Case No. 12-1382

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELLONY BURLISON, as Parent and
Next Friend of C.M. and H.M., Minors, and
DOUGLAS BURLISON, as Parent and
Next Friend of C.M. and H.M., Minors,

Plaintiffs-Appellants,

v.

SPRINGFIELD PUBLIC SCHOOLS, NORM RIDDER
RON SNODGRASS, and JAMES ARNOTT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri

APPELLANTS' REPLY BRIEF

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STATEMENT OF THE CASE

In their Brief, Defendants-Appellees Springfield Public Schools ("SPS"), Norm Ridder and Ron Snodgrass erroneously assert that the Appellants, Mellony and Doug Burlison ("the Burlisons") do not appeal the District Court's judgment denying the Burlisons' motion for summary judgment. To the contrary, the Burlisons' brief specifically asserts that the District Court erred in ruling that the "lock down" drug detection operation executed at Central High School on April 22, 2010 did not effect an unconstitutional seizure of the effects of C.M., and that the District Court should have granted the Burlisons' motion for summary judgment (Appellants' Brief at 9, 20). Thus, this Court should not only reverse the judgment entered in favor of the Appellees, but render judgment in favor of the Burlisons if it finds that the District Court's ruling on the constitutionality of the forced separation of C.M. from his belongings was wrong.

Moreover, Defendants Ridder and Snodgrass are not entitled to dismissal of the claims against them regardless of this Court's decision on the whether an illegal seizure of C.M.'s belongings occurred on April 22, 2010. Ridder and Snodgrass were sued in the Amended Complaint in their official capacities (J.A. Vol. I at 12-13), which is essentially a claim against

SPS. The District Court held that Ridder and Snodgrass were entitled to summary judgment in the suit against them in their official capacities only because it had previously determined that SPS was not liable (J.A. Vol. II at 398-399). If the underlying basis for exonerating SPS is reversed, as the Burlisons claim it should be on this appeal, the grounds for granting Ridder and Snodgrass summary judgment also be subject to reversal and they would be liable in their official capacities.

ARGUMENT

I. C.M.'S BELONGINGS WERE SEIZED FOR PURPOSES OF THE FOURTH AMENDMENT BECAUSE THERE WAS A MEANINGFUL INTERFERENCE WITH HIS POSSESSORY INTEREST IN THOSE BELONGINGS

While the Defendants are correct that the constitutional issue raised by this appeal is limited to whether an illegal seizure of C.M.'s effects took place,[1] they are wrong in claiming that no seizure within the meaning of the

[1] Because the proper parties are not in this action, the Burlisons have not pursued a claim that an unconstitutional search of C.M.'s belongings took place during the April 22, 2010 lock down. However, the Defendants are incorrect that there is no evidence that a search of C.M.'s backpack took place while he was out of his classroom and unable to see what was going on. C.M. testified at his deposition that when he left the classroom his backpack was zipped, but when he returned it was unzipped and he believed it had been opened (J.A. Vol. I at 114; J.A. Vol. II at 358-359). That there is evidence that C.M.'s belongings were searched is particularly disturbing in

Fourth Amendment took place under the circumstances of this case. Defendant SPS asserts that the test for whether a seizure of property occurs is linked to interference with a freedom of movement (Brief of Appellee SPS at 27). But the case cited for this proposition, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), notes that freedom of movement is the test for seizures of the person, i.e., arrests, not for seizures of property. *Jacobsen* held instead that seizures of property occur when there is a meaningful interference with a person's possessory interest in that property.

The Defendants' arguments that the required separation of C.M. from his belongings was not a meaningful interference with his possessory interests focuses on the same decision the District Court relied upon, *Doran v. Contoocook Valley Sch. Dist.*, 616 F.Supp.2d 184 (D.N.H. 2009). But as pointed out in the Burlisons' previous brief (Appellants' Brief at 16-17), the decision in *Doran* is based upon an unwarranted limitation of the rights of public school students that is contradicted by the ruling in *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985), concerning the rights of students with respect to their possessions at school. SPS attempts to distinguish the ruling in *T.L.O.* by asserting that case involved the constitutionality of a search, not a seizure. But the Defendants cannot avoid the plain language of *T.L.O.*,

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light of the Appellees' position that no dog alerted on any belongings in C.M.'s classroom.

469 U.S. at 338-39, that public school students legitimately carry numerous noncontraband items to school and there is no basis for concluding that they waive all their rights regarding those items because they are in public school.

Thus, while public school students' freedom of personal movement may be greatly limited, as the orderly operation of the school requires students move to class at the required times or be subject to orders related to discipline, there is no similar justification for imposing the kind of severe limitation (indeed, elimination) on the right of students to the possession and control of personal items legitimately brought to school and not causing any disruption of the school environment requested by the Defendants.[2]

In any other context, if a government actor acting under color of the authority of his or her office orders a person to leave his or her belongings in order to allow an inspection, thereby dispossessing the person of the belongings, the interference with the person's possessory interests would be considered meaningful and a seizure for purposes of the Fourth Amendment.

