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

DIANNE TURNER — APPELLANT

VS.

Appeal from Kentucky Court of Appeals
Case Nos. 2007-CA-000489 and 2008-CA-001588
Fayette Circuit Court,
Case No. 06-CI-00976

BROOKE NELSON, Individually, and
BROOKE NELSON, as Next Friend of F.B., A Minor — APPELLEES

BRIEF OF APPELLEES

CERTIFICATE OF SERVICE

This is to certify that the original and nine copies of the **Brief of Appellees** have been hand-delivered to Susan Stokley Clary, Clerk of Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601, and copies have been served via U.S. Mail, postage prepaid, to Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky; Mark S. Fenzel, Dana L. Collins, and Kevin L. Chlarson, Middleton Reutlinger, 2500 Brown & Williamson Tower, Louisville, Kentucky 40202, *Counsel for Appellant;* and Guy R. Colson, Barry M. Miller, and Christina M. Vessels, Fowler, Measle & Bell, 300 West Vine Street, Suite 600, Lexington, Kentucky 40507-1660, on this the 23rd day of February 2011.

J. Dale Golden
Diane R. Conley
GOLDEN & WALTERS, PLLC
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
(859) 219-9090
COUNSEL FOR APPELLEES

STATEMENT CONCERNING ORAL ARGUMENT

Although Appellant's Brief contains no statement concerning oral argument, Appellees respectfully request oral arguments. Appellant raises several issues in this appeal, and they are of great public importance as they deal with the protection and safety of all children within Kentucky's mandatory public school system and their teachers' mandatory duty to report abuses to the children under their control.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

A. Procedural Background

Appellees, Brooke Nelson, Individually, and Brooke Nelson, as Next Friend of F.B., a Minor ("Appellees"), do not accept the Appellant's Statement of the Case and first provide this procedural background to clarify the precise matter at issue on this appeal. Appellant's Brief, Part II, asserts that "[t]he Court of Appeals . . . failed to analyze whether Ms. Turner was entitled to qualified official immunity from the claim that she negligently supervised F.B. in this case."[1] Appellees' claim for negligent supervision against Turner is not at issue on this appeal. Instead, the only issue relevant to this appeal is that related to Turner's failure to comply with KRS 620.030 in the reporting of abuse.

Appellees' Amended Complaint alleged two (2) negligence counts against Appellant, Dianne Turner ("Appellant" or "Turner"), one for negligent supervision and a second for negligent failure to report abuse under KRS 620.030.[2] In its March 1, 2007 Order, the Fayette Circuit Court held in relevant part that Turner was entitled to qualified official immunity with regard to the negligent supervision claim and that Appellees did not have a private cause of action under KRS 620.030.[3] Appellees appealed that Judgment and Order to the Kentucky Court of Appeals. In its June 6, 2008 Opinion, the Kentucky Court of Appeals held:

> We vacate the summary judgment entered in favor of Turner with respect to the allegation of negligent supervision. Because this

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[1] Appellant's Brief, p. 35.
[2] R. 0086.
[3] R. 435; Appellant's Appendix Tab 4.

> claim must return to the trial court, we cannot affirm the court's dismissal of Nelson's third-party bad faith action against KSBIT.[4]

Clearly, the Court of Appeals preserved Appellees' negligent supervision claim. The Opinion additionally held,

> The trial court has determined that this was a discretionary act; however, the trial court did not provide any analysis as to how it reached the decision that this was a discretionary act in light of a **mandatory reporting requirement**. This analysis by the trial court is necessary because if the mandatory reporting laws apply, then Turner could not be afforded the protection of qualified official immunity.[5]

On remand, the Fayette Circuit Court was fully aware that it had been reversed on the negligent supervision count, and as directed by the Court of Appeals, entered a subsequent Order solely addressing its analysis regarding the reporting requirement of KRS 620.030.[6] The final paragraph of the Circuit Court's July 23, 2008 Order states:

> For these reasons, the court finds that qualified immunity is afforded the defendant, Turner, regarding the plaintiff's claim regarding **mandatory reporting**. Therefore, summary judgment is granted to the defendants on that claim. This order is final and appealable.[7]

It is from that Order that Appellees appealed again to the Kentucky Court of Appeals on April 3, 2009. The sole subject of that appeal was "the trial court's decision that the **reporting requirement** of sexual abuse under KRS 620.030 is discretionary, rather than ministerial."[8] That appeal resulted in an April 30, 2010 Opinion wherein the Court of Appeals specifically addressed the sole issue of the mandatory reporting statute, stating:

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[4] R. 457, p. 14; Appellant's Appendix Tab 3.
[5] R. 457, p. 12; Appellant's Appendix Tab 3 (emphasis added).
[6] R. 527; Appellant's Appendix Tab 2.
[7] R. 527, p. 3 (emphasis added); Appellant's Appendix Tab 2.
[8] See Brooke Nelson's April 3, 2009 Brief to the Court of Appeals, p. i.

