PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1972

R.A., Individually, and as lawful guardian ad litem of Minor Child G.A.,

Plaintiff – Appellee,

v.

BRADY JOHNSON,

Defendant – Appellant,

and

IREDELL-STATESVILLE SCHOOL DISTRICT BOARD OF EDUCATION; ALVERA LESANE; RHONDA MCCLENAHAN; ALISHA CLOER; ANDREW MEHALL; ROBIN JOHNSON,

Defendants.

No. 21-1973

R.A., Individually, and as lawful guardian ad litem of Minor Child G.A.,

Plaintiff – Appellee,

v.

ALVERA LESANE; RHONDA MCCLENAHAN; ALISHA CLOER,

Defendants – Appellants,

and

IREDELL-STATESVILLE SCHOOL DISTRICT BOARD OF EDUCATION; BRADY JOHNSON; ANDREW MEHALL; ROBIN JOHNSON,

Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Statesville. Kenneth D. Bell, District Judge. (5:20-cv-00192-KDB-DSC)

Argued: May 3, 2022 Decided: June 7, 2022

Before WILKINSON, MOTZ, and THACKER, Circuit Judges.

Reversed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Thacker joined. Judge Motz wrote an opinion concurring in the judgment.

ARGUED: Sarah Margaret Saint, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP, Greensboro, North Carolina, for Appellants. Stacey Marlise Gahagan, GAHAGAN PARADIS PLLC, Durham, North Carolina, for Appellee. **ON BRIEF:** Gary S. Parsons, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP, Greensboro, North Carolina, for Appellant Brady Johnson. Virginia M. Wooten, Steven A. Bader, CRANFILL SUMNER LLP, Charlotte, North Carolina, for Appellants Rhonda McClenahan, Alisha Cloer, and Alvera Lesane.

WILKINSON, Circuit Judge:

R.A., the mother of a child in North Carolina's Iredell-Statesville School District, brought various claims against several school employees and administrators for mistreatment her son G.A. experienced at the hands of his teacher. The district court dismissed all claims against the school officials except two on state law negligence grounds. As to those two claims, the school officials filed an interlocutory appeal, asserting that they are entitled to public official immunity under North Carolina law. We agree, and hold that their immunity requires that the state law claims against them be dismissed.

I.

G.A. is a child with autism spectrum disorder that left him with limited functional communication. R.A. is his mother. In 2017, G.A. began first grade at Cloverleaf Elementary School, part of the Iredell-Statesville School District (ISSD). He was in a special education classroom, and Robin Johnson was his teacher. At that time, appellants were all ISSD and Cloverleaf Elementary administrators: Brady Johnson was ISSD Superintendent, Alvera Lesane was Associate Superintendent for Human Resources, Rhonda McClenahan was Executive Director of Exceptional Children, and Alisha Cloer was principal of Cloverleaf Elementary.[1]

[1] G.A.'s teacher Robin Johnson was named as a defendant in the suit, but she is not an appellant here. Because she and Superintendent Brady Johnson share a name, we refer to them as Ms. Johnson and Mr. Johnson respectively. We refer to appellants Mr. Johnson, Lesane, McClenahan, and Cloer collectively as "the school officials."

In the amended complaint, R.A. alleges that Ms. Johnson repeatedly mistreated G.A. while he was in her class, beginning in the first grade. In one of the most egregious episodes, Ms. Johnson placed G.A. in a trash can and prevented him from getting out for some period of time, telling him that "if he acted like trash, [she] would treat him like trash." J.A. 24. Sometime during that school year, another ISSD employee, Jennifer Bender, observed this behavior and reported what she saw to Cloer, who in turn reported to Mr. Johnson, Lesane, and McClenahan. That report was never forwarded to or investigated by the North Carolina Department of Social Services.

Ms. Johnson remained G.A.'s teacher for second grade the following school year (2018–2019). During that year, according to the complaint, Ms. Johnson continued to mistreat G.A., including by refusing to replace his broken desk so that he had to stand for a prolonged period, spilling hot grease from her lunch on his head, and putting her hands over his mouth to stop him from disturbing other students. R.A. alleges generally that the school officials knew of these ongoing incidents; the school officials assert that these incidents were not reported to them.

