregard for the rights of the Appellee, thereby entitling the Appellee to compensatory damages, consequential damages, and exemplary damages, all past and future. Although not specifically pled, this case revolves around the decision of the Knott County Central Site Based Council to change the foreign language course offered at the high school from French to Spanish. In an effort to save the Court's time, a more complete factual background may be found at pages 2 through 4 of the opinion of the Court of Appeals. (See COA opinion at Appx. 10).

Appellee, Grace Patton, appealed from a summary judgment of the Knott Circuit Court dismissing her claims against Robert Pollard, Harold Combs, and the Knott County Board of Education, *et al.*, (the Appellants) for retaliation and wrongful termination, violation of her First Amendment rights to free speech, breach of contract, promissory estoppel and violation of applicable statutes. The Court of Appeals entered an *opinion affirming in part and reversing in part* on December 2, 2011. (See Appx. 10). The Court of Appeals entered an order denying Appellants' petition for rehearing or modification or extension of opinion on February 2, 2012. (See Appx. 11).

A review of Appellee's (1) complaint (See Appx. 1), (2) memorandum in response to motion for summary judgment, (3) discovery responses (See Appx. 2), (4) other pleadings in this matter, and (5) Patton's Court of Appeal brief reveals that at no time were issues concerning any alleged violations of KRS 61.102 or the "whistleblower act" raised or addressed. Additionally, there was no argument made that the Appellee made any effort to report or disclose a "*suspected violation of state or local law*" as has now become a pivotal issue in this matter. The first time that this issue was raised was in the Court of Appeals Opinion rendered December 2, 2011.

Generally, as the moving party, it was the Appellants' burden of showing the absence of a genuine issue of material fact; then, as the nonmoving party, it was the Appellee's burden to present sufficient evidence from which a jury could reasonably find for her. Likewise, it is an untenable burden upon the trial court to address any and all specious claims in ruling upon a motion for summary judgment when it is not the duty of the Court to scour the record in order to plead Appellee's arguments for her. See Beecham v. Com., 657 S.W.2d 234, 236 (Ky. 1983) and Phelps v. Louisville Water Co., 103 S.W.3d 46, 53 (Ky.2003). Appellant, Board of Education, as well at the trial court, were not given the opportunity to address any allegations of retaliation outside of "*politically motivated retaliation*" as stated in Appellee's SBDMC decision appeal. (See ROA – listed separately, Deposition of Grace Patton, Exhibit 7). Issues concerning retaliation for alleged "*whistle blowing*" were never raised as an issue in this matter until the Court of Appeals rendered its Opinion December 2, 2011.

The Court of Appeals in addressing qualified immunity as applied to individual liability was directly influenced by (1) arguments of Appellee's counsel misstating the

evidence of record, (2) Appellee's subjective beliefs about the nature of the evidence, and (3) claims and arguments of both Appellee and Appellee's counsel without any evidence of record to support them in finding that the individual defendants (school board members, school administrators, and site based decision making council members) are not entitled to qualified immunity and that the record contains material issues of fact requiring trial.

Although the Court of Appeals notes at page 5 of the opinion that the entire process from proposal to enactment occurred within a ten day period, the proof of record established that a student survey had been taken prior to the April 2, 2007 meeting.

Appellee Patton testified at p. 16 of her deposition as follows:

Q. I also have copies of— Let's see. Are you familiar with a survey that was, I guess, provided to the students during the 2006/2007 school year?

A. At the time **I remember giving the survey**. I don't know what it looked like. I know I passed it out to my class.

Q. And that was at the request of who that you passed it out to your class, if you recall?

A. It came through our advisory class.

Q. Advisory class or advisory committee?

A. No, advisory class period is when it came in.

Q. Well, do you remember who asked you to pass it out or what the instructions were?

A. I think it was given by like an office aide worker. **Well, it came from the guidance office.** Yeah, it came from the guidance office from what I understood, **and then we sent them back to the guidance office.**

Q. And that may or may not be the survey?

A. Uh-huh.

MR. SHAW: I'll attach it as Defense Three.

Q. Do you have any reason to believe that this would not be a copy of the survey that was passed out?

A. No.

Q. The questions on the survey, do they look familiar to the questions that you—

A. Right; uh-huh.

See ROA – listed separately, Deposition of Grace Patton at p. 16.

