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Supreme Court of Kentucky

2013-SC-000560-DG

SHEILA PATTON, AS ADMINISTRATRIX OF THE ESTATE OF STEPHEN LAWRENCE PATTON — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2012-CA-000598
FLOYD CIRCUIT COURT NO. 08-CI-00653

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

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

AFFIRMING

Thirteen-year-old Stephen Patton was an eighth-grader at Allen Central Middle School (ACMS) when he committed suicide allegedly because he was bullied at school. His estate[1] filed this lawsuit naming various teachers[2] and administrators[3] claiming that they all knew, or should have known, of the bullying he suffered at school.

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[1] We will refer to Patton's estate as the Estate throughout this Opinion.

[2] "The Teachers" collectively refers to Appellees Jeremy Hall, Angela Mullins, Lynn Handshoe, and Greg Nichols, all teachers at ACMS.

[3] "The Administrators" collectively refers to Appellees Davida Bickford (ACMS Principal), Paul Fanning (Floyd County School Superintendent), and Ronald "Sonny" Fentress (Floyd County School Superintendent).

The trial court granted summary judgment in favor of the Teachers and the Administrators, ruling that they were entitled to the protection of qualified official immunity from this suit and that Patton's suicide was an intervening cause interrupting any potential liability by the Teachers and Administrators.

The Court of Appeals upheld the summary judgment solely on the intervening-cause issue. But the Court of Appeals disagreed with the trial court's ruling on qualified official immunity, holding that neither the Administrators nor the Teachers were immune from liability because their duties were ministerial in nature.

On review, we affirm the Court of Appeals' result on different grounds. ACMS had detailed policies in place regarding bullying and the appropriate steps for school personnel to take to respond to it. Perhaps school personnel had some degree of discretion in carrying out these policy directives, but that does not, in itself, mean their duty was discretionary to the extent that they are entitled to qualified official immunity under our case law. So to that extent, we agree with the conclusion reached by the Court of Appeals and hold that the trial court erred when it ruled that the Teachers were cloaked with qualified official immunity. But we disagree with the Court of Appeals and hold that the trial court did not err in ruling that the Administrators were protected by qualified immunity and entitled to summary judgment on those grounds.

Even though we find that the Teachers were not immune from suit, we ultimately conclude that the trial court did not err by granting summary judgment because the Estate presented no credible evidence that Patton was bullied because the Teachers were negligent either in their duty to supervise their pupils or their duty to handle bullying reports appropriately. As a result,

we see no reason to address the issue of whether Patton's act of suicide was an intervening cause.

I. FACTUAL AND PROCEDURAL BACKGROUND.

By all accounts, Patton was a well-liked, personable young man. What is disputed is whether Patton was actually bullied at school. The Teachers and Administrators' proof suggested that perhaps he was distracted by pain from persistent migraine headaches or suffering from a mental disorder. Tragically, Patton killed himself at home in his bedroom, and the Estate claims that his suicide was the result of repeated bullying while he attended ACMS.

In its complaint, the Estate alleged both the Administrators and Teachers were negligent in discharging their duties as school employees, ACMS's bullying policies were insufficient, and ACMS's supervision protocol was inadequate. In essence, the Estate alleged the Administrators failed to implement sound policies and the Teachers failed to know Patton was being bullied and mistreated under their watch.

II. ANALYSIS.

We have been firm in our view that summary judgment is a remedy to be used sparingly when circumstances demand, *i.e.* "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant."[4] The trial court's primary directive in this context is to determine whether an issue of material fact exists; if so, summary judgment is improper. This requires the

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[4] *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 905 (Ky. 2013). As we always caution, "[i]mpossible is to be used in a practical sense, not in an absolute sense

facts be viewed through a lens most favorable to the Estate, the party opposing summary judgment.[5] But it is important to point out that "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[6]

A motion for summary judgment presents only questions of law and "a determination of whether a disputed material issue of fact exists."[7] So our review is de novo, and we afford no deference to the trial court's decision.

At the outset, we should clarify the Estate's arguments. The Estate asserts that the Teachers and, to the extent applicable, the Administrators, negligently supervised students and failed to follow school policy, which cultivated at ACMS a culture of bullying. Importantly, the Estate also seems to allege that the Teachers and Administrators were negligent because students allegedly reported Patton's bullying and they did nothing to stop it. Rather than a claim based in the supervision of students, this latter claim focuses on the negligent implementation of the school's policies. The Teachers and Administrators, respond that, argue the Estate's claims should be dismissed because they are entitled to qualified official immunity.