When G.A. entered third grade the following year (2019–2020), his special education class was moved to a different school and Ms. Johnson was no longer his teacher. During that year, G.A. told his mother R.A. about Ms. Johnson's actions, including the trash can incident. Another parent, whose child reported similar experiences in Ms. Johnson's classroom, consulted with a therapist, and that therapist questioned other students to confirm the incidents occurred. The therapist then filed a report with the Iredell County Sheriff's Office and the police opened an investigation. Ms. Johnson was placed

on administrative leave and later pleaded guilty to two counts of misdemeanor assault on a disabled person.

In December 2020, G.A. and R.A. filed suit against the ISSD Board of Education and several individual defendants, alleging federal constitutional and statutory claims, as well as state law claims for negligence and negligent inflection of emotional distress. Mr. Johnson, Lesane, McClenahan, and Cloer timely moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, asserting, inter alia, that the state law negligence claims against them in their individual capacities were barred by public official immunity under North Carolina law. Upon the recommendation of the magistrate judge, the district court granted their motion in part and dismissed all federal claims against the appellants.[2] But as for the state law negligence claims, it denied the school officials' motion to dismiss. It concluded that the school officials were not entitled to public official immunity for a breach of a ministerial duty to report child abuse. The school officials promptly appealed the denial of immunity.

II.

We have jurisdiction to hear this interlocutory appeal. An order denying immunity is immediately appealable when, "under state law, the immunity is an immunity from suit," not merely from liability. *Bailey v. Kennedy*, 349 F.3d 731, 738 (4th Cir. 2003) (quotation marks omitted). That is the case here: in North Carolina, the "essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages

[2] Some of the federal claims against other defendants, not appellants here, remain.

action," *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 201 (1996) (quotation marks omitted), and so "public official immunity is effectively lost when that public official is forced to go to trial," *Wilcox v. City of Asheville*, 222 N.C. App. 285 (2012) (quotation marks omitted). We review the denial of state law immunity de novo. *Bailey*, 349 F.3d at 739.

The public officials here are presumptively entitled to public official immunity for their exercise of discretion in overseeing their school district. And R.A. did not adequately plead any exception that would pierce their immunity. Accordingly, R.A. has failed to state a claim of negligence against the school officials in their individual capacities.

A.

Under North Carolina law, "a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Smith v. State*, 289 N.C. 303, 331 (1976) (quoting *Smith v. Hefner*, 235 N.C. 1, 7 (1952)). North Carolina courts have recognized this doctrine at common law for over a century. *See Epps*, 122 N.C. App. at 202. The immunity serves to stem the tide of litigation that might arise if public officers were liable for every arguably negligent discretionary decision they make in the course of their official duties.

North Carolina courts have identified several rationales for a strong immunity defense. For one, the immunity encourages public service, as "it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of

discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward any one who might be affected thereby." *Miller v. Jones*, 224 N.C. 783, 787 (1945). The immunity also protects a public official in the "honest exercise of his judgment within his jurisdiction, however erroneous or misguided his judgment may be." *Templeton v. Beard*, 159 N.C. 63, 63 (1912) (citation omitted). The aim is to enable officials to exercise that judgment free from undue constraint in the innumerable decisions they must make every day. *See Epps*, 122 N.C. App. at 203. For if officials "were constantly exposed to the threat of personal liability at the hands of disgruntled or damaged citizens," the basis of democratic authority "might well be jeopardized." *Id.* In sum, North Carolina has chosen to tolerate inevitable mistakes in order to promote "fearless, vigorous, and effective administration of policies of government." *Wilcox*, 222 N.C. App. at 290 (quoting *Pangburn v. Saad*, 73 N.C. App. 336, 344 (1985)).

In practice, the immunity "precludes suits against public officials in their individual capacities and protects them from liability 'as long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption.'" *Hart v. Brienza*, 246 N.C. App. 426, 431 (2016) (quoting *Smith*, 289 N.C. at 331 (alterations adopted)). The immunity applies only to public officials, not public employees—a distinction which turns on whether the position is created by statute, exercises sovereign power, and requires discretion. *Hare v. Butler*, 99 N.C. App. 693, 699–700 (1990); *Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 177 (2009). North Carolina courts have "recognized that school officials such as superintendents and principals" are public officials, in part

because they "perform discretionary acts requiring personal deliberation, decision, and judgment." *Farrell v. Transylvania Cnty. Bd. of Educ.*, 175 N.C. App. 689, 695 (2006) (citing *Gunter v. Anders*, 114 N.C. App. 61, 67–68 (1994)). R.A. does not dispute that appellants are all public officials under North Carolina law.