> Nelson now appeals from the circuit court's determination that Turner was entitled to summary judgment. The circuit court based this determination on its conclusion that Turner was shielded by qualified official immunity because her **duty to report** the alleged sexual abuse is properly characterized as discretionary rather than ministerial.[9]

Continuing, the Court of Appeals reversed the Fayette Circuit Court, holding that because "KRS 620.030 uses mandatory 'shall' language to describe the reporting requirement, and since a motion for Summary Judgment requires the record to be viewed in a light most favorable to the non-movant," this issue would be remanded for further proceedings.[10] Turner filed a Motion for Discretionary Review with this Court on May 27, 1010. Under the Questions of Law section in that Motion, Turner properly did not seek review of Appellees' negligent supervision claim.[11] The only "questions of law" presented by Appellant are those related to the reporting requirements of KRS 620.030.[12] Thus, the only matter currently before this Court involves Appellees' claim against Turner under the mandatory reporting statute, KRS 620.030. Appellees' claim for negligent supervision is not before this Court, and therefore those portions of Appellant's Brief addressing negligent supervision must not be considered by this Court.

B. Factual History

In November of 2005, F.B., a five-year-old kindergarten student, was repeatedly sexually molested by another student while attending a Fayette County public elementary school. In November 2005, Appellee F.B. was enrolled at Southern Elementary School and the Appellant, Dianne Turner, was the

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[9] April 30, 2010 Opinion of the Court of Appeals, p. 2; Appellant's Appendix Tab 1 (emphasis added).
[10] *Id.*
[11] Appellant's May 27, 2010 Motion for Discretionary Review, pp. 7-8.
[12] *Id.*

teacher responsible for her during school hours.[13] On November 18, 2005, F.B.'s mother, Appellee Brooke Nelson, telephoned Turner and reported that F.B. had complained that another child in Turner's class, C.Y., had "put her finger up my butt" at school two (2) days prior.[14] Rather than report the incident to the proper authorities as required by KRS 620.030, Turner decided to interpret "finger up my butt" to mean only "a wedgie."[15] In response, Turner merely rearranged her seating chart to separate the children and claims that she had "instituted a policy" that they not be allowed together.[16]

The ineffectiveness of this response was revealed on November 21, 2005, when Turner allowed the other student to once again penetrate F.B.'s anus with her finger.[17] It is undisputed that this second time, F.B. personally approached Turner after lunch and reported to her that the other student once again went "up her butt."[18] It is also undisputed that C.Y. directly admitted to Turner that she had done exactly what F.B. reported, and even admitted it was a "game" someone had been playing with her at home.[19]

Turner made no effort to question either student further for specifics and, after a brief unsuccessful effort to locate the school's principal or guidance counselor, ended her investigation.[20] Turner again chose to make no report to any authority, even after hearing the other student's confession, and also did not

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[13] R. 366.
[14] *Id.*
[15] *Id.*
[16] R. 250, 366.
[17] R. 251, 367.
[18] *Id.*
[19] *Id.*
[20] *Id.*

even report the incident to F.B.'s mother.[21] Instead, F.B.'s family only learned of the second incident of sexual assault after questioning F.B. while she was crying and claiming of vaginal pain during her evening bath.[22]

The following morning, November 22, 2005, Brooke Nelson arrived at Southern Elementary to demand an explanation from its principal, Freida Collins, only to sit and wait for an audience to no avail.[23] Although Principal Collins eventually contacted Brooke Nelson by phone, she advised that she had not been made aware of either incident.[24] Although she agreed to "look into the matter immediately," she also did not make a report to the authorities.[25] Instead, she decided the sexual conduct was "accidental."[26]

Sometime during that same day, C.Y. was allowed to abuse F.B. for a third time. F.B. reported to her mother that afternoon that C.Y. had "rubbed, touched and pinched F.B.'s nipples and anally and vaginally violated F.B."[27] F.B. had bruising on her abdomen and scratches on her face, and said that the other student pushed her during the assault.[28] After this third incident, Brooke Nelson had no choice but to remove F.B. from Southern Elementary altogether.[29]

On the evening of November 22, 2005, Ms. Nelson took F.B. to the University of Kentucky Hospital's Emergency Room, where doctors found a bruise and "some small irritation of the vagina, with no definite tear, blood seen,

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] R. 252, 367-368.
[28] *Id.*
[29] R. 368.

20, 2006, fifty (50) days after counsel sent notice of their claim, acknowledging

or no discharge."[30] Appellant's own expert, Dr. David Shraberg, concluded on January 9, 2007 that this irritation and bruise was "possibly consistent with F.B.'s report of certainly sexual play and roughhousing."[31] On the three separate occasions where F.B. was sexually assaulted, both children were under the direct control and supervision of Southern Elementary School and their teacher, Turner, on school premises and during school hours.

