COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2013-SC-000560
COURT OF APPEALS FILE NO. 2012-CA-000598-MR

SHEILA PATTON, as Administratrix of the Estate of
STEPHEN LAWRENCE PATTON, deceased — APPELLANT

VS.

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

COMBINED REPLY BRIEF FOR APPELLANT, SHEILA PATTON, As Administratrix of the Estate of STEPHEN LAWRENCE PATTON, Deceased

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Submitted by:

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CERTIFICATE OF SERVICE

On the 1st day of December, 2014, a true copy of the foregoing was sent via U.S. Mail to: Michael J. Schmitt and Jonathan C. Shaw, Porter, Schmitt, Banks & Baldwin, 327 Main Street, P.O. Drawer 1767, Paintsville, KY 41240; Neal Smith, Smith, Thompson & Carter, PLLC, P.O. Box 1079, Pikeville, KY 41502; Hon. John David Caudill, Judge, Floyd Circuit Court, Division II, 127 S. Lake Drive, 1st Floor, Suite 100, Prestonsburg, KY 41653; and Hon. Samuel P. Givens, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The record on appeal has not been withdrawn.

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INTRODUCTION

At the outset, it is important to address matters Appellees concede or at least do not dispute.

APPELLEES CONCEDE A "SPECIAL RELATIONSHIP" EXISTS AND AGREE WITH THE ANALYSIS IN *WILLIAMS*.

Appellees concede that each of them has a "'***special relationship'... to take all reasonable steps to prevent foreseeable harm to its students***." *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145, 148 (Ky. 2003)(emphasis added).[1]

In *Williams*, school officials failed to supervise students who consumed alcohol at a school function. That, in turn, resulted in off-school-premises drunk driving by a student. The student, Hall, later wrecked his car, resulting in the death of Hall's passenger, Williams. This Court held that failure of teachers and administrators to supervise was a "***substantial factor*** in causing the death of [Williams]." *Id.* at 150(emphasis added). This Court also held that the student's off-school-premises drunk driving and wreck was not a "superseding cause" because it was "***neither 'extraordinary' nor 'unforeseeable***.'" *Id.* at 151 (emphasis added). Finally, the supervisory duties of the school officials in *Williams* were deemed "***ministerial***." *Id.* at 155 (emphasis added).

Here, Appellees argue that any failure to comply with procedures applicable to student misbehavior (i.e. bullying) is "discretionary." However, Appellees acknowledge, by citation to *Williams*, that failure to supervise another form of student misbehavior (i.e. alcohol consumption) is ministerial. Appellees also argue that any suicide death from bullying on school premises must be a "superseding cause" (i.e. "extraordinary" and "unforeseeable"). But Appellees acknowledge, again via citation to *Williams* that death

[1] See Brief for Appellees Bickford, Fanning and Fentress, p. 17; Brief for Hall, Mullins, Handshoe and Nichols, p. 17.

due to a motor vehicle wreck, at a location far removed from school premises, and outside the direct supervision of school officials, is nonetheless foreseeable.

APPELLEES DO NOT DISPUTE THAT STATUTES AND SCHOOL POLICIES IMPOSE MANDATORY DUTIES WITH RESPECT TO "BULLYING"

Appellees do not seriously dispute that KRS 161.180(1) requires:

> Each teacher and administrator in the public schools ***shall*** in accordance with the rules, regulations, and bylaws of the board of education made and adopted pursuant to KRS 160.290(3) for the conduct of pupils, hold pupils to a strict account for their conduct on school premises[.]

The rules and regulations promulgated by the board of education in the Floyd County district include a very specific anti-bullying policy, which, by way of KRS 161.180(1), the teachers and administrators are required to enforce. Appellees' duties are set forth in the Floyd County Schools Student Handbook & Code of Conduct:

> HARASSMENT/DISCRIMINATION
> ....
>
> ... Students who engage in harassment/discrimination of an employee or another student ***shall be subject to disciplinary action*** including, but not limited to, suspension and expulsion.
>
> ***District staff shall*** provide for a prompt and equitable resolution of complaints concerning harassment/ discrimination.
> ....
>
> Within twenty-four (24) hours of receiving a serious allegation of harassment/discrimination, ***district personnel shall*** attempt to notify parent(s)/guardian(s) of both student victims and students who have been accused of harassment/discrimination.
> ....
>
> Procedures
>
> Students who believe they have been a victim of harassment/discrimination or who have observed other students being victimized shall, as soon as reasonably practicable, inform their teacher, guidance counselor or principal of the incident.