B.

Even so, R.A. argues that the school officials' immunity does not apply here. According to R.A., public officials are entitled to immunity for negligence stemming only from their exercise of discretion, not their completion of ministerial tasks. She asserts that the school officials' actions here were ministerial since they had a statutory duty to report child abuse, and so their negligent failure to do so is not immune from suit.

It is far from clear that North Carolina law limits public official immunity to discretionary acts. R.A. has come forth with no cases in which North Carolina courts have denied immunity on the grounds that the officials were performing nothing more than a ministerial function. Any abrogation of the immunity for ministerial acts would be beyond our authority absent some clear statement to that effect by the North Carolina courts. Even were we to accept R.A.'s argument on this point, however, her position would still fall short, because the school officials' actions here were discretionary.

Ministerial acts are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts," *Meyer v. Walls*, 347 N.C. 97, 113 (1997) (quotation marks omitted), performed "without regard to or the exercise of [one's] own judgment upon the propriety of the act being done," *Langley v. Taylor*, 245 N.C. 59, 62 (1956) (quoting Black's Law Dictionary (3d ed. 1933)). North

Carolina courts have described such acts as "mechanical task[s]," to include sweeping a road, *Miller*, 224 N.C. at 784, 788, or driving a school bus, *Hansley v. Tilton*, 234 N.C. 3, 8 (1951). By contrast, discretionary actions require some degree of "personal deliberation, decision and judgment." *Meyer*, 347 N.C. at 113 (citation omitted). For example, North Carolina courts have held that assistant jailers exercise discretion when providing "care, custody and safekeeping" of inmates—despite being "subject to detailed regulations and policies"—because they must make judgments such as "which inmates to screen for suicide watch and how to immediately deal with troublesome detainees." *Baker v. Smith*, 224 N.C. App. 423, 432–33 (2012). For similar reasons, a school "principal's decision to use reasonable force in order to maintain discipline at a school dance" was also found to be discretionary. *Webb ex rel. Bumgarner v. Nicholson*, 178 N.C. App. 362, 366 (2006).

The school officials' actions at issue here were likewise discretionary. What to do when faced with allegations of a teacher mistreating her student is not a decision that can be made automatically, without regard to the administrator's judgment. Like an assistant jailer watching over inmates and school principal disciplining students, the school officials are charged with innumerable daily decisions concerning the care, oversight, and safekeeping of others. When presented with a report of poor teacher behavior, officials are faced with a number of questions: Do they report to authorities? Do they take a more severe route and suspend or fire the teacher, opt for a milder reprimand, or perhaps reassign her to a different post? Or should they even do anything at all? These questions cannot be answered without thoughtful consideration and deliberation. *See, e.g.*, *Hare*, 99 N.C. App. at 701 (finding that supervision of employees is "discretionary in nature").

According to R.A., a mandatory reporting statute creates a ministerial duty. North Carolina law requires school personnel who have "cause to suspect child abuse" to report it to the Director of Social Services. N.C. Gen. Stat. § 115C-400; *see also id.* § 7B-301 ("Any person. . . who has cause to suspect that any juvenile is abused, neglected, or dependent . . . shall report the case of that juvenile to the director of the department of social services."). ISSD policy reaffirms that duty. *See* J.A. 21–22 (quoting Board Policy 4240/7312, 4040). But the existence of guiding regulations—even "detailed" ones—does not eliminate the need for judgment. *See Baker*, 224 N.C. App. at 433. Most obviously, whether or not an official has "cause to suspect" child abuse is a judgment call. It depends, among other things, on the official's assessment of an accusation's credibility and severity. And even assuming the accusation is credited, whether or not alleged behavior rises to the level of "child abuse" is likewise a case-by-case decision. The official must assess the intent of the actor, the risk of injury to the child, the severity of physical injury, and the appropriateness of disciplinary devices, among other factors. *See* N.C. Gen. Stat. § 7B-101(1) (defining child abuse). Surely those assessments require a good measure of "personal deliberation, decision and judgment." *Meyer*, 347 N.C. at 113.

