COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2010-SC-0356-DG

DIANNE TURNER — APPELLANT

V.

BROOKE NELSON, INDIVIDUALLY;
AND BROOKE NELSON, AS NEXT FRIEND OF
F. B., A MINOR — APPELLEES

BRIEF OF APPELLANT, DIANNE TURNER

FROM KENTUCKY COURT OF APPEALS
CASE NOS. 2007-CA-000489 and 2008-CA-001588
FAYETTE CIRCUIT COURT NO. 06-CI-00976
HONORABLE SHEILA R. ISAAC, JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing ***Brief of Appellant*** was served by U.S. mail, first-class postage prepaid, on Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; J. Dale Golden, Esq., Timothy C. Feld, Esq., GOLDEN & WALTERS, PLLC, 771 Corporate Drive, Suite 905, Lexington, Kentucky 40503, *Counsel for Appellees*; Guy R. Colson, Esq., Barry M. Miller, Esq., Christina M. Vessels, Esq., FOWLER, MEASLE & BELL, LLP, 300 West Vine Street, Suite 600, Lexington, Kentucky 40507-1660, *Counsel for Kentucky School Boards Insurance Trust*; on this 7th day of January, 2011.

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INTRODUCTION

In this case, a kindergarten teacher appeals a Court of Appeals decision that the child abuse reporting statute, KRS 620.030(1), required her to report to law enforcement an allegation by one female kindergartener that another female kindergartener was "up my butt" despite the fact that the statute by its plain terms only applies where the alleged abuse is by a "parent, guardian or other person exercising custodial control or supervision of the child." KRS 600.020(1). In addition, the teacher appeals the finding that her actions in supervising the students in response to the allegation, including her decision as to whether the facts presented to her constituted abuse as defined in the Kentucky statutes, were ministerial and not discretionary.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

At the beginning of the 2005-06 school year, Appellee F.B., a female minor, was a kindergarten student at Southern Elementary School ("Southern"). Deposition of Brooke Nelson, 25:8-10 (R. 272). Appellant Dianne Turner was F.B.'s kindergarten teacher. Deposition of Dianne Turner, 14:22-25 (R. 292). Ms. Turner had been teaching at Southern since 1990 and had been a kindergarten teacher elsewhere for 10 years before that time. *Id.* at 6:16-19 (R. 290). Ms. Turner had a sterling record; she had never been reprimanded or disciplined in any way. *Id.* at 8:1-4 (R. 291). Appellee Brooke Nelson, F.B.'s mother, believed Ms. Turner to be a good teacher. Nelson Deposition, 28:12-14 (R. 273). To assist Ms. Turner in teaching her kindergarten class, Ms. Turner had a teaching assistant, Betty Ross, with her in the classroom as well as a high school intern. Turner Deposition, 45:23-46:15 (R. 301-2). There were 23 students in Ms. Turner's class.

In Ms. Turner's class, F.B. was an average student. *Id.* at 17:10-16 (R. 295). F.B. was very talkative in class, especially with her friend C.Y., also a five-year-old female. *Id.* at 15:1-7 (R. 293).

Ms. Nelson, F.B.'s mother, called Ms. Turner on November 18, 2005, to report that F.B. told her that C.Y. was "up her butt." Turner Deposition, 35:1-15 (R. 297). Based upon Ms. Nelson's description of the incident to her in that phone call, Ms. Turner "thought [C.Y.] had given [F.B.] a wedgie . . ." *Id.* at 36:4-11 (R. 298). Ms. Turner also testified that she thought C.Y. had given F.B. a wedgie because F.B. often wore low cut jeans with her underwear showing in the back. *Id.* She thought that C.Y. had touched

F.B.'s underwear. *Id.* During the November 18 phone call, Ms. Nelson was not upset and appeared to understand the situation. *Id.* at 45:5-11 (R. 301).

Following the November 18 phone call from Ms. Nelson, Ms. Turner took appropriate steps to address the alleged inappropriate behavior with C.Y. Ms. Turner talked to C.Y. and explained to her that such alleged behavior was wrong:

> Q. Well, did you talk to [C.Y.]?
> A. Yes.
> Q. What'd you say to her?
> A. That we don't do those kind of things.
> Q. What kind of things?
> A. Touching other people and especially touching other people on the bottom.

Turner Deposition, 43:11-17 (R. 299). Additionally, Ms. Turner decided to separate the girls during school in an attempt to avoid future problems. *Id.* at 51:9-21 (R. 305). As part of that effort, Ms. Turner drafted a seating chart separating the girls' seats and instituted a policy that F.B. and C.Y. should be separated in and out of the classroom. *Id.* at 44:18-20; 45:15-22 (R. 300-1). Ms. Turner also informed Ms. Ross of the incident and of the plan to keep F.B. and C.Y. apart. *Id.* at 48:1-10; 50:14-22 (R. 303-4); Deposition of Betty Ross, 29:8-13 (R. 316).

On November 21, 2005, F.B. herself reported to Ms. Turner that C.Y. had been "up her butt."[1] Ms. Turner described learning of the incident as follows:

> It was supposed to have happened in reading group, but I didn't hear about it till after lunch. We were lining up for the bathroom and [F.B.] said,

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[1] Appellees have stated that because F.B. said on three separate occasions that C.Y. was "up her butt," there must have been three separate occasions of alleged improper touching. Appellant does not concede that any improper touching actually occurred, much less that there were three separate incidents of same. F.B.'s mother has testified that F.B. made three separate reports that another student was "up her butt"--two reports to her mother that another girl, C.Y., was "up her butt," and one report to her aunt that the girl touched her privates and her bottom. Turner Deposition, 35:1-15 (R. 297); 57:14-58:4 (R. 306-7); Nelson Deposition, 38:8-10 (R. 279). These three reports do not necessarily constitute evidence of three separate incidents.

> 'Ms. Turner, [C.Y.] was up my butt.' And so I got [C.Y.] and we went in there, and I said, '[F.B.] says you're up her butt, whatever that is, and did you do this?' And she said, 'Yeah.' And I said, 'Well, what is this? Is this a game you play, or does someone play with you at home?' And she said, 'It's a game we play at home.' So then I said, 'Okay.' And I told Ms. Ross to watch the kids, and I took [C.Y.] to try to find everybody [the principal and counselor], and I couldn't find Ms. Collins or Ms. Lindsey, and -- and so that's kind of where it ended.

Turner Deposition, 57:14-58:4 (R. 306-7). ***No*** other reports of inappropriate touching were made to Ms. Turner. This point is important because she is the only Defendant remaining in this action.

Ms. Nelson testified that F.B. described the incident to Ms. Nelson's sister who was watching F.B. on the evening of November 21. Nelson Deposition, 36:18-37:14 (R. 277-78). In describing the incident to Ms. Nelson, Ms. Nelson's sister recounted that F.B. told her that C.Y. had touched her privates and "butt." *Id.* at 38:8-10 (R. 279).

In response, rather than contacting Ms. Turner to find out what had happened on November 21, Ms. Nelson contacted the school principal, Frieda Collins, on November 22. *Id.* at 39:11-13 (R. 280). In response to Ms. Nelson's phone call, Ms. Collins indicated that she would look into the matter immediately, which she did. *Id.* at 39:17-23 (R. 280). Ms. Collins removed both girls from class and took them to her office so that they could tell her what happened. Collins Deposition, 19:8-18 (R. 320). Ms. Collins learned that C.Y. had "accidentally hit [F.B.] in between the legs, but there was not a – an intentional reaching over and touching [F.B.] on her vagina." *Id.* at 27:13-21 (R. 321). Ms. Collins testified that the girls described a game in which one student would pull the waistband on the other student's underwear or pants and yell, "Up your butt!" Moreover, the two girls told Ms. Collins that C.Y. did *not* "anally violate" F.B. *Id.* at 31:3-10 (R. 322). They told her, "That did not happen." *Id.* at 31:8-10 (R. 322). Ms. Collins called

Ms. Nelson back that same day to let her know that she had learned the facts and that she was going to continue her investigation. Nelson Deposition, 39:24-40:8 (R. 280-81).

