

COTI MATTHEWS, et al.,

Plaintiffs,

VS.

KOUNTZE INDEPENDENT SCHOOL DISTRICT and KEVIN WELDON, in his individual and official capacity as Superintendent,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

356th JUDICIAL DISTRICT

HARDIN COUNTY, TEXAS

NO EVIDENCE MOTION FOR SUMMARY JUDGMENT OF KOUNTZE ISD AND KEVIN WELDON ON ULTRA VIRES CLAIMS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendants Kountze Independent School District and Kevin Weldon, in his official capacity, (hereinafter “Kountze ISD,” “the School District,” or “Defendant”), and files this their No Evidence Motion for Summary Judgment on Plaintiffs’ *Ultra Vires* Claims pursuant to Texas Rule of Civil Procedure 166a(i), seeking dismissal of Plaintiffs’ *Ultra Vires* Claims. In support of this motion, the School District would respectfully show unto the Court as follows:

I. SUMMARY

By filing this its No Evidence Motion for Summary Judgment, the School District challenges Plaintiffs to come forward and present sufficient evidence to rebut this motion as to each element of each of their claims based on the allegedly *ultra vires* actions of Kevin Weldon.

The School District specifically challenges Plaintiffs to come forward and present sufficient evidence to rebut the School District’s contentions that, even if Kevin Weldon was deliberately indifferent or misapplied the Texas Constitution or Texas law, his actions were still

within the scope of his discretionary duties as superintendent of Kountze ISD.

II. BACKGROUND

1. The live petition in this case is Plaintiffs' Third Amended Petition and Application for Permanent Injunction ("Plaintiffs' Petition").

2. Plaintiffs' Petition alleges the following causes of action: (1) Texas Constitution – Article I, Section 6; (2) Texas Constitution – Article I, Section 8; (3) Texas Constitution – Article I, Section 3; (4) Chapter 106 of the Texas Civil Practice and Remedies Code; (5) Chapter 110 of the Texas Civil Practice and Remedies Code, also known as the Texas Religious Freedom Restoration Act (Texas RFRA); (6) Chapter 25 of the Texas Education Code, also known as the Religious Viewpoints Anti-Discrimination Act (RVAA); and (7) Chapter 37 of the Texas Civil Practice and Remedies Code, also known as the Uniform Declaratory Judgments Act.

3. Plaintiffs claim or claims under Chapter 37 of the Texas Civil Practice and Remedies Code include the following allegations:

Plaintiffs seek a declaration from the Court, under Chapter 37 of the Texas Civil Practice and Remedies code, that Defendant Weldon's conduct and actions as described are *ultra vires* as Defendant Weldon did not have discretion to be deliberately indifferent to and to misapply the Texas Constitution, the Texas Religious Freedom Restoration Act, the Texas Religious Viewpoints Anti-Discrimination Act, or Chapter 106 of the Texas Civil Practice and Remedies Code.

III.
ARGUMENTS AND AUTHORITIES

A. Standard for no evidence summary judgment.

A party may move for summary judgment, after adequate time for discovery and without presenting summary judgment evidence, on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse part would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 718 (Tex. App. – Fort Worth 2008, pet. filed). The motion must specifically state the elements for which there is no evidence. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *City of the Colony*, 272 S.W.3d at 718; *Page v. State Farm Lloyds*, 259 S.W.3d 257, 261 (Tex. App. – Waco 2008, pet. filed).

A no-evidence motion will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). In order to provide sufficient evidence, the summary judgment evidence must “rise to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *King Ranch, Inc.*, 118 S.W.3d at 751 (quoting *Merrell Dow Pharms.*, 953 S.W.2d at 711).

By filing this its No Evidence Motion for Summary Judgment, Kountze ISD challenges Plaintiffs to come forward and present sufficient evidence to rebut this motion as to each element of each of their *ultra vires* claims.

