NO. 11-41359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BARBARA WYATT,
AS NEXT FRIEND OF S.W.
Plaintiff-Appellee
v.
RHONDA FLETCHER; CASSANDRA NEWELL,
Defendants-Appellants

BRIEF OF PLAINTIFF-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
CIVIL ACTION NO. 6:10-CV-674
JOHN D. LOVE, JUDGE PRESIDING

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case, as described in Fifth Cir. R. 28.2.1. These representations are made so the Judges of this Court may evaluate issues of possible disqualification or recusal.

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee suggests that oral argument is warranted under the standards set forth in Fifth Cir. R. 28.2.4 and FED. R. A. P. 34(a)(2) since it may assist the Court in resolving the issues presented in this appeal.

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION..1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE..3

A. Course of Proceedings and Disposition in the Court Below 3

STATEMENT OF THE FACTS 5

SUMMARY OF THE ARGUMENT 13

ARGUMENT AND AUTHORITIES..13

A. Applicable Standards 13

1. Standard of Review 13

2. Summary Judgment Standard 14

B. ISSUE: 15

1. Fletcher and Newell's Actions Were Objectively Unreasonable ...15

2. Fletcher and Newell Violated Clearly Established Constitutional Rights 23

CONCLUSION...28

CERTIFICATE OF SERVICE 29

CERTIFICATE OF COMPLIANCE..30

Table of Authorities

Page(s)

Cases

ACLU of Miss. v. Miss.
911 F.2d 1066 (5th Cir. 1990) 27

Bloch v. Ribar
156 F.3d 673 (6th Cir.1998) 29

C.N. v. Wolf
410 F.Supp.2d 894 (C.D. Cal. 2005) 28

Cantrell v. City of Murphy
666 F.3d 911 (5th Cir. 2012) 15, 22

Coontz v. Katy Independent School Dist.
No. 98-20188, 1998 WL 698904 (5th Cir. Sept. 14, 1998)............................23

Doe v. S & S Consol. I.S.D.
149 F.Supp.2d 274 (E.D. Tex. 2001)...24

Eastwood v. Dept. of Corrections
846 F.2d 627 (10th Cir.1988) 29

Estate of Shane G. Sorrells v. City of Dallas
45 Fed.Appx. 325 (5th Cir. 2002) 24

Fadjo v. Coon
633 F.2d 1172 (5th Cir. 1981) 27

Flores v. Morgan Hill Unified School District
324 F.3d 1130 (9th Cir. 2003) 29

Gill v. Devlin
No. 4:11-cv-00623-Y (N.D. Tex. March 12, 2012) 28

In re Crawford
194 F.3d 954 (9th Cir. 1999) 29

In re Crestcare Nursing and Rehabilitation Center
222 S.W.3d 68 (Tex.App.-Tyler 2006) 28

James v. City of Douglas
941 F.2d 1539 (11th Cir. 1991) 30

Lawrence v. Texas
539 U.S. 558 (2003)..27

Mangels v. Pena
789 F.2d 836 (10th Cir. 1986) 29

Mitchell v. Forsyth
427 U.S. 511 (1985)....1

Morgan v. Swanson
659 F.3d 359 (5th Cir. 2011) (en banc). (R.2, USCA5 722-723)....27

Murray v. Earle
405 F.3d 278 (5th Cir. 2005)....1

National Treasury Employees Union v. U.S. Dept. of Treasury
25 F.3d 237 (5th Cir. 1994)....23

Plante v. Gonzalez
575 F.2d 1119 (5th Cir. 1978)....23

Powell v. Schriver
175 F.3d 107 (2d Cir. 1999)....29

Scott v. Harris
550 U.S. 372 (2007)....15, 22

Sterling v. Borough of Minersville
232 F.3d 190 (3d Cir. 2000)....28

Terry v. Ohio
392 U.S. 1 (1968)....30

Whalen v. Roe
429 U.S. 589 (1977)....26

Zaffuto v. City of Hammond
308 F.3d 485 (5th Cir. 2002)....26

Statutes

28 U.S.C. §§ 1331 and 1343(a)(3)-(4)....3

28 U.S.C. §§ 1332 and 1367....3

28 U.S.C. § 1391(b)....3

28 U.S.C. §§ 2201(a) and 2202....3

42 U.S.C. § 1983....3

TEX. EDUC. CODE ANN. § 22.0511(a) (VERNON 2006)....24

TEX. PENAL CODE ANN. §22.011(e) (West 2011)....19

Other Authorities

Fourteenth Amendment 3

Fourth Amendment 25, 30

STATEMENT OF JURISDICTION

Defendants-Appellants appealed the Order denying their Motion for Summary Judgment based on qualified immunity, which is immediately appealable under the collateral order doctrine. *Mitchell v. Forsyth*, 427 U.S. 511, 530 (1985). This Court also has jurisdiction over the appeal of the denial of their Motion for Summary Judgment based on official immunity on state law claims. *Murray v. Earle*, 405 F.3d 278, 294 (5th Cir. 2005).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE: Summary judgment was properly denied. The judge's finding that various material fact issues are disputed is well supported by the facts from the pleadings presented in the light most favorable to Plaintiff-Appellee.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On December 20, 2010, Barbara Wyatt, Plaintiff, as next friend of her minor daughter, S.W., filed a *Complaint* in the U.S. District Court, Eastern District of Texas, Tyler Division, No. 6:10-cv-674, against Defendants Kilgore Independent School District ("KISD") and, in their personal capacities, Rhonda Fletcher, Douglas Duke, and Cassandra Newell, seeking damages, prospective injunctive relief, and declaratory relief against KISD and the named individual Kilgore High School staff members for blatantly disregarding S.W.'s constitutional privacy rights under color of law (R.1, USCA5 3; 10). [1]

