IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: 22-0028

KANAWHA COUNTY BOARD OF EDUCATION, a political subdivision, GEORGE AULENBACKER, principal, BRAD MARANO, assistant principal, Defendants Below,

Petitioners,

v.

S.D., a minor, by and through her parent and next friend. J.D.,

Respondents.

REDACTED RESPONSE BRIEF ON BEHALF OF S.D.

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I. STATEMENT OF THE CASE

In this case, the Respondent, S.D., did in fact suffer physical injury, as she was sexually assaulted on January 29, 2018 (A.R. at 5). The uncontroverted testimony of S.D. is that M.P. "grabbed and touched her in the "private area" for 10 full seconds (A.R. at 0647).

Upon notification by the Respondent of the sexual abuse against her, the Petitioner's did not properly safeguard Plaintiff against further harassment and abuse, leading to further damages suffered by Respondent as she was assaulted by M.P. after a short suspension at the high school on February 1, 2018 (A.R. at 0660).

After being notified of the first assault by the Respondent, Petitioner's Aulenbacher and Marano suspended M.P. for an "indecent act on a student" (A.R. at 349). However, the Kanawha County Board of Education student/parent handbook is very clear as to what actions constitute indecent acts and sexual harassment, and what actions are to be taken by administration upon knowledge of these acts occurring (A.R. at 0836).

An indecent act toward another student is described under 25.07.1.3.8 of the KCBE handbook as, "A student will not direct profane language, obscene gestures or indecent acts towards a school employee or a fellow student. This inappropriate behavior includes but is not limited to, verbal, written, electronic and/or illustrative communications intended to offend and/or humiliate" (A.R. at 0836).

Sexual Misconduct is described in 25.07.1.5.10 of the KCBE handbook as, "A student will not publicly and indecently expose themselves, display or transmit any drawing or photograph of a sexual nature, or commit an indecent act of a sexual nature on school property, on a school bus or at a school sponsored event" (A.R. at 0839).

Harassment/Bullying/Intimidation are laid out in detail in 25.07.1.5.13 of the KBCE handbook. There are many different forms of harassment and bullying, but one that is specified in detail is sexual harassment. Sexual harassment is described as "sexually motivated physical conduct" when such conduct "creates an intimidating, hostile, or offensive educational environment." The handbook then goes on to explicitly list some examples of sexual harassment, which includes "inappropriate or unwelcome patting, pinching or physical contact" (A.R. at 0840).

Further described in this section is sexual violence, which is described as "physical act of aggression or force or the threat thereof which involves the touching of another's intimate parts" with intimate parts being described as "The primary genital area, groin, inner thigh, buttocks or breast, as well as the clothing covering these areas" (*Id*).

The handbook also lays out in detail what actions should be taken by administrators when a student is being sexually abused. 25.04.15 requires teachers, counselors, nurses, and other professionals who suspect that a student has been sexually abused at school to report their findings to the Department of Health and Human Resources (A.R. at 0822-0825).

An Indecent Act towards another student is described as a Level II violation. Level II violations are described in 25.07.1.3 as disruptive and potentially harmful behaviors; these behaviors are considered to be not malicious and not intended to cause harm or danger to others (A.R. 0834-0835).

Sexual misconduct, sexual harassment, and sexual violence are all Level III violations. Level III violations are described in 25.07.1.5 as being imminently dangerous, illegal and/or aggressive behaviors (A.R. at 0838-0839). These violations are considered to be willfully committed and are known to be illegal and/or harmful to people or property.

The GWHS handbook lays out in more detail what punishments will be given for the different violations listed above. An indecent act towards another student is punishable by only 1-3 day of out of school suspension, while an act of sexual misconduct is punishable by up to 10 days of out of school suspension, and an act of bullying or harassment is a minimum 3 days out of school suspension (A.R. at 0816-0817). All of these punishments are for first offenses only, second offense to sexual misconduct is expulsion, and second offense to bullying or harassment is 5 days out of school suspension (*Id.).*

In this case, the Petitioner's found that M.P. had only committed an indecent act towards another student despite clear definitions of what sexual misconduct and sexual harassment/violence are. M.P., without the consent of Respondent, placed his hand in between Plaintiff's thighs, on her vaginal area, and grabbed her, holding for 10 seconds (A.R. at 349).