Appellees allege that another inappropriate touching incident occurred between F.B. and C.Y. on November 22. That day, according to Ms. Nelson, the following purportedly occurred: "the little girl [C.Y.] had rubbed and touched and pinched [F.B.'s] nipples and anally and vaginally violated [F.B.]. And then [F.B.] said that [C.Y.] pushed her into a table, and [F.B.] had bruising on her abdomen and scratches on her face." *Id.* at 43:21-44:1 (R. 282). All of these actions supposedly occurred in the classroom. *Id.* at 44:9-10 (R. 283). Ms. Nelson later admitted that the scratches and pain F.B. felt in her abdomen were not related to any alleged inappropriate touching. Incident Report, p. 3 (R. 348). Ms. Nelson did not report this incident to Ms. Turner. She came to the school to meet with Ms. Collins that day and reported it to the school and to law enforcement which was present at the school on another matter. That night, Ms. Nelson took F.B. to the University of Kentucky Hospital's emergency room for a medical examination. Nelson Deposition, 45:6-16 (R. 284). However, the doctors found no medical evidence that F.B. had been vaginally or anally violated. *Id.* at 46:8-11 (R. 285). The Cabinet for Families and Children began an investigation of the allegation which was ultimately unsubstantiated.[2]

On March 3, 2006, Appellees filed this case as a bad faith claim against the Fayette County Board of Education's insurance carrier, the Kentucky School Boards

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[2] At the Court of Appeals, Appellees argued that F.B. was "repeatedly penetrated vaginally and anally." This allegation came only from Appellees' attorneys later in this case and not from any evidence presented. In fact, F.B. told her principal that C.Y. did not anally violate her. Collins Deposition, 31:3-10 (R. 322). Both F.B.'s mother and the teacher, Ms. Turner, testified that F.B. herself reported that another girl was "up her butt." The medical evidence in the case demonstrated that there was in fact no vaginal or anal penetration. Nelson Deposition, 46:8-11 (R. 285).

Insurance Trust ("KSBIT"). Complaint (R. 1-7). The Fayette Circuit Court dismissed the claim against KSBIT without prejudice as the underlying tort claim had not been filed, settled, or adjudicated. Order (R. 84-5).

On or about April 14, 2006, after the Circuit Court's ruling but before an order was entered, Appellees moved to join the Fayette County Board of Education ("the Board"), Fayette County Public Schools and Ms. Turner as parties to the case and amend the Complaint to add the following tort claims: Ms. Turner was negligent by failing to report the alleged bad acts and failing to take remedial action to ensure that no further acts occurred; Ms. Turner violated KRS 620.030(1) by failing to report the alleged incidents to law enforcement; the Board was vicariously liable for the actions and inactions of Ms. Turner; and the conduct of Ms. Turner constituted the tort of outrage. Amended Complaint (R. 86-98).

On January 19, 2007, the Board, Fayette County Public Schools and Ms. Turner filed a Motion for Summary Judgment on the following bases: (1) all of Appellees' claims against the Board were barred by the doctrine of governmental immunity; (2) the Board could not be held vicariously liable for Ms. Turner's alleged acts or omissions; (3) Ms. Turner was protected from tort liability by the doctrine of qualified official immunity because her complained-of actions and omissions were within the scope of her discretionary authority and were not taken in bad faith; (4) the facts of the case did not constitute a violation of KRS 620.030; (5) Appellees failed to state a claim of outrage; and (6) Appellees were not entitled to punitive damages. Motion for Summary Judgment (R. 245-364).

At a hearing on the Motion, the Fayette Circuit Court, Judge Sheila Isaac presiding, held as follows: (1) the claims against the Board are barred by the doctrine of governmental immunity, and the Board cannot be held vicariously liable for the actions or inactions of Ms. Turner; (2) Ms. Turner is entitled to qualified official immunity from the negligence claim asserted against her as her decision in determining whether the facts in this case constituted abuse was discretionary in nature; (3) Appellees do not have a private cause of action for violation of KRS 620.030, and Ms. Turner is not liable for violation of KRS 620.030 as the facts of the case do not meet the requirements set forth under the statute; and (4) the facts of the case do not satisfy the elements of the tort of outrage as defined by Kentucky law. (VR No. 22-7-07-VCR-CD-7: 2/2/07 1:21:36-01:21:26).

Shortly thereafter, KSBIT filed a Motion to Dismiss on the basis that Appellees could not establish their bad faith claim against it because the underlying case had been dismissed upon a finding of no liability. Motion to Dismiss (R. 400-2). The Fayette Circuit Court held a hearing on the Motion to Dismiss on February 16, 2007. (VR No. 22-7-07-VCR-CD-12: 2/16/07 00:26:53-00:29:01). At that hearing, Judge Isaac dismissed the bad faith claims against KSBIT holding that pursuant to the law of this Commonwealth, Appellees must first prove that KSBIT is obligated to pay the underlying claim under the terms of the policy, and they were unable to do so given the finding of no liability in the underlying tort claim. On March 1, 2007, Judge Isaac entered a Judgment and Order incorporating her prior rulings and dismissing all

Defendants with prejudice. Judgment and Order (R. 435-38), Appendix Tab 4. Appellees appealed the Judgment and Order.[3]

The Court of Appeals issued an Opinion on June 6, 2008, affirming in part, vacating and remanding in part, the Judgment and Order of the trial court. Opinion (R. 457-75), Appendix Tab 3. In the Opinion, Judge Denise Clayton stated that the Fayette Circuit Court did not provide enough analysis as to how it reached the decision that Ms. Turner's actions were discretionary. The Court remanded the case back to the trial court for an explanation of how it reached its decision that Ms. Turner was entitled to qualified official immunity and a determination of the applicability of KRS 620.030. The Court of Appeals affirmed the trial court's dismissal of Appellees' outrageous conduct claim.[4] Finally, the Court of Appeals found that because there was no finding of liability on the underlying negligence claim, "the question of KSBIT's obligation to pay the claim cannot be adjudicated as a matter of law." Opinion, p. 15 (R. 471), Appendix Tab 3.

On remand, Judge Isaac issued an Order in which she outlined the reasons behind her finding that Ms. Turner was entitled to qualified official immunity in this case. First, she quoted the language of the reporting statute and noted that the reporting requirement applies only where a person knows or has reason to know that sexual abuse has occurred. She stated:

> It is clear from this language that the mandatory reporting requirement applies only when a person 'knows' or has 'reasonable cause to believe' that a child has been abused....The legislature could have required reporting on a mere allegation or statement, but the standard is clearly

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[3] In the appeal, Appellees did not challenge the Fayette Circuit Court's ruling that the Fayette County Board of Education was entitled to governmental immunity from the claims asserted against it and that it could not be found vicariously liable for the actions or inactions of Ms. Turner. That portion of the Circuit Court's decision is therefore final.

[4] Appellees have not challenged the dismissal of the outrageous conduct claim on appeal.

> higher... There is no claim in this case that Turner witnessed F.B. being abused or had any personal knowledge that F.B. was abused. Her only information about the event alleged came from what she was told by two five-year-old children. There appear to be no other witnesses to the alleged events. These circumstances required Turner to make a judgment about what may have happened and respond appropriately.

Order, p. 2 (R. 528), Appendix Tab 2. Judge Isaac next found that a determination of a belief or reasonable cause to believe that sexual abuse has occurred is discretionary. She stated:

> ***Since Turner did not have actual or personal knowledge of the events alleged, the only other basis upon which she was required to make a report would be the development of a 'reasonable cause to believe' that one of the children had been abused.*** Making such a determination clearly involves the exercise of discretion....This requires that Turner make reasonable inquiry into the facts, weighing the credibility of each child and then using her judgment and experience of a teacher of kindergarten level students, to reach a decision as to whether there was reasonable cause to believe that sexual abuse had occurred.