Since Ms.Wyatt's *Complaint* charged violations arising under 42 U.S.C. § 1983 and the Fourteenth Amendment to the U.S. Constitution, the U.S. District Court has jurisdiction to provide monetary and injunctive relief pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3)-(4); jurisdiction over her federal claims, pursuant to 28 U.S.C. §§ 2201(a) and 2202; and jurisdiction over the state claims, pursuant to 28 U.S.C. §§ 1332 and 1367. *Complaint*, ¶¶3-4 (R.1, USCA5 11).

Venue in the case is proper in the Eastern District of Texas, Tyler Division, pursuant to 28 U.S.C. § 1391(b), because the events at issue occurred therein and

[1] In this brief, the record on appeal is cited as "R.1" or "R.2" to indicate the respective Volume of the Record, followed by the applicable pages.

all individual Defendants and Ms. Wyatt reside in Gregg County, Texas. *Complaint*, ¶5 (R.1, USCA5 11).

Defendant Rhonda Fletcher, an assistant softball coach at Kilgore High School, was sued in her personal capacity for damages because her actions complained about occurred in the course and scope of her employment and under color of law. *Complaint*, ¶7 (R.1, USCA5 11).

Defendant Cassandra Newell, the head softball coach at Kilgore High School, was sued in her personal capacity for damages because her actions complained about occurred in the course and scope of her employment and under color of law. *Complaint*, ¶8 (R.1, USCA5 11).

Defendant Douglas Duke, the assistant athletic director at Kilgore High School, was sued in his personal capacity for damages because his actions complained about were in the course and scope of his employment and under color of law. *Complaint*, ¶9 (R.1, USCA5 11). Ms. Wyatt voluntarily dismissed Defendant Duke from the case (R.1, USCA5 7; Dkt. No. 51) when she filed a *Motion to Amend the Complaint* and dismissed Defendant Duke on October 5, 2011 (R.1, USCA5 7; Dkt. No. 55).

On February 21, 2011, Defendants filed their *Answer* claiming the affirmative defenses of sovereign immunity for KISD and qualified immunity and

official immunity for Fletcher and Newell (R.1, USCA5 2, Dkt. No. 2; R.1, USCA5 23; 27-28).

On September 1, 2011, Defendants filed a *Motion for Summary Judgment* (R.1, USCA5 6; Dkt. No. 41; USCA5 173) and, on October 4, 2011, Ms. Wyatt filed her *Response to the Motion for Summary Judgment* with supporting summary judgment evidence (R.1, USCA5 7; Dkt. No. 54; R.2, USCA5 531 *et seq*.). She also filed a *First Amended Complaint* against Fletcher, Newell, and KISD that same day (R.1, USCA5 7; Dkt. No. 53; R.2, USCA5 508).

On December 1, 2011, the judge entered a Memorandum Opinion and Order Denying Defendants' Motion for Summary Judgment in its Entirety ("Order") (R.1, USCA5 8; Dkt. No. 65; R.2, USCA5 717 et seq.).

Although KISD chose not to appeal the Order, Fletcher and Newell filed their *Notice of Interlocutory Appeal* on December 14, 2011 (R.1, USCA5 8; Dkt. No. 66; R.2, USCA5 740).

STATEMENT OF THE FACTS

S.W. was a typical student-athlete. She was a straight-A student who loved softball and had many friends in school. But her life changed when Defendants Fletcher and Newell took it upon themselves to violate S.W.'s fundamental right to privacy and personal autonomy. They retaliated against S.W. by forcing her to reveal details of her sexual orientation; disclosing her sexual orientation, without

consent, to Ms. Wyatt; then kicking S.W. off the softball team because of a false rumor passed along by a student that day that S.W. said she was dating Defendant Newell's ex-girlfriend. *Deposition of S.W.*, p.126 (R.2, USCA5 573); *Deposition of Wyatt*, pp.109-111 (R.2, USCA5 562); and *Deposition of Rhonda Fletcher*, pp.31-32 (R.2, USCA5 379-80). *See also Declaration of S.W.* (R.2, USCA5 575-576).

While Ms. Wyatt was shocked by Defendants' disclosure of her daughter's private and personal information (*Declaration of Wyatt*, ¶¶1-10 (R.2, USCA5 579)), S.W. was devastated. As a consequence of Defendants' acts, S.W. suffered severe mental and emotional trauma, becoming socially isolated and dejected, cutting herself, contemplating suicide, and losing interest in school. *Report of Stephen A. Thorn, Ph.D.* (R.2, USCA5 588; 592-594); *Declaration of S.W.*, ¶¶20-25 (R.2, USCA5 575-577); and, *Declaration of Wyatt*, ¶¶20-25 (R.2, USCA5 579-580).