C.

To be sure, public official immunity is not absolute. Under North Carolina law, public officials' actions are not shielded if they were "(1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox*, 222 N.C. App. at 288. R.A. does not argue on appeal that the school officials acted outside the scope of official authority or corruptly. That leaves malice, which has a certain intuitive appeal here given the troubling

facts alleged. But R.A. did not plead malice or intent in the complaint, and thus she has failed to state a claim under state law.

R.A.'s claim was against public officials, in their individual capacities, for state law negligence. For such claims, North Carolina law dictates that "[t]he plaintiff may not *just* allege negligent behavior and expect his personal capacity action to survive." *Epps*, 122 N.C. App. at 207 (emphasis in original). Instead, the plaintiff may only pierce public official immunity by "showing that the defendant-official's tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official's conduct is malicious, corrupt, or outside the scope of official authority." *Id.* at 205. Therefore, "if a plaintiff wishes to sue a public official in his personal or individual capacity, the plaintiff must, at the pleading stage and thereafter, demonstrate that the official's actions (under color of authority) are commensurate with one of [those] 'piercing' exceptions." *Id.* at 207. In other words, to sufficiently state a claim in cases where immunity presumptively applies, the plaintiff must adequately plead one of these exceptions in the complaint.

In assessing whether R.A. has done so, we apply federal procedural law, including pleading rules. *See Hanna v. Plumer*, 380 U.S. 460, 465, 472 (1965). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563.

R.A. has not satisfied this obligation. R.A. did not allege malice, or any other piercing exception, in the amended complaint. Therefore, she has not satisfied the basic burden to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This pleading standard is not a mere formality. It is especially important when immunity is at stake. For "[t]he basic thrust" of immunity "is to free officials from the concerns of litigation, including avoidance of disruptive discovery." *Iqbal*, 556 U.S. at 685 (quotation marks omitted). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Id.* R.A. did not make even a bare or conclusory statement that the school officials acted maliciously, and so their immunity is not pierced and the suit cannot be allowed to move forward to exact such costs.

R.A. argues before us that the facts alleged in the complaint satisfy the malice element, even if she did not use the word "malice." R.A. points to Ms. Johnson's odious behavior and, from there, infers that the school officials acted maliciously by not reporting the behavior or allowing it to continue. This argument likewise fails.

Under North Carolina law, a "defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313 (1984). A malicious act thus has three elements: it is "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox*, 222 N.C. App. at 288. As to the third element, "[t]he intent to injure can either be 'actual' or 'constructive.'"

Knibbs v. Momphard, 30 F.4th 200, 227 (4th Cir. 2022) (quoting *Wilcox*, 222 N.C. App. at 290). "North Carolina law 'presumes that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law,' so evidence of malice 'must be sufficient by virtue of its reasonableness, not by mere supposition.'" *Id.* (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 24 (2020)).

R.A. has not alleged any facts as to the third element of malice: intent. Nowhere has R.A. asserted that the school officials had any actual intent to harm G.A. Importantly, Ms. Johnson herself is not a party to this appeal; all appellants are school administrators at least one step removed from the incidents in question. The mere allegation that such disheartening things occurred at their school does not show that the school officials *intended* them to happen. We are thus left only with administrators' failure to report or take corrective action in response to Ms. Johnson's behavior, which R.A. argues amounts to a constructive intent to harm G.A. While we certainly do not hold that such a failure can never amount to malice, it is a high bar.

North Carolina courts have "emphasized that 'mere reckless indifference is insufficient' to show a constructive intent to injure." *Knibbs*, 30 F.4th at 228 (quoting *Wilcox*, 222 N.C. App. at 292). To amount to constructive intent, "a plaintiff must show that the defendant's actions were 'so recklessly or manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent.'" *Id.* (quoting *Wilcox*, 222 N.C. App. at 289 (alteration adopted)). Notably, North Carolina courts have found that direct excessive force causing serious or fatal injury can be sufficient to survive a motion