Order, p. 3 (emphasis added) (R. 529), Appendix Tab 2.

Judge Isaac concluded that "[t]he very purpose of the doctrine of qualified official immunity is to protect government officials exercising discretion from second-guessing of their good faith decisions made in difficult situations such as this." Order, p. 2 (R. 528), Appendix Tab 2. The Fayette Circuit Court properly found that Ms. Turner is entitled to qualified official immunity from the claims that she was negligent and in violation of KRS 620.030 for failing to report the allegations made in this case. Appellees again appealed.[5]

On April 30, 2010, the Court of Appeals issued a 2-1 Opinion reversing the Order of the trial court. Judge Janet Stumbo wrote the opinion and found that Ms. Turner's

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[5] On appeal, Appellees listed KSBIT as a party to the appeal, but they did not challenge the dismissal of KSBIT in their brief. As a result, KSBIT filed a Motion to Dismiss the Appeal which the Court of Appeals passed to the panel hearing the merits of the case. The panel denied the Motion.

decision as to whether the facts in this case constituted "abuse" as defined in the statutes was ministerial and not discretionary, and therefore Ms. Turner was not entitled to qualified official immunity. Judge Kelly Thompson wrote a dissent in which he stated that "the majority's opinion does nothing to rectify the disturbing increase in the deplorable crime of child sexual abuse but only subjects a teacher, who acted reasonably under the circumstances, to liability premised on a misinterpretation of the law." Opinion, p. 14, Appendix Tab 1. Judge Thompson noted that the majority "ignores the explicit statutory language" defining abuse as committed by a person exercising supervisory control and "holds that a five-year-old child is mentally and legally capable of committing abuse. The flaws in its reasoning are evident." Opinion, p. 15, Appendix Tab 1.

Ms. Turner filed a Motion for Discretionary Review which was granted by this Court by Order of November 10, 2010.

For the reasons set forth *infra*, this Court should affirm the March 1, 2007 and July 23, 2008 Orders of the Fayette Circuit Court and hold that Ms. Turner is entitled to summary judgment.

ARGUMENT

I. KRS 620.030(1) Does Not Apply To This Case, And That Statute Does Not Provide For A Private Cause of Action.

Appellees allege that Ms. Turner violated KRS 620.030(1), "Duty to Report Dependence, Neglect, or Abuse," by failing to report the alleged incidents to law enforcement. Appellees have no valid KRS 620.030(1) claim against Ms. Turner because: (1) "abused" child is specifically defined in the statutory law, and the facts of

this case do not meet that definition; and (2) KRS 620.030(1) does not create a private cause of action for an alleged violation of the reporting statute.

A. No Reportable Abuse Was Alleged In This Case, And Therefore Ms. Turner Cannot Be Held Liable For Failing To Report Same.

First, Appellees' KRS 620.030(1) claim fails because what was alleged in this case does not meet the required definition of "abuse" within the statutory law. KRS 620.030(1) states, "[a]ny person who knows or has reasonable cause to believe that a child is dependent, neglected or *abused* shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police . . ." (emphasis added). Appellees claim that Ms. Turner violated this statute by failing to report the facts relayed to her. For the purposes of Chapter 620, the definition of an "**[a]bused** or neglected child" is:

> a child whose health or welfare is harmed or threatened with harm when ***his parent, guardian, or other person exercising custodial control or supervision of the child***:
>
> (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
> . . . . . .
>
> (e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
>
> (f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child . . .

KRS 600.020(1) (emphasis added).

A considered examination of the above-cited statutory provisions establishes that the facts relayed to Ms. Turner by Ms. Nelson and F.B. do not constitute reportable abuse as a matter of law. As evidenced by the bare face of the Amended Complaint, the complained-of abuse was not done by F.B.'s "parent, guardian, or other person exercising custodial control or supervision" of F.B. In fact, the Appellees have specifically alleged that the abuse was done "by another student." Amended Complaint (R. 87). Deposition testimony has confirmed that the alleged perpetrator was a five-year-old, female kindergarten student in F.B.'s class. Under the plain language of the statute, an "abused" child is not a child who is allegedly abused by another student, much less a student who is also a minor. Consequently, under the terms and definitions of KRS 620.030(1) and 600.020, there was no reportable abuse in this case.

Appellees claim that Ms. Turner should be held liable for violating KRS 620.030(1) by failing to report the incident to law enforcement even though the alleged perpetrator in this case, a female kindergarten student in F.B.'s class, is not included in the definition of abuse, dependency, neglect or sexual abuse in the statutes. In the previous appeal, Appellees based their argument on the fact that KRS 620.030(2) contains a provision that *the Cabinet* is required to report to the proper authorities if the Cabinet receives a report involving a perpetrator who is someone other than a parent, guardian or person exercising custodial control or supervision. This portion of the statute specifically sets forth the duty of *the Cabinet* in situations in which the report is made about a perpetrator who is someone other than the caretaker. The statute specifically mentions this situation with regard to the Cabinet, but not with regard to the general duty

of "any person." The courts must interpret the statute as written and cannot add or imply language which is not contained in the statute.

As set forth definitively in the law of this Commonwealth, courts "are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000), citing *Beckham v. Bd. of Educ.*, 873 S.W.2d 575, 577 (Ky. 1994). The General Assembly has expressly defined "abused or neglected child" as one who is harmed or threatened by a parent, guardian or other person exercising custodial or supervisory control. The courts cannot add language to the statute. A court "is not permitted to redefine the meaning of a word in a statute when the General Assembly has already expressly defined the word." *E. B. Griffin v. City of Robards*, 990 S.W.2d 634, 638 (Ky. 1999).

As stated by the Kentucky Supreme Court, "[t]he language of KRS 620.030(1) is clear and unambiguous." *Com. v. Allen*, 980 S.W.2d 278, 281 (Ky. 1998). Rather than reinventing the law as the Appellees would promote, a court "must refer to 'the words used in enacting the statute rather than surmising what may have been intended but was not expressed.'" *Id.* at 280, quoting *Flying J. Travel Plaza v. Com.*, 928 S.W.2d 344, 347 (Ky. 1996).

Other states with similar reporting statute requirements define reportable "abuse" in terms similar to those used in the Kentucky statutes. As will be evident, none of the definitions includes any alleged "abuse" by a minor. For example:[6]

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[6] This listing is not meant to be exhaustive of the states with similar child abuse definitions but merely an illustration that Kentucky's definition of "abuse" is similar to other states.

1. California defines "abuse," "harm," and "neglect" in terms of the child's parent or guardian: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child *by the child's parent or guardian* . . . ." Cal. Welf. & Inst. Code § 300(a) (emphasis added);

2. Georgia's definition of "child abuse" is a "physical injury or death inflicted upon a child *by a parent or caretaker thereof* . . ." Ga. Code Ann. § 19-7-5(b)(3)(a) (emphasis added);

3. Illinois defines an "abused child" as "a child whose *parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent*: (a) inflicts, causes to be inflicted, or allows to be inflicted upon such child physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function . . . ." 325 Ill. Comp. Stat. 5/3 (emphasis added);

4. Indiana defines "abuse" in terms of a child in need of services when "the child's physical or mental health is seriously endangered due to injury by the act or omission of the *child's parent, guardian, or custodian* . . . ." Ind. Code § 31-34-1-2 (emphasis added);

5. Maryland defines "abuse" in its child abuse and neglect statutes as "the physical or mental injury of a child *by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member* . . . or sexual abuse of a child." Md. Code Ann., Fam. Law, § 5-701(b)(1) and (b)(2) (emphasis added);