March 3, 2009 began like any ordinary day for S.W. While at school, she heard an announcement about an unscheduled softball team meeting at the off-campus playing field. *Order*, p.2 (R.2, USCA5 718). As a member of the varsity softball team, S.W. made sure that she attended the team meeting. After S.W. arrived, instead of holding a team meeting, Defendants Fletcher and Newell dismissed everyone but S.W. *Deposition of S.W.*, p.119 (R.2, USCA5 571, ¶¶19-26); *Declaration of S.W*, ¶3 (R.2, USCA5 576). Defendants led S.W. into the

empty locker room, locked the door, and began interrogating her. *Order*, p.2 (R.2, USCA5 718); *Deposition of S.W.,* p.119 ¶¶23-25 (R.2, USCA5 571). Defendants easily could have scheduled the meeting on school grounds since that morning Newell knew about the rumor involving Hillary Nutt and she had discussed it at lunch with Fletcher when they decided to confront SW. A reasonable inference is they chose not to have it on school grounds because they wouldn't have been able to lock S.W. in a room or scream at her without being noticed. *Deposition of Fletcher,* pp. 31-32 (R.2, USCA5 379-380).

Once S.W. was segregated and confined, the Defendants cornered S.W. and demanded to know whether she was dating Hillary Nutt. *Order*, p.2 (R.2, USCA5 718); *Deposition of S.W.*, p.120, ¶¶11-21 (R.2, USCA5 571); *Declaration of S.W*, ¶6 (R.2, USCA5 575). As S.W. sat alone and nervous in the locked room, Fletcher continued to intimidate and interrogate her. S.W. repeatedly denied she was dating the teenage girl. Although S.W. didn't want to answer the question, Fletcher refused to accept any answer other than S.W. was dating Hillary, and persisting in illegally prying the most intimate information from S.W. against her will. *Deposition of S.W.*, p.120, ¶¶11-21 (R.2, USCA5 571); *Declaration of S.W*, ¶6 (R.2, USCA5 575). Defendants eventually coerced S.W., a 16-year-old girl who couldn't withstand the threats and sustained reprimands, to say she was dating this girl (although, in fact, she and Hillary hadn't dated). *Order*, p.2 (R.2, USCA5 718);

Deposition of S.W., pp.120-121, ¶¶11-25; ¶¶1-6 (R.2, USCA5 571-572); *Declaration of S.W*, ¶11 (R.2, USCA5 576). Still unsatisfied, Fletcher accused S.W. of spreading gossip about Hillary being Newell's ex-girlfriend, which S.W. denied. *Order*, p.2 (R.2, USCA5 718); *Deposition of S.W.*, p.120, ¶¶15-21 (R.2, USCA5 571); *Declaration of S.W*, ¶7 (R.2, USCA5 575).

While S.W. and Hillary had arranged to get a soft drink at a nearby Sonic after the game, they weren't in a relationship. *Order,* p.2 (R.2, USCA5 718); *Deposition of S.W.,* p.121, ¶¶5-6 (R.2, USCA5 572). In fact, S.W. never had a physical or romantic relationship with the other teenager. *Deposition of S.W.*, p.110, ¶¶6-25 (R.2, USCA5 570). Newell, on the other hand, had interacted with Hillary at various events, had invited her to S.W.'s softball games (which is inconsistent with Newell characterizing Hillary as a "bad influence"), and knew her through Newell's domestic partner. *Deposition of Cassandra Newell*, p.46, ¶¶1-25 (R.2, USCA5 582; 584).

The two adult Defendants continued bullying S.W. behind locked doors, threatening to tell her mother she was having a sexual relationship with a woman *Order,* p.2 (R.2, USCA5 718). While S.W. begged them not to, the Defendants dismissed her pleas and ignored her rights, saying that she couldn't play in the softball game that night until they told her mother about her sexual orientation. *Order,* p.2 (R.2, USCA5 718); *Declaration of S.W.,* ¶14 (R.2, USCA5 576). Only

after a knock came on the locked door was S.W. allowed to leave. *Declaration of S.W.*, ¶14 (R.2, USCA5 576). A reasonable inference is that the Defendants realized that others would hear how they were treating S.W.

Next, Fletcher called S.W.'s mother and instructed Ms. Wyatt to meet with her and Newell at the softball field. *See id.*, ¶16 (R.2, USCA5 576). When Ms. Wyatt arrived, an angry Fletcher spitefully asked if she knew where her daughter was.[2] *Declaration of Wyatt*, ¶¶3-4 (R.2, USCA5 579). Fletcher then selectively described their interrogation of S.W. in the locker room (*Deposition of Wyatt*, pp.109-111 (USCA5 562)), before disclosing to Ms. Wyatt that S.W. was dating a girl who Fletcher falsely characterized as S.W.'s "girlfriend." *Order*, p.2 (R.2, USCA5 718); *Deposition of Wyatt*, p.109, ¶8 (USCA5 562).