Appellees originally brought suit only against the Kentucky School Board's Insurance Trust ("KSBIT") for its violations of KRS § 304.48-240, the Unfair Claims Settlement Practice Act applicable to liability self-insurance groups.[32] KSBIT had sent only a single correspondence to Appellees' counsel on January 20, 2006, fifty (50) days after counsel sent notice of their claim, acknowledging counsel's representation, promising to investigate the claim, and promising to advise Appellees' counsel of KSBIT's position in the matter as soon as possible.[33] Thereafter, KSBIT refused to communicate further with Appellees' counsel in any manner whatsoever, and refused to respond to written demands and correspondence.[34]

Instead, KSBIT immediately hired counsel to represent Turner and the Fayette County Public Schools, even though there was no litigation at the time, and to simultaneously handle all "further pre-litigation settlement demands" on behalf of KSBIT.[35] Counsel retained by KSBIT then forwarded to Appellees' counsel a March 1, 2006 correspondence that went on to threaten that, if a

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[30] *Id. See also* U.K. Hospital attending note dated November 22, 2005, R. 390.
[31] R. 368 and 390.
[32] R. 5.
[33] R. 25, 42.
[34] R. 25.
[35] *Id.*

lawsuit was filed, the attorney would seek to have the dispute resolved by a jury; thereby implying that five-year-old F.B. would be subjected to the rigors of a jury trial if she pushed the claim any further.[36] Immediately after Appellees filed suit against KSBIT for refusal to even communicate or investigate and discuss the claim, KSBIT moved the trial court to dismiss the case, arguing that Appellees were obligated to first pursue and complete tort litigation against Turner before any consideration of KSBIT's violation of the statute could be considered.[37] The Fayette Circuit Court dismissed the complaint against KSBIT, but allowed the Appellees to amend their Complaint to reassert claims against both KSBIT and Turner.[38] The subsequent procedural history of this matter has already been stated in Part A, above. Appellant's Motion for Discretionary Review was granted by this Court by Order dated November 10, 2010.

ARGUMENT

A. Standard of Review

In reviewing the summary judgment entered by the Fayette Circuit Court, the Court of Appeals was charged with determining "that there were no genuine issues as to any material fact and that [Appellant] was entitled to summary judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). *See also Capital Holding Corp. v. Bailey,* 873 S.W.2d 187, 189 (Ky. 1994)("Our review of a summary judgment it limited to whether the facts alleged by plaintiffs and the evidence of record supporting their claim at the time of dismissal, together with all reasonable inferences therefrom, fail to support a

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[36] R. 26-27, 55-57.
[37] R. 17.
[38] R. 84-85.

claim.")(citations omitted). In making that determination, "'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. . . . Summary 'judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.'" *Scifres*, 916 S.W.2d at 782 (citations omitted). *See also Steiner v. Bank of Louisville and Trust Co.*, 682 S.W.2d 789, 791 (Ky.App. 1985)("All considerations are loaded in favor of the nonmovant.")(citations omitted). In this case, the Court of Appeals properly determined that Appellant failed to demonstrate that Appellees could not prevail under any circumstances with regard to their claim that she failed to abide by the mandatory reporting requirements of KRS 620.030, and that determination must be affirmed.

B. The Court of Appeals Correctly Determined That the Reporting Requirements of KRS 620.030 Are Not Discretionary.

In its April 30, 2010 Opinion, the Court of Appeals reversed the ruling of the Fayette Circuit Court that the reporting requirements of KRS 620.030 are discretionary, thus providing Turner qualified official immunity for her failure to report the abuse inflicted on F.B. For the second time in this case, the Court of Appeals found that "KRS 620.030(1) sets out a 'mandatory reporting requirement . . . .' The Legislature's usage of the mandatory 'shall' language evinces its intent that a person who has reasonable cause to believe that a child has been abused has no discretion on the question of whether the alleged abuse

must be reported."[39] This determination is patently correct based on the plain language of the statute.

KRS 620.030(1) states that "**[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 specified law enforcement agencies. (emphasis added). Subsection (1) further provides for the referral of any "**report of abuse or neglect allegedly committed by a person other than a parent, guardian or person exercising custodial control or supervision,**" and makes clear that "**nothing**" in the statute "**shall relieve individuals of their obligations to report.**" (emphasis added). The statute is clear and unambiguous, and a report by a teacher merely to her supervisor does not satisfy the statutory duty to report. *Commonwealth v. Allen,* 980 S.W.2d 278 (Ky. 1998).[40] In this case, Appellant did not report the abuse to her supervisor, but merely attempted to do so.

The Fayette Circuit Court originally accepted Turner's argument that since she personally decided that the explicit reporting requirements of KRS 620.030 did not apply to her, then it somehow retroactively made her decision a "discretionary act" for which she is entitled to immunity.[41] This argument is just as illogical as suggesting that compliance with posted speed limits is discretionary for a motorist as long as the motorist makes the subjective judgment call not to obey them. Simply choosing to violate or ignore the law does not make compliance with the law discretionary. It is also flatly refuted by one of

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[39] April 30, 2010 Opinion of the Court of Appeals, p. 11; Appellant's Appendix Tab 1.
[40] *See also Fugate v. Fugate,* 896 S.W.2d 621 (Ky. App. 1995) (holding that even a trial judge is not exempt from the duty to report dependency, neglect or abuse).
[41] R. 527; Appellant's Appendix Tab 2.

the very decisions relied upon by the trial court, *Bramble v. Graham,* Ky. App., No. 2003-CA-001755-MR, (Sept. 24, 2004).[42]

In *Bramble*, this Court directly considered whether an individual police officer was entitled to qualified official immunity for failing to report suspected child abuse as required by KRS 199.335, an earlier similar statute, and whether the duty to report was discretionary or ministerial. This Court relied upon *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) to conclude:

> KRS 199.335(2), the forerunner to KRS 630.030-050, provided in part "Any...peace officer...who...has reasonable cause to believe that a child is an abused...child, shall report or cause a report to be made...." **Clearly the statute creates a duty *to report* suspected abuse which would be a ministerial duty.**[43]

This Court rejected the premise that failure to comply with a statutory duty can be considered a discretionary act in *Pile v. City of Brandenburg*, 215 S.W.3d 36 (Ky. 2006). In *Pile*, a police officer had arrested and handcuffed a prisoner, placing him in the back seat of the officer's cruiser. When the officer exited the still-running vehicle in violation of KRS 189.430, which prohibits ignition keys in unattended vehicles, the prisoner climbed into the front seat and sped away, ultimately killing another motorist.