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[2] While the Appellees assert that students have no right to take their belongings with them when they leave a class during class time, they base this claim upon an affidavit presented below in support of SPS's motion for summary judgment (J.A. Vol. II at 263). The rights of students with respect to their belongings is a question of law to be determined by the courts, and is not determined by a statement in an affidavit. *See Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004) (fact that student handbook issued by school provided that student belongings were subject to search by school officials did not mean students had waived their Fourth Amendment rights with respect to belongings brought to school).

Audio Odyssey, Ltd. v. Brenton First Nat. Bank, 245 F.3d 721, 735-36 (8th Cir. 2001), *opinion reinstated*, 286 F.3d 498 (8th Cir.), *cert. denied*, 537 U.S. 990 (2002). SPS's reliance upon the decision in *United States v. Va Lerie*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 548 U.S. 903 (2006), to support the judgment below that no seizure occurred in this case is wholly misplaced because *Va Lerie* involved a situation where the person in custody of the effects at issue asked that law enforcement officers take the bag. *See United States v. Alvarez-Manzo*, 570 F.3d 1070, 1076 (8th Cir. 2009) (distinguishing *Va Lerie* because the private carrier in that case directed law enforcement officials in terms of what they could do with the bag). Here, the interference with C.M.'s possessory interest was significant and meaningful because he was directly in possession of the bag and had not given a third party control over it.

To accept the position of the Defendants that no seizure occurred here, one must adopt the view that public school students retain no possessory interest in their belongings once they cross the threshold of the schoolhouse. This is view is plainly contradicted by the decision in *T.L.O.* respecting the rights of students with respect to effects legitimately brought to school. Therefore, the decision below that no seizure of C.M.'s belongings was effected during the lock down must be rejected and reversed.

II. THE SEIZURE OF C.M.'S BELONGINGS WAS NOT REASONABLE AND WAS NOT JUSTIFIED BY THE INTEREST IN STEMMING DRUG USE BY STUDENTS

Contrary to the contentions of the Defendants, the seizure of C.M.'s effects was not reasonable simply because it was done while he was a student in a public school and was undertaken in connection with drug interdiction activities. Defendants cite to the Supreme Court decisions upholding mandatory drug testing for students involved in extracurricular activities[3] as justifying and legalizing the random, suspicionless seizures of student belongings in connection with a school's attempt to combat student drug use at issue in this case.

However, in *Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004), this Court struck down a school's policy of conducting searches of student belongings and rejected the school's argument that the Supreme Court's school drug testing cases authorized the policy. The practice and policy was described by the court as follows:

> One day during the school year, all of the students in Ms. Doe's classroom were ordered to leave the room after removing everything from their pockets and placing all of their belongings, including their backpacks and purses, on the desks in front of them. While the students were in the hall outside

[3] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), and *Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002).

> their classroom, school personnel searched the items that the students had left behind, including Ms. Doe's purse, and they discovered marijuana in a container in her purse. The parties have stipulated that LRSD has a practice of regularly conducting searches of randomly selected classrooms in this manner.

Id. at 351. The school district there argued, as do the Defendants here, that suspicionless searches were authorized by the Supreme Court's decisions in *Vernonia* and *Earls*.

But the *Doe* decision pointed out that, unlike the searches of participants in school sports and extracurricular activities approved in *Earls* and *Vernonia*, "the search regime at issue here is imposed upon the entire student body, so the [school district] cannot reasonably claim that those subject to search have made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege." *Doe*, 380 F.3d at 354. This Court went on to hold that "the type of search at issue here invades students' privacy interests in a major way." *Doe*, 380 F.3d at 354. Moreover, "[t]he mere assertion that there are substantial problems associated with drugs and weapons in its school does not give [a school district] *carte blanche* to inflict highly intrusive, random searches upon its general student body." *Id.* at 357. "Because subjecting students to full-scale, suspicionless searches eliminates virtually all of their privacy in their belongings, and there is no evidence in

the record of special circumstances that would justify so considerable an intrusion, we hold that the search practice is unconstitutional." *Id.* at 352-53.