Whether qualified official immunity applies has been problematical for this Court. We have, with only marginal success, wrestled with the nuances of ministerial and discretionary duties in an attempt to divine some sort of clarity for not only the bench and bar but the public as well. This case is no different.

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[5] *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

[6] *Id.* at 482.

[7] *Shelton*, 413 S.W.3d at 905.

Official immunity, generally speaking, is "immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions."[8] Under certain conditions, this immunity can be absolute; qualified immunity, though, applies only to the negligent performance of duties that are discretionary in nature. But a government official is not afforded immunity from tort liability for the negligent performance of a ministerial act. Perhaps put another way: the act of "governing cannot be a tort, but failing to carry out the government's commands properly when the acts are known and certain can be."[9]

This begs the question: where is the line between a discretionary and ministerial duty? Answering this question presents the Gordian knot to litigants and courts alike. We recently affirmed that the distinction "rests not on the status or title of the officer or employee, but on the function performed. Indeed, most immunity issues are resolved by examining the nature of the functions with which a particular official or class of officials has been lawfully entrusted."[10] And we have previously provided a somewhat rudimentary summation of the distinction between discretionary and ministerial acts: "Promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function."[11] This is, of course, too simple for most circumstances, but it serves as a sound point from which to begin.

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[8] *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001).

[9] *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014).

[10] *Id.* (internal quotation marks and citation omitted).

[11] *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003).

A ministerial duty is one that "requires only obedience to the orders of others."[12] In other words, "when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."[13] Be that as it may, a ministerial duty does not demand the simple rote application of a set of rules. A ministerial duty may involve "ascertainment of . . . facts[14]," and an officer may be permitted "some discretion with respect to the means or method to be employed."[15] The point is that a government official performing a ministerial duty does so without particular concern for his own judgment; or, as we said in *Marson*, the act is ministerial "if the employee has no choice but to do the act."[16]

In contrast, discretionary acts or duties are "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment."[17] In *Yanero*, the seminal case in this arena, we described discretionary acts as "good faith judgment calls made in a legally uncertain environment."[18] The underlying rationale for providing immunity to discretionary acts is that "courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate

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[12] *Marson*, 438 S.W.3d at 297.

[13] *Id.* (quoting *Yanero*, 65 S.W.3d at 522).

[14] *Upchurch v. Clinton Cnty.*, 330 S.W.2d 428, 430 (Ky. 1959).

[15] *Id.; see also* 63C Am.Jur.2d *Public Officers and Employees* § 319 ("Even a ministerial act requires some discretion.").

[16] *Marson*, 438 S.W.3d at 297.

[17] *Knott Cnty. Bd. of Educ. v. Patton*, 415 S.W.3d 51, 57 (Ky. 2013) (alterations omitted) (quoting *Yanero*, 65 S.W.3d at 522).

[18] *Yanero*, 65 S.W.3d at 522.

crucible for testing the merits of social, political or economic policy."[19] This rationale makes clearer that discretionary acts are those performed at the policy-making level, but acts performed at the operational level are included within this category as well.

1. The Administrators Were Entitled to Qualified Official Immunity.

As for the relation of this binary classification to situations within the education environment, we begin with the Administrators. With perhaps the exception of Principal Bickford in very limited circumstances, the Administrators were not tasked with supervising students.[20] In point of fact, the Estate does not argue the Administrators negligently supervised or monitored students; rather, the Estate primarily argues the Administrators did not create adequate policies and, in any event, did not follow those policies. The Administrators' primary duty was dictating the code of conduct or policy guidelines for ACMS and all Floyd County Schools.

The Administrators, in promulgating conduct policies, operated under a legislative directive. The General Assembly has enacted anti-bullying legislation, requiring "each local board of education" to "formulat[e] a code of acceptable behavior and discipline to apply to the students in each school operated by the board."[21] But this does not establish, however, that the Administrators carried out a ministerial function. We dealt with this in *Knott*

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[19] *Id.* at 519.

[20] In her deposition, for example, Principal Bickford acknowledged that she would aid in supervising the cafeteria when a sufficient number of teachers was not available. Normally, ACMS had at least two teachers—three on most occasions—supervising the cafeteria during lunchtime (roughly 100 students). If a teacher had to leave the cafeteria for some reason or was otherwise unavailable to supervise lunchtime, Principal Bickford acknowledged she would help.

[21] Kentucky Revised Statute (KRS) 158.148(4); *see also* KRS 158.440.