6. Massachusetts provides the following definition of "abuse" in its regulations: "the non-accidental commission of any act *by a caretaker* upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the laws of the Commonwealth or any sexual contact *between a caretaker* and a child under the care of that individual." Mass. Regs. Code tit. 110 § 2.00 (emphasis added);

7. Missouri's child protection statutes define abuse as "any physical injury, sexual abuse, or emotional abuse inflicted on a child . . . *by those responsible for the child's care, custody, and control* . . ." Mo. Rev. Stat. § 210.110(1) (emphasis added);

8. New Mexico defines "abused child" as a child "who has suffered or who is at risk of suffering serious harm because of the action or inaction of the *child's parent, guardian or custodian* . . . ." N.M. Stat. Ann. § 32A-4-2 (emphasis added);

9. Rhode Island defines an "abused and/or neglected child" as "a child whose physical or mental health or welfare is harmed or threatened with harm *when his or her parent or other person responsible for his or her welfare*: (i) Inflicts or allows to be inflicted upon the child physical or mental injury, including excessive corporal punishment . . . ." R.I. Gen. Laws § 40-11-2 (emphasis added); and

10. South Dakota defines "abused or neglected child" as "a child: (1) Whose *parent, guardian, or custodian* has abandoned the child or has subjected the child to mistreatment or abuse . . . ." S.D. Codified Laws § 26-8A-2 (emphasis added).

In addition, in order for the statutory duty to report to attach, an individual must have reasonable cause to believe that reportable abuse under KRS 600.020(1), including sexual abuse or sexual exploitation, has occurred. Even if the student [C.Y.] who

allegedly abused F.B. was an identified potential abuser under the Kentucky reporting statute, the complained-of actions were not "sexual abuse." Sexual abuse is statutorily-defined as follows: "'Sexual abuse' includes, but is not necessarily limited to, any contacts or interactions in which *the parent, guardian, or other person having custodial control or supervision of the child or responsibility for his welfare*, uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person." KRS 600.020(54) (emphasis added). Here, there was no contact or interaction initiated by a parent, guardian, or control person. That issue aside, there is absolutely no allegation, much less evidence, that F.B. was "used" for the sexual stimulation of any person, including C.Y. Consequently, there was no reportable sexual abuse of F.B. in this case.

In addition to "sexual abuse," reportable abuse under KRS 600.020(1)(e) also includes "sexual exploitation." There was also no "sexual exploitation" of F.B. in this case. Sexual exploitation is defined as:

> a situation in which *a parent, guardian, or other person having custodial control or supervision of a child or responsible for his welfare*, allows, permits, or encourages the child to engage in an act which constitutes prostitution under Kentucky law; *or a parent, guardian, or other person having custodial control or supervision of a child or responsible for his welfare*, allows, permits, or encourages the child to engage in an act of obscene or pornographic photographing, filming, or depicting of a child as provided for under Kentucky law.

KRS 600.020(55) (emphasis added). Based on the facts of this case, no sexual exploitation of F.B. occurred. All of these statutory provisions are consistent in that they apply to a situation in which a parent, guardian or person having custodial control or supervision has abused a child. This is not the factual situation which was described to Ms. Turner.

Moreover, courts have recognized that in the case of alleged sexual abuse between two minor children, a minor cannot commit sexual abuse. While Appellant knows of no reported case in Kentucky that has specifically addressed this issue, other states analyzing their own similar reporting statues have determined that the alleged abuse in this case falls outside of both the statutory definitions of, and the traditional notions of, child abuse:

> Under section 232.68(2), "child abuse" or "abuse" is defined six ways. However, each definition not only describes some form of harm to a child, but also requires the harm to result from the acts or omissions of a person responsible for the care of the child. Thus, although "[t]he commission of a sexual offense with or to a child," for example, comprises one of the definitions of "child abuse" or "abuse," the definition also requires the offense to be committed "as a result of the acts or omissions of the person responsible for the care of the child." *If the sexual abuse is committed as a result of the acts of a non-care provider, it is outside the definition of "child abuse" or "abuse" for purposes of the reporting provisions under chapter 232.* Thus, these definitions instruct us that child abuse does not include injuries perpetrated against children by non-care providers. This is consistent with the traditional notion of what constitutes child abuse.

State v. Anderson, 636 N.W.2d 26, 33-34 (Iowa 2001) (internal citations omitted) (emphasis added).

A recent case out of the District of Columbia provides a case directly on-point for the Court's guidance--*Hargrove v. Dist. of Columbia*, 5 A.3d 632 (D.C. 2010). In *Hargrove*, a principal and vice-principal appealed their convictions under the District of Columbia's child abuse reporting statute for "failing to report suspected child abuse after a student's parents complained to them that their daughter had been molested at school by other students." *Id.* at 632. The complaint was that the parents' daughter, a preschool student, had been molested in a school bathroom by four of her preschool classmates who allegedly put their fingers in the daughter's vagina. *Id.* at 633. In response to the

parents' complaint, which had also been made to the police and child services, the Defendants conducted an investigation which included questioning the accused preschool students and their parents. *Id.* When the Defendants determined that the accusations were not credible, they closed the investigation and did not make a report to the local police or child services. *Id.* The Defendants were subsequently charged with and convicted of violating the District of Columbia's reporting statute, D.C. Code § 4-1321.02(a).[7] *Id.*

The District of Columbia Court of Appeals reversed the Defendants' convictions. *Id.* at 638. In doing so, the Court of Appeals described the issue on appeal, its ruling, and its reasoning as follows:

> At issue is the meaning of the language in D.C.Code § 4-1321.02(a) describing the child whose maltreatment must be reported: "a mentally or physically abused or neglected child, as defined in § 16-2301(9)." The parties disagree over how the two parts of this description relate to each other. Appellants argue that the phrase "as defined in § 16-2301(9)" modifies the preceding phrase, "a mentally or physically abused or neglected child," in its entirety, and hence that the statute requires a report only in cases of abuse or neglect involving caretaker malfeasance. The District argues that the reference to § 16-2301(9) defines only the term "neglected child" in the first phrase, and that a child may be "abused" within the meaning of that phrase even if no caretaker malfeasance is implicated. We conclude that appellants' reading of the statute is the correct one.
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> **********
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> The District has not advanced, nor have we found, any legislative history casting doubt on what we take to be the Council's consistent view from 2002 to 2007 that § 4-1321.02(a) imposes no reporting obligation with respect to non-caretaker malfeasance.

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[7] "(a) Notwithstanding § 14-307, any person specified in subsection (b) of this section who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity has been or is in immediate danger of being a mentally or physically abused or neglected child, as defined in § 16-2301(9), shall immediately report or have a report made of such knowledge or suspicion to either the Metropolitan Police Department of the District of Columbia or the Child and Family Services Agency." D.C. Code § 4-1321.02(a).

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> We conclude that the mandatory reporting statute means just what it says. Section 4-1321.02(a) imposes no reporting requirement in the absence of reasonable cause to suspect caretaker malfeasance in connection with the abuse or neglect of a child. Because appellants had no reason to suspect such malfeasance on the part of I.S.'s parents or caretakers in the present case, we vacate their convictions.

Id. at 634, 637-638.

The *Hargrove* decision should be very instructive to this Court. Factually, *Hargrove* and the present case share the same reporting issue: a school official's duty to report allegations of sexual abuse of a minor by another minor. In both cases, the subject school officials conducted an appropriate investigation and concluded that the allegations of sexual abuse did not have merit and did not rise to the level of reportable abuse. Legally, in both cases, the language of the applicable reporting statutes, including the governing statutory definitions of "abuse," pertained to a child's caretakers, not to other minor children. Accordingly, like the *Hargrove* court and based on the same reasoning, this Court should rule that based on the facts of this case and the language of KRS 620.030, as defined in KRS 600.020, Ms. Turner did not violate Kentucky's mandatory reporting requirements.