In reversing summary judgment for the officer, this Court held that since the operation of a police cruiser "is a daily routine responsibility" and therefore "ministerial in nature," the negligent operation of such a vehicle by an officer who violates existing procedures and regulations is actionable. *Id.* at 40. Even though the officer may have been using his personal "discretion" in the general conduct

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[42] Turner originally cited this Court's unpublished decision in *Bramble*, attached hereto as Appendix 1, on the grounds that "there is no published opinion that would adequately address the issue before the court." R. 260.

[43] *Id.* at p. 2. (emphasis added).

of his duties as a police officer and making decisions along the way, none of those circumstances relieved him of his duty to observe the specific statutes applicable to those duties, including his personal decision to leave his vehicle unattended. Just as in *Pile*, Appellant's obligation to comply with KRS 620.030 was a ministerial duty for which she is afforded no immunity, regardless of how many individual personal decisions she chose to make during the course of her cursory investigation of F.B.'s complaints.

And, as a matter of fact, Appellant's supervisor, Principal Frieda Collins, admitted that the school instructs its teachers that it is not their personal judgment call to make, whether or not they are obligated to report abuse under the statute, but rather they are required to comply, "take the judgment out of it," "make the telephone call," and then "the Cabinet makes the decision."[44] Even Appellant herself admitted that she is not qualified to make judgments on her own about whether or how this sort of sexual contact is preventable.[45]

Appellant chooses to ignore the plain, non-discretionary "shall" language of 620.030(1) and, like the trial court, wrongfully attempts to merge this mandatory requirement with the phrase "reasonable cause," which relates to the factual belief that triggers the ministerial duty to report.[46] However, the duty to report is in and of itself a ministerial function. Therefore, the Court of Appeals correctly held that compliance with KRS 620.030 is a ministerial act for which Appellant is entitled to no immunity whatsoever.

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[44] R. 380 & 390.
[45] R. 380-381 & 390.
[46] Appellant's Brief, p. 29.

C. The Court of Appeals Correctly Found That Appellees Have Raised a Genuine Issue of Material Fact as to Whether Appellant Had "Reasonable Cause" to Believe Abuse Occurred, Thus Triggering the Reporting Requirements of KRS 620.030.

After concluding that Appellant's obligations under the statute are ministerial and not entitled to qualified official immunity, the Court of Appeals next addressed whether Appellees had raised a genuine issue of material fact as to whether Appellant had "reasonable cause" to believe abuse had occurred, thus triggering her ministerial duty to report. Concluding that the trial court wrongly entered summary judgment in Appellant's favor, the Court of Appeals noted that she received reports of alleged abuse and "took these allegations seriously" by developing a plan of response and seeking the counsel of her supervisor.[47] The Court further held that, as all doubts must be resolved in Appellant's favor, "[a] genuine issue exists as to whether the claims reported to Turner are properly characterized as a 'reasonable cause to believe' that F.B. has been abused for purposes of KRS 620.030."[48]

The facts related to the actions of C.Y. towards F.B., and Appellant's response, or lack thereof, are described fully in the Factual History of Appellees' Counterstatement of the Case. These facts clearly demonstrate that Appellees can and have raised a genuine question of material fact as to whether those circumstances would give rise to a "reasonable belief" that abuse had occurred. As noted by the Court of Appeals, such questions of reasonableness are questions of fact, not law. *Brown v. Noland Co.*, 403 S.W.2d 33 (Ky. 1966); *Davis v.*

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[47] April 30, 2010 Opinion of the Court of Appeals, p. 12; Appellant's Appendix Tab 1.
[48] *Id.*

Howard, 276 S.W.2d 460 (Ky. 1955); *Lee v. Farmer's Rural Elec. Co-op Corp.*, 245 S.W.3d 209 (Ky.App. 2007).

In response to this argument, Appellant makes a misguided and spurious argument that KRS 620.030 applies only to abuse inflicted by a parent, guardian or other person exercising custodial control over the child. In doing so, Appellant cites to KRS 600.020, which provides the definitions for KRS Chapters 600 to 645. Specifically, Appellant relies on 600.020(1) which defines "abused or neglected child" as "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" acts in certain enumerated ways. In the first instance, this subsection defines "abused or neglected child" and not "abuse," which is the term that triggers the reporting obligation under 620.030. Second and perhaps most importantly, 600.020 begins with the admonition that the definitions contained therein are to be used "unless the context otherwise requires." In short, Appellant is asking this Court to find that no one has an obligation to report abuse of any kind to the proper authorities under 620.030 unless that abuse is committed by a parent, guardian or other custodian even though 1) the statute itself plainly contemplates reporting abuse committed by anyone and 2) the definition she references does not relate to terms contained in the statute.