The Superintendent shall develop procedures providing for the activities listed below.

> 1) Investigation of allegations of harassment/discrimination to commence as soon as circumstances allow, but not later than three (3) school days after submission of the original written complaint. A written report of all findings of the investigation shall be completed within thirty (30) calendar days....
>
> 2) A process to identify and implement, within three (3) school days of the submission of the written investigative report, methods to correct and prevent reoccurrence of the harassment/discrimination....
>
> 3) Annual dissemination of written policy to all staff and students.
>
> 4) Age appropriate training during the first month of school to include an explanation of prohibited behavior and the necessity for prompt reporting of alleged harassment/ discrimination.
>
> 5) Development of alternate methods of filing complaints for individuals with disabilities and others who may need accommodation.
>
> ....

Failure by an employee, immediate supervisor, principal, and/or superintendent to initiate an investigation of alleged harassment/discrimination, to follow approved procedures, or to take corrective action shall be cause for disciplinary action.

APPELLEES DO NOT DISPUTE THAT MANDATORY SCHOOL POLICIES AND PROCEDURES ARE INTENDED TO PREVENT HARM TO STUDENTS, LIKE STEPHEN.

And Appellees do not dispute that the above procedures are designed to prevent and punish bullying so as to prevent harm to students, like Stephen.

Two years before Stephen's death, ACMS principal, Davida Bickford, ***specifically warned*** staff via e-mail that one of the harms suffered by bullying victims is suicide. Ms. Bickford ***admitted*** the obvious in her own deposition, agreeing that suicide is a "foreseeable" risk of bullying.[2] Appellant's experts confirmed same.

[2] Response Exhibit 4, p. 46, T.R. p. 780.

The State Executive, through the Kentucky Department of Education, has also recognized: ***"[k]ids who are bullied may be at a higher risk of suicide."***[3] Even the General Assembly enacted anti-bullying legislation, and requires every public middle and high school administrator to disseminate suicide prevention awareness information to students each year. See KRS 156.095; KRS 158.070.

In fact, the General Assembly, by statute, has designated October of every year "Anti-Bullying Month in the Commonwealth." See KRS 2.227(1). The same statute expressly recognizes that bullying ***causes*** suicide. The General Assembly designated an official ribbon to remember students, like Stephen, who have "***taken their lives as a result of bullying.***" See KRS 2.227(2)(emphasis added).[4]

REBUTTAL

I. A JURY SHOULD DECIDE WHETHER APPELLEES' FAILURE TO FOLLOW SCHOOL RULES WAS A SUBSTANTIAL FACTOR IN BRINGING ABOUT STEPHEN'S DEATH.

Relying primarily on federal and out-of-state cases, Appellees would absolve anyone from liability—including bullies—so long as the abuse is severe enough that the victim commits suicide.

Contrary to executive and legislative findings, and the facts in this case, Appellees maintain that students ***cannot*** as a matter of law take their own lives "as a result of

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[3] http://education.ky.gov/school/sdfs/pages/bullying.aspx.

[4] KRS 2.227 states in full:

> (1)The General Assembly recognizes its responsibility to secure the environment for all Kentucky students. Thus, October of each year shall be designated as Anti-Bullying Month in the Commonwealth.
>
> (2)As a symbol of awareness of the serious issues and negative effects of bullying, the official ribbon for the Anti-Bullying Month in the Commonwealth shall be purple and yellow. The color purple is a reminder of domestic violence and the color yellow is in memory of those who have taken their lives as a result of bullying.

bullying." *Cf* KRS 2.227(2). Appellees instead argue—even against logic—that suicide is "***not a 'normal response'*** to the original tortious act [bullying]" and "***highly extraordinary***" so as to be "***unforeseeable***."[5] Therefore, according to Appellees, "suicide [is] an intervening and superseding act that cut[s] off liability."[6]

Appellees also claim school bullying/suicide as a superseding cause falls within as-yet-undefined "general rule," although no appellate court in this state has ever recognized same. Appellees primarily rely on a case from 1882 and Illinois case law from the 1960's.[7] The cases cited by Appellees lack any precedential value and are not binding on this Court. In any event, Appellees fail to recognize important changes in ***Kentucky law*** since those cases were decided.

