RENDERED: MAY 29, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000830-MR

LOUISE SLATTERY, SUSAN P. QUINLAN, AND JESSICA WATKINS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 11-CI-008055

J. F., INDIVIDUALLY; AND AS MOTHER AND NEXT FRIEND OF A.F. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: The first question presented on this appeal is whether this Court should exercise appellate jurisdiction of interlocutory appeals of denials of motions for reconsideration of prior denials of claims of immunity. We answer in the affirmative.

Next, the issue is whether Appellants are entitled to qualified official immunity for their alleged negligence in the supervision of their students. For the following reasons, we reverse the Jefferson Circuit Court's opinion and order denying Appellants' motion for summary judgment and remand with instructions to enter judgment in favor of Appellants on the ground that qualified official immunity applies and there is no showing of bad faith conduct on the part of Appellants.

I. Factual and Procedural Background

Mother of A.F., a student, alleges that two teachers, Appellants Louise Slattery and Jessica Watkins, and the principal of Foster Traditional Elementary School, Appellant Susan Quinlan, were negligent in the supervision of their students. A.F. maintains that she was regularly bullied by fellow student, S.B., and that Appellants were unresponsive to A.F.'s pleas for help.

There are three specific incidents that occurred between A.F. and S.B. during their third-grade year that essentially form the basis of A.F.'s claim, although Mother alleges that A.F. endured daily torment by S.B. and fellow classmates. First, A.F. reported that S.B., along with another student, banged her head against a projector during class sometime around October 2010. A.F. reported the incident to Slattery who verbally reprimanded both students for their misconduct. Mother contends A.F. suffered a concussion from the altercation; however, there are no medical records supporting Mother's claim. Next, A.F. reported that S.B. slapped her in the face while the two were in the hallway near

the cafeteria. A.F. did not immediately report this incident to her teacher, but instead reported the matter directly to Principal Quinlan the next day. Principal Quinlan verbally reprimanded S.B. There were no witnesses to this incident.

Mother asserts that A.F. complained to her about ongoing issues with S.B. and other students, and instructed A.F. to notify her teacher of any problems. Mother contacted the school's counselor in October 2010 to discuss her concerns about S.B. The counselor relayed the information to Slattery. Slattery contacted Mother to discuss her concerns and to discuss A.F.'s academic and behavioral issues. Mother requested that A.F. be moved to the front of the classroom in an attempt to improve the situation. Mother and Slattery had ongoing disagreements regarding A.F.'s behavior and medication, so Mother requested that A.F. be moved to a different classroom. A.F. was transferred to Watkins's third-grade class during the second half of the school year.

The third incident between A.F. and S.B. occurred on the playground during recess at the end of May 2011. Both Slattery and Watkins permitted their students to use the playground during recess. When students were returning to the school building from the playground at the end of recess, Slattery was informed by another student that S.B. had slapped A.F. in the chest. Slattery questioned A.F., S.B., and other students about the incident. She determined that during a game of kickball, a third student hit A.F. in the head with the ball several times. This caused S.B. to laugh at A.F. A.F. then slapped S.B. who then "karate kicked" A.F. in the chest. Slattery completed a standard discipline referral form as it involved

S.B. and the third student and reported the incident to Principal Quinlan. Principal Quinlan ultimately referred the incident to the Jefferson County Board of Education (JCBE) Compliance and Investigations Office for a review and additional investigation.

Watkins took A.F. to the office to call Mother. Mother instructed A.F. to take the bus home as usual because it was the end of the school day. Thereafter, Mother took A.F. to the hospital where she was diagnosed with a bruised sternum from S.B.'s kick. Mother substantiated this injury with A.F.'s medical records.

JCBE's investigation of the playground incident confirmed that S.B. kicked A.F. in the chest after she slapped him. Watkins did not let A.F. participate in recess for the remainder of the school year because of concerns arising from discussions with Mother. There were no more alleged bullying incidents for A.F.'s third-grade year.

A.F. then reported two incidents of bullying during her fourth-grade year.[1] A.F. claims that S.B. threw tater tots at her in the cafeteria; however, A.F. never reported these incidents to a teacher or administrator. A.F. also claimed that S.B. chased her around a classroom with a pair of scissors for a full ten minutes with a teacher present in the room. A.F. eventually reported the incident to her

[1] Neither Watkins nor Slattery taught A.F. or S.B. during their fourth-grade year. A.F.'s fourth-grade teacher is not a party to this action.

teacher, who then called the school security guard to escort S.B. out of the classroom.