KRS 620.030(1) states that "**[a]ny person**" with reasonable belief that a child has been "abused" "shall" report such abuse to law enforcement or governmental authorities. (emphasis added). Continuing, the subsection specifically notes that if the Cabinet for Health and Family Services receives a report of abuse "committed by a person **other than** a parent, guardian, or

person exercising custodial control or supervision," certain specific actions must be taken by the Cabinet. (emphasis added). It defies all logic that Legislature intended that the definition of the unrelated phrase "abused or neglected child" contained in 600.020(1) could trump the plain directive of 620.030(1) that all reasonable beliefs of abuse by anyone be reported, even providing special procedures for abuse committed by people **other than** a parent or similarly situated person. Under Appellant's proposed statutory construction, she would also claim to be excused from reporting that she observed a school janitor fondling one of the children in the supply closet simply because the janitor was someone other than the child's parent or guardian. Such construction is ridiculous and contrary to the plain language of the statute.[49]

Statutory construction is a matter of law. *Floyd Co. Board of Education v. Ratliff*, 955 S.W.2d 921, 925 (Ky. 1997). Statutes must be interpreted according to their plain meaning. *Id.* They cannot be interpreted in a way that causes "absurd or unreasonable results." *Estes v. Com.*, 952 S.W.2d 701, 703 (Ky. 1997). Instead, they must be construed from the language and spirit of the statute itself, as well as "the mischief intended to be remedied." *Gurnee v. Lexington-Fayette Urban Co. Gov.*, 6 S.W.3d 852, 856 (Ky.App. 1999). If a statute is "clear and unambiguous and express[es] the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written." *Lincoln Co. Fiscal Court*, 794 S.W.2d at 163 (citation omitted). Appellant's

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[49] Appellant also discusses the definition of "sexual exploitation" found at KRS 600.020(56) and numerous statutes from other jurisdictions. "Sexual exploitation" is not a term relevant to these proceedings and not addressed by the Court of Appeals. Appellant's references to other statutes are irrelevant in light of the plain language of the Kentucky statute at issue. "An unambiguous statute must be applied without resort to any outside aides." *Lincoln Co. Fiscal Court v. Dept. of Public* Advocacy, 794 S.W.2d 162, 163 (Ky. 1990)(citation omitted).

proposed construction of KRS 620.030 is against the plain meaning and spirit of the statute.

Appellant also put forth a similar arugment that no "abuse" could have occurred in this case because the alleged perpetrator was another child. However, the purpose of the statute is to protect children from abuse, not to protect a certain class of perpetrators. A closer view of the statute indicates that there is no limitation to the protection afforded a child in that the statute specifically addresses the injury and not the identity of the perpetrator. The breadth of 620.030 is further demonstrated in subsection (2), which specifically identifies a laundry list of individuals, including teachers, to whom the reporting requirements apply, and then prescribes additional duties that may be imposed upon them in light of their professional capacity in addition to those contained within subsection (1). Significantly, subsection (2) clearly states that such reporting is triggered for these individuals "regardless of whether" the abuse was committed by a parent or guardian. Therefore, a clear reading of the statute shows that the legislature was trying to provide the broadest, most comprehensive protection available for children.

Significantly, Appellant and several other school officials have already admitted in sworn testimony that F.B.'s complaints of abuse were precisely the kind that Turner was required to report under KRS 620.030. For example, Turner admitted in her deposition that she had a legal obligation to report any suspected sexual abuse of F.B. by the other student, and that even though she just "did not suspect that it was sexual abuse," that "if she [C.Y.] did" what F.B.

claimed then what she endured was indeed sexual abuse.[50] Turner also admitted that F.B.'s mother had already told her that F.B. had complained C.Y. "was up her butt."[51] Amazingly, Turner admitted that she simply avoided the risk of knowing too much by refusing to ask what actually happened, even after hearing C.Y.'s confession, and "didn't pursue it any more than that."[52]

Instead, even though it would have only taken "just a second" to ask what the children meant, Turner admitted that she "just didn't think about pursuing it further."[53] Turner clearly preferred not to pursue the truth, as she admitted that "If it's a child – if I understand that a child is truly sexually abusing another student, then I'm going to call Crimes Against Children."[54] Fortunately, numerous other employees of the Fayette County Public Schools testified that Turner's inaction was inconsistent with Southern Elementary's rules.