Furthermore, other courts in states with similar reporting statutes have gone even farther by plainly ruling that sexual contact between minors does not constitute reportable abuse. For example, in a case involving allegations of sexual abuse of four minors by another minor, the Illinois Court of Appeals ruled that a suit based upon the sexual abuse of a minor by another minor failed to state a claim:

> [T]he plaintiffs have failed to state a claim under the Act. The Act requires that subject individuals who have "reasonable cause to believe a child

> known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the [DCFS]." 325 ILCS 5/4 (West 2002). An abused child is defined by the Act as a:
>
> "child whose parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent * * * (c) commits or allows to be committed any sex offense against such child, as such sex offenses are defined in the Criminal Code of 1961, as amended, and extending those definitions of sex offenses to include children under 18 years of age." 325 ILCS 5/3 (West 2002).
>
> Initially, we note that the children in this case do not fall within the statutory definition of "abused children." There is no allegation that a parent or anyone else responsible for the children's welfare allowed the abuse to occur. This alone renders the Act inapplicable.

Doe 1 ex rel. Tanya S. v. N. Cent. Behavioral Health Sys., Inc., 816 N.E.2d 4, 8 (Ill. App. Ct. 2004).

Other state courts have ruled similarly. The Michigan courts, analyzing whether sexual contact between two minor children required a report to Michigan's Family Independence Agency under that state's reporting statute, ruled that "the definition of 'child abuse' means that mandated reporters are only required to report child abuse-which includes nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment-when the suspected perpetrator is a parent, legal guardian, teacher, teacher's aide or other person responsible for the child's health and welfare." *People v. Beardsley*, 688 N.W.2d 304, 308 (Mich. App. 2004). Consequently, the court affirmed the lower court's finding that the "underlying incident of sexual contact between the two children did not constitute reportable child abuse because the sexual act was not perpetrated by one of the persons [statutorily responsible for a child's welfare]." *Id.* at 305. Louisiana courts have stated that when the alleged failure to report abuse involves

alleged child abuse by another child, the reporting statute does not support a claim for relief since the statute "requires reporting of child abuse or neglect by a person responsible for a child's care." *Morris v. Canipe*, 528 So.2d 659, 661 (La. App. 1988).

Finally, no law enforcement agency or other report-receiving agency would initiate a charge based on the facts of this case because C.Y. was legally incapable of committing a criminal act of abuse. In Kentucky, "[t]he arbitrary age below which a child is incapable of committing a crime is seven." *Thomas v. Com.*, 300 Ky. 480, 189 S.W.2d 686, 687 (1945); *see also*, *Davis v. Com.*, 967 S.W.2d 574, 581 (Ky. 1998). At the time of the November 2005 alleged incidents, C.Y. was only five years old. Incident Report, p. 1 (R. 346). Thus, under Kentucky law, she was legally incapable of committing any criminal abuse of F.B.

B. The Court Of Appeals Opinion Completely Omits Application Of The Statutory Framework Of KRS Chapter 620.

KRS 600.020(1) specifically defines "abused or neglected child" and states that this definition applies to all KRS Chapters 600 to 645 "unless the context otherwise requires." KRS 600.020. Despite this definition, the Court of Appeals does not address or apply the statutory definition of "abused or neglected child" in any place in its decision interpreting KRS 620.030(1), "Duty to report dependency, neglect, or abuse." It is a fundamental rule of statutory construction that statutes *in pari materia* should be read and interpreted together to give consistent meaning to all parts of the legislation. *Pendennis Club v. Alcoholic Beverage Control Bd.*, 287 Ky. 49, 151 S.W.2d 438, 440 (1941). As stated by the Kentucky courts, a court "must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." *Floyd County Bd. of Educ. v. Ratliff, Ky.*, 955 S.W.2d 921, 925 (Ky. 1997). Furthermore, '[w]e construe

statutes within their context and strive to give consistent meaning to related statutory provisions.'" *Manies v. Croan*, 977 S.W.2d 22, 23 (Ky. App. 1998), citing *Combs v. Hubb Coal Corp.*, 934 S.W.2d 250 (Ky. 1996); *Rogers v. Fiscal Court of Jefferson County*, 48 S.W.3d 28, 31 (Ky. App. 2001). Contrary to this basic tenet of the law, the Court of Appeals interpreted the reporting statute, KRS 620.030, in total disregard of the statutory definition of "abused child" set forth in KRS 600.020 which leads to a misinterpretation of the law.

The reporting statute requires an individual to report to law enforcement or other appropriate state agency when that person "knows or has reasonable cause to believe that a child is dependent, neglected or abused." KRS 620.030(1). In his dissent, Judge Thompson notes that when the reporting statute is "read in conjunction with the definition of 'dependent, neglected or abused' in KRS 600.020(1), it is incontrovertible that the legislature intended to facilitate the reporting of abuse against a child by a 'parent, guardian, or other person exercising custodial control or supervision of the child'." Opinion, p. 15 (J. Thompson dissenting), Appendix Tab 1. It is undisputed that those are not the facts presented in this case. As stated by Judge Thompson, "the five-year-old kindergarten student was not in a supervisory capacity over her classmate. Moreover, a child under the age of seven is conclusively presumed incapable of criminal intent. *See Davis v. Com.*, 967 S.W.2d 574, 581 (Ky. 1998). Finally, a five-year-old child is incapable of acting with the intent of sexual gratification." Opinion, p. 15 (J. Thompson dissenting), Appendix Tab 1. The General Assembly clearly intended for KRS 600.020 to apply to KRS 620.030. Indeed KRS 600.020 is titled, "Definitions for KRS Chapters 600 to 645." The Court of Appeals' Opinion cannot stand as it

misinterprets KRS 620.030(1) contrary to the statutory definition contained elsewhere in the statutes.

C. Appellees Have No Private Cause Of Action Against Ms. Turner For Violation Of KRS 620.030(1).

Appellees' KRS 620.030 claim against Ms. Turner fails because the statute does not provide a private cause of action. This Court has acknowledged that another similar reporting statute only creates "a general duty owed to the public at large," not a specific duty to identifiable persons. *Bramble v. Graham*, No. 2003-CA-001755-MR, 2004 WL 2151071, 1-2 (Ky. App. Sept. 24, 2004) (unpublished). This Court held that the reporting statute in that case contained "no statutory authority *for* imposing liability to the victims for the failure to report." *Id.* (emphasis in original). Similarly, KRS 620.030(1) does not create a special duty to a specifically-identified person, and therefore it does not provide for a private cause of action. *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995). As a result, Ms. Turner is not liable to the Appellees under KRS 620.030(1).

Such a ruling would place Kentucky with the vast majority of states with similar reporting requirements and which have already considered and ruled on the question of whether a reporting statute created an implied private cause of action. The courts in other states have ruled that the child abuse reporting statute does not provide an implied private cause of action to a plaintiff for a reporter's failure to comply with the statute. *See, e.g.*, *Doe v. D'Agostino*, 367 F.Supp.2d 157, 176 (D. Mass. 2005) (applying Massachusetts law); *Doe v. Nev.*, 356 F. Supp.2d 1123, 1125 (D. Nev. 2004) (applying Nevada law); *C.B. v. Bobo*, 659 So.2d 98, 102 (Ala. 1995); *Reece v. Turner*, 643 S.E.2d 814, 818 (Ga. Ct. App. 2007); *Doe 1 ex rel. Tanya S.*, 816 N.E.2d at 8; *C.T. v. Gammon*, 928 N.E.2d 847, 853-854 (Ind. Ct. App. 2010); *Kan. State Bank & Trust Co. v. Specialized Transp.*