The actions of M.P. clearly describe sexual misconduct at the least, which is an indecent act towards another student of a sexual nature. The grabbing of a member of the opposite sex's intimate area cannot be mistaken as anything but an act of a sexual nature. Further, sexual harassment includes sexually motivated physical conduct, and sexual violence goes further and includes, in detail, the touching of a student's intimate area, which includes the thighs, groin, buttocks, or vaginal area (A.R. at 0838).

M.P. was only given 2 days of out of school suspension for an indecent act towards another student (A.R. at 349). This was after Petitioners had been informed that M.P. had grabbed Plaintiff in her vaginal area. Because M.P. was not given more than two days of out of school suspension, he was able to play in the varsity basketball game GWHS had scheduled the day after M.P. came back to school. Not listing M.P.'s acts as sexual in nature had the added effect of allowing Petitioners to skip reporting of sexual abuse to the DHHR or the KCBOE Title

IX Department and would not be included in M.P.'s record as an act of sexual violence (A.R. at 0818-0865). Furthermore, S.D. did not receive support from the KCBOE Title IX Department as the case was never reported from GWHS to the KCBOE as mandated by the policies and procedures of KCBOE regarding any and all sexual assaults (*Id.*).

When M.P. did return to school, he attempted to bully and harass the Respondent again in the hallway by "flinching" at her (A.R. at 0660). This too was reported to Petitioners who informed Plaintiff there were no actions they could take against M.P (*Id.*)

The Respondent continued to be harassed by M.P. in and out of school, on social media, and by his friends and family (A.R. at 0636-0641). The Respondent received several absences in school because she would take a longer route, so she did not interact with M.P (*Id.*) The Respondent also was afraid to attend sporting events as a cheerleader because of the continued harassment of her and her family by M.P. and his friends and family (*Id.*).

The Petitioner's allege that the Respondent is precluded from recovery for negligent infliction of emotional distress because she has no ascertainable physical injury and the fact that Defendants could not have stopped M.P.'s initial sexual abuse (A.R. at 0035). However, the damages alleged against Petitioners by the Respondent did in fact constitute physical injury. Furthermore, the negligence arises from their mishandling of the situation after the sexual abuse by M.P., not before or during. The negligent conduct of Petitioners allowed for the further harassment of Respondent by M.P. in and out of school, and the preferred treatment M.P. received as a star member of the basketball team only exacerbated the situation.

II. SUMMARY OF ARGUMENT

This Court should uphold the ruling of the judgment of the lower court dismissing the summary judgment motion of the Petitioners. First, the individual Petitioners do not have

immunity under W.Va. Code §29-12a-5(b), as their actions were clearly done in a reckless manner without regard to the county policies and procedures. Second, the Kanawha County Board of Education is not immune from liability under W.Va. code §18A-5-1(f). Finally, there is in fact a physical injury to the Petitioner.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe oral argument is necessary unless the Court determines that issues should be addressed in said manner. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

IV. ARGUMENT

A. Standard of Review

"A circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Similarly, we previously have stated, and now so hold, that this Court "review[s] de novo, the denial of [a] motion for summary judgment," *Adkins v. Chevron*, USA, Inc., 199 W.Va. 518, 522, 485 S.E.2d 687, 691 (1997).

"An appellate court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by the court. A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine. A circuit court's entry of summary judgment is reviewed de novo. However, in cases where interlocutory review of qualified immunity determinations occurs, any summary judgment rulings on grounds other than immunity are reserved for review at the appropriate time should the interlocutory appeal result in finding immunity inapplicable under the circumstances." *Ayersman v. Wratchford*, Nos. 21-

0174, 21-0181, 2022 W. Va. LEXIS 387, at *1 (May 20, 2022).

"The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition. Questions regarding malice are questions for the fact-finder." *Id.* at *1.

