IN THE MISSOURI SUPREME COURT

SUPREME COURT CASE NO. 86412

STATE OF MISSOURI, ex rel. DIANA GOLDEN,
Relator,

vs.

THE HONORABLE WILLIAM C. CRAWFORD,
Respondent

ORIGINAL PROCEEDING IN PROHIBITION

RELATOR'S BRIEF

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(All citations to statutes in chapter 190 refer to RSMo 2002, but none of the sections cited have been amended since 2002, with the exception of the addition of §190.306.)

Jurisdictional Statement

This is an original action in prohibition, which seeks an order prohibiting the Circuit Judge of Jasper County Missouri from taking any action in the underlying wrongful-death action other than granting relator summary judgment. The Circuit Court denied relator's motion for summary judgment on April 5, 2004 (App. at A2); her petition for a writ of prohibition to the Southern District Court of Appeals was denied November 2, 2004 (App. at A3). This court issued a preliminary writ December 21, 2004. (App. at A4). The court has jurisdiction to issue and determine original remedial writs under Article V, section 4 of the Missouri Constitution.

Statement of Facts

Since June 1996 the City of Joplin has administered emergency telephone services under a contract with the Jasper County Emergency Services Dispatch Board, an entity established under §§190.335 and 190.337 RSMo. (Ex. K1 at 354-362). Relator, Diana Golden, has been employed by the City of Joplin in its Public Safety Communications Department since September 2000. (Ex. F5 at 207 [Golden Dep. at 9:11-13]).

On March 31, 2002, at 1:11 AM, while working as a 911 operator, Golden received a 911 call that described a man lying in the street "by High and Hill." (Ex. F2 at 33 [911 Tr. at 1:8-12]; App. at A7). Golden asked if the man was in the intersection. (Ex. F2 at 33 [911 Tr. at 1:13-14]; App. at A7). The caller said "no…he's…between High and Michigan…on Hill Street." (Ex. F2 at 33 [911 Tr. at 1:15-18]; App. at A7). Golden correctly entered into her computer the location of the incident as Hill and Michigan. (Ex. F1 at 27; App. at A14).

Without first checking a map, Golden also entered "to the west BM (black male) laying in the middle of the street." (Ex. F1 at 27; App. at 14). At the time, she believed High Street was west of Michigan. (Ex. F5 at 210 [Golden Dep. at 21:12-14]). She felt sure of the location. (Ex. F5 at 211 [Golden Dep. at 23:14-24]). She testified that she was very familiar with that intersection because she had a childhood friend that lived there; she believed the information she entered was correct. (Ex. F5 at 214 [Golden Dep. at 34:17-25; 35:1-7]).

In fact, High Street is one block east of Michigan, not west. Thus, the location the caller described was east of the Hill-Michigan intersection, not west. (Ex. F5 at 210 [Golden Dep. at 21:7-9]).

An officer was dispatched at 1:13 AM. (Ex. F1 at 27; App. at A14). The dispatcher—Golden's co-worker—relayed the instructions, "Hill and Michigan to the West." (Ex. F2 at 34 [911 Tr. at 2:9-20]; App. at A8).

The responding officer approached the intersection from the south without his emergency lights on; there was another vehicle in front of him. As he looked left to the west of the intersection for a person in the street, the vehicle in front of him turned right on Hill and struck the man lying in the street. (Ex F6 at 226, 229 [Clayton Dep. at 22:15-25 to 23:1-13, and 37:17-22]). At 1:14 AM the officer reported that the man had been run over. (Ex. F2 at 35 [Tr. at 3:3-5]; App. at A9).

The underlying petition alleges that Golden negligently failed to accurately record information from a 911 call, negligently failed to accurately pass on the information from the call, and negligently failed to verify the information dispatched by the police dispatcher, resulting in Wesley Love's death. (Ex. A at 3 [Petition at ¶10]). The information that Golden relayed to the dispatcher, is set forth in full in the appendix at page A14. A complete transcript of the 911 call is set forth in the appendix at pages A7-A13.

