SUMMER 2014 NEWSLETTER

SCHOOL LAW UPDATE

By John D. Husted

FIFTH CIRCUIT COURT OF APPEALS

***Morgan v. Swanson*, No. 13-40433, 2014 U.S. App. LEXIS 10293 (5th Cir. June 3, 2014)**

A school official is entitled to qualified immunity from an elementary school parent's First Amendment viewpoint discrimination claim arising from the discretionary decision to not allow a parent to distribute religious material to other adults at his son's in-class winter party.

In December, 2003, Mr. Morgan attended his son's elementary school in-class winter party. Principal Lynn Swanson prohibited Morgan's son from distributing candy canes bearing a religious message at the in-class party, and the family filed suit alleging a First Amendment violation. In *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), the Court held that Swanson's conduct was unconstitutional, but she was entitled to qualified immunity because relevant law was too "abstruse" and "complicated" for Swanson to have known how to handle the situation. Now, with this case, Mr. Morgan asserts that he, too, experienced viewpoint discrimination when Principal Swanson told him not to distribute the religious material to other consenting adults in the classroom. Morgan alleges that regardless of the forum, viewpoint discrimination regarding private speech is unconstitutional.

A school official is entitled to qualified immunity from civil liability arising out of her discretionary decisions unless her conduct is "clearly established" as unconstitutional. In considering whether Morgan's asserted right to distribute the material was so clearly established so as to overcome Principal Swanson's qualified immunity, the court found that educators are rarely denied immunity from liability arising out of First-Amendment disputes, except in the rare exceptions involving scenarios in which a factually analogous precedent clearly established the disputed conduct as unconstitutional. Additionally, plaintiffs do not overcome qualified immunity by alleging the violation of a right that is only defined at a high level of generality. Where, as here, there is no authority recognizing an asserted right, and where the area of law is abstruse and complicated, the asserted right cannot be clearly established for qualified immunity purposes. Therefore, the Court dismissed Mr. Morgan's claim.

TEXAS COURT OF APPEALS

***La Joya Independent School District v. Villarreal*, No. 13-13-00325, 2014 Tex. App. LEXIS 7162 (Tex. App. – Corpus Christi – Edinburg July 3, 2014, no pet. h.) (mem. op.)**

A third party beneficiary to a contract between a vendor and a school district may bring a breach of contract claim against the school district pursuant to Tex. Local Gov't Code § 271.152's

limited waiver of governmental immunity. Also, Tex. Educ. Code Ann. § 22.0514's exhaustion of administrative remedies requirement does not apply to intentional tort claims brought against individual school board members in their individual capacities for acts that are neither incident to nor within the scope of their employment.

The District entered a contract with HealthSmart Benefit Solutions, Inc. to serve as a third party administrator to the District's self-funded health plan for District employees. The contract contained a section regarding Broker Commissions, which named Ruth Villarreal as the broker and discussed terms of compensation. In late 2012, the various individual defendants ran for election to the District school board. Villarreal alleges that they openly expressed their intent to award contracts to their campaign supporters, and shortly after their election, the District decided to replace Villarreal with Bob Trevino. Villarreal then brought suit against the district for breach of contract and against the individual defendants for tortious interference with a contract and civil conspiracy.

The District and individual defendants filed a plea to the jurisdiction arguing that governmental immunity shielded it from Villarreal's breach of contract claim and that the § 271.152's limited waiver of immunity did not apply to her as a third party beneficiary. The individual defendants contended that the Texas Education Code provided them with immunity to Villarreal's tort claims and that she did not exhaust her administrative remedies.

The Court affirmed the trial court's denial of defendants' plea. While Villarreal was not a party to the contract, the Court found that she was a third party beneficiary and that the Texas Local Government Code does not exclude third party standing. As for the claims against the individual defendants, the Court found that the alleged acts that make the basis of the tort claims fell outside the scope of their professional duties and thus are not protected by the statutory immunity provided by the Texas Education Code, so its exhaustion requirements did not apply.

***S.W. v. Arlington Independent School District*, No. 02-13-00280, 2014 Tex. App. LEXIS 6424 (Tex. App. – Fort Worth June 12, 2014, no pet. h.)**

The *Prasifka* exception to governmental immunity did not waive a school district's immunity from a student's promissory estoppel claim.

A.W., a twelve year old that had costochondritis attended a PE class taught by Foster. S.W., parent of A.W., alleged that because some of A.W.'s classmates were late to class, Foster required all students in the class to perform a series of very strenuous exercises. S.W. alleged that Foster knew of A.W.'s condition and that A.W. reported soreness and difficulty completing the exercises. In the days that followed, A.W. spent about a week in the hospital, experiencing severe pain, was unable to sit or sleep, had blood in her urine, and was diagnosed with Rhabdomyolysis. While in the hospital, A.W. was visited by O.J. Kemp, a District official, whom S.W. alleges stated "this is our fault, we own this, and we are going to take care of this." S.W. then brought various claims against Foster and the District, including a promissory estoppel claim against the District based on Kemp's statements. The trial court granted the District's plea to the jurisdiction based on governmental immunity, and S.W. appealed.

The Court affirmed the granting of the plea to the jurisdiction. While S.W. alleged that the District was performing proprietary functions when Kemp made the alleged statements, the Court found that Texas school district's never perform proprietary acts. S.W. also argued that even if it was a governmental function, estoppel may still apply pursuant to *City of Hutchins v. Prasifka*, in which the Texas Supreme Court held that "a *municipality* may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions. But such doctrine is applied with caution and only in exceptional cases where the circumstances clearly demand its application to prevent manifest injustice." The Court found that the *Prasifka* exception has never been applied to any entity other than a municipality, and that even if it could be applied to the District, it would not apply here where S.W. failed to allege how Kemp's statements induced her to act in a way that caused her prejudice or impacted her or the District's positions in the litigation.

***Kountze Independent School District v. Matthews*, No. 09-13-00251, 2014 Tex. App. LEXIS 4951 (Tex. App. – Beaumont May 8, 2014, no pet. h.) (mem. op.)**

A school district's prompt voluntary action in adopting a policy that allowed high school cheerleaders to include religious content in run-through banners displayed at sporting events mooted the Parents' dispute about whether the cheerleaders could put such messages on the run-through banners.

Parents of certain members of the Kountze High School cheerleading squad brought suit against Kountze ISD, who is represented by FHMBK, after its former superintendent Kevin Weldon issued a statement prohibiting the cheerleaders from including religiously-themed messages on run-through banners used at the beginning of football games. The District appealed the denial of its plea to the jurisdiction, asserting that the trial court erred when it denied the plea because the Parents' claims are moot and the trial court, therefore, lacked subject matter jurisdiction.

In reversing the trial court's order against the District, the Court found that the Parents' claims against the District were moot because the District adopted a new policy which states, in part, that "school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious." The Court found further support in the fact that the District had made judicial admissions affirming its new policy and its future intentions regarding religious content on the run-through banners. Further, in light of the District's creation of the new policy, there was no evidence that a ban was capable of repetition, nor was there evidence of any collateral consequences where the cheerleaders never actually had a banner containing religious messages banned per the former superintendent's statement.

According to news reports, the plaintiffs may seek review from the Texas Supreme Court. Also, it is anticipated that the lower court will review whether or not the Parents are entitled to attorney's fees.