"Motions for summary judgment impose a difficult standard on the movant; for, it must be obvious that no rational trier of fact could find for the nonmoving party. *Davis v. Williamson*, 208 F. Supp.2d 631 (N.D. W. Va. 2002). Any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *McLaughlin v. Chrysler Corp.*, F. Supp.2d 671 (2003). Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *New Hampshire Ins. Co. v. RRK, Inc.*, 230 W. Va. 52 (2012).

B. The individual Petitioners are NOT immune from this suit in accordance with W.Va. Code §29-12A-5(B).

Respondents Aulenbacher and Morano are clearly not immune from liability under *W.Va. Code §29-12A-5(B)* as stated in the lower courts final order. Both Respondents acted in a reckless manner as prescribed by their actions above in not finding sexual contact or sexual abuse under the KCBOE Policies and Procedures. Furthermore, this incident was not reported to the KCBOE or the Title IX Department by either Petitioner.

The depositions of the Respondents showed they acted in a reckless manner by not reviewing their own policies and procedures before deciding on the suspension for M.P. Petitioner Marano stated the following:

Q. Okay. And you believe that she never disclosed to you there was any kind of improper sexual contact; correct?
A. Correct.
Q. Now, what do you know the definition of sexual contact to be as defined by Kanawha County Schools?
A. Sexual –
Q. Contact.
A. To me, sexual misconduct on our write-form - -
Q. uh-huh
A. is if somebody is together on the bus and they mutually agree to something, or another individual puts their hand down their pants or shirt or something of that nature.
Q. What about improper touching above the clothes? Do you believe that to be- in a sexual area. Would that be sexual abuse or sexual contact?
A. It would be- all circumstances are different. I would just have to investigate it and find out. Because they're all handled on an individual basis. So I'd have to get testimony from the people.
Q. Okay. If a student is deemed to have sexually abused someone-
A. Uh huh
Q. at the school, what would the suspension and/or punishment be? Is it suspension? Expulsion? What's your punishment when you deem there's reasonable cause to believe that sexual abuse has taken place?
A. There, again, sexual abuse, I think, or sexual misconduct would be somebody having sex under the stairwells or putting their hands down each other's pants. If it was mutual, it's handled different. If it was somebody taking advantage of somebody else, then it's usually brought to the County SAT and to see if they're placed at Chandler or allowed to come back to GW.
Q. Okay
A. Or it could even go to the hearing examiner as an expulsion case.
Q. Okay. So you can refer it to the hearing examiner down at the board to do an expulsion. If they're not expelled, what's the – what' the amount of the suspension days that you know of?
A. Off the top of my head, without seeing our form, I believe sexual misconduct is zero to ten days. Up to ten days.
Q. Okay. But you obviously didn't deem- in your investigation, you did not deem it anything to do with being sexual; correct?
A. Correct

(AR. at 0365-0367). Petitioner Morano also stated:

Q. I want you to review first "Sexual Contact" its policy 28-01-5 at the bottom. Right there. Yep.
A. Oaky
Q. You're on it. That's it. The part is-
A. Okay, that's fine.

Q. Okay. I just had you define this. This definition is a little different than what you described before; is that correct?
A. I didn't describe this before.
Q. well, I asked you what would sexual contact or sexual abuse mean to you. And you described a much different- and I don't want to put words in your mouth, because we've got a transcript. But sexual contact, by the definition, means "any intentional touching, either directly or through clothing, of the breast, buttocks, anus, or any part of the sex organs of another person or the intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party." Is that correct?
A. Yes
Q. You understand that to mean sexual contact as Kanawha County Schools Policy J28; correct?
A. Yes. As that's stated there. I described sexual misconduct.
Q. Okay
A. Not Sexual Contact.
Q. Okay. Now, your testimony is, though, that you believed, after speaking with S.D., that there was or was not any sexual contact between M.P and S.D.?
A. I believe that there was an indecent act of a gentleman walking down the hallway and smacking a girl on the butt and kept going.
Q. Okay
A. There was not sexual gratification in that
Q. But you
A. relayed to me or stated in that way by either party.
Q. Okay. So S.D. said- what did S.D. say as to any kind of gratifying- the purpose gratifying the sexual desire? You didn't believe that she thought M.P. was- it was sexually motivated?
A. S.D. said that a student walked by her in the hallway and smacked her on the rear end.
Q. Okay. And you spoke with M.P.; Correct?
A. Yes
Q. Okay. And what did he have to say as to why he did this?
A. He did not say why. He just couldn't give me an answer why.
Q. Okay.
A. He just said that he did it and he should not have done it.
Q. and in your investigation, you didn't believe it had anything to do with gratifying the sexual desire of either party.
A. Correct.