Respondent denied relator's motion for summary judgment on April 5, 2004. (App. at A1). Relator's Petition for Writ of Prohibition to the Court of

Appeals, Southern District was denied November 2, 2004. (App. at A2). This Court granted Relator's Petition for Writ of Prohibition, issuing its preliminary writ of prohibition on December 21, 2004. (App. at A3).

Points Relied On

I. Relator is entitled to an order prohibiting Respondent from taking any action other than granting relator's motion for summary judgment, because relator is immune from suit under the official immunity doctrine, in that she is a public employee and her actions in response to the subject 911 call were discretionary acts.

Principal authorities relied on

State ex rel. Twiehaus v. Adolf, 706 S.W.2d 433 (Mo. banc 1986)

Boyer v. Tilzer, 831 S.W.2d 695 (Mo. App. E.D. 1992)

II. Relator is entitled to an order prohibiting Respondent from taking any action other than granting relator's motion for summary judgment, because under the public duty doctrine relator owed no duty to the decedent, in that relator's duties in responding to 911 calls are owed to the public at large and not privately to individuals in need of assistance.

Principal authorities relied on

Jungerman v. City of Raytown, 925 S.W.2d 202 (Mo. banc 1996)

Muthukumarana v. Montgomery County, 805 A.2d 372 (Md. 2002)

III. Relator is entitled to an order prohibiting Respondent from taking any action other than granting relator's motion for summary judgment, because relator is entitled to judgment as a matter of law under §190.307 RSMo (2002), in that plaintiff has failed to plead—or place in genuine dispute—acts or omissions by relator that constitute willful and wanton misconduct or gross negligence.

Principal authorities relied on

§190.307 RSMo (2002)

Boyer v. Tilzer, 831 S.W.2d 695 (Mo. App. E.D. 1992)

Duncan v. Missouri Board of Architects, 744 S.W.2d 524 (Mo.App. W.D. 1988)

Argument

Issue Summary

Each of relator's three points involve this central issue:

The official immunity doctrine protects public employees from suit over their discretionary acts, while the public duty doctrine protects them from suits involving duties owed to the public at large. Missouri's §190.307 says that no employee of a public agency may be held liable for damages resulting from any act or omission except willful and wanton misconduct or gross negligence in connection with operating a 911 emergency telephone system.

Can city-employed 911 operators be denied protection under the official immunity and public duty doctrines and be sued for discretionary actions they take in performing their jobs?

Argument

Point I

I. **Relator is entitled to an order prohibiting Respondent from taking any action other than granting relator's motion for summary judgment, because relator is immune from suit under the official immunity doctrine, in that she is a public employee and her actions in response to the subject 911 call were discretionary acts.**

A. Propriety of prohibition & standards for granting the writ

1. Prohibition following denial of summary judgment is proper.

A writ of prohibition after denial of summary judgment is proper if it will prevent unnecessary, inconvenient and expensive litigation. *State ex. rel. Springfield Underground Inc. v. Sweeney*, 102 S.W.3d 7, 9 (Mo. banc 2003). Trial of this case will be expensive, involving competing experts in multiple fields including emergency response, accident reconstruction and economics. And since the issues raised in the writ petition--the applicability of the official immunity and public duty doctrines--are principally legal questions and not jury questions, no purpose would be served by postponing their resolution until appeal.

2. Prohibition based on official immunity is proper.

Official immunity raises questions of subject matter jurisdiction, and this Court has repeatedly granted prohibition based on official immunity. *See State*

ex rel. Barthelette v. Sanders, 756 S.W.2d 536 (Mo. banc 1988); *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 433 (Mo. banc 1986); *and State ex rel. Missouri Dept. of Agriculture v.McHenry*, 687 S.W.2d 178 (Mo. banc 1985).

3. Standards for granting the writ

As prohibition is an original proceeding, and not a review of the lower court's action, this Court should apply the normal standards used for deciding motions for summary judgment. The court should grant relief if the material facts are not genuinely disputed and show that relator is legally entitled to judgment. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993).

B. The official immunity doctrine

Under the official immunity doctrine, public officers acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions, but may only be held liable for torts committed when performing ministerial actions. *Twiehaus*, 706 S.W.2d at 444. *See also Charron v. Thompson*, 939 S.W.2d 885 (Mo. 1996) and *Kanagawa v. State by and through Freeman*, 685 S.W.2d 831 (Mo. 1985). The doctrine applies to all discretionary acts of a public official, except those done in bad faith or with malice (those done with actual intent to cause injury.) *Twiehaus*, at 446-447.