B. Plaintiffs cannot sustain their burden of proof as to their *ultra vires* claims.

Plaintiffs cannot sustain their burden of proof as to their *ultra vires* claims for relief under the Uniform Declaratory Judgments Act. Plaintiffs misunderstand the meaning of the term “discretion” as used in the context of *ultra vires* actions by public officials. Plaintiffs suppose that a public official acts *ultra vires* whenever the official misapplies the Texas Constitution or Texas law. Plaintiffs are mistaken. The question of “discretion” for *ultra vires* claim is, as the Beaumont Court of Appeals has noted, connected with the question of “discretion” in the official immunity context. *See Townsend v. Montgomery Cent. Appraisal Dist.*, No. 09-10-00394-CV, 2011 Tex. App. LEXIS 5782, at *13-*14 (Tex. App.—Beaumont 2011, pet. denied)

In the immunity context, a distinction is made between discretionary and ministerial acts. *Lane v. Young*, No. 09-06-260 CV, 2007 Tex. App. LEXIS 144, at *14-*15 (Tex. App. – Beaumont 2006, no pet.) (citing *Downing v. Brown*, 935 S.W.2d 112, 114 (Tex. 1996)). Ministerial acts are those where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion and judgment. *Lane*, 2007 Tex. App. LEXIS 144, at *15; *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). An action involving personal deliberation, decision, and judgment is discretionary. *Lane*, 2007 Tex. App. LEXIS 144, at *15; *Chambers*, 883 S.W.2d at 654; *Ramos v. Texas Dep’t of Public Safety*, 35 S.W.3d 723, 727 (Tex. App. – Houston [14th Dist.] 2000, pet. denied). If the actor is entitled to personally deliberate about the manner or means of performance and invoke his own judgment, then the act is discretionary. *Lane*, 2007 Tex. App. LEXIS 144, at *15. In other words, discretionary authority exists when the law does not specify the precise action that the official must take. *Leo v. Trevino*, 285 S.W.3d 470, 484 (Tex. App. – Corpus Christi 2006, no pet.).


Kevin Weldon acted pursuant to his duty as superintendent to manage the day-to-day

operations of the school district. As the Beaumont Court of Appeals has pointed out, a superintendent's "duty to manage the day-to-day operations of [a school district] does not specify how this duty [is] to be performed, nor does it define his responsibility with such precision as to leave nothing to [the superintendent's] exercise of judgment or discretion." *Lane*, 2007 Tex. App. LEXIS 144, at *15. Even where there is a "mandatory duty," such as a "mandatory duty to supervise," such duties involve the exercise of judgment or discretion. *Leo*, 285 S.W.3d at 484. Mr. Weldon's decision to take action to restrict the messages contained on the "run-through" banners at Kountze High School football games required the exercise of judgment or discretion, and consequently cannot serve as the basis for an *ultra vires* claim. Plaintiffs cannot sustain their burden of proof on their *ultra vires* claims.

WHEREFORE, PREMISES CONSIDERED, the Kountze Independent School District and Kevin Weldon, in his official capacity, respectfully pray that after hearing, the Court grant their motion, enter a take-nothing judgment on all of the Plaintiffs' *ultra vires* claims against them, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

**FANNING HARPER MARTINSON
BRANDT & KUTCHIN, P.C.**



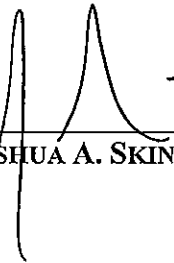
THOMAS P. BRANDT
State Bar No. 02883500
JOSHUA A. SKINNER
State Bar No. 24041927
JOHN D. HUSTED
State Bar No. 24059988
Two Energy Square
4849 Greenville Ave. Suite 1300
Dallas, Texas 75206

(214) 369-1300 (office)
(214) 987-9649 (telecopier)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed, telecopied, or hand delivered to all attorneys of record, in compliance with Rule 21a of the Texas Rules of Civil Procedure, on the 4th day of April, 2013.



JOSHUA A. SKINNER

Cause No. 53526

COTI MATTHEWS, et al.,

Plaintiffs,

VS.

KOUNTZE INDEPENDENT
SCHOOL DISTRICT and KEVIN
WELDON, in his individual and
official capacity as Superintendent,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

356th JUDICIAL DISTRICT

HARDIN COUNTY, TEXAS

FIAT

IT IS ORDERED that a hearing on the foregoing Defendants Kountze Independent School District's and Kevin Weldon's, in his official capacity, No Evidence Motion for Summary Judgment on Plaintiffs' *Ultra Vires* Claims is set for the ____ day of _____, 2013 at ____ o'clock __.m. in the Courtroom of the 356th District Court in Hardin County, Texas.

Signed this ____ day of _____, 2013.

JUDGE PRESIDING