Cnty. Bd. Of Educ. where school administrators had a statutory duty to establish a school curriculum and adopt a policy for assessing curriculum needs. But the choice to teach Spanish language courses in the curriculum rather than French language courses was discretionary because neither was mandated by law.[22]

Such is the case here with the Administrators. No doubt there was a ministerial duty to implement policies regulating appropriate conduct for the school district. The Administrators complied with their statutory directive and enacted rather extensive policies regarding bullying and harassment. But creating the actual content of those policies was purely discretionary.[23] Providing the parameters for accepted conduct within the entire school system was, to be sure, an example of "good faith judgment calls made in a legally uncertain environment."[24] The Administrators, as a result, are entitled to qualified official immunity as to the Estate's claim that the policies were inadequate.

2. The Administrators and Teachers Conducted Ministerial Functions, but Summary Judgment was Appropriate.

Before discussing the Estate's claims that the Administrators failed to follow the policies they promulgated—a claim somewhat different from the

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[22] *See Knott Cnty. Bd. of Educ.*, 415 S.W.3d at 58.

[23] To the extent Patton argues the Administrators were negligent in implementing the policies by not filing proper reports, supervising students, or otherwise failing to create a healthy culture within ACMS and the Floyd County School System, this argument is refuted by the record. The record attempts to highlight each of the Administrators' deviations, regardless of degree, from the strict language of the policy. A prima facie claim of negligence fails, however, because the record is devoid of any connection between these deviations and bullying that occurred at ACMS or bullying endured by Patton.

[24] *Yanero*, 65 S.W.3d at 522.

previous claim and more closely related to the Estate's claim against the Teachers—or that the Teachers negligently supervised students, we need to provide an overview of the policies ACMS had in place to prevent or resolve harassment.

ACMS was clear in its intention to create a safe school environment for all its students. Critical to the success of that goal was the elimination and prevention of bullying:

> What parents want most is for their children to be safe on their way to/from and at school. When a child does not feel safe at school, it affects other areas of that child's life. Students who feel anxious about their personal safety are sometimes reluctant to attend. Once students and community are aware that bullying is not tolerated at school, students will be less guarded and concentrate more on learning than staying safe. The victim, the bully as well as witnesses to bullying acts are more comfortable when they know the community, students, staff and administration stand together against bullying. Our school will then be viewed as a safe school.

But what constituted *bullying*? On its face, bullying seems like a highly nebulous concept. In 2003, ACMS adopted the following definition to provide a degree of clarity: "Bullying is defined as (but not limited to) communicating verbally and nonverbally using: teasing; mocking; sending/writing negative/hurtful notes; rude/negative/hurtful/off color comment; rude gestures/'flipping off' another person; isolating another from a group."[25] Going further, the school's code of conduct included any of the following physical acts under the bullying classification when occurring "on school property, at any school function, or on school transportation[:]

- Hitting with hand or object;
- Grabbing;
- Pinching;

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[25] Bullet points omitted.

- Twisting body parts;
- Tripping;
- Pushing;
- Shoving;
- Flip/throw/toss objects at another student;
- Poking;
- Punching;
- Kicking;
- Hiding or damaging another student's property."

These specified acts are expansive, to be sure, but the policy provides a clear illustration of prohibited conduct.

And ACMS's policy mandates school staff members—Teachers and Administrators—who observe bullying or receive a report of bullying, to then report that incident to their supervisor: "all bullying [behaviors] as defined [above] WILL be reported for investigation." A multilateral general investigative process then followed: (1) "Report bullying incident to principal or designee for investigation"; (2) "Principal or designee investigates"; and (3) "Documentation of evidence is gathered and evaluated." After the investigation, if the report is substantiated, the student found to be a bully is disciplined from a range of possible penalties.

Beyond the literal policy language, ACMS also took steps to train its staff, raise awareness among its student body, and bring parents into the fold on matters related to bullying. The bullying policy was read aloud to students by teachers on the first day of school; the policy was distributed to students so they could take it home for parents to review; students were surveyed during the first week of school and asked to respond anonymously regarding who they perceived as potential bullies for the upcoming school year; an anti-bullying program was presented each year; anti-bullying posters were hung throughout

the school; and a bullying box was placed outside Principal Bickford's office so that students could submit anonymous claims of bullying. If a student was reported as a bully or if a student was the victim of bullying, parents were notified.

Particular to the Teachers and Administrators (especially Principal Bickford), ACMS conducted various professional development programs to further educate on the importance of bullying prevention and detection. Before the first day of the school year, ACMS personnel were informed of their responsibility to nurture a positive classroom environment and follow appropriate discipline procedures. Likewise, personnel received training on bullying via PowerPoint presentation and training on appropriate management of classroom behavior, which, predictably, included strategies for dealing with bullying and harassment.