For example, Valerie Lindsey is Southern Elementary School's Child Guidance Specialist and the school representative responsible for instructing all of the school's teachers and staff about compliance with KRS 620.030. It is undisputed that she reviewed with the teachers at the beginning of the 2005 school year their obligation to report incidents of abuse under this statute, including Turner. According to Ms. Lindsey, if a teacher were to receive a call from a parent that her little girl had reported inappropriate touching by another student in the class, that teacher would be required to immediately report it

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[50] R. 369 & 390.
[51] R. 369 & 390.
[52] R. 370 and 390.
[53] R. 370 and 390.
[54] R. 370-371.

under the statute.[55] In fact, she testified that this duty is even clearer when the complaints are as specific as those reported to Turner in the present case.[56]

Ms. Lindsey also testified that Turner's statutory duty to report is the same regardless of the abuser's identity, and that such incidents must be reported even if the abuser is another student.[57] Of course, Ms. Lindsey was never informed of these incidents as they were occurring. When she first learned that F.B. was allowed to endure this conduct three times, she stated, "It shocks me that something like that could happen."[58]

Even Turner's own assistant, paraeducator Betty Ross, admitted that F.B.'s complaints are the type of sexual abuse that Turner was required to report under the statute.[59] Similarly, Principal Freida Collins testified that their obligations under the statute continue no matter who is abusing one of the children in their custody, even another student.[60] More importantly, Principal Collins admitted that the authorities listed in the reporting statute are required to be notified because it is they, not Turner, who has the knowledge and training to evaluate and address these abuses.[61] The bottom line is that Turner was simply not free to make these decisions on her own. Her obligations under KRS 620.030 were not limited because the abuse did not occur at the hands of a parent or guardian, or because the perpetrator was a minor. Appellees have raised more than a genuine issue of material fact that Appellant had reasonable

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[55] R. 372 and 390.
[56] R. 373 and 390.
[57] R. 373-374 and 390.
[58] R. 374-375 and 390.
[59] R. 376-377 and 390.
[60] R. 375 and 390.
[61] R. 375-376 and 390.

cause to believe abuse had occurred, and her mandatory duty to report was thus triggered.

D. APPELLEES' CAUSE OF ACTION IS PERMITTED BY KRS 446.070.

Appellant's Brief also asserts that Appellees do not have a private right of action under KRS 620.030.[62] This issue was not addressed or ruled upon by the Court of Appeals, which limited its Opinion to the questions of whether the duty to report under KRS 620.030 is ministerial or discretionary and whether Appellees raised a genuine issue of material fact as to whether Appellant had a reasonable belief of abuse under the statute. Because a reviewing court may not address issues "raised but not decided by the Court below," this issue is not properly before the Court. *Gailor v. Alsabi*, 990 S.W.2d 597, 602 (Ky. 1999)(citations omitted). Additionally, because the Court of Appeals reversed the entry of summary judgment in Appellant's favor and held that she failed to demonstrate that "no genuine issues remained for adjudication," it may be presumed that the Court of Appeals did not question Appellees' entitlement to a private right of action.[63] However, in the event that this Court accepts review of this issue, Appellees do have a private right of action for Appellant's failure to comply with KRS 620.030.

KRS 446.070 provides that "[a] **person injured** by the **violation of any statute** may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." (emphasis added). Accordingly, one who falls within the class of persons

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[62] Appellant's Brief, p. 22.
[63] April 30, 2010 Opinion of the Court of Appeals, p. 13; Appellant's Appendix Tab 1.

intended to be protected by a particular statute may recover for a violation of that statute. *See e.g. Hackney v. Fordson Coal Co.*, 19 S.W.2d 989, 990 (Ky. 1929). F.B. is clearly within the class of persons intended to be protected by KRS 620.030.

KRS 620.010 states:

> In addition to the purposes set forth in KRS 600.010, this chapter shall be interpreted to effectuate the following express legislative purposes regarding the treatment of dependent, neglected and abused children. Children have certain fundamental rights which must be protected and preserved, including but not limited to, . . . the right to be free from physical, sexual or emotional injury . . . .

Similarly, KRS 600.010(2) states that "KRS Chapters 600 to 645 shall be interpreted to effectuate the following express legislative purposes: (a) The Commonwealth shall direct its efforts to promoting protection of children . . ." For these reasons, this Court has specifically recognized that the purpose of the entire Juvenile Code under which the reporting statute falls is to protect the children of the Commonwealth. *Lane v. Com.*, 956 S.W.2d 874, 875 (Ky. 1997) ("KRS 620.010 specifically states that children have a fundamental right to be free from physical injury as well as other types of injury. . . . [The statute] is a statement of the legislative purpose on which the chapter is based.").

Turner violated KRS 620.030, and that failure led to repeated instances of sexual abuse under her watch. F.B. was physically and emotionally injured as a result of her misplaced trust in Turner, who was required by law to take these and other necessary steps to prevent further injury. Turner owed a duty to F.B. because F.B. was compelled to attend school as a result of the compulsory

attendance laws in Kentucky.[64] In *Williams v. Ky. Dept. of Education*, 113 S.W.3d 145, 148 (Ky. 2003), this Court held that "a child is compelled to attend school" and "the protective custody of teachers is mandatorily substituted for that of the parent." *See also Yanero,* 65 S.W.3d *at 529 (quoting McLeod v. Grant County Sch. Dist. No. 128, 42 W.N.2d 316, 255 P.2d 360, 362 (Wash. 1953)).* Because of that substitution, a special relationship is formed between the student and the teacher, and "an **affirmative duty** [is imposed] on the district, **its faculty**, and its administrators to take all reasonable steps to prevent foreseeable harm to its students. *Id.* (emphasis added).