Thus, the decision in *Doe* striking down a school district policy and practice almost identical to the one embodied in SPS Standard Operating Procedure 3.4.1 and employed against C.M. on April 22, 2010, wholly refutes the claim that the seizure of C.M.'s belongings is reasonable because the school was engaged in drug interdiction activities. Although SPS argues that *Doe* allows random, suspicionless searches of students, *Doe* limited its observation to circumstances where school officials have "received specific information giving them reasonable grounds to believe that the students' safety was in jeopardy." *Doe*, 380 F.3d at 356. *Doe* cited *Thompson v. Carthage School District*, 87 F.3d 979 (8th Cir. 1996), where suspicionless searches of students were undertaken where school officials had specific evidence that a weapon was then located on school grounds. Unlike *Thompson*, the instant case and *Doe* did not involve any specific report of the presence of contraband at the school which might justify a generalized search. As *Doe* makes clear, a generalized concern about drugs at school does not make reasonable the mass, suspicionless invasion of students' Fourth Amendment interests. Students do not forfeit their Fourth

Amendment rights by complying with compulsory attendance laws and attending public schools.

And even though the *Doe* decision may have indicated that use of dogs to examine student belongings would not violate the rights of students, the use of dogs to examine student belongings is not at issue in this case. What is at issue is the seizure of belongings from students without any reasonable, particularized suspicion relating to the student or the effects at issue.

The Defendants' claim that there need not be individualized suspicion in order to seize student belongings in this context must be rejected as inconsistent with the decision in *Doe*. This Court wrote there that it was unaware of any authority upholding the kind of Fourth Amendment invasion at issue in that case "absent individualized suspicion, consent or waiver of privacy interests by those searched, or extenuating circumstances that pose a grave security threat." *Doe*, 380 F.3d at 355. Indeed, in *T.L.O.*, 469 U.S. at 342 n. 8 (citations omitted), the Supreme Court pointed out that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[.] . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards'

are available to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." In this case, the fact that C.M. and other students were unable to observe what went on inside the classroom and what was happening to their belongings shows that the kind of necessary safeguards against official misconduct did not exist in this case. Therefore, the Defendants' claim that the seizure is reasonable notwithstanding the lack of suspicion particular to C.M.'s belongings should not be sustained.[4]

III. THE RECORD DEMONSTRATES THAT SPS IS LIABLE FOR THE FOURTH AMENDMENT VIOLATION BECAUSE THE VIOLATION WAS CAUSED BY A POLICY OR PRACTICE ATTRIBUTABLE TO SPS

As Defendant SPS itself recognizes and concedes, a governmental entity is liable under 42 U.S.C. § 1983 when the deprivation of a constitutional right suffered by the plaintiff is caused by the execution of a policy of the entity. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385

[4] For the same reason, the decision in *In the Matter of D.H.*, 306 S.W.2d 955 (Tex. App.—Austin 2010), which all the Defendants cite and rely upon heavily, should not be considered persuasive. That state court decision that the seizure of student belongings was reasonable flowed from the flawed premise that the decision in *Earls* was controlling even though the school's drug detection operation applied to the entire student body and was not limited to participants in extra-curricular activities. Thus, the *D.H.* court improperly concluded that individualized reasonable suspicion was not required.

(1989). The requirement that a deprivation result from a governmental entity's policy is meant to assure that entity liability for the deprivation is based upon a decision or action attributable to the government entity and not based solely upon *respondeat superior* principles. *Monell v. Dept. of Soc. Services of the City of New York*, 436 U.S. 658, 694 (1978). "Local governing bodies, . . ., can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690.

SPS argues that it should not be liable for the unconstitutional seizure of C.M.'s belongings because it did not result from the execution of any SPS "policy," contending that S.O.P. 3.4.1 (J.A. Vol. I at 90-93) is not a "policy" of the District and that there is no evidence that "the Board of Education approved or authorized the drug detection activity at Central High School[.]" (Brief of Appellee SPS at 52). However, this contention is wholly contradicted by evidence SPS itself offered in support of its summary judgment motion. In an affidavit offered by Kathy Looten, Secretary to the SPS Board, Looten swore that "[p]ursuant to Board Policy JFG, the District has adopted Standard Operating Procedure 3.4.1. ("SOP 341"), *Protocol For*

Use of Drug Dogs in School Buildings[.]" (J.A. Vol. I at 125, 130-133). A "policy" for purposes of § 1983 and *Monell* is a deliberately adopted choice of a guiding principle or procedure. *Jenkins v. County of Hennepin, Minn.*, 557 F.3d 628, 633 (8th Cir. 2009). In light of Looten's affidavit, S.O.P. 3.4.1 is clearly a policy of SPS upon which SPS's liability may be based.

It should further be pointed out that SPS is simply wrong in contending that the District Court held that the Burlisons' § 1983 claim failed "because they did not present any evidence that the alleged constitutional deprivation was caused by a policy . . . of the District." (Brief of Appellee SPS at 51). In fact, the District Court wrote that S.O.P 3.4.1 was the "District policy at issue[.]" (J.A. Vol. II at 397). The District Court held that the separation of students from their belonging required by S.O.P. 3.4.1 did not involve a constitutional deprivation, not that the policy did not cause this separation.