While Ms. Wyatt was taken aback by this news and trying to grapple with it (*Declaration of Wyatt*, ¶5 (R.2, USCA5 579)), Newell gratuitously offered to provide her with contact information for S.W.'s "alleged" girlfriend which Newell kept in her cellular phone (despite Newell's claim that Ms. Nutt was a dangerous adult and a bad influence on S.W.). *Order*, p.2 (R.2, USCA5 718); *Declaration of Wyatt*, ¶7 (R.2, USCA5 579). Ms. Wyatt tried to discuss what had transpired between the Defendants and her daughter, who had returned, but Newell tersely

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[2] Of course, if Fletcher and Newell really were concerned about S.W. leaving the field with a teenager they considered dangerous, they could have instructed her to remain with them at the field until her mother arrived or just kept her in the locker room.

dismissed them and refused to talk further. *Declaration of S.W.*, ¶17 (R.2, USCA5 576). A reasonable fact-finder could infer from these facts, viewed in the light most favorable to Plaintiff, that if Newell had really believed that Hillary was such a bad influence and was genuinely concerned for S.W.'s safety, that would have been the time for her to tell Plaintiff why she felt Hillary was a bad influence for S.W. The failure to do so, moreover, can be reasonably inferred to demonstrate the illegitimacy of her professed justifications for what they did to S.W. and why they did so.

Before Defendants disclosed S.W.'s sexual orientation, Ms. Wyatt didn't know she was gay. *Order,* p.2 (R.2, USCA5 718); *Declaration of Wyatt*, ¶6 (R.2, USCA5 579). While she had asked S.W. if she was gay, S.W. had always denied it. *Order*, p.2 (R.2, USCA5 718); *Deposition of S.W.*, p.60, ¶¶3-7 (R.2, USCA5 567). Hearing this news from a relative stranger, rather than from her daughter, was disturbing and shocking for Ms. Wyatt.

Apparently still unsatisfied with the pain imposed on S.W. and her mother, Defendants further retaliated by kicking S.W. off the softball team—taking away her passion in life and jeopardizing her future educational opportunities. *Declaration of S.W.*, ¶¶18-22 (R.2, USCA5 576).

Defendants' callous violation of S.W.'s rights to privacy, and the surrounding controversy it engendered, caused *severe* emotional and mental

anguish, including anxiety, loss of sleep, suicidal ideation, and self-mutilation. *Report of Thorn* (R.2, USCA5 588; 592-594). Defendants' cruelty also severely damaged S.W.'s trust and respect in adult authority and exposed her to significant social ostracism. *See id.* Their actions demoralized S.W, caused her academic performance to suffer, and destroyed her long-held ambition of attending college to study kinesiology and sports medicine, in emulation of her one-time role models. *Declaration of S.W.*, ¶¶18-22 (R.2, USCA5 576).

From these facts, viewed in the light most favorable to Plaintiff, a factfinder could reasonably infer that Defendants' conduct wasn't to further a legitimate state interest, but was an unbridled abuse of authority. A similarly situated person would know not to disclose protected information about a person's sexual orientation because disclosing such information would be highly offensive and likely would result in harm. In fact, Newell understood that a high school student like S.W. had a protected expectation of privacy in one of the most intimate aspects of her life like her sexual orientation. *Deposition of Newell,* p.32 ¶¶2-21 (R.2., at USCA5 583).

A similarly-situated educator with 18 years of experience offered sworn testimony that:

> Defendants in this case had no good reason to disclose S.W.'s sexual orientation to her mother. Their inappropriate conduct violated S.W.'s privacy, placing a teenage student's well-being in jeopardy. Defendants similarly had no good reason to remove S.W., a talented

> athlete and hard worker, from the softball team because of her sexual orientation. . . . Defendants Fletcher and Newell's disclosure of S.W.'s sexual orientation, a deeply private and personal matter, to her mother lacked any legitimate justification. The two coaches' conduct. . . . violated the Code of Ethics and Standard Practices for Texas Educators contained in the Texas Administrative Code (Title 19, Rule §247.2).

Report of Kristine A. Vowels, Ed.D., p. 4 ¶¶3-4 (R.2, USCA5 649).

The extent of the harm here is addressed in part by Dr. Thorne, a psychologist, who explains that research and clinical experience "indicate that gay, lesbian, and/or bisexual teenagers . . . forced to reveal their sexual preference(s) before they are ready are susceptible to compromised social, emotional, and behavioral functioning." *Report of Thorn*, p.7 (R.2, USCA5 594). After he evaluated S.W., Dr. Thorne concluded that "[a]s it relates to the specific trauma symptoms associated with reportedly having been 'outed' in March of 2009, [S.W.], as indicated previously, did report/endorse having previously experienced a variety of intense and recurrent thoughts/emotions relating to the incident, as well as suicidal ideation, self-mutilation, appetite and sleep disruption, and a loss of self-esteem achieved through academics and athletics." *Id*. Dr. Thorne concluded that S.W.'s psychological symptoms are attributable, at least in part, to "her emotional response to the reported incident in March of 2009." *Id*., at p.7 (R.2, USCA5 594).

SUMMARY OF THE ARGUMENT

The judge properly determined that genuine issues of material fact exist about whether the challenged acts by Defendants-Appellants were unlawful and had violated S.W.'s clearly established right to privacy. The judge's order denying Defendants' motion to dismiss on summary judgment is well supported and should be upheld.