Mother filed this action in Jefferson Circuit Court on December 15, 2011, alleging claims of negligent supervision. Mother further alleged that Appellants were negligent *per se* as they were required to take specific action pursuant to Kentucky Revised Statutes (KRS) 161.180, KRS 158.154, and KRS 158.156, and the Jefferson County Public School's Code of Acceptable Behavior and Discipline (the Code). Appellants answered asserting the affirmative defense of qualified official immunity.

On November 14, 2012, Appellants filed a motion for summary judgment based upon qualified official immunity, immunity under the Paul D. Coverdell Teacher Protection Act of 2001, 20 United States Code Annotated (U.S.C.A.) § 6731, and failure of Mother's negligence *per se* claim as a matter of law.

The circuit court denied Appellants' motion for summary judgment in an opinion and order dated January 30, 2013. The court determined obedience to the statutes cited by Mother as ministerial, and noted the facts of the case were in dispute and best suited to be resolved by a jury. Appellants asked the court to reconsider its denial of summary judgment on February 18, 2013; however, this motion was denied on May 1, 2013. Appellants filed their notice of appeal on May 7, 2013.

II. Standard of Review

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted).

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest,* 807 S.W.2d at 480.

Whether an individual is entitled to official immunity is a question of law reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

III. Analysis

Before addressing the merits of the arguments presented on appeal, we must determine whether the notice of appeal was timely filed so that this Court may exercise appellate jurisdiction over the matter.

Generally, our jurisdiction is restricted to final judgments. *See* CR 54.01. Ordinarily, an appeal from an order denying summary judgment would not be permitted; such an order is regarded as interlocutory in nature because it fails to

adjudicate all of the rights of the parties. *Id.* However, in *Breathitt County Bd. of Educ. v. Prater*, the Kentucky Supreme Court recognized an exception to the final judgment rule, stating "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." 292 S.W.3d 883, 887 (Ky. 2009). The fact that *Prater* authorizes an immediate appeal from such an order does not change its interlocutory character. Summary judgments are especially important in the context of qualified official immunity because the defense "renders one immune not just from liability, but also from suit itself." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010); *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006).

The timeliness of the filing of the notice of appeal depends on whether the denial of a motion to reconsider a previous denial of a claim of immunity should be excepted from the final judgment rule for the same reason *Prater* excepts the original denial of immunity. We cannot see how *Prater's* principles are not equally applicable given its rationale that "entitlement [to qualified official immunity] cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action." *Prater*, 292 S.W.3d at 886.

Mother implied in her brief and expressly stated at oral argument that, by operation of CR 73.02, Appellants forever waived the right to an interlocutory appeal of the circuit court's decision regarding immunity when they failed to file an interlocutory appeal within thirty days from entry on January 30, 2013, of the

original order denying immunity. This reasoning disregards the plenary power of a circuit court to revise and reconsider all interlocutory orders, whether subject to the final judgment rule or excepted from it.

One can easily appreciate circumstances that might cause a party to put the issue of immunity before the trial court more than once. Additional discovery and changes in the law are two such circumstances that readily come to mind. A third is the idea that a judge experiences continuing enlightenment during his or her time on the bench, both generally and within the context of a specific case. All these reasons are why we have a rule, CR 54.02(1), allowing a judge to revise an interlocutory order, even on the same facts and state of the law. Our Supreme Court recently made this point perfectly clear in *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, when it said:

> Until a final judgment is entered, all rulings by a court are interlocutory, and subject to revision. *See* CR 54.02(1) ("[A]ny order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."); . . . *see also Coleman v. Sopher*, 201 W.Va. 588, 499 S.E.2d 592, 609 (1997) ("[a trial] court has plenary power to reconsider, revise, alter, or amend an interlocutory order") (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* § 59.43 [1] (3d ed.1997) (alteration in original)); *Eberle v. Eberle*, 2009 ND 107, 766 N.W.2d 477, 483 (N.D.2009) ("Interlocutory orders . . . may be revised or reconsidered any time before the final order or judgment is entered.").