This case mirrors our recent decision in *Marson* in important ways. We noted in *Marson* that school principals certainly have a "duty to provide a safe school environment, but they are not insurers of children's safety."[26] But this duty is discretionary in nature because it is "so situation specific, and because it requires judgment rather than a fixed, routine performance."[27] In the ordinary course, the duty is "exercised most often by establishing and implementing safety policies and procedures.[28] After all, there is a "qualitative difference in actually [supervising students] and assigning someone to fill that

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[26] *Marson*, 438 S.W.3d at 299.

[27] *Id.*

[28] *Id.*

task."[29] The Administrators, in other words, are a degree removed from the actual execution of the policies. Instead, their role is to monitor the implementation of the policies and react as needed.[30] Disciplining students for policy violations is likewise a discretionary function.

Principal Bickford had only a general supervisory duty over the students. As we indicated previously, at times she would help with monitoring the cafeteria during lunchtime, but the record is clear that her role as principal did not entail the specific supervision or monitoring that was required of the Teachers. So qualified official immunity is warranted with regard to the Administrators in the context of the Estate's allegation that the policies were negligently implemented.

The Teachers, on the other hand, were tasked not with the promulgation of policy, but its enforcement. We have consistently held that the general supervision of students by teachers is ministerial in nature, "as it requires enforcement of known rules."[31] In fact, we have only labeled the duty of supervision discretionary in two cases illustrating the same factual scenario. That is, the official tasked with supervision was given *no* (or very little, *e.g.* a single oral statement) direction, training, or guidance in how the supervision was to be performed.[32] That is far from the situation presented here. As we

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[29] *Id.*

[30] Again, as we outlined in *Marson*, the Administrators "had a general rather than a specific duty, [which] require[ed them] to act in a discretionary manner by devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees." *Id.*

[31] *Marson*, 438 S.W.3d at 301 (citing *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003)).

[32] *See Haney v. Monsky*, 311 S.W.3 235 (Ky. 2010); *Rowan Cnty. v. Sloas*, 201 S.W.3d 469 (Ky. 2006).

previously detailed, the Teachers were given ample training on the purpose and meaning of the policies as well as what to look for during their supervision to detect bullying. This is not a situation where an officer performed governmental acts "not prescribed" or "without clear directive."[33]

No doubt a school environment is unique, a fact that is not now nor has ever been lost on this Court. We have routinely recognized that it is critical "that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom."[34] To be successful, teachers "must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions as to what actually happened, and ultimately to determine an appropriate course of action, which may, at times, involve reporting the conduct of the child to the appropriate authorities."[35] To be sure, there is a degree of discretion associated with the Teachers' duties here. But this discretion, in and of itself, does not transform an otherwise ministerial duty to a discretionary one.

Of course, it could be argued that the determination of whether or not bullying is occurring is a discretionary function that then triggers the ministerial duty to report the conduct. Facially speaking, this seems accurate. But our case law disagrees. "That a necessity may exist for the ascertainment of . . . facts does not operate to convert the act into one discretionary in nature."[36] And simply because an officer may be permitted a degree of

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[33] *Marson*, 438 S.W.3d at 302.

[34] *Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky. 2011).

[35] *Id.*

[36] *Upchurch v. Clinton Cnty.*, 330 S.W.2d 428, 430 (Ky. 1959).

discretion "with respect to the means or method to be employed"[37] does not strip away the ministerial nature of the duty.

Again, in *Marson*, a case that is nearly dispositive of the instant matter, we emphasized that allowing a simple degree of discretion to convert an otherwise ministerial function "would undermine the rule that an act can be ministerial even though it has a component of discretion."[38] The discretion in *Marson* was greater even than that found here. The teacher was placed on "bus duty" and intertwined with that ministerial duty of supervision was an aspect of discretion: "looking out for [the children's] safety" or, in the teacher's own words, looking out for "any kinds of safety things that might cause problems for the kids."[39] There was no policy in place defining "safety things" or any sort of guideline that might have provided the teacher in *Marson* with any understanding of what to look for when attempting to detect these "safety things." It is easy to imagine that what one teacher may have found an unsafe thing another teacher might find safe.

This minor aspect of the teacher's ministerial role in "bus duty" is akin to the lack of guidance provided to the camp counselor designated to conduct the Night Hike through the zoo in *Haney*. We found conducting the Night Hike to be discretionary and bus duty ministerial. This was right, to be sure, but the instant case aligns neatly with *Marson*, not *Haney*. If anything, the Teachers at ACMS were provided *less* discretion than the teacher in *Marson* because bullying was defined and the policy *required* that the conduct be reported. The

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[37] *Id.*

[38] *Marson*, 438 S.W.3d at 302.