Ms. Patton testified that she was a member of the Knott County Central Site Based Council (*Id.* at 19) and that she was present at the meetings of the Council held April 2nd and April 9th, 2007 wherein curriculum was discussed and the Council decided to change the foreign language class offerings from French to Spanish. *Id.* at 20. During the April 9th meeting, a vote was taken and the Council voted (4 – 1, with one abstention) to change the foreign language class offering. *Id.* Apparently, Ms. Patton had counsel present with her during the site based meetings. *Id.* at 21. Ms. Patton testified that the decision of the Council (teachers and parents) was not “personal”. *Id.* at 22. Ms. Patton appealed the decision of the Site Based Council to the board of education. *Id.* at 24. Once the decision was affirmed, Ms. Patton received a suspended contract. *Id.* at 25. Ms. Patton was aware prior to the Council meetings that Principal Pollard would be making a recommendation to change the foreign language at the school during a meeting on March 30, 2007. *Id.* at p. 30. Ms. Patton did not like this idea because it would affect her personally (*Id.* at 31) as she was the French teacher.

Attached to the Motion for Summary Judgment filed in this matter were exhibits introduced during Ms. Patton's discovery deposition. The exhibits consisted of (1) - a

copy of her continuing contract of employment for the 2006–2007 school year (ROA 128, Motion for Summary Judgment, Exhibit 2); (2) - a copy of Board Policy 8.1 dealing with curriculum and instruction (ROA 130, Id., Exhibit 3); (3) - a copy of the student survey regarding classes/ programs that Mr. Pollard had completed by the students at the school and which indicated that the student body had requested that Spanish be taught as a foreign language at the school (ROA 131, Id., Exhibit 4); (4) - copies of Site Based Council meeting minutes for the April 2, 2007 and April 9, 2007 meetings (ROA 132, Id., Exhibit 5); (5) - copies of Knott County Central High School SBDM council policies (ROA 137, Id., Exhibit 6); (6) - minutes of the April 19, 2007 meeting of the Knott County Board of Education wherein Ms. Patton, with counsel, addressed the board of education (ROA 141, Id., Exhibit 7); and ROA 142, Id., Exhibits 8–16 contains correspondence regarding this matter.

Likewise, Appellee **Robert Pollard** testified that:

Q. Okay. Okay, and the, the surveys were compiled and the results were calculated. Who did that?

A. That was done **in the counselor's office**, through the counselor's office. They were the ones who sent the survey out and the ones who compiled it.

Q. And how does it get back to you? The counselor's office send it to you?

A. Well, yeah. They gave me the results of the survey.

Mr. Pollard testified at p. 31 of his deposition that the survey results showing a significant number of students who were interested in Spanish being taught prompted interest in the issue. (ROA – listed separately, Deposition of Robert Pollard, pp. 31, 33).

The affidavits of Guidance Counselors, **Sally Brashear** and **Dianne Collins**, are filed of record in this matter. (ROA 230-233, Notice of Filing, Affidavits of Sally

Brashear and Dianne Collins). Ms. Brashear and Ms. Collins both testified via affidavit that the school survey was administered during the 2006–2007 school year to obtain student input on their class preferences and that the guidance office utilized guidance office student workers to tally survey results which were then given to the school principal to share with the Site Based Council. *Id.* A copy of the tally sheet was attached as an exhibit to the deposition of Robert Pollard (See ROA – listed separately, Deposition of Robert Pollard, Exhibit 2).

Patricia Hackworth, Site Based Council member, testified at p. 29 of her deposition that **she made the motion** to change the program from French to Spanish. She explained that although it was a tough decision, she thought that it was common sense to go from French to Spanish, because the kids would benefit more from having Spanish. *See* ROA – listed separately, Deposition of Patricia S. Hackworth at pp. 29–30.

Charles Jones, Site Based Council member, abstained from voting on the issue and explained during his deposition that although he was in favor of the change, he believed there should have been a transition period. *See* ROA – listed separately, Deposition of Charles Jones at p. 17. **Sharon Smith**, Site Based Council member, testified that she voted in favor of the decision and stands by that vote. *See* ROA – listed separately, Deposition of Sharon Smith at p. 13. Likewise, **Diane Hall**, Site Based Council member, testified that she voted in favor of the change. *See* ROA – listed separately, Deposition of Diane Hall at p. 17. None of the Site Based Council members who testified reported, although the survey had prompted the principal bringing the matter up at the Site Based meeting, that the student survey in any way affected the motion made or the decision made.