> Indeed, efficient judicial process mandates that a trial court correct an erroneous ruling before finality when possible. There is an expectation that trial courts will apply the correct law to matters before it. Certainly, if a court believes before finality that it has made an error in the law, it is incumbent upon the court to correct the matter. *Cf. Potter v. Eli Lilly & Co.*, 926 S.W.2d 449, 453 (Ky.1996) ("[T]he trial court has a duty and a right to determine that its judgments are correct and accurately reflect the truth."), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky.2004). To fail to do so strikes at the heart of what it means to get a fair trial in a court of law.

424 S.W.3d 902, 909 (Ky. 2014).

To deny exercising appellate jurisdiction of interlocutory appeals of denials of motions for reconsideration of prior denials of claims of immunity would essentially obliterate the rationale of *Prater* and its progeny that justify making interlocutory orders denying claims of immunity immediately appealable in the first place. *Prater's* principles should be equally applicable to avoid the costs and burdens incurred at any time before finality, in particular, following the trial court's reconsideration of the issue.

There may be concern that allowing an interlocutory appeal here will lead, in future cases, to abuse by the repetitive filing of motions to reconsider. However, like all motions before the circuit courts, motions to reconsider are subject to CR 11 empowering the circuit court to sanction parties and their counsel for bringing motions for any improper purpose. Our circuit judges are not milquetoast. We should not presume any would hesitate to apply CR 11 in exercising authority over his or her own court. In any event, to the extent a circuit

judge does hesitate, it is at his or her own peril and at the sacrifice of his or her own judicial resources.

On the other hand, denying jurisdiction in this circumstance has great potential for unnecessarily wasting substantial judicial resources, costing parties substantial money, and compromising the right of those parties to an efficient resolution of their case. To hold otherwise wagers those resources, costs, and rights on a bet that everything that transpires in the circuit court from the denial of reconsideration until final judgment will not be wasted. However, if we deny jurisdiction now, forcing the parties claiming immunity to wait until finality, every appellate victory based on immunity truly would be Pyrrhic only. In reality, everyone loses. A claimant's victory would be erased and both claimant and the official whose immunity is finally recognized will have needlessly spent time and treasure.

So, the only jurisdictional hurdle to appellate review of an order denying a motion to reconsider a claim of immunity is CR 73.02, requiring the notice of appeal to be filed within 30 days of the order's entry. In this case, that hurdle was cleared. Therefore, this Court does have appellate jurisdiction.

Turning to the merits of the case, Appellants assert they are entitled to qualified official immunity from Mother's claims of negligent supervision and negligence *per se*, and accordingly, their motion for summary judgment should have been granted.

Qualified official immunity is an affirmative defense that protects public officers and employees when sued in their individual capacities "from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (citing 63C Am.Jur.2d, *Public Officers and Employees* § 309 (1997)). Public employees receive the immunity protection if they qualify for it by demonstrating their alleged negligent conduct consisted of "discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) [undertaken] in good faith; and (3) within the scope of the employee's authority." *Yanero*, 65 S.W.3d at 522 (internal citations omitted).

On the other hand, "ministerial acts or functions—for which there are no immunity—are those that require '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.'" *Haney*, 311 S.W.3d at 240 (citing *Yanero*, 65 S.W.3d at 522). Qualified official immunity will not protect one who fails to discharge a ministerial duty.

"In reality, few acts are ever purely discretionary or purely ministerial." *Haney*, 311 S.W.3d at 240. Negligent supervision in the public school setting has been held to be both discretionary and ministerial based upon varying facts and circumstances. *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011); *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003); *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002); *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

With this in mind, "our analysis looks for the *dominant* nature of the act" or function at issue. *Haney*, 311 S.W.3d at 240 (emphasis in original).

Appellants first argue they are immune from Mother's negligent supervision claim because supervising students and responding to accusations of bullying are discretionary functions. Appellants rely mainly on *Turner v. Nelson*, 342 S.W.3d 866 (Ky. 2011), and an unpublished opinion, *Florence v. L.P.*, 2012 WL 162699 (Ky. App. January 20, 2012)(2010–CA–000003–MR, 2010–CA–000004–MR),[2] to support their contention that supervising students is a discretionary function.