For example, in 1980, this Court adopted the modern test for proximate cause in *Deutsch v. Shein*, 597 S.W. 2d 141, 144 (Ky. 1980): "[w]as the defendant's conduct a ***substantial factor*** in bringing about the plaintiff's harm?" "The question of proximate cause is ***factual one, not a legal one***, depending on whether the evidence shows that the results of the misconduct are foreseeable." *Grayson Fraternal Order of Eagles v. Claywell*, 737 S.W.2d 328, 334 (Ky. 1987)(emphasis added). "[T]he question of foreseeable risk is covered by the usual instruction related to proximate cause which is ***an issue framed for the jury*** in terms of whether the misconduct was a substantial factor. " *Id.* (emphasis added). This Court will find no reference to *Deutsch* or substantial-factor causation in Appellees' briefs.

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[5] See Brief for Appellees Bickford, Fanning and Fentress, p. 12, *quoting House v. Kellerman*, 519 S.W.2d 380 (Kv. 1974).

[6] See Brief for Hall, Mullins, Handshoe and Nichols, p. 19.

[7] See Brief for Appellees Bickford, Fanning and Fentress, p. 13, *citing Scheffer v. Washington City V.M. & G.S.R.*, 105 U.S. 249 (1882); *Stasiof v. Chicago Hoist & Body Co.*, 50 Ill.App.2d 115, 200 N.E.2d 88 (1st Dist. 1964).

In 1984, this Court abolished common law contributory negligence. *Hilen v. Hays*, 673 S.W. 2d 713 (Ky. 1984). In 1988, the General Assembly did the same by statute. KRS 411.182. Kentucky adopted the "pure" form of comparative fault whereby a plaintiff may recover damages even if he is 95% at fault and the defendant is only 5% at fault. As this Court noted in *Com., Transp. Cabinet, Dep't of Highways v. Babbitt*, 172 S.W.3d 786 (Ky. 2005), "the rationale for the doctrine of ***superseding cause has been substantially diminished by the adoption of comparative negligence.***" *Id.* at 793 (emphasis added). This Court then quoted from the *Restatement (Third) of Torts*, Liab. for Phys. Harm § 34 cmt. a (Proposed Final Draft No. 1, 2005):

> The advent of more refined tools for apportionment of liability—comparative responsibility, comparative contribution, and substantial modification of joint and several liability—also has undermined one important rationale for these rules: the use of scope of liability to prevent a modestly negligent tortfeasor from being held liable for the entirety of another's harm when the tortious acts of other, more culpable persons were also a cause of the harm.

Babbitt, supra at 793. Again, Appellees fail to mention this in their briefs.

In 1991, this Court fully recognized Kentucky's historical and constitutional devotion to the right to trial by jury as reflected in Kentucky's summary judgment standard. *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). Recently, this Court in *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013) expressly recognized a "recommitment" to the "very stringent standard for summary judgment in *Steelvest* and the ***rejection of the much more lenient federal standard.***" *Id.* at 916 (emphasis added). In so doing, this Court in *Shelton* disposed of another vestige of contributory negligence: the open and obvious doctrine. Not only do Appellees fail to address this in their briefs, or modern case law recognizing substantial-

factor causation as a jury issue, Appellees incorrectly portray the facts of this case in a light most favorable to them.

Finally, pertinent Kentucky law cited by Appellees actually support Appellant. For example, Appellees rely on *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003). Several parallels exist between *Williams* and the present case. First, both involve the "special relationship" between teachers/administrators and students. Second, both involve tragic student deaths. Third, both stem from a similar fact pattern: school officials fail to follow rules designed to prevent student misconduct, student misconduct occurs, and the misconduct results in harm to a fellow student. Fourth, defendants in both cases claimed superseding causation as a bar to recovery (as well as qualified official immunity). Interestingly, the causation evidence in *Williams* was more attenuated than in the present case. Unlike the student misconduct here, bullying, the student misconduct in *Williams*, drunk driving, occurred ***completely off school premises*** and outside the scope of any school official's supervision. Nonetheless, this Court in *Williams* held that the doctrine of superseding causation did not apply.

Whether this Court abandons the doctrine of superseding causation—a result supported by the trend in Kentucky law—or considers the doctrine in light of *Williams,* the conclusion is the same: the doctrine of superseding causation does not apply. Otherwise, its application is tantamount to finding that Stephen Patton is 100% at fault for his own death, and no reasonable jury could find otherwise. Stated differently, no reasonable jury could possibly find Appellees' conduct was a "substantial factor" in bringing about the harm to Stephen—not even to assign 1% of fault. The facts of this case, viewed in a light most favorable to Stephen, simply do not support that conclusion.