Moreover, it is clear that the unconstitutional seizure of C.M.'s belongings was caused by the implemention or execution of S.O.P. 3.4.1. *Monell*, 436 at 690. A policy will be considered to have caused a deprivation if the policy itself violates the Constitution or directs an employee to do so. *Moyle v. Anderson*, 571 F.3d 814, 817-18 (8th Cir. 2009). S.O.P. 3.4.1 at I(C)(2)(e) provides that "[s]tudents will not be present

in an area/room when the drug detection dog is working." (J.A. Vol. I at 132). Thus, this policy either (1) mandates on its face that student be separated from their belongings in order that the dogs may sniff student belongings, or (2) directs school employees carrying out S.O.P. 3.4.1 to separate students from their property. In either case, the policy caused the seizure of C.M.'s belongings that occurred on April 22, 2010 and SPS is responsible for the results of that policy.

IV. DEFENDANT ARNOTT IS LIABLE FOR THE FOURTH AMENDMENT VIOLATION AT ISSUE IN THE CASE

Despite acknowledging that he willingly committed Sheriff Office assets to assist with the lock down at Central High School, Defendant Arnott insists that he should not have any individual liability for the illegal seizure. But this argument should be rejected in light of his further acknowledgement that liability will attach under 42 U.S.C. § 1983 if the state actor directs or acquiesces in the action causing the constitutional deprivation and knew or should have known that the deprivation would result (Brief of Appellee Arnott at 14). The evidence of record shows that this was not the first time drug detection dogs were used in SPS schools; indeed, they had been used in SPS school since 2003 for a total of 112 times (J.A. Vol. II at 224). Given this frequency of use, Defendant Arnott at the very least should have known

that students were being dispossessed of their belongings in connection with the drug interdiction activities and that mass, suspicionless seizures of student belongings were occurring.

As to Defendant Arnott's claim that he is entitled to qualified immunity from individual liability, the fact that there is no case finding a constitutional deprivation under the precise circumstances presented by this case does not demonstrate that the law on the validity of seizures was not "clearly established." In *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1049 (8th Cir. 1989), this Court rejected the idea that for the law to be "clearly established" the specific acts at issue in the case must have been particularly proscribed by a decision in this Circuit or another court. "A right is clearly established if its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.'. . . The standard does not require that there be a case with materially or fundamentally similar facts." *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). For the reasons set forth in Sections I and II, *supra*, it is apparent that the contours of the Fourth Amendment right to be free from unreasonable seizures was sufficiently

defined to have put Defendant Arnott on notice that he was assisting in the deprivation of Fourth Amendment rights by aiding SPS's drug interdiction activities.

With respect to his official capacity liability (which is not subject to the defense of qualified immunity, *Van Horn v. Oelschlager*, 502 F.3d 775, 778-79 (8th Cir. 2007)), Defendant Arnott's argument that a showing of a sufficient degree of fault or deliberate indifference is required wholly misses the mark. The cases cited by Defendant Arnott on this point all deal with claims of inadequate training or supervision, under which a municipal entity is deemed liable only if it has been deliberately indifferent to the rights of citizens with respect to its policy for training officers. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Thus, in *Bd. of County Commrs. Of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 406-07 (1997), the Court distinguished § 1983 claims based upon policy of *inaction*, such as a failure to train or supervise, and those involving a policy directing conduct that deprived others of constitutional rights, holding that it is the former that must be shown to be deliberately indifferent to the rights of citizens.

Indeed, *Brown*, 520 U.S. at 406, specifically distinguished the kind of municipal liability recognized in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), which is the grounds for official capacity liability asserted in

this case. Because the claim here is that Defendant Arnott, as the policymaker for the Sheriff's Office, directed officers to engage and assist in an operation that would deprive students of their Fourth Amendment rights, there is no requirement of some degree of fault, whether it be deliberate indifference or something else, in order to establish official capacity liability.

CONCLUSION

For the reasons set forth above and in their opening brief, Appellants respectfully request that this Court rule that the District Court erred in denying Appellants summary judgment motion and in granting the competing motions of the Appellees, that the Court reverse the judgment below, and remand the case with directions that the District Court grant the Plaintiffs' motion for summary judgment that the Defendants are liable under 42 U.S.C. § 1983 for a violation of C.M.'s right to be free from unreasonable seizures.

Respectfully submitted,

/s Jason T. Umbarger

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Appellants' Reply Brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B) because the foregoing brief contains 3,383 words, excluding parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The undersigned further certifies that the foregoing brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it uses Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

Dated: June 7, 2012

/s Jason T. Umbarger
Jason T. Umbarger

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and 8th Cir. R. 28A(d), the undersigned does hereby certify that on June 12, 2012, one copy of the foregoing Appellants' Reply Brief was served upon each counsel of record for Appellees by delivering said copies to a third-party commercial carrier for delivery within three days, addressed to each of the following:

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