(A.R. at 0370-0373).

Petitioner Aulenbacher also admitted to never notifying the KCBOE or Title IX Department about the assault:

> Q. If you have reasonable cause to suspect that a child is neglected or abused, including sexual abuse or sexual assault, you must report withing 24 hours after learning; correct?
> A. Yes.

(A.R. at 0317). Petitioner Aulenbacher further stated:

> Q. Oaky, in the instant case, did you report the actions that were taken by M.P. against S.D. on January 29th, 2018 to Jean Ann Herscher?
> A. No
> Q. Why?
> A. Because we viewed it as an indecent act.
> Q. Okay. You did not – you did not believe this rose to the standard of sexual contact.
> A. Correct
> Q. Okay. But you just testified earlier that you believed that touching over the clothes- you had never been told that was a reportable issue.
> A. Well, we have 1,100 kids
> Q. uh- huh
> A. we have to look at each case individually and try to may the best judgement with each one of those.

(A.R. at 0314).

The lower court was correct in denying the summary judgment motion.

C. The KCBOE is NOT immune from this suit in accordance with W.Va. Code §29-12A-5(A)(4).

The argument of the Petitioner KCBOE is clearly flawed, and it is not immune from this suit. The Petitioner claims that it is immune from liability under W.Va. Code §29-12A-5(A)(4) because the only thing the Respondent alleges is that the KCBOE Adoption failed to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy. This is clearly not the case and the pleading against the KCBOE prove this. The Respondent alleges that the KCBOE was negligent in its supervision of the Respondent, negligent in protecting the Respondent after the first assault, negligent in reporting the assault to

protect the Respondent and negligent allowing M.P. to return to school after a two-day suspension to play in a basketball game (which GWHS then won the state title).

The KCBOE is clearly not immune as the Respondent did not even plead that the KCBOE did not follow its own policies and procedures, as this was only found out after discovery in the underlying case.

This court has ruled that a negligence claim is not immune. "This conduct alleged in support of the Petitioners' negligence per se claim does not involve either the failure to adopt or the adoption of a policy for which immunity is afforded to the Board. See *W. Va. Code § 29-12A-5(a)(4)*. Rather, these allegations sound in negligence and complement the allegations that the Board negligently retained the Assistant Principal [***17] once it became aware of his conduct set forth in Count 6 of the Petitioners' complaint and discussed infra. Because the Act does not afford immunity for negligence claims, the Petitioners' claim for negligence per se alleging the Board's violation of its policy is not automatically precluded by the Board's assertion of immunity. *See Zirkle*, 221 W. Va. at 414, 665 S.E.2d at 160. *C.C. v. Harrison Cty. Bd. of Educ.*, 245 W. Va. 594, 603, 859 S.E.2d 762, 771 (2021). In the present case, the KCBOE's negligence does not grant it immunity under the code.

D. The KCBOE was negligent and acted reckless in determining the violation was not sexual in nature and was further negligent in allowing the student M.P. around the Respondent once he returned to assault her again.

The Petitioners did not exercise reasonable care in supervising students as claimed. The Petitioners cite both *Moore* and *W.Va. Code §18A-5-1(f)* and claim that schools have a duty to exercise reasonable care in supervising students and that schools are solely responsible for proper discipline except in extreme cases. Furthermore, the Petitioners state that "courts should not interfere with the decisions of school board officials in disciplinary matters except in extreme

cases." *Keith v. Ball*, 177 W. Va. 93, 94, 350 S.E.2d 720, 722 (1986).

In the present case, first, the Respondents did not exercise reasonable care. The Petitioner's incorrectly continue to argue that the decision to suspend M.P. on a Level II violation, instead of a Level III violation, was in their clear discretion. Regardless of this argument, the KCBOE was negligent by not protecting the Respondent and allowing the student back around her (after being on notice of the sexual assault) two days later to assault her again.