In *Turner*, a kindergarten teacher was sued by a student's parents claiming that their child was sexually assaulted by another student at school due to the teacher's negligent supervision. The teacher separated the students upon learning that one had allegedly touched the other inappropriately. The teacher also informed her assistant of the alleged incident and her plan to keep the students apart. The Kentucky Supreme Court held that the mandatory reporting requirement of child abuse in KRS 620.030(1) did not apply to require the teacher to report the alleged abuse of one student by another student unless a parent or other person exercising supervision allowed the abuse or created a risk of abuse. The teacher's actions of separating the students in *Turner* were found to be discretionary, and she was therefore entitled to qualified immunity, as the only

[2] Though this case appears to be factually similar to the case at bar, we decline to make use of it in our consideration of the issues presented. That is, we are not applying CR 76.28(4)(c) to cite *Florence* as persuasive because this case can be decided by relying on published authority.

basis on which the teacher was required to report the alleged abuse was through the use of her own discretion in determining whether there was a reasonable cause to believe a student had been abused.

In the case before us now, for each of the three incidents that occurred between A.F. and S.B. throughout their third-grade school year, S.B. was reprimanded, A.F. was accommodated, or an investigation was conducted. After the incident involving the projector, S.B. was verbally reprimanded by Slattery. When A.F. informed Principal Quinlan about the slapping incident outside the cafeteria, S.B. was again reprimanded. After these two incidents, Mother informed the school counselor about her concerns regarding S.B. in October 2010. The counselor then relayed the information to Slattery. When Slattery became aware of Mother's concerns, she called Mother to address the issues. After their discussion, A.F. was moved to the front of the classroom in an effort to resolve the situation. During the second half of the school year, A.F. transferred into a different third-grade classroom at Mother's request.

There were no reported altercations between A.F. and S.B. for the rest of their third-grade year until the end of May when the kicking incident occurred at recess. This incident was immediately handled by Appellants and was further investigated by Principal Quinlan and the JCBE Compliance and Investigation Office. S.B. was disciplined for his conduct at recess.[3]

[3] There is a disciplinary referral form in the record stating that S.B. received in-school suspension for the behavior involving A.F. at recess on May 25, 2011.

Mother responds that the Kentucky Supreme Court stated in *Turner* that the failure of teachers to supervise their students "in the face of known and recognized misbehavior" was not a discretionary act. *Turner*, 342 S.W.3d at 876. Mother asserts that Appellants completely failed to supervise A.F. and S.B. and there was no meaningful response to A.F.'s complaints.

That Appellants did not witness any of the events transpiring between A.F. and S.B. does not demonstrate they failed in their duty to supervise their students. Although Mother asserts A.F.'s bullying was relentless, the facts reveal only three separate incidents occurred over the course of an entire school year and each of those incidents was of short duration. While there may be legitimate disagreement over the corrective measures taken by Appellants, A.F. testified that Appellants responded to each and discipline was administered each time. A.F. did not miss any school as a result of any of the alleged bullying. It also appears that given the lapse of time from the slapping incident in October 2010 until the kicking incident in May 2011, the responsive measures of Appellants were effective. Appellants used their personal judgment in determining the appropriate discipline for the reported wrongdoing, and therefore, we hold Appellants' conduct in this case to be discretionary. The Court in *Turner* emphasized:

> It is imperative that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom. To do this, they must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions (based on facts not always known) as to what actually happened and ultimately to determine an

> appropriate course of action, which may, at times, involve reporting the conduct of a child to the appropriate authorities. In fact, protection of the discretionary powers of our public officials and employees, exercised in good faith, is the very foundation of our doctrine of "qualified official immunity."

Turner at 876.

Given the nature of the reported disputes between A.F. and S.B., Appellants' reasonable, responsive discipline and other corrective action, and the sentiment conveyed in *Turner*, Appellants' supervision in this case exemplifies the exercise of a discretionary function by the educators involved.

Mother nevertheless contends that Appellants are not entitled to qualified immunity because their supervision was ministerial, being the subject of directives contained in the code of conduct Appellants were required to follow and enforce, particularly, KRS 161.180, as well as the rules promulgated by the Jefferson County Board of Education through its Code of Acceptable Behavior and Discipline. Mother argues that Appellants' failure to comply with these mandated ministerial disciplinary procedures exposes them to liability. We will address them.

Mother contends that Appellants' supervision and response to S.B.'s misconduct was ministerial because according to KRS 161.180(1) "[e]ach teacher and administrator in the public schools shall in accordance with the rules, regulations, and bylaws of the board of education made . . . for the conduct of pupils, hold pupils to a strict account for their conduct on school premises[.]"