This case should be remanded so a Floyd County jury can decide whether Appellees' failure to follow school policies and procedures was at least a "substantial factor" in bringing about Stephen's death.

II. APPELLEES ARE NOT IMMUNE.

Although the Court of Appeals held that Appellees were not immune, and Appellees did not file a cross-motion for discretionary review, Appellees now claim they are cloaked with either state-law qualified official immunity or protected by the "Paul D. Coverdale [sic] Teacher Protection Act of 2001."[8] Both state-law qualified official immunity and the Coverdell Act are affirmative defenses for which Appellees bear the burden of proof.[9]

A. Appellees are not entitled to state-law qualified official immunity.

The Court of Appeals correctly found that the school policies and procedures detailed in the "Introduction" ***require*** the Superintendent to develop procedures with respect to bullying, and mandate certain activities, such as an affirmative duty to investigate and report. The facts viewed in a light most favorable to Appellant reveal that Superintendent did not do those things. Likewise, district staff (including the Teachers and Principal) ***shall*** promptly resolve complaints of bullying. Again, the facts viewed in a light most favorable to Appellant reveal that did not happen. These duties, as well as the other duties identified in the "Introduction," are ministerial duties for which there is no immunity.

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[8] See Brief for Appellees Bickford, Fanning and Fentress, p. 21; See Brief for Hall, Mullins, Handshoe and Nichols, p. 26.

[9] *See Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001)("qualified official immunity is an affirmative defense that must be specifically pled"); *Webb, ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 620, 218 P.3d 1239, 1245 (2009)("we conclude that the Coverdell Act is an affirmative defense because the Coverdell Act, in this case, is a new fact and argument that, if true, would defeat Webb's claim.").

A ministerial act is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky.2001). An immune discretionary act, on the other hand, requires policy-making or significant judgment. *Id.* The rules listed in the "Introduction" all qualify as ministerial acts. They only require enforcement. They flow from a specific statute as well as a formal policy statement or protocol (i.e. the handbook). Even so, ministerial acts can flow from common law duties or professional customs and practices as well. *See Com., Transp. Cabinet, Dep't of Highways v. Sexton*, 256 S.W.3d 29, 33 (Ky.2008)("an act may be ministerial even if that act is not specifically covered by applicable statutes, or administrative regulations"). For instance, in *Yanero*, a high school baseball coach's failure to require a player to wear a batting helmet during batting practice was a negligent ministerial act, for which there was no immunity, even though there was no established or written rule mandating the use of helmets. In any event, for the purpose of the ministerial/discretionary distinction, this case is not materially different from *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003). *Williams* held that school policies and procedures with respect to student supervision were ministerial acts for which there was no immunity. The same is true here.

B. The Paul D. Coverdell Teacher Protection Act of 2001 does not apply.

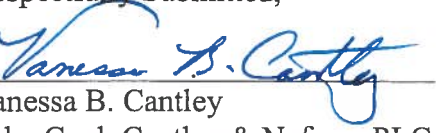
Appellees devote little time to the Coverdell Act, 20 U.S.C. § 6731 et seq. The trial court did not consider it. The Court of Appeals did not consider it. In fact, Appellees presented no proof that the prerequisites of the Act have been met. For example, the Act only applies if Kentucky receives federal funds under the chapter. 20 U.S.C. § 6734.

Appellees submitted no such proof. Most importantly, the Act provides limited protection ***only if*** the "actions of the teacher were carried out ***in conformity*** with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student." 20 U.S.C. § 6736(a)(2)(emphasis added). Here, Appellees' negligent actions were not carried out in "conformity" with state statutes and school policies and procedures—in fact, they were not followed at all. That is the very basis of the ministerial negligence in this case. Accordingly, the Coverdell Act does not apply.

CONCLUSION

The purpose of tort law "is to compensate the injured, to spread the loss and to deter others from committing like wrongs." *City of Louisville v. Louisville Seed Co.*, 433 S.W.2d 638, 642 (Ky. 1968) *overruled on other grounds by Gas Serv. Co. v. City of London*, 687 S.W.2d 144 (Ky. 1985). Neither the antiquated doctrine of superseding causation, nor a misapplication of immunity, advance that laudable goal. The constitutional right to trial by jury does. A Floyd County jury, after listening to the facts, is in the best position to determine whether Appellees' conduct was a substantial factor in bringing about harm to Stephen. Accordingly, for all the previous reasons, and the reasons in Appellant's opening brief, the Court of Appeals Opinion should be reversed and this case should be remanded for a jury trial.

Respectfully Submitted,



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