[39] *Id.* at 300, 302.

Teachers were given a directive to carry out rather than asked to make a decision in an uncertain environment.

Our research discloses a singular example of this Court finding teacher supervision discretionary where a mixture of ministerial and discretionary duties were present. That case, *Turner v. Nelson*, exists on a separate plane from the circumstances presented here. In *Turner*, we found discretionary a teacher's statutory obligation to report suspected sexual abuse because the duty to report was only triggered if a "person . . . knows or has reasonable cause to believe that a child is . . . abused."[40] This required investigating the facts, weighing the credibility of the children, and using the teacher's judgment to reach a decision.[41] The discretion in that process is evident. But, this case is nearly the opposite. ACMS policy provided a list of specific conduct considered to be bullying and then demanded that *any* of those actions *must* be reported. The investigation occurred after the teacher was required to report the behavior. *Turner* is not applicable here.

The duty of the Teachers was ministerial, so they could be sued individually. We should be clear that the Teachers or those similarly situated in future cases are not without defenses; they simply are not *immune* from suit. A flood of litigation against teachers is not foreseeable because a teacher acting under such extensive policies must still be found *negligent*. The limitations of the human form being what they are, of course a teacher is not expected to be in all places at once or see all things, but they are expected to act according to the directives outlined in their school's policy.

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[40] *Turner*, 342 S.W.3d at 877 (quoting KRS 620.030(1)).

[41] *Id.* at 878.

The problem with the Estate's negligence claim is the complete absence of proof regarding the bullying Patton allegedly endured. The record is silent on this matter. Counsel for the Estate repeatedly claimed she had affidavits from Patton's classmates describing the torment he endured and indicating Bickford was notified twice of the cruel conduct and teachers turned a blind eye. But the Estate never placed these affidavits in the record because the Estate's counsel argued they were privileged work-product. And the students were never deposed. In fact, according to the Teachers and Administrators, the affidavits were only produced *after* summary judgment was granted, almost four years after the initial complaint was filed.

So the only indication Patton was bullied at all is found in the deposition of the Estate's bullying expert,[42] and that is merely a reference to the characterization of the evidence by the Estate's counsel that the expert relied on in making her report. The expert admitted she had never seen the affidavits or spoken to the students who allegedly witnessed Patton's bullying. That is not to say that the burden rests solely on students for claims of this nature to proceed; rather, it is simply a recognition that the record before us cannot bear the weight the Estate places upon it. Without some factual support for the

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[42] We should mention that Patton's mother emailed Handshoe, an ACMS teacher, prior to Patton's suicide because she was concerned why Patton did not wish to go to school. In the email, Patton's mother mentions his headaches and the fact that report cards were due soon and Patton was nervous about that; but, she did also mention that her motherly intuition made her think something else was wrong. Handshoe replied to the email and mentioned that Patton had been bothered by the baby simluators' crying (part of Baby-Think-It-Over-type school program), but other than that seemed okay. Perhaps, if there was any other evidence in the record to support bullying, this email could be viewed as support for Handshoe's negligent supervision; but, that is an incredible stretch given the record as it stands.

bullying allegations, there is no evidence of the Teachers' negligence under the policies.[43]

It is not uncommon that we are presented with a minimal record from which to review summary judgment. But this case is somewhat unique. It is not simply a minimal record. The record of actual bullying is de facto nonexistent. Put simply, the Estate has not presented any "affirmative evidence showing that there is a genuine issue of material fact for trial."[44] The Estate's claim that the Teachers or Administrators were negligent in either their supervision or their failure to report bullying incidents is completely undercut by the lack of evidence relating to bullying. Summary judgment, accordingly, was appropriate here.

III. CONCLUSION.

We have consistently held a teacher's duty to supervise students is ministerial in nature. That does not change today. The Teachers had a ministerial duty, but the Estate has failed to present a question of material fact. The Administrators, however, were entitled to qualified official immunity because their duty was discretionary, which is consistent with our precedent. As it stands, summary judgment was appropriate. The decision of the Court of Appeals is affirmed.

All sitting. Minton, C. J., Hughes, Keller, Noble, Venters, Wright, JJ., concur. Cunningham, J., concurs in result only.

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[43] Of note, even if the Administrators' duty was ministerial, it would be impossible to find proximate cause for Patton's suicide without some indication Patton was actually bullied. The Administrators allowing a culture of bullying to consume the school only becomes actionable for the Estate by proving Patton was bullied; otherwise, the Administrators' conduct did not contribute to Patton's suicide.

[44] *Steelvest*, 807 S.W.2d at 482.

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