Servs. Inc., 819 P.2d 587, 604 (Kan. 1991); *Becker v. Mayo Found.*, 737 N.W.2d 200, 207-209 (Minn. 2007);[8] *Bradley v. Ray*, 904 S.W.2d 302, 313-314 (Mo. Ct. App. 1995); *Berry v. Watchtower Bible and Tract Soc'y of N.Y., Inc.*, 879 A.2d 1124, 1128 (N.H. 2005), citing *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995); *Paulson v. Sternlof*, 15 P.3d 981, 984 (Okla. Civ. App. 2000); *Doe v. Marion*, 645 S.E.2d 245, 248-250 (S.C. 2007); *Arbaugh v. Bd. of Educ., County of Pendleton*, 591 S.E.2d 235, 241 (W. Va. 2007).[9]

The basic rationale as to why a reporting statute was not intended to provide an implied private cause of action was discussed in length by the *Bobo* court. In that case, the Alabama Supreme Court, in determining that Alabama's mandatory reporting statute did not provide a private cause of action, analyzed the governing statute as follows:

> Our review of § 26-14-1 et seq. persuades us that the legislature did not intend to confer a private right of action for any breach of the duty to report imposed by the statute. Rather, our review reveals that the primary thrust of the legislation is to help those who are abused or neglected by establishing child protection services and a method of conducting investigations. While the Act imposes a duty on an individual to make such a report, there is no indication of any legislative intent to impose civil liability for failure to report. Rather, the failure to report is made a misdemeanor and is made punishable by a sentence of not more than six months' imprisonment or a fine of not more than $500. § 26-14-13. Other provisions dealing with such reports provide civil and criminal immunity to those who make a report and they abrogate the rule of privileged communication, with the exception of the attorney-client privilege, as "a ground for excluding any evidence regarding a child's injuries or the cause

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[8] "We conclude that CARA's text is unambiguous. The plain language of the statute indicates that the legislature chose to impose criminal, but not civil, penalties on mandatory reporters who fail to report. Other language in CARA demonstrates that the legislature expressly creates civil liability when it intends to do so . . . . We therefore conclude that CARA does not create civil liability." *Becker*, 737 N.W.2d at 208-09.

[9] "[W]e conclude that West Virginia Code § 49-6A-2 does not give rise to an implied private civil cause of action, in addition to criminal penalties imposed by the statute, for failure to report suspected child abuse where an individual with a duty to report under the statute is alleged to have had reasonable cause to suspect that a child is being abused and has failed to report suspected abuse. The same conclusion has been reached by a decided majority of states which have applied factors comparable to those in *Hurley* when considering whether a private cause of action was implied through mandatory reporting statutes similar to ours." *Arbaugh*, 591 S.E.2d at 241.

> thereof in any judicial proceeding resulting from a report pursuant to this chapter." § 26-14-10.
>
> The Child Abuse Reporting Act creates a duty owed to the general public, not to specific individuals, and, consequently, it does not create a private cause of action in favor of individuals. Therefore, to the extent that the plaintiffs rely on that statute, they fail to state a cause of action, and the trial court properly dismissed the claims insofar as they were based on the statute.

Bobo, 659 So.2d at 102 (citations omitted); *see also*, *Arbaugh*, 591 S.E.2d at 241 ("When the provisions of the article are considered as a whole, we do not see that a private cause of action would meaningfully further the purposes of the article so as to find that such was intended by the Legislature.").

Moreover, other courts have recognized the causation problems inherent in attaching an implied private right of action to a statute when the legislature did not intend to do so:

> we hesitate to extend a private cause of action by implication to any child injured by a non-reported abuser against the person responsible for reporting since substantial questions of causation are raised and the failure to report "would not in the direct sense be a proximate cause of the injury to the child." *Borne by Borne v. Northwest Allen County School Corp.*, 532 N.E.2d 1196, 1203 (Ind.App.1989). The problems with causation are further complicated when one considers that the statute conditions the reporting requirement on the exercise of judgment of an individual reporter who may become aware of a possible case of child abuse only through rumors, innuendo or second-hand reports. The diverse backgrounds, professions and occupations represented in the statutorily defined class of persons required to report make it all the more difficult to define what conduct is required in various conceivable situations. Under such nebulous circumstances, we are unwilling to recognize a new and broad field of tort liability without express legislative designation of a private cause of action.

Arbaugh, 591 S.E.2d at 240-241.

Appellees previously argued that KRS 446.070 provides for a cause of action for violation of KRS 620.030(1). That statute states that a person injured by a violation of a

statute may recover from the offender. Appellees failed to plead such a claim in their Amended Complaint, however, and are therefore prohibited from asserting it now. CR 8.01; *Dalton v. First Nat'l Bank of Grayson*, 712 S.W.2d 954, 956 (Ky. App. 1986); *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. App. 1962) (complaint must provide fair notice and identification of claim). Second, in order to recover under KRS 446.070, Appellees are required to establish: (1) a violation of KRS 620.030(1); (2) they are members of the class intended to be protected by the statute; (3) they suffered damages resulting from the KRS 620.030(1) violation; and (4) such damages were proximately caused by the violation. *Ky. Laborers Dist. Council Health and Welfare Trust Fund v. Hill & Knowlton, Inc.*, 24 F.Supp.2d 755, 774 (W.D. Ky. 1988).

As discussed *supra*, Appellees cannot establish that Ms. Turner violated KRS 620.030(1). The statute was enacted to apply to incidents in which it is believed that a guardian or other caretaker has abused a child. The situation alleged in the present case does not fall within the protection of the statute and, therefore, Appellees do not have standing to bring a claim under KRS 446.070. *Hill & Knowlton, Inc., supra.*

Furthermore, while Ms. Nelson seeks damages for Ms. Turner's alleged violation of KRS 620.030(1), that statute is intended to protect children, not adults. Thus, F.B.'s mother, Ms. Nelson, is not a member of the class ("dependent, neglected or abused" children) the statute is intended to protect, and she does not have a cause of action under KRS 446.070. *Michals v. William T. Watkins Mem'l United Methodist Church*, 873 S.W.2d 216, 219-20 (Ky. App. 1994). Additionally, F.B. cannot recover under KRS 446.070. If F.B. had suffered any damages, she could "recover from [Defendants] such

damages as [she] sustained by reason of the violation" of KRS 620.030(1). *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). However, Appellees have not introduced any evidence in the record that F.B. suffered any actionable damages.

KRS 620.030(1) only imposes a duty to report that a child has been neglected or abused. The facts in this case do not meet those constituting an abused or neglected child. The alleged inappropriate touching was done by one of F.B.'s kindergarten classmates, another minor child. As a result, under a plain reading of the Kentucky reporting statute, the complained-of acts did not trigger a duty to report. Such a determination is consistent with the applicable Kentucky statutory law and the law of other states which have already considered such issues in the context of similar reporting statutes. Additionally, no criminal abuse investigation would have occurred because no crime could have occurred. C.Y., due to her age, was legally incapable of committing a crime. Further, Appellees have no private cause of action against Ms. Turner under the statute. Therefore, this Court should affirm the trial court's dismissal of the violation of KRS 620.030(1) claim against Ms. Turner.

II. Appellees' Tort Claims Against Ms. Turner Should Be Dismissed Because She Has Qualified Official Immunity From Suit.

In addition to the claim that Ms. Turner violated KRS 620.030(1), Appellees have asserted a claim of negligent supervision against her. They claim that Ms. Turner was negligent for failing to report the abuse to law enforcement and for failing to respond appropriately in her supervision of the students. Appellees have alleged both that Ms. Turner is liable for failing to report under KRS 620.030(1) and that she is negligent for failing to report under KRS 620.030. They cannot receive a double recovery for a single alleged injury, and therefore, this claim is really one for negligent supervision. This tort

claim against Ms. Turner cannot proceed because she has qualified official immunity from suit.