ARGUMENT AND AUTHORITIES

A. Applicable Standards

1. Standard of Review

In this appeal, the applicable standard of review is to review the facts and reasonable inferences to be drawn therefrom in the light most favorable to the party who opposed the summary judgment motion; moreover, since this matter involves a claim of qualified immunity, the standard also ordinarily requires adopting Plaintiff's version of the facts. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (citing *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962) (per curiam)). *See also Cantrell v. City of Murphy*, 666 F.3d 911, 9818 (5th Cir. 2012) ("We review the . . . denial of the qualified immunity defense de novo, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff") (internal citations omitted).

2. Summary Judgment Standard

In denying the summary judgment motion, the judge properly stated the applicable standard:

> The moving party bears the initial burden of showing absence of a material fact issue, and doubt is resolved against the moving party. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157 (1970); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (the court should draw all reasonable inferences in favor of the non-moving party). If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the non-movant's response." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the movant meets this burden, Rule 56 requires the opposing party to go beyond the pleadings and to show by affidavits, depositions, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Texas Instruments, Inc*., 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Texas Tech. Univ*., 80 F.3d 1042, 1046-47 (5th Cir. 1996).
>
> When ruling on a motion for summary judgment, the Court . . . [must] view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita* [*Electric Industrial Co., Ltd. v. Zenith Radio Corp*.], 475 U.S. [574] at 587 [(1986)]; *Adickes* [*v. S.H. Kress & Co.*], 398 U.S. [144] at 158-59 [(1970)]; *Merritt-Campbell, Inc*. [*v. RxP Prods.*, Inc.,] 164 F.3d [957] at 961 [(5th Cir. 1999)]. However, the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc*., 66 F.3d 89, 92 (5th Cir. 1995), *as modified*, 70 F.3d 26 (5th Cir. 1995). Unless there is sufficient evidence for a reasonable jury to return a verdict in the opposing party's favor, there is no genuine issue for trial, and summary judgment must be granted. Celotex, 477 U.S. at 322-23; *Anderson* [*v. Liberty Lobby, Inc*.,] 477 U.S. [242] at 249-51 [(1986)]; *Texas Instruments*, 100 F.3d at 1179.

Order, at pp.5-6 (R.2, USCA 5 721-722).

B. ISSUE:

SUMMARY JUDGMENT WAS PROPERLY DENIED. THE JUDGE'S FINDING THAT MATERIAL FACT ISSUES REMAIN IN DISPUTE IS WELL SUPPORTED BY THE FACTS FROM THE PLEADINGS WHEN PRESENTED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

The judge properly determined that genuine issues of material fact exist about whether the challenged acts by Defendants were unlawful and violated S.W.'s clearly established constitutional rights. As he noted, the test for qualified immunity requires determining if "the public official's actions were objectively reasonable in light of the law at the time of the challenged conduct." *Order*, pp.6-7, citing *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). (R.2, USCA5 722-723). It also requires determining whether a public official's conduct violated a constitutional or statutory right that was clearly established when the challenged conduct occurred. *Id.* (citing *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011), and *Morgan*, 659 F.3d at 371-72). (R.2, USCA5 722-723).

1. Fletcher and Newell's Actions Were Objectively Unreasonable

The judge explained there are two *markedly different* sets of material fact in this case about—and the reasons for—what transpired when Defendants questioned S.W. in a locked room off the school campus about her sexual preference. S.W. offered evidence that the Defendants locked her in, then threatened and forced her into revealing her sexual orientation through bullying and threats:

> My coaches made me go into the empty locker room . . . and locked the door . . . I had no choice . . . and I was not free to leave.
>
> * * *
>
> Ms. Fletcher asked me if I was gay and . . . [in] a relationship with . . . [Hillary Nut]. . . . At the time, I was 16 years old and Hillary was 18.
>
> [She] . . . then accused me of spreading gossip that Hillary Nutt was "Coach Newell's girlfriend," which was not true. . . .
>
> * * *
>
> When I denied Ms. Fletcher's accusations, my coaches got very angry. Ms. Fletcher got close to me, yelled at me, and threatened to sue me for slander. She repeatedly called me [a] "liar."
>
> I was terrified, and I thought Ms. Fletcher might hit me. She made intimidating gestures, and I felt threatened.
>
> I was so afraid that I stopped arguing . . . I just wanted to get . . . out of there. After denying it a few times, I eventually told them that Hillary and I were dating, even though we were not . . . We had only recently met each other.
>
> My coaches threatened to talk to my mother about my dating Hillary, and they told me to give them my mother's phone number.
>
> I didn't want them to tell my mom about Hillary because my mom didn't know that I was interested in girls.
>
> I gave them my mother's phone number . . . because I felt I had no choice. They made it clear . . . that I would not be allowed to play softball until they told my mother I was dating Hillary. I felt threatened and wanted to get out of that locker room as fast as I could.

Declaration of S.W., ¶¶4; 6-14 (R.2, USCA5 531; 574-576).