Second, this is clearly an extreme case. The Respondent was sexually assaulted in the hallway of the school and immediately reported it (A.R. at 0647). The sexual assault lasted for over 10 seconds (Id.). The vice-principal then only suspended M.P for improper touching, even though it was clear that a sexual assault had taken place (A.R. at 349). By doing this, M.P. only received a two-day suspension, the KCBOE Title 9 department was not notified of the sexual assault, the case was not referred to the resource officer or prosecuting attorney and no protection plan was put in place as prescribed by the KCBOE policies and procedures (A.R. at 258). This is clearly an extreme case and there was no reasonable care taken to protect the Respondent. She was not protected and was assaulted again with no protection just days later (A.R. at 0660). Her family was assaulted at a basketball game on KCBOE property and she and her family were harassed by M.P.'s family for months after with no protection.

Finally, the Petitioners cite *Glaspell* incorrectly. In *Glaspell* this court stated that "there was no evidence the Board and its employees had actual knowledge or notice and it was not feasible for school employees to be able to see what every student is doing in the cafeteria and hallways at every moment throughout the school day" *Glaspell v. Taylor Co. Bd. of Educ.*, 2014 WL 5546480 at *3 (2014). This case is clearly different as there were multiple incidents and because there was no protection provided for the Respondent, she was assaulted again and

continued to suffer without protection in a public school that she had to attend per the laws of our state. The argument of the Petitioners is clearly flawed. The circuit court concluded that, viewing the evidence in a light most favorable to the Respondent, there was reckless conduct.

E. There was clearly a physical injury to the Respondent as shown in the deposition testimony and the Respondent has plead other theories of negligence that do not require a showing of physical injury.

The Petitioner's allege that the Respondent is precluded from recovery for negligent infliction of emotional distress because she has no ascertainable physical injury and the fact that Defendants could not have stopped M.P.'s initial sexual abuse (A.R. at 0035). However, the damages alleged against Petitioners by the Respondent did in fact constitute physical injury. Furthermore, the negligence arises from their mishandling of the situation after the sexual abuse by M.P., not before or during. The negligent conduct of Petitioners allowed for the further harassment of Respondent by M.P. in and out of school, and the preferred treatment M.P. received as a star member of the basketball team only exacerbated the situation.

Furthermore, the Petitioners continue to incorrectly make claims that West Virginia case law prohibits recovery of damages for negligence when there is no ascertainable physical injury. Defendants cite to *Workman v. Kroger Ltd. P'ship I, No. 5:06-cv-00446, 2007 U.S. Dist. LEXIS 77974 (S.D. W. Va. Oct. 11, 2007)*, claiming that *Workman* precludes any type of recovery for emotional damages alone. Defendants then go on to claim that there are only narrow exceptions that clearly do not apply in this case. However, the Petitioners' own case clearly states that the West Virginia Supreme Court has carved out "the West Virginia court found a much broader exception, allowing recovery "for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." *Id. at* *9.

Clearly, in this case, Respondent's claims of emotional damages are not spurious. Respondent is a young woman still in her minor years who was sexually abused at school. Respondent then trusted the school to protect her from further harm from the aggressor M.P. Not only did the school fail to protect the Respondent from further harm, the administrators purposely mischaracterized the behavior performed by M.P. so that it would not reflect poorly upon the school's star basketball player. M.P. then attempted to harass Respondent again in the hallway of the school, which was reported again to the Petitioners, but there was no action taken (A.R. at 0836). This conduct, which went expressly against both the KCBOE Policies and Procedures and the GWHS Policies and Procedures, caused Plaintiff to suffer.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above the Respondent respectfully requests that this Honorable Court review and uphold the Final Order of the circuit court.

S.D. by her parent and next friend J.D.
By Counsel

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CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for S.D., by J.D., Respondents, do hereby certify that service of the foregoing ***Respondent's Redacted Response to the Petitioner's Brief*** in the above styled case have been made upon the following:

Jace H. Goins, Esq.
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this the 10 day of August 2023, via United States mail, in a sealed envelope, postage prepaid.

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