to dismiss or summary judgment on the question of constructive intent to harm. *See, e.g.*, *Wilcox*, 222 N.C. App. at 294 (jury question on constructive intent to harm where defendant "fired six bullets into a slow-moving vehicle, knowing it was occupied by a passenger . . . despite the absence of a clear public threat"); *Chastain v. Arndt*, 253 N.C. App. 8, 19 (2017) (jury question on constructive intent to harm where defendant "pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen"). But even direct infliction of physical injury may not always be enough to create a jury question on constructive intent. *See, e.g.*, *Brown v. Town of Chapel Hill*, 233 N.C. App. 257, 270 (2014) (no constructive intent to harm where, during an allegedly racially-motivated arrest, officer's use of handcuffs caused plaintiff "great pain"); *DeBaun v. Kuszaj*, 228 N.C. App. 567, 2013 WL 4007747 at *6 (2013) (no constructive intent to injure where defendant used taser on fleeing subject).

There will be close cases. But given the North Carolina case law, this is not one of them. No direct infliction of force or injury is alleged. At most, R.A. alleges that the school officials failed to investigate and report Ms. Johnson's behavior, and were thus recklessly indifferent to G.A.'s wellbeing. But, as noted, "reckless indifference is insufficient" to find constructive intent. *Wilcox*, 222 N.C. App. at 292. Simply by alleging failure to take corrective action, R.A. has not adequately pled that the school officials constructively intended to harm G.A. We are therefore left with North Carolina's presumption that the school officials acted in good faith in their decision-making after learning of Bender's report. *See Doe*, 273 N.C. App. at 24.

III.

The facts alleged here are concerning and disheartening. But concerning and disheartening facts do not alone pierce public official immunity. North Carolina law recognizes that school officials must be given a certain degree of latitude to run their schools. Given the intense community interest in public education, some of the many decisions administrators make will provoke disagreement. Other such decisions may even be ill-advised. If such judgments were often the prelude to litigation, however, the school environment would be transformed.

We cannot say whether the school officials here exercised wise judgment. But that is the whole point. For if school administrators were infallible then no immunity would be necessary. In this case, appellants are public officials entitled to immunity under North Carolina law. And R.A. has not alleged that the officials maliciously intended to cause G.A. harm such that the immunity is pierced. The state law claims against appellants must thus be dismissed, and the district court's decision to the contrary is reversed.

REVERSED

DIANA GRIBBON MOTZ, Circuit Judge, concurring in the judgment:

When we send our children to school, we entrust teachers and school officials with the solemn responsibility of protecting them from harm. As alleged by R.A., the mother of a young child with autism, a teacher and school officials tragically failed to fulfill that responsibility here. R.A. alleges that a teacher placed her child in a trash can, prevented him from getting out, and told him that "if he acted like trash, [she] would treat him like trash." To make matters worse, R.A. alleges that even though four school officials knew about this abuse (including the district superintendent), *none* of them reported it to the authorities or otherwise took any action to protect her child, allowing the teacher to continue abusing him during the next school year.

These facts should enrage us all. But in this appeal, we deal only with one narrow legal question: whether, under North Carolina law, the four officials who allegedly knew about the abuse and failed to report it or take any other action to protect the child are entitled to immunity from R.A.'s negligence claims. On that question, I must agree with the majority.[1]

As will undoubtedly be the case here, those harmed by the government may understandably view the grant of immunity to the officials whose actions or inactions

[1] I agree with the majority that "[i]t is far from clear that North Carolina law limits public official immunity to discretionary acts." I also agree that R.A. failed to adequately allege that one of the exceptions to public official immunity applies here. In my view, on remand the district court should consider rendering the dismissal of these negligence claims as without prejudice to allow R.A. a chance to amend her complaint to allege that an exception applies.

harmed them as a miscarriage of justice. Yet situations such as this are not uncommon. For under federal and state law, immunity doctrines shield government officials from suit and/or liability for all sorts of harm. Certain of those immunity doctrines have faced intense criticism.[2] But North Carolina has not yet chosen to reconsider its doctrine of public official immunity. Unless and until that day comes, we can only apply the immunity as the law requires.

[2] Most notably, aspects of the federal doctrine of qualified immunity have faced criticism from litigants, scholars, and Supreme Court Justices alike. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (stating that the Supreme Court's decision reversing the denial of qualified immunity "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).