Defendants contend they wanted to protect S.W. from a bad influence (although Newell knew Hillary Nut well enough that she let her come around the students at the softball team's practice field and kept Ms. Nutt's contact

information on her cell phone) and wanted to alert Ms. Wyatt that her daughter may have been the victim of a crime since Ms. Nutt was an adult.

> [Defendants] . . . wanted to alert Plaintiff that her daughter might be involved in an inappropriate relationship with an adult. Ms. Fletcher told Plaintiff . . . her daughter might be the victim of a crime in that she might have been romantically involved with an adult. Plaintiff asked if . . . [they] knew who S.W. was dating. Ms. Fletcher then told Plaintiff that she suspected S.W. was dating . . . Hillary Nutt.

Defendant Fletcher's Answers and Objections to Plaintiff's First Set of Interrogatories (R.2, USCA5 633).

There are notable flaws with the unjustifiable claim. As the judge explained, the statute upon which Defendants tethered this claim conspicuously absolves an adult from any criminal liability if the child was 14 years of age or older (as S.W. was) and the actor wasn't more than the three years older than the victim at the time (Hillary Nutt was two years older). *Order* p.13, ¶2, discussing this exception codified in TEX. PENAL CODE ANN. §22.011(e) (West 2011) (R.2, USCA5 729).

Moreover, as demonstrated by Plaintiff's evidence and noted by the judge, Defendants lacked a reasonable basis for speculating there had been sexual contact between S.W. and Ms. Nutt, and had also failed to follow statutorily mandated steps if they had a good faith basis for their notion:

> From the evidence presented by Plaintiff, a reasonable person could conclude that the Coaches were not motivated by the need to protect S.W. but rather were retaliating against S.W. for spreading a rumor about Coach Fletcher. Moreover, the state has no interest in retaliating against students, no matter how difficult to coach or teach . . .

> Additionally, even if the Coaches were motivated by a desire to protect S.W., Plaintiff provides expert testimony based on Plaintiffs' version of the facts that the Coaches actions "were not a reasonable response to any potential concerns they may have had regarding S.W. or her welfare." *Id.* (quoting EXHIBIT M TO RESPONSE, DECLARATION OF KRISTINE VOWELS . . . at 5). As a result, based on the record . . . , the Court cannot find that the states' interest outweighs S.W.'s right to keep her sexual orientation confidential.

Order, pp.13-14 (R.2, USCA5 729-730).

Defendants' conduct was neither mistaken nor objectively reasonable. As she admitted in her deposition, Newell knew that a high school student, such as S.W., had a protected expectation of privacy in her sexual orientation, since it is one of the most intimate aspects of her life (R.2., USCA5 583).

While Defendants say they wanted to protect S.W., their actions foreseeably did just the opposite. In her declaration, S.W. explains that "[a]fter everything that happened on March 3, 2009, I was depressed and anxious. I had trouble sleeping. I even cut myself and contemplated suicide. My grades went down, and I started skipping school. Before . . . [then] I had been a straight-A student and had loved going to school." (R.2, USCA5 576). *See also Report of Thorn,* which reflects that "information obtained during the . . . evaluation suggests [S.W.] has, during . . . the last 30 months, experienced significant levels of psychological tension and turmoil, including depression/sadness, anxiety, anhedonia, emotional lability, anger/irritability, isolation, pessimism, and hopelessness. . . ." (R.2, USCA5 588; 592-4). He also observed that, "[a]s it relates to specific trauma symptoms

associated with . . . having been "outed" . . . , [S.W.] . . . report[ed] having . . . intense and recurrent thoughts/emotions relating to the incident, as well as suicidal ideation, self-mutilation, appetite and sleep disruption, and a loss of self-esteem achieved through academics and athletics. . . ." (*Id.*)

Kristine A. Vowels, Ed.D., an educator for 18 years (including 12 years of teaching), who has coached girls' basketball and has been an educational consultant for numerous organizations, points out the objective unreasonableness of Defendants' actions. Dr. Vowels explains that they violated numerous provisions of the *Code of Ethics and Standard Practices for Texas Educators*:

> Standard 3.1 mandates that educators shall not reveal confidential information concerning students unless disclosure serves lawful professional purposes or is required by law. . . .
>
> Standard 3.2 requires that educators shall not knowingly treat a student in a manner that adversely affects the student's learning, physical health, mental health, or safety...
>
> [S]tandard 3.5 mandates that educators shall not engage in physical mistreatment of a student.
>
> In this case, Fletcher and Newell took S.W. Into a locker room, closed and locked the door. Fletcher accused her of having a sexual relationship with another girl. S.W. was . . . threatened by the two coaches who also stated they were going to tell her mother that she was gay and having a sexual relationship with another girl. . . .The two coaches took matters further into their own hands, setting an impromptu meeting . . . [to] disclos[e] confidential information about S.W., her sexual orientation, to her parent. . . .
>
> * * *

> Based on my knowledge and experience as a veteran educator, Fletcher and Newell's actions were not a reasonable response to any potential concerns . . . regarding S.W. or her welfare. [They] . . . did not follow state law and local policy for reporting a possible "inappropriate and potentially illegal" relationship with an adult by a 16 year old student. . . .

(R.2, USCA5 646; 649-650).