Kentucky law holds that public officials and employees enjoy qualified official immunity from tort liability. *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010); *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), citing *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989). Such protection encompasses: (1) the negligent performance of discretionary actions (acts involving "the exercise of discretion and judgment, or personal deliberation, decision, and judgment," *Yanero, supra,* at 522), citing 63C Am. Jur. 2d *Public Officers and Employees*, § 322 (1997); (2) in good faith; and (3) within the scope of the subject employee's authority. *Id.*, citing 63C Am. Jur. 2d *Public Officers and Employees*, §§ 309 and 322. Further, once the subject official makes a *prima facie* showing that the complained-of action was within the scope of his/her discretionary authority, the burden shifts to plaintiff to show that the subject official's performance was in bad faith. *Id.* at 523, citing *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991), *as modified by, Cox v. Ky. Dept. of Transp.*, 53 F.3d 146 (6th Cir. 1995).

All of Ms. Turner's complained-of actions/inactions were within her discretionary authority as a kindergarten teacher and were done in good faith. Appellees claim that Ms. Turner was negligent because she failed to report the incidents to law enforcement and failed to take remedial action to ensure that the incidents would not recur. On the contrary, Ms. Turner made decisions about how to handle the report by Ms. Nelson based on her many years of experience as a kindergarten teacher. Once Ms. Nelson reported that F.B. had said another girl, C. Y., was "up her butt," Ms. Turner: (1) separated F.B. and C.Y.'s seats on the classroom seating chart; (2) did not allow the girls to leave the

classroom together to use the restroom; (3) alerted Ms. Ross to the incident and took corrective measures so that Ms. Ross could assist in keeping the girls apart; and (4) discussed with C.Y. that such touching was inappropriate. Turner Deposition, 44:18-20; 45:15-22; 48:1-10; 50:14-22 (R. 300-4). These decisions involved discretion and judgment.

When F.B. told Ms. Turner on November 21 that "C.Y. was 'up my butt,'" Ms. Turner once again took discretionary action and reacted as she believed was appropriate based on her experience. Once informed of the incident by F.B., Ms. Turner took C.Y. aside and questioned her about what had occurred. *Id.* at 57:14-25 (R. 306). Then, Ms. Turner set out (with C.Y.) to discuss the situation with Ms. Collins and the school counselor, Valerie Lindsey. *Id.* at 57:25-58:4 (R. 306-7). When she was unable to locate Ms. Collins or Ms. Lindsey, she discussed the situation with Nancy Smith, Ms. Collins' Professional Staff Assistant. Deposition of Nancy Smith, 8:21-9:21; 10:10-11:2 (R. 333-6). Ms. Smith, when asked by Ms. Turner what she thought Ms. Turner should do, affirmed that Ms. Turner had made the appropriate decision to discuss the matter with Ms. Collins and Ms. Lindsey. *Id.* at 10:24-11:2 (R. 335-6).

Although Ms. Turner was unable to make contact with Ms. Collins and Ms. Lindsey on November 21, Ms. Turner made sure that C.Y. did not return to class that day in order to make sure the girls were separated for the rest of the day. Turner Deposition, 31:17-20 (R. 296). This ended Ms. Turner's direct involvement in the complained-of incidents. Ms. Turner was not informed of the alleged November 22 incident, and F.B. did not return to school after that time. *Id.* at 116:15-18 (R. 313). Ms. Turner's actions and alleged inactions in handling this sensitive situation were discretionary.

Likewise, reaching a decision as to whether there was reasonable cause to believe that sexual abuse had occurred was discretionary. As demonstrated *infra*, KRS 620.030(1) does not apply to the facts of this case. However, if this Court finds that it does, Ms. Turner is still protected from tort liability because her actions in determining whether the allegations should be reported were discretionary. The Fayette Circuit Court held that KRS 620.030 applies only when a person knows or has reasonable cause to believe that a child has been sexually abused. This holding mirrors the specific language of the statute which holds, "Any person *who knows or has reasonable cause to believe* that a child is...abused shall immediately cause an oral or written report to be made to...(the appropriate authorities then listed)." KRS 620.030 (emphasis added), Order, p. 1 (R. 527), Appendix Tab 2. Appellees have argued that any situation reported to a teacher triggers a duty to report under the statute. To the contrary, the specific language of the statute demonstrates that "[t]he legislature could have required reporting on a mere allegation or statement, but the standard is clearly higher." *Id.* (R. 527-8). Other courts have ruled that such decisions are discretionary: "Section 51A [the reporting statute] does not require the reporting of every bruise; it requires reporting on the basis of indicators which give reasonable cause to believe that a child is being abused. That conclusion requires an element of judgment to separate an incident from a pattern, the trivial from the serious. *Mattingly v. Casey*, 509 N.E.2d 1220, 1222-1223 (Mass. App. Ct. 1987).

The trial court also held that making a determination of whether reasonable cause exists involves the exercise of discretion. Parents call teachers to discuss many different kinds of incidents. Obviously not every phone call involves a situation in which a teacher suspects or has reason to suspect sexual abuse. The courts must examine the facts and

circumstances that Ms. Turner knew at the time of this alleged incident, not what Appellees and their attorneys now claim. No one stated to Ms. Turner that any sexual abuse had taken place. As the trial court noted, Ms. Turner herself did not witness any abuse or have any personal knowledge that F.B. had been "abused." Order, p. 2 (R. 528), Appendix Tab 2. Ms. Nelson told Ms. Turner that her daughter had reported that another five-year-old girl was "up her butt." When Ms. Turner questioned the girls, F.B. said that C.Y. was "up her butt" and that the incident had occurred during reading circle. Turner Deposition, 57:14-19 (R. 306). Ms. Turner knew that there were two adults in the room at all times and at least one high school intern. Turner Deposition, 45:24-5; 46:1-25 (R. 301-2). Based upon these facts, and Ms. Turner's over twenty years of teaching young children, Ms. Turner testified that she did not suspect that sexual abuse had taken place. Even after the Complaint was filed and Ms. Turner had further opportunity to review the facts known to her at the time, she said, "F.B. always wore jeans...And they were these little tight jeans. And I don't see how it's possible in reading circle, with all these little tattletale children sitting around, with me sitting there reading to them and talking to them and with Ms. Ross and two other people in the room, that this [allegation in the Complaint] could have happened." Turner Deposition, 116:2-9 (R. 313).

Ms. Turner's decision was made in good faith, and her determination based upon inquiring into the facts, weighing the credibility of the parties and using her experience as a teacher was discretionary. *Picarella v. Terrizzi*, 893 F.Supp. 1292, 1300 (M.D. Pa. 1995) (Under Pennsylvania's reporting law, enumerated persons, such as teachers, who are required to report possible child abuse when they have reason to believe that a child is abused are required to make a discretionary judgment as to whether there is a reason to

believe a child has been abused).

Haney v. Monsky, supra, a case recently decided by this Court, likewise involved an examination of whether the duty to properly supervise children was ministerial or discretionary. In *Haney*, the plaintiff alleged that a camp counselor was negligent in her supervision of children hiking on a trail at the zoo and that she was not entitled to immunity from suit because her duty to keep the children in the middle of the path was ministerial and not discretionary. This Court noted that the counselors had significant discretion in enforcing the rule that the children must be kept in the middle of the path and that the supervisory duty was "general and continuing" and "depended upon constantly changing circumstances." *Id.* at 13. Likewise, it was "largely subjective and 'left to the will or judgment of the performer.'" *Id., quoting Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (1959). As noted by this Court, "we have found that supervising the conduct of others is a duty often left to a large degree—and necessarily so—to the independent discretion and judgment of the individual supervisor." *Haney, supra*, at 17. Ultimately, this Court held that the counselor's duty was discretionary in nature thus entitling her to qualified official immunity from the negligence claim asserted against her.

This Court distinguished the facts in *Haney* from those in *Yanero, supra,* in which there was an absolute rule which the defendant did not follow. In *Yanero*, the plaintiff, Ryan Yanero, was struck by a baseball in the head during batting practice. In the Complaint, Yanero alleged that the coach was negligent in failing to require his students to wear batting helmets as required by a school rule. It was undisputed that there was an absolute rule that the students be required to wear a batting helmet during batting

practice. The present case, like *Haney*, is distinguishable from *Yanero* because here there was no absolute legal duty to report the allegations made by Ms. Nelson because the alleged abuser was not one exercising supervisory or custodial care over the student. Therefore, the decisions as to how to respond to the allegations were "largely subjective" and "left to the will or judgment" of Ms. Turner. Ms. Turner took the actions that she believed were appropriate based upon her many years of teaching experience. Kentucky law demonstrates that these actions were discretionary.