The Site Based Council met and discussed this matter on April 2nd and then met and voted on April 9th. The Site Based Council vote was 4 – 1, with one abstention. The only individual opposed to the change was the Appellant.

V. ARGUMENT

Pursuant to Civil Rule 76.12(4)(v), Appellants' arguments were raised and preserved in the motion for summary judgment and petition for rehearing filed in this matter.

Throughout the Court of Appeals Opinion there are misstatements of material fact that, although argued by Appellee's counsel, are not supported by the record and appear to have directly influenced the lower court's analysis. Relevant items of concern include the following:

1. Throughout the opinion the Court refers to the alleged violation of *board* policies and procedures as opposed to the Knott Central High School Site Based Decision Making (SBDMC) *Council* policies and procedures. As addressed at pages 3 and 4 of Appellants' brief for appellee and below, the record contains both board policies and SBDMC policies. (See also Appendix 5, 6, and 9).
2. Footnote 1 incorrectly states that it appears that there is no formal administrative appeal process. (See Appendix 5, Board Policy 02.42411 and 03.16; Brief for Appellees at p. 4; ROA - deposition of Grace Patton at 62 - 66).
3. The various SBDMC policies cited at page 9 of the opinion **are not the applicable policies**. The sections cited were contained in a 1998 policy that was revised in 2001. The 2001 revisions were the applicable SBDMC policies during the 2006 /07 school year. (See page 4 and 8 of Brief for Appellee and applicable revised policies at ROA 137, Exhibit 6; ROA, Deposition of Patton, Exhibits 5 and 6 (attached as Appendix 6 and 9)).

A. THE COURT OF APPEALS ERRED BY IMPROPERLY ANALYZING THE WHISTLEBLOWER ACT AS IT APPLIES TO THE INSTANT CASE.

A review of Appellee's (1) complaint (See Appx 1), (2) memorandum in response to motion for summary judgment, (3) discovery responses (See Appx. 2), (4) other pleadings in this matter, and (5) Patton's Court of Appeal brief reveals that at no time were issues concerning any alleged violations of KRS 61.102 or the "whistleblower act" raised or addressed. Additionally, there was no argument made that the Appellee made any effort to report or disclose a "*suspected violation of state or local law*" as has now become a pivotal issue in this matter. The first time that this issue was addressed was in this Court's Opinion rendered December 2, 2011.

The Court of Appeals, in reversing the trial court's entry of summary judgment in favor of the Board for Patton's state law retaliation claim under KRS 61.102, correctly stated at page 13 of the Opinion that:

"In order to establish a violation of KRS 61.102, an employee must show (1) that "the employer is an officer of the state" or one of its political subdivisions, (2) that "the employee is employed by the state" or one of its subdivisions, **(3) that "the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law"** and (4) that "the employer took action or threatened to take action to discourage [them] from [doing the same] or to punish the employee for making [the] disclosure." Davidson, 152 S.W.3d at 251."

The Court then went on to find that:

"Patton has sufficiently demonstrated the first three of these elements and has raised a genuine issue of material fact with respect to the fourth. Indeed, it is clear from the record that she was a state employee who called to the attention of her boss's supervising authority suspected violations of KDE directives or mandates and a Kentucky statute."

1. THE EVIDENCE OF RECORD DOES NOT DEMONSTRATE THAT APPELLEE ATTEMPTED TO REPORT OR DISCLOSE A SUSPECTED VIOLATION OF STATE OR LOCAL LAW

The holding of the Court of Appeals essentially creates a cause of action under the Whistleblower Act for internal personnel matters where no such authority previously existed. A review of the record shows that Principal Pollard had received information raising concern regarding Appellee's possible abuse of sick leave and signing of a sick leave affidavit when, in fact, she was on vacation with her family in Miami, Florida.¹ See ROA, Patton deposition, Exhibit 18; Appendix 7 attached hereto. Pollard copied Superintendent Combs on the January 18, 2007 (*mistakenly dated as 2006*) letter to Patton and had requested that the three of them (Superintendent Combs, Principal Pollard, and Ms. Patton) meet concerning this matter. Appellee Patton then drafted a response citing "the following items influence my request" listing KRS 161.155 (sick leave for employee or teacher) and later tendered a doctor's excuse from her mother. *Id.*, at pp. 55, 59 and Exhibits 19 and 20; *see also* Appx. 7. KRS 161.155(1)(c) defines "immediate family" and (2) that "sick leave shall be granted to a teacher or employee if he or she presents a personal affidavit or a certificate of a physician stating that the teacher or employee was ill, that the teacher or employee was absent for the purpose of attending to a member of his or her immediate family who was ill, or for the purpose of mourning a member of his or her immediate family." Here, Appellee's mother explained that "Ms. Patton took sick leave due to the condition of her father" and was required "*to come to Miami to pick up their daughter*" as opposed to *attending to her ill father*. *Id.* at