After accepting all well-pleaded facts as true and viewing them in the light most favorable to Plaintiff, along with the reasonable inferences drawn from the facts, the judge properly found that a material fact issue existed as to whether Defendants had a legitimate state interest for disclosing S.W.'s sexual orientation after coercing this constitutionally-protected, private information from her. *See Scott v. Harris*, 550 U.S. at 378 (2007), and *Cantrell v. City of Murphy*, 666 F.3d at 918.

There is ample material evidence that Defendants maliciously abused their position of trust and power over S.W., a minor, and don't qualify for immunity protection. A reasonable school official would recognize that restraining and bullying a minor to reveal her sexual orientation doesn't further a legitimate state interest but, rather, would be viewed as actionable misconduct committed by an official acting under color of law. Even if, assuming *arguendo*, Defendants' proffered excuses could be said to be legitimate, they must be balanced against the foreseeable, significant harm likely to result from their actions. *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (approving a balancing test that compares the

interests served with those hindered, and noting that more than mere rationality must be demonstrated in light of the constitutional protection accorded the privacy of one's personal affairs); *National Treasury Employees Union v. U.S. Dept. of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994) (citing *Plante* and noting that addressing the merits of an individual's right to confidentiality claim requires weighing it against the government's interest in disclosure). *See also, e.g., Coontz v. Katy Independent School Dist*., No. 98-20188, 1998 WL 698904, at *3 (5th Cir. Sept. 14, 1998) (unpublished decision citing *Plante* and applying the balancing test to a minor in a school setting).

The analysis of the qualified immunity defense presented by a summary judgment motion requires determining if the objective unreasonableness of the official's conduct was clearly established at the time of the event. *Plaintiff's Response to Defendants' Motion for Summary Judgment and Objection to Evidence,* at p.20, citing *Leibowitz v. City of Mineola*, 660 F.Supp.2d 775, 779 (E.D. Tex. 2009) ("Qualified immunity will be defeated where an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury'") (internal citation omitted) (R.2, USCA5 550).

The same factual disputes that preclude summary judgment on a qualified immunity claim also preclude summary judgment on an official immunity claim.[3] *See Estate of Shane G. Sorrells v. City of Dallas*, 45 Fed.Appx. 325 (5th Cir. 2002) (not reported). Texas' law of official immunity is substantially the same as federal qualified immunity law, except it isn't necessary to show the right violated was clearly established. Rather, official immunity focuses solely on the objective legal reasonableness of the officials' conduct. *See id.*

In their brief, Defendants ignore the standard of review for their failed summary judgment motion, and attempt to diminish the serious factual disputes at the heart of the objective *un*reasonableness of their conduct—suggesting that Ms. Wyatt's argument is a teacher can't have disciplinary meetings with a parent or teachers. That isn't the case. Her argument is that officials cannot *intentionally retaliate* against a young student based on a rumor that she never spread by locking her in an off-campus room, bullying her into revealing intimate information, and then disclosing this protected information without her consent in bad faith. S.W. has offered 15 pieces of evidence to dispute the reasonableness of Defendants'

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[3] While Defendants' brief also argues they are protected by official immunity under TEX. EDUC. CODE ANN. § 22.0511(a) (VERNON 2006) (*see Brief of Appellants*, p.29), they fail to acknowledge case authority holding that statutory immunity from a suit granted to employees of a school district under Texas law doesn't shield them from federal constitutional claims. *See Doe v. S & S Consol. I.S.D.*, 149 F.Supp.2d 274, 297-98 (E.D. Tex. 2001) (citing *Moore v. Port Arthur Indep. Sch. Dist.,* 751 F.Supp. 671, 672 (E.D. Tex. 1990), *aff'd* 309 F.3d 307 (5th Cir. 2002) (per curiam).

conduct. The judge properly determined there are too many credible but contradictory facts and evidence to hold there is no issue of genuine material fact at this stage.

Likewise, there is ample evidence that Defendants weren't acting reasonably when they detained S.W. and violated her Fourth Amendment rights. The cases they cite are inapposite; each depends on the detention occurring at school. The judge provided the Defendants with "more leeway because of the unique circumstances of public education," yet still found that a genuine issue of fact precluded summary judgment under the Fourth Amendment. *Order*, p.15 (R.2, USCA5 731).

In analyzing Defendants' motion for summary judgment, the judge accepted Plaintiff's facts as true, along with all reasonable inferences to be drawn therefrom. After doing so, he found sufficient evidence that Defendants weren't acting in good faith, but rather intended to "out" S.W.'s private, constitutionally-protected information about her sexual preference in retaliation for the rumor passed along by another student that S.W. supposedly said she was dating Newell's ex-girlfriend. *Order*, pp.13-14 (R.2, USCA5 729-730).

2. Fletcher and Newell Violated Clearly Established Constitutional Rights

The judge correctly ruled the law was, in fact, clearly settled in this regard, explaining that long-standing Texas case precedent extends privacy protection to a

matter such as S.W.'s sexual orientation, namely "intimate personal relationships or activities, and freedoms to make fundamental choices involving oneself, one's family, and one's relationship with others" and "the most intimate aspects of human affairs." *Order*, at p.20 (citing *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 580 (5th Cir. 1987); *Zaffuto v. City of Hammond*, 308 F.3d 485, 490 (5th Cir. 2002) (citing *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988)) (R.2, USCA 550).