Mother asserts that this statute mandates strict obedience to the school's Code of Acceptable Behavior and Discipline, and therefore, enforcement of the Code is a ministerial act.

The mandate of this statute is to hold pupils to a strict account for their behavior. Appellants complied with that mandate by exercising the discretion they deemed appropriate to accomplish that goal. The language used in the Code allows for considerable discretion on the part of teachers and administrators in satisfying the mandate of KRS 161.180(1). In this case, Appellants accomplished this.

The second introductory paragraph of the Code states: "Staff members may use reasonable judgment in how to apply the code, but the code will be enforced fairly and equitably[.]" The Code also provides guidelines for discipline; it expressly states in the Violations/Student Misconduct section on pp. 18-19:

> Disciplinary measures are generally progressive, but with serious offenses, the school staff may initiate a different disciplinary action. School staff will use reasonable discretion in the use of the code as it is applied to the specific facts of each case. They will follow the code in a fair and equitable manner.

The Code additionally provides an overview of the discipline process noting that "[m]ost discipline is handled by teachers in the classroom." A partial list of disciplinary measures for the classroom, school, Central Office, and Board of Education is also included.

Mother suggests that Principal Quinlan violated the Code when she verbally reprimanded S.B. after the slapping incident because verbal reprimand is not listed as an option of Administrator's Disciplinary Measures. She maintains that the Code requires conferences with parents and suspensions as the only permissible consequences. We read this language differently: parent conferences are permissible, but not mandatory, consequences of unacceptable student conduct. Principal Quinlan's response to A.F.'s complaint is consistent with the provisions of the school's Code which expressly requires that school staff "use reasonable discretion in the use of the code as it is applied to the facts of each case." (R. 510-11).

The Code is clear that student misconduct generally will result in classroom or in-school discipline. Also, the Code acknowledges in the Violations/Student Misconduct section that students of different ages and grade levels need different consequences for their behavior, noting that suspension of elementary school students "shall be considered only in exceptional cases."

The following are behavior violations relevant to these facts that result in disciplinary action as outlined in the Code on p. 20:

> Fighting/Striking student – the use of physical violence between two students or the use of violence by a student on another person where there is no major injury as determined by the school administrator (excludes verbal confrontations, threats, intimidation, and other encounters where no injury is intended[.])
>
> Intimidation/Harassment/Interference with staff or student/Bullying/Harassing communications – with intent

> to deliberately place another person in fear of bodily injury or other substantial physical or emotional discomfort (includes sexual harassment, verbal abuse, threatening, bullying, menacing, wanton endangerment, stalking, and harassing communications[.])

The Code itself calls for the use of reasonable judgment in its own application and enforcement as well as in disciplinary action. Appellants responded to all of these incidents reported by A.F. with disciplinary measures Appellants believed reasonable under the circumstances. This is well within Code compliance. Therefore, we disagree with Mother that the Code prescribes ministerial duties in this case as well as with her assertion that Appellants violated the Code by their corrective actions.

Mother also argues that Appellants were negligent *per se* in their supervision of their students due to violation of the mandatory reporting requirements of KRS 158.154 and KRS 158.156. Mother alleges these specific statutes do not allow the Appellants to exercise any discretion in their response to A.F.'s complaints of bullying by S.B. Specifically, Mother contends S.B.'s conduct and A.F.'s injury from the playground incident at recess compelled a report to law enforcement. Appellants argue that a determination of whether the statutes have been invoked requires the exercise of discretion, and further, A.F.'s injury was not of the type the statutes were designed to protect. We agree.

Aside from any duty prescribed by statute, teachers and school administrators have a duty "to take all reasonable steps to prevent foreseeable harm to [their] students." *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 148

(Ky. 2003) (citations omitted). "A negligence *per se* claim is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." *Lewis v. B & R Corp*. 56 S.W.3d 432, 438 (Ky. App. 2001) (quoting *Real Estate Marketing Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994)).

Turning to KRS 158.154, the language used mandates action only by the principal to report certain conduct to law enforcement. The statute states:

> When the principal has a reasonable belief that an act has occurred on school property or at a school-sponsored function involving assault resulting in serious physical injury, … the principal shall immediately report the act to the appropriate local law enforcement agency. For purposes of this section, "school property" means any public school building, bus, public school campus, grounds, recreational area, or athletic field, in the charge of the principal.