¹ The execution of a false affidavit in regard to a sick days is in violation of KRS 523.030, second-degree perjury, a Class A misdemeanor. More importantly, this act alone is a terminable offense constituting conduct unbecoming a teacher under KRS 161.790(1)(a) and (b). See *Board of Educ. of Laurel County v. McCollum*, 721 S.W.2d 703, 705 (Ky., 1986).

Exhibit 20. **There is no allegation in this letter that Principal Pollard violated any state or local law**, merely that her response and request to have this letter removed from her file was influenced by the cited sections. There is no proof of record that “the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law” as is required under the act.

The purpose of the Whistleblower Act “is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information.” *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky.App.2004). Generally, for purposes of protection under the Whistleblower Act there must be some actual legal basis to support public employee's subjective belief that a violation of law occurred. It serves to discourage wrongdoing in government, and to protect those who make it public. Appellee's *response* was made as a part of an internal personnel matter between a school principal and teacher and clearly states that the items listed were "information found" in support of her response. (See Appendix 7). **Both the initial letter from Pollard and Patton's response were copied to Superintendent Combs as he was to attend the meeting concerning the issue.** In fact, it was Appellant Pollard's letter that requested a meeting between Superintendent Combs, Principal Pollard and Patton to address the items of concern. The letter does not articulate what KDE directives were reviewed and does not state that Pollard violated them. The letter speaks for itself and it is clear that Patton did not "blow the whistle" on any alleged wrongdoing.

2. REGARDLESS, PATTON FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES CONCERNING ANY ALLEGED EXERCISE OF STATUTORY RIGHT AND THIS ALONE ACTS AS A BAR TO HER KRS 61.102 RETALIATION CLAIM AGAINST THE KNOTT COUNTY BOARD OF EDUCATION.

As a general rule, a party is required to exhaust available administrative remedies prior to seeking judicial relief. Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may: (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky.2004), quoting 2 AM.JUR.2D Administrative Law § 505 (1994). See also *Kentucky Retirement Systems v. Lewis*, 163 S.W.3d 1, 3 (Ky.2005) (quoting *Board of Regents of Murray State University v. Curris*, 620 S.W.2d 322, 323 (Ky.App.1981)).

In this case, a similar rationale compels the application of the doctrine. The board's policy and procedure manual sets forth specific steps to be taken to initiate the grievance procedures and ultimately entitled Appellee Patton to the district's grievance procedure. In fact, Patton utilized Policy 02.42411 (Appeal of SBDMC Decisions) and pursued her internal remedies concerning allegations of unauthorized change to class offerings alleging that the decision "was not Principal Pollard's decision to make and was **politically motivated retaliation**". (See Appendix 5; attached board minutes of record at ROA 141, Exhibit 7; and Brief of Appellee at page 4). The Knott County Board of Education also had Policy 03.16 (Grievances) in place. The Board of Education was not given the opportunity to address any allegations of retaliation outside of "politically

motivated retaliation" as stated in the SBDMC decision appeal. **Issues concerning retaliation for alleged "whistle blowing" were at no time raised.** To allow her to "sidestep these procedures would undermine the internal grievance procedure that the parties had agreed to and encourage other litigants to ignore the available procedure as well." See Mullins v. Gooch, 2005-CA-002480-MR, Ky.App.,2006 at page 3 citing Neiman v. Yale University, 270 Conn. 244, 851 A.2d 1165, 1172 (Conn.2004).

The 2006 agreement between the Knott County Education Association and Knott County Board of Education cited at pages 1 and 13 of Appellee's brief likewise contains a professional grievance procedure. (See Appx. 8). Appellee failed to avail herself of this process as well. Under Kentucky law, "when one accepts employment under the collective agreement, (s)he thereby ratifies and accepts its terms, and her rights and her employer's rights are to be measured and adjudged by that contract." Bridge v. F.H. McGraw & Co., 302 S.W.2d 109, 112 (Ky.1957).

B. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT WITH RESPECT TO EACH OF THE INDIVIDUAL DEFENDANTS IN FINDING A MINISTERIAL DUTY WHERE NONE PREVIOUSLY EXISTED.