Federal courts likewise recognize an individual's right to keep such sensitive intimate information private, as seen by reviewing the line of cases from *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (discussing the constitutional protection given the fundamental right to have sensitive personal information kept private) through *Lawrence v. Texas*, 539 U.S. 558 (2003), which dealt directly with sexual orientation (under the auspices of personal autonomy, there is a right to privacy that protects matters related to marriage, procreation, contraception, family relationships, child rearing, and education).

The Fifth Circuit has also addressed the contours of this protection. *Order,* at p.14 (R.2, USCA5 730). *See Fadjo v. Coon*, 633 F.2d 1172, 1174 (5th Cir. 1981) (finding a legitimate interest in the privacy of "the most private details of [Fadjo's] life"); *ACLU of Miss. v. Miss.*, 911 F.2d 1066, 1070 (5th Cir. 1990) (finding that instances of (often unsubstantiated) allegations of homosexuality, child

molestation, illegitimate births, and sexual promiscuity as well as reports of financial improprieties and drug abuse are sensitive personal information subject to protection).

Notably, the standard doesn't require demonstrating the existence of a prior ruling on the exact issue, as the Fifth Circuit explained in *Morgan*, 659 F.3d at 371-372:

> The Fifth Circuit, sitting en banc, recently explained the proper analysis for determining whether a right was clearly established for the purposes of the qualified immunity analysis:
>
> When considering a defendant's entitlement to qualified immunity, we must ask whether the law so clearly and unambiguously prohibited his conduct that "every 'reasonable official would understand that what he is doing violates [the law].'" *Al-Kidd*, 131 S.Ct. at 2083 (emphasis added) (citing *Andersen v. Creighton*, 483 U.S. 635, 640 (1987)). To answer that question in the affirmative, [the court] must be able to point to controlling authority—or a "robust 'consensus of persuasive authority' "—that defines the contours of the right in question with a high degree of particularity. *Id.* at 2084 (citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

Order, at p.14 (R.2, USCA5 730).

In fact, as the judge ruled, the constitutional protection accorded to informational privacy—such as S.W.'s right to keep her sexual orientation private—in this and other circuits is clear. *Compare Gill v. Devlin*, No. 4:11-cv-00623-Y (N.D. Tex. March 12, 2012) (Order denying motion to dismiss complaint by college administrators on qualified immunity grounds for discriminating against teacher based on her perceived sexual orientation) and *In re Crestcare Nursing and*

Rehabilitation Center, 222 S.W.3d 68 (Tex.App.-Tyler 2006) (disclosural privacy encompasses the ability of individuals to determine when, how, and to what extent information about them is communicated to others) *with C.N. v. Wolf*, 410 F.Supp.2d 894, 903 (C.D. Cal. 2005) (refusing to dismiss allegations of discrimination by school officials against lesbian student in face of argument there wasn't an actionable privacy interest because she was openly gay, writing "[t]he fact that an event is not wholly private does not mean . . . an individual has no interest in limiting disclosure or dissemination of information"); *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (denying qualified immunity for police officer who forced the disclosure of sexual orientation by a young man who later committed suicide, observing that this intimate aspect of his personality was entitled to constitutional protection); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (discussing privacy interests in sexual identity: "the excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate"); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir.1998) ("Sexuality and choices about sex . . . are interests of an intimate nature which define significant portions of our personhood . . . [and] an aspect of our lives that we regard as highly personal and private . . ."); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (9th Cir. 2003) (school officials who deliberately ignored harassment targeting students because of their real or

perceived sexual orientation weren't entitled to qualified immunity); *In re Crawford*, 194 F.3d 954, 958-60 (9th Cir. 1999) (the Constitution protects "an individual interest in avoiding disclosure of personal matters" referred to generally as the right to information privacy—citing sexual orientation; the court listed "sexual orientation" as an example of "inherently sensitive [and] intimate information," the disclosure of which could "lead directly to injury, embarrassment or stigma."); *Eastwood v. Dept. of Corrections*, 846 F.2d 627, 631 (10th Cir.1988) (the right to privacy "is implicated whenever an individual is forced to disclose information regarding personal sexual matters"); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (the Due Process clause forbids the disclosure of certain information unless it "advance[s] a compelling state interest which, in addition, must be accomplished in the least intrusive manner"); and *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991) (vitiating qualified immunity in a suit alleging violations of the constitutional right to information privacy).

Similarly, Defendants cannot argue that S.W. lacked a clearly established Fourth Amendment right. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968). They can only argue that their version of the facts is more convincing than

that of Plaintiff. At bottom, Defendants cannot win summary judgment with this argument; instead, they must wait until trial to do so.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Plaintiff-Appellee respectfully requests the Court to affirm the judgment of the District Court and deny any and all other relief, at law or in equity, to Defendants-Appellees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument was served upon all counsel of record in the above entitled and numbered cause on June 13 , 2012, in the following manner:

X Via ECF

/s/ Michael E. Clark
MICHAEL E. CLARK

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2, THE BRIEF CONTAINS:

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/s/ Michael E. Clark
MICHAEL E. CLARK