Appellees have argued that the actions taken by Ms. Turner were ministerial rather than discretionary because *Bramble v. Graham*, *supra*, (unpublished) states that if a police officer has reasonable cause *to suspect abuse*, the duty to report that suspected abuse under KRS 199.335(2) is a ministerial duty. *Bramble* defines a ministerial act as "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 1 citing *Yanero, supra.* The present case is distinguishable because Ms. Turner did not have a legal duty to report under KRS 620.030(1). KRS 620.030 applies only where the complained-of abuse was done by a parent, guardian or other person exercising custodial control or supervision over the child. The allegation in this case is that the abuse was perpetrated by a fellow female kindergarten student, and therefore the statute does not apply. Only where there is reasonable cause to believe that abuse, as defined in the statutes, has occurred does a duty attach. The question here is whether Ms. Turner was negligent in failing to report the

allegation to law enforcement separate and apart from the duties imposed by the reporting statute.[10]

The decision of how to react to the situation was therefore discretionary. Ms. Turner has stated again and again that she did not suspect that sexual abuse had occurred in this case. Given the facts that Ms. Turner knew at the time of the alleged incident, there was not reasonable cause to believe that abuse, as defined in the statutes, had occurred. Furthermore, the remedial actions Ms. Turner took in response to the report were discretionary or as defined by this Court, involved "the exercise of discretion and judgment, or personal deliberation, decision and judgment." *Haney, supra*, at 7, *quoting Yanero, supra*, at 522.

Appellees have also relied upon *Williams v. Ky. Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003) for their argument that Ms. Turner was performing a ministerial duty when she developed a response to Ms. Nelson's report. In *Williams*, teachers failed to enforce school rules requiring the students to ride the bus to a school function and prohibiting the use of alcohol on school premises. Appellees in this case have alleged that Ms. Turner failed to "take appropriate remedial action to ensure that F.B. would not be sexually abused again." Amended Complaint (R. 87). The actions taken by Ms. Turner involved decision-making as to how best to prevent any future incidents from occurring such as the decision to separate the girls on the seating charts, the decision to not allow the girls to leave the classroom together, the decision to alert her aide to the incident and the remedial measures and the decision to discuss the incident with the alleged perpetrator,

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[10] In his dissenting opinion, Judge Thompson properly noted this point in stating, "[a]bsent the application of [KRS 620.030], the decision regarding the action to be taken by this teacher would be a discretionary function and protected by qualified immunity. See *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002)." Opinion, p. 14 (Thompson, J. dissenting), Appendix Tab 1.

C.Y. These decisions were not "compliance with [a] directive" as in *Williams*. *Id.* at 151.

Finally, it is *undisputed* that Ms. Turner's actions/inactions were all unequivocally done in good faith. Ms. Turner plainly testified that she believed that her actions were proper under the circumstances. Turner Deposition, 64:22-24 (R. 309). Professionally, she was not criticized or reprimanded as a result of her actions. *Id.* at 8:1-4; 100:20-23; 114:23-115:6 (R. 291, 310-12). Moreover, there is ample testimony supporting the fact that not only were Ms. Turner's actions done in good faith, they were an appropriate response to the situation:

- Cheryl Rankins, investigating law enforcement officer for Fayette County Schools: Ms. Rankins concluded from her investigation of the alleged touching incidents that there was nothing that occurred between F.B. and C.Y. that constituted abuse. Deposition of Cheryl Rankins, 17:17-22; 18:5-8 (R. 343-4). Ms. Rankins also stated that "[i]n my opinion, I think [Ms. Turner] did the right thing. I think she handled it the way she should." *Id.* at 16:13-19 (R. 342); Rankins' Incident Report, pg. 3 (R. 346-9). Moreover, Ms. Rankins stated that "I don't think she should have contacted the police. I think she did the right thing by contacting her principal first." Rankins Deposition, 17:4-7 (R. 343).

- Nancy Smith, Professional Staff Assistant to Ms. Collins: Ms. Smith stated that to the best of her knowledge, Ms. Turner took the appropriate steps to investigate the incident. Smith Deposition, 23:24-24:5 (R. 337-8). She also indicated that she would have taken the same steps to investigate the incident as Ms. Turner did, which was in accordance with her training: talk to the children involved, talk to the mother involved, and report to the principal. *Id.* at 38:12-22 (R. 339).

- Valerie Lindsey, school counselor: Ms. Lindsey agreed that upon receiving a report of alleged abuse from a parent, it is appropriate to discuss the incident(s) with the child involved to get more information about the situation before reporting the incident(s), if a reasonable belief existed that the child was abused. Deposition of Valerie Lindsey, 30:4-13; 31:13-15 (R. 352-3).

By establishing that Ms. Turner's actions were discretionary and conducted in good faith, the Appellees bear the burden to establish that the actions were done in bad faith. However, Appellees have presented absolutely no evidence of any alleged bad faith conduct by Ms. Turner. Merely alleging that Ms. Turner "failed to protect" F.B. is not evidence of bad faith. Nelson Deposition, 83:1-4 (R. 286). Further, Appellees have no documents or testimony supporting any allegation of bad faith against Ms. Turner. As a result, the Appellees cannot satisfy their burden to show that any of the complained-of actions/inactions by Ms. Turner were done in bad faith. Therefore, this Court should affirm the finding of the Circuit Court that Ms. Turner is entitled to qualified official immunity in this case.

III. The Court Of Appeals Improperly Based Its Conclusion On A Finding Of Fact Which Should Be Reserved For The Fact Finder Rather Than Deciding The Questions Of Law Before It.

The Court of Appeals ignored the statute defining "abused or neglected child" and also failed to analyze whether Ms. Turner was entitled to qualified official immunity from the claim that she negligently supervised F.B. in this case. Instead, it reversed the findings of the trial court on the basis that "for purposes of the Summary Judgment motion only—Turner had a reasonable cause to believe that F.B. was abused." Opinion, p. 12, Appendix Tab 1. This is a factual finding, not one which is proper for a court to make. It was unnecessary and improper for the Court of Appeals to make this finding. Rather, the Court of Appeals should have decided the matters of law before it: (1) whether Ms. Turner could be found liable for violating KRS 620.030(1) for failing to report the facts known to her to law enforcement; and (2) whether Ms. Turner was

entitled to qualified official immunity from the tort claims brought against her. It failed to do so.

The Court of Appeals' Opinion is conflicting and would certainly be confusing to any trial court that was required to interpret its decision. On the one hand it holds that "for purposes of Summary Judgment motion only," it is finding that Ms. Turner had reasonable cause to believe that abuse had occurred. Opinion, p. 12, Appendix Tab 1. On the other hand, it admits that "[a]s we are not the trier of fact, we may not determine whether Turner had reasonable cause to believe that F.B. was abused for purposes of subsequent proceedings or possible trial." And "[R]easonableness—in this case, whether Turner had a reasonable cause to believe that F.B. was abused—is also a question of a fact. *Brown v. Noland Co.*, 403 S.W.2d 33 (Ky. 1966); *Davis v. Howard*, 276 S.W.2d 460 (Ky. 1955)." Opinion, p. 13, Appendix Tab 1. This very conflict demonstrates the error of the reasoning of the Court of Appeals and why its Opinion cannot be allowed to stand.

CONCLUSION

As set forth herein, Appellees' claims against Ms. Turner are entirely barred. Therefore, this Court should reverse the decision of the Court of Appeals and dismiss all remaining claims against Ms. Turner.