KRS 158.154.

A primary rule of statutory construction is to apply the plain meaning of the words used in the statute. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005); KRS 446.080(4). "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001).

The plain language of KRS 158.154 calls for an objective determination of whether an act occurred on school property resulting in a serious physical injury. A factual determination is required for the statute's application. The statute does not require the principal to report every altercation between students to law enforcement. Neither of the children's teachers nor Principal Quinlan witnessed

the incident on the playground at recess. However, several students were questioned in addition to A.F. and S.B. The circumstances under which the kicking incident occurred required Principal Quinlan to exercise her discretion whether the incident between the two third-grade students warranted a report to law enforcement. Clearly, Principal Quinlan determined the altercation was not so serious that law enforcement needed to be notified. She did, however, consider the situation to be worthy of an investigation by the JCBE Compliance and Investigations Office, and she immediately submitted a request for their review. The investigation substantiated A.F.'s claim that S.B. kicked her in the chest on the playground at recess.

Additionally, Watkins examined A.F.'s chest after the scuffle, and there were no visible signs of injury to A.F. A.F. stayed at school and took the bus home as usual. Accordingly, based upon its plain language, KRS 158.154 provides for the use of discretion before any report to law enforcement.

Similarly, KRS 158.156(1) provides that:

> [a]ny employee of a school . . . who knows or has reasonable cause to believe that a school student has been the victim of a violation of any felony offense specified in KRS Chapter 508 committed by another student while on school premises . . . shall immediately cause an oral or written report to be made to the principal of the school attended by the victim. . . . The principal shall file [a written report] with the local school board and the local law enforcement . . . within forty-eight (48) hours of the original report[.]

KRS 158.156(1). Making such a determination certainly requires the exercise of discretion for the same reasons applicable to Principal Quinlan under the previously discussed KRS 158.154. Furthermore, under the facts of this case, it is apparent that after investigating the incident on the playground, Appellants did not have "reasonable cause to believe" that A.F. had been the victim of a felony at the hands of S.B.

As previously noted, Watkins examined A.F. after recess and determined there were no visible signs of injury requiring immediate medical attention, and A.F. finished the school day as usual. Mother did take A.F. to the hospital for medical treatment, and A.F. was diagnosed with a bruised sternum. Nonetheless, the altercation on the playground between the children and resulting injury to A.F. did not rise to the degree of seriousness that would compel Appellants to make a report to law enforcement. A.F., S.B., and several classmates were questioned, Principal Quinlan and parents were notified, JCPS Compliance and Investigations Office reviewed the matter, and S.B. was ultimately disciplined for his misconduct. Appellants' actions were in accordance with the language of KRS 158.154 and KRS 158.156, permitting them to use their reasonable discretion in handling the playground incident between A.F. and S.B.

Once it has been established that the employee has acted within the scope of his/her discretionary authority, "the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith." *Yanero v. Davis*, 65 S.W.3d at 523 (Ky. 2001) (citing

Wegener v. City of Covington, 933 F.2d 390, 392 (6th Cir. 1991), *as modified by*, *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146 (6th Cir. 1995)). Thus, the requisite proof focuses on "bad faith," rather than "good faith."

Mother's arguments suggest that Appellants' bad faith is demonstrated by their continual failure to protect A.F. from S.B.'s torment as well as their inability to recall with specificity certain conversations and interactions with students. This, says Mother, is evidence of an attempt to conceal the bullying.

> [I]n the context of qualified official immunity, 'bad faith' can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

Yanero, 65 S.W.3d at 523, (citing 63C Am. Jur. 2d, *Public Officers and Employees* § 333 (1997)).

Our review of the record indicates there is no basis for concluding that Appellants' conduct violated any right applicable to A.F. or was the product of any willful intent to harm the child.

Because Appellants' actions in this case were performed within their discretionary authority and in good faith, they are entitled to qualified immunity and cannot be held personally liable to Mother's claims of negligent supervision or negligence *per se*.

IV. Conclusion

For the foregoing reasons, the decision of the Jefferson Circuit Court is reversed and remanded with instructions to grant Appellants' motions for summary judgment on the ground that qualified official immunity applies and there is no showing of bad faith conduct on the part of Appellants.

ALL CONCUR.

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