The Court, in reversing the trial court's entry of summary judgment with respect to each of the individually named Appellants, correctly stated at page 21 of the Opinion that:

"Here, while KRS 160.345 plainly gave the SBDMC discretion to establish committees, once the body exercised that discretion, it was required to adhere to the procedures and rules it voluntarily established."

The Court relied upon and cited various alleged SBDMC policies at page 20 of the opinion that **are not the applicable policies stating that:**

"Sections 6.1 and 6.2 of the Knott County Schools Systems Policies and Procedure Manuals provide that "[t]he use of committees to accomplish tasks of the council is considered vital[]" and that "[a] standing committee will be formed in ... Curriculum[.]" Patton testified that she was a member of the SBDMC. She further testified that there was no standing curriculum committee at any time in question. Section 6.5 of the Manual mandates that "[a]ll committee meetings shall be open to the public except when personnel, legal issues effecting (*sic*) the committee, rights to privacy issues are under into (*sic*) executive session." Moreover, Section 6.6 requires that "[a]ll committee meetings shall be announced via the largest media source in the district 24 hours in advance, [and] have a prepared agenda[.]" Finally, Section 7.3 mandates that "[n]o policy shall be adopted by the council at the meeting in which the policy is introduced."

The sections cited were contained in a 1998 policy that had been revised and were no longer applicable. The Court of Appeals found a ministerial duty where none existed under the applicable policies. The 2001 revisions were the applicable SBDMC policies during the 2006 /07 school year. (See page 4 and 8 of Appellees' brief and applicable revised policies at ROA 137, Exhibit 6; ROA, Deposition of Patton, Exhibits 5 and 6; and Appendix 6). A complete copy of the SBDMC policies in effect during the 2005 - 2006 school year is attached at Appendix 9.

Additionally, at page 20 of the Opinion, the Court states that "upon review of the minutes of meetings present in the record, there appears to be no other evidence of a standing curriculum committee". Appellee Patton's complaint in her testimony was that **she did not believe the curriculum committee was established correctly** as opposed to that **there was no committee.** (ROA, Patton deposition, pp. 77-78, 105). Her belief was based partially upon training materials from the Kentucky Association of School Councils as opposed to the applicable Knott County Central High School SBDMC policies. *Id.* Patton also relied upon an old replaced 1998 version of the SBDMC policies. *Id.* at 105 - 106. Overwhelming testimony in this record demonstrates that there was, in fact, a standing curriculum committee during the relevant time period. (See ROA,

deposition of Patricia Hackworth, p. 7; Charles Jones, p. 5; Sharon Smith, p. 6; Robert Pollard, p. 10; and Harold Combs, p. 12). Regardless, there is nothing stated in the policies that indicate that the curriculum committee is the sole means by which this issue could be presented to the site based council. The principal, as well as any member of the faculty, would have the authority to bring matters before the school's site based decision making council. Here, this issue was presented after a poll of the students revealed a majority desire to have Spanish taught. The individual defendants were clearly acting within a discretionary realm in deciding that the students would be better served by having Spanish taught at the high school as opposed to French.

Contrary to footnote 7 in the opinion, Patton testified that she believed that she was the only person in her department, but did not know who the department head was. (See ROA, Patton deposition, p 105). The Board of Education considered Foreign Language to be a Language Arts position. (ROA 141, Exhibit 7). French was a part of the Language Art's department and the Chair was Jane Park. (ROA, Patton deposition, pg. 38).

Likewise, at page 24, footnote 9, the Court states that "there is a question as to whether Pollard himself may have tallied the surveys and then destroyed the originals" when the testimony of record cited above at pages 5 and 6 clearly demonstrates that the guidance office utilized student workers to tally the results of the survey and that the results were then given to the school principal. (*See also* ROA - Brief for Appellee at p. 4).

As is addressed at page 7 of the Court of Appeals opinion, summary judgment is proper only "where the Appellant shows that the adverse party could not prevail under

any circumstances.” However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.”

Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky.1992) (citing Steelvest). See also O'Bryan v. Cave, 202 S.W.3d 585, 587 (Ky.2006); Hallahan v. The Courier Journal, 138 S.W.3d 699, 705 (Ky.App.2004); Kentucky Community and Technical System v. Marks, 2010–CA–001672–MR, page 2, (Ky.App.,2011). A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment. Rules Civ.Proc., Rule 56.01. Haugh v. City of Louisville, 242 S.W.3d 683, Ky.App.,2007. Additionally, the party opposing summary judgment cannot rely on its own claims or arguments without significant evidence in order to prevent a summary judgment. See Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky.App.,2004).