This duty charged to Appellant gives rise to the private right of action and is also presumed within KRS 620.030 itself. If the reporting does not occur, the proper authorities do not get the information they need to protect children. In fact, 620.030(2) plainly highlights the duty assigned to Appellant, a teacher, and others like her who are in special relationships to children—doctors, nurses, social workers, etc.. These are people who are most likely to be on the front line of identifying and suspecting abuse and who possess the most information to assist the authorities in stopping such abuse.

To suggest that someone like Appellant has no duty to F.B. and therefore cannot be held liable in a private action would necessarily eviscerate the statute. The purpose of the statute is clearly to stop abuse of children. If the front line defense is not held to their reporting duties, the whole system of protection dissolves. In that regard, Appellant's Brief emphasizes the age of the reporting child and the perpetrator in this case, but that just highlights the need for the

[64] KRS 159.010.

duty. Appellant's comments in this regard are the equivalent of saying that if a five year old child does not supply the magic words that make certain an abuse has occurred or if the perpetrator, whatever his or her age, does not receive gratification from the abuse, then no duty exists and no protection or investigation need occur.

Yet, protection of this vulnerable segment of the population is entirely the point of this statute. If those on the front line report abuse, the proper authorities can investigate, prosecute or act in whatever way they deem appropriate, regardless of the considerations suggested by Appellant. Although it is difficult to imagine a population more defenseless and vulnerable than a young child, the victim here is akin to a mentally handicapped person or a person with Alzheimer's; people who are not capable of reporting or even comprehending abuse fully, and thus the statue recognizes that anyone, and teachers in particular, are charged with a duty to initiate protection on their behalf. Denying a private right of action means there is no recourse against a teacher---specifically identified in the statute as one with special status---who fails to comply with his or her obligations.

The breadth of this duty has already been addressed by this Court in the *Allen* opinion identified *supra*. That case determined that a teacher cannot discharge his or her duty under KRS 620.030 by reporting abuse to a supervisor. In doing so, the Court commented on the teacher's argument that it would be "inconsistent to impose a reporting duty on a supervisor if an employee has an independent duty to make a report, as a situation that would lead to multiple,

and perhaps superfluous, reports of the same incident." *Id.* at 279. In rejecting that argument, this Court held:

> In a perfect world where every person discharged every **legal duty**, perhaps this would be so. However, in this world where imperfections abound, it is not illogical or inefficient for the legislature to **require every individual entrusted with the care and supervision of children** to be required to report crimes against those children. . . . Moreover, there is no guarantee that a supervisor will follow through with the duty and relay the report to governmental authorities, particularly with regard to a sensitive matter. . . . By requiring each person with knowledge to report child abuse in his or her **individual capacity**, the General Assembly more nearly assured that the suspected abuse would be investigated by state authorities. Rather than relieving [the teacher] of their **duty to report**, we believe the reporting requirement on supervisory personnel is demonstrative of unequivocal legislative intent.

Id. at 280 (emphasis added).

Kentucky courts have already recognized private rights of action under similar circumstances. In *Lomayestewa v. Our Lady of Mercy Hospital*, 589 S.W.2d 885 (Ky. 1979), this Court addressed an action arising from a hospital's failure to comply with a state regulation that required it to have detention screens across its windows. The hospital failed to comply with the regulation, and Lomayestwa, a patient suffering from epilepsy and emotional derangement, broke free of her restraints and fell or jumped through a window. The Court concluded that

> [h]aving determined there was a violation of the statutory standard, we have no trouble in determining that Jessica was one of the class of persons intended to be protected by the regulation, and her jump from the window was an event that the regulation was designed to prevent.

Id. at 887. Accordingly, the Court held "any question of causation presents no impediment to the hospital's liability" in negligence. *Id.*

In *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987), an intoxicated driver killed one police officer and injured another in a motor vehicle accident. This Court addressed the issue of whether the club and its bartender could be held civilly liable on claims of wrongful death and personal injuries where the intoxicated driver had been served in a "dry" county and when he was plainly intoxicated, both in violation of Kentucky statutes. In considering whether KRS 446.070 provided a private right of action for violation of the statutes, this Court noted that 446.070

> has been applied to recognize a cause of action on behalf of a fire victim where the apartment building lacked adequate exits as required by the Building Code, *Higgins Investments Inc. v. Sturgill*, Ky., 509 S.W.2d 266 (1974), and to recognize a cause of action on behalf of a child visiting a tenant when the child was scalded as the result of a violation of the Plumbing Code, *Rietze v. Williams*, Ky., 458 S.W.2d 613 (1970).

Id. The defendants in *Claywell*, like Appellant in this case, argued that the statutes in question only provided a standard for criminal liability, not civil liability. Rejecting that argument, this Court held, "civil liability, although it may borrow a standard of conduct from a criminal statute, is not predicated on whether the defendant could have been criminally convicted. Civil liability is predicated on . . . the duty owed . . . ." *Id.* This Court quoted from the *Restatement (Second) of Torts, § 286, When Standard of Conduct Defined by Legislation or Regulation Will be Adopted*, which states:

> The court may adopt as the standard of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is

> invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

Id. at 334. The Court further noted that the comments to this section indicate that when courts adopt standards laid out in such statutes for civil liability, they are "acting to further the general purpose . . . in the legislation" and concluded that a private right of action could be maintained. *Id.* (citing *Restatement*, § 286, *Comment d*). Clearly then, Kentucky law counsels in favor of a private right of action under KRS 620.030.