The Court of Appeals opinion was directly influenced by (1) arguments of Appellee's counsel misstating the evidence of record, (2) Appellee's subjective beliefs about the nature of the evidence, and (3) claims and arguments of both Appellee and Appellee's counsel without any evidence of record to support them in finding that the individual defendants (school board members, school administrators, and site based decision making council members) are not entitled to qualified immunity and that the record contains material issues of fact requiring trial. Arguments and statements of this nature are insufficient to defeat a supported motion for summary judgment under Kentucky law. Generally, as the moving party, it was the Appellants' burden of showing the absence of a genuine issue of material fact; then, as the nonmoving party, it was the Appellee's burden to present sufficient evidence from which a jury could reasonably find

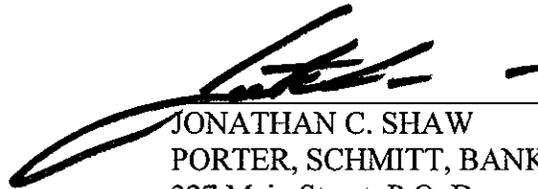
for her. Likewise, it is an untenable burden upon the trial court to address any and all specious claims in ruling upon a motion for summary judgment when it is not the duty of the Court to scour the record in order to plead Appellee's arguments for her. See Beecham v. Com., 657 S.W.2d 234, 236 (Ky. 1983) and Phelps v. Louisville Water Co., 103 S.W.3d 46, 53 (Ky.2003). Given the "shotgun approach" of Appellee's complaint in this matter and lack of assertion throughout three years of litigation, it is an untenable burden to require counsel to defend against any and all specious and broad based claims when at no time prior were they properly raised.

VI. CONCLUSION

Appellant, KNOTT COUNTY BOARD OF EDUCATION, respectfully requests that the Court reverse that portion of the attached *opinion affirming in part and reversing in part* that was entered on December 2, 2011 reversing the trial court's entry of summary judgment in favor of the Board regarding Patton's state law retaliation claim under KRS 61.102 that were never raised by Appellee nor addressed by the trial court. Appellants, ROBERT POLLARD, HAROLD COMBS, KIMBERLY KING, LANTRE COMBS, REX SLONE, DENNIS JACOBS, RANDY COMBS, ANNA DIXON, PATRICIA SLONE HACKWORTH, CHARLES JONES, SHARON SMITH, and DIANE HALL, further request that the Court reverse that portion of the opinion reversing the trial court's entry of summary judgment with respect to each of the individually named Appellants due to various misstatements of material fact and law that directly influenced the lower court's opinion. The opinion of the Court of Appeals places unprecedented individual risk and exposure to personal liability of individual site based council (SBDMC) members, including parent members, and individual school board members. For the

reasons set forth above, the Opinion of the Knott Circuit Court which granted summary judgment to Appellants in this matter should have properly been affirmed.

Respectfully submitted,



JONATHAN C. SHAW
PORTER, SCHMITT, BANKS & BALDWIN
327 Main Street, P.O. Drawer 1767
Paintsville, Kentucky 41240-1767
Telephone: (606) 789-3747
Facsimile: (606) 789-9862
ATTORNEY FOR APPELLANTS

APPENDIX

1. Complaint;
2. Verified answers to interrogatories by Ms. Patton;
3. March 18, 2010 Order and Judgment of the Knott Circuit Court Granting Summary Judgment;
4. June 24, 2010 Order of the Knott Circuit Court denying motion to alter, amend, or vacate;
5. Knott County Board of Education Policy 02.422 (School Council Authority SBDMC) 02.42411 (Appeal of SBDMC Decisions); and 03.16 (Grievances);
6. Cited Knott County Central High School SBDM council policies;
7. Reprimand, response, and excuse cited at Brief for Appellee pg. 6 and ROA, Patton deposition, Exhibits 18 - 20;
8. Professional Grievance portion of 2006 agreement between the Knott County Education Association and Knott County Board of Education;
9. Complete Knott County Central High School SBDM council policies in effect during the 2006 / 07 school year;
10. Court's December 2, 2011 Kentucky Court of Appeals to be published Opinion Affirming in part and Reversing in Part;
11. February 2, 2012 Order Denying Petition for Rehearing.