Because there appears to be no Kentucky case directly addressing whether a private right of action can be maintained under KRS 620.030, Appellant's Brief relies primarily on a number of cases from other jurisdictions which purportedly do not allow private rights of action under supposedly similar reporting statutes. Without addressing each of Appellant's foreign cases individually, some clearly do not fully support Appellant's argument. For example, in *Doe v. D'Agostino*, 367 F.Supp.2d 157 (D.Mass. 2005), the Court determined that plaintiffs' claims under the reporting statute were barred by the Massachusetts Tort Claims Act providing public employees immunity for acts in the scope of their employment.

Appellant quotes extensively from *C.B. v. Bobo*, 659 So.2d 98 (Ala. 1995). But there, the Court's denial of a private right of action hinged on the language of the reporting statute, which identified its central purpose as being to assist the Department of Human Resources in carrying out their duties, not the protection of children. *Id.* at 102. The purpose of KRS 620.030 is explicitly not so limited. Appellant also heavily relies on *Arbaugh v. Board of Education*, 591 S.E.2d 235,

240 (W.Va. 2003), but omits that the court found that a student does fall within the class sought to be protected by the reporting statute and expressed concern that the teacher's knowledge might be based on unreliable information such as rumor. In this case, Appellant had direct information on more than one occasion about the abuse suffered by F.B. Also, the court notes that Arkansas, Colorado, Iowa, Michigan, Montana, New York and Rhode Island all specifically provide for civil liability for failure to comply with child abuse reporting statutes. *Id.* at 239. *See also Kimberly S.M. v. Bradford Central School*, 226 A.D.2d 85 (N.Y. 1996); *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976); *Ham v. Hospital of Morristown, Inc.*, 917 F.Supp. 531, 537 (E.D.Tn. 1995)(rejecting opinions in other jurisdictions that deny a private right of action for abuse statutes, in favor of Tennessee Court of Appeals determination that a private right of action did exist for state's duty to report statute, stating "[t]he reporting statute, therefore, is not intended for the protection of the general public. It is intended to protect children only, and more specifically, those children who are the victims of brutality, neglect, and physical and sexual abuse".)

The imposition of civil liability is consistent with the purposes of KRS 620.030, encourages the educators charged with a duty to report to comply with their mandatory obligations and provides victims of that failure with the compensation they deserve. For all of these reasons, Appellees have a private right of action under KRS 620.030 and 446.070.

E. Appellees' Negligent Supervision Claim is not Before This Court.

As noted in the Procedural History section of Appellees' Counterstatement of the Case above, Part II of Appellant's Brief argues against Appellees' claim for negligent supervision. That claim is not at issue on this appeal and cannot be reviewed by this Court. *Com. v. Lavit*, 882 S.W.2d 678, 680 (Ky. 1994)("Since this is an appellate court, our function is to review possible errors made by the trial court. If such court has had not opportunity to rule on a question, there is no alleged error before us to review.")(citation omitted). For that reason, all parts of Appellant's Brief addressing Appellees' negligent supervision claim cannot be considered by this Court.[65]

CONCLUSION

The Court of Appeals correctly determined that Appellant's reporting obligations under KRS 620.030 are ministerial, not discretionary. The mandatory language of the statute itself, Kentucky case law and the testimony of Appellant's own supervisor support such a determination. Accordingly, Appellant cannot be afforded qualified official immunity for any failure to discharge her obligations under that statute. With regard to Appellant's alleged failure, the Court of Appeals also correctly held that Appellees have raised a genuine issue of material fact as to whether Appellant had reasonable cause to believe abuse had occurred, thus triggering her reporting obligations. Because Appellant brings this appeal from a motion for summary judgment, all considerations must be viewed in Appellees' favor. The facts and testimony given in this case amply demonstrate

[65] Regardless, this Court has already determined that a teacher can be held liable for the negligent supervision of her students and that the duty of supervision is not discretionary. *Williams*, 113 S.W.3d at 148, 150.

that, on more than one occasion, Appellant was placed on notice that F.B. had been abused by her classmate, C.Y., and Appellant failed to report that abuse as the statute requires, thus subjecting F.B. to additional abuse.

Finally, although not properly before the Court on this appeal, Appellants have demonstrated that they are entitled to a private right of action under KRS 620.030 by means of KRS 446.070. That statute provides that any person injured by the violation of a statute may recover from the offending party for damages suffered. F.B. clearly falls within the class of persons intended to be protected by the Juvenile Code in general and KRS 620.030 specifically. In light of Kentucky's compulsory school attendance requirements and the special duty charged to Appellant under them, recognition of a private right of action is consistent both with the purpose of KRS 620.030 and prior Kentucky case law affording private rights of action under similar circumstances. For all of these reasons, the Opinion of the Court of Appeals must be affirmed.

Respectfully Submitted,

GOLDEN & WALTERS, PLLC

J. Dale Golden
Diane R. Conley
Corporate Plaza
771 Corporation Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
COUNSEL FOR APPELLEES