The rule has been applied to a protect a public employee from suit for negligent supervision, oversight and maintenance of a 911 system, *see R.C. v.*

Southwestern Bell Telephone Company 759 S.W.2d 617, 620 (Mo. App. E.D. 1988), but Missouri courts have yet to consider the official immunity of a public 911 operator.

Official immunity protects "mere employees." *Missouri Dept. of Agriculture,* 687 S.W.2d at 183; *see also Brummitt v. Springer,* 918 S.W.2d 909, 912 (Mo. App. S.D. 1996). In *Green v. Denison,* 738 S.W.2d 861, 865 (Mo. banc 1987), this court stated, "we reject any suggestion that only higher officials possess the discretion or judgment so as to enjoy the protection of official immunity."

C. Section 190.307 does not supersede official immunity.

Plaintiff argued below that if §190.307 (contained in the appendix at A5-A6, and discussed in point III) applies to Diana Golden, then it supersedes the official immunity and public duty doctrines, and in effect *creates* a private right of action. (Ex. L at 377).

Plaintiff cited no Missouri case where a statute had been found to eliminate official immunity. This Court rejected out of hand a similar assertion, also unsupported by caselaw, in *Green v. Lebanon R-III School Disctrict,* 13 S.W.3d 278, 285 (Mo. banc 2000).

1. Boyer v. Tilzer

Statutory elimination of official immunity was examined in detail and rejected in a context remarkably similar to that of the present case in *Boyer v.*

Tilzer, 831 S.W.2d 695, 697 (Mo. App. E.D. 1992). *Boyer* dealt with §632.440 RSMo, which protects public mental health workers from liability for negligently detaining, transporting, releasing, or discharging patients. That section protects actions taken "in good faith and without gross negligence." *Boyer* followed *Sherrill v. Wilson,* 653 S.W.2d 661 (Mo. banc 1983), which applied official immunity and public duty to state hospital physicians deciding the detention and release of patients. *Sherrill* was decided three years after §632.440 was enacted but did not consider that section since the underlying events took place two years prior to its enactment.

In *Boyer*, the plaintiff argued that §632.440 created an exception to the common law principles applied in *Sherrill*. The court pointed to *Twiehaus'* lengthy discussion of the conduct necessary to overcome official immunity. That case sets the standard for overcoming official immunity at "bad faith or malice." *Twiehaus* at 446. Thus, a defendant covered by both §632.440 and official immunity would clearly face liability for bad faith conduct. But what about §632.440's other exception, for gross negligence?

The court rejected the idea that the statute was intended to lessen the protection that would otherwise exist at common law. The court cited definitions of "gross negligence" that included "conscious indifference to a professional duty," a phrase which the court found described "a reckless act or more seriously a willful and wanton abrogation of professional responsibility…conduct so egregious as to warrant a mental state unacceptable in a professional." *Boyer* at

698, citing *Duncan v. Missouri Board of Architects*, 744 S.W.2d 524 (Mo. App. 1988). The court observed that references to similar conduct were recurrent in *Twiehaus'* analysis of what conduct was unprotected by official immunity.

In *Sherrill*, the plaintiff's bare assertion of gross negligence was insufficient to overcome official immunity. *Sherrill* at 664. Yet, the *Boyer* court stated, "we do not believe the legislature intended to create a lesser standard [for overcoming official immunity] by the enactment of §632.440 providing for immunity from civil liability for acts 'performed in good faith and without gross negligence.'" *Boyer*, at 698. The court's conclusion suggests that it either equated gross negligence under §632.440 with malice under *Twiehaus*, or at least found that §632.440 was consistent with the continued viability of official immunity for covered defendants. That conclusion makes sense. The apparent purpose of §632.440 would have been frustrated had the court held that it reduced the protections available under common law.

2. §190.307 and official immunity share common purposes.

Such a holding would similarly frustrate the purposes behind §190.307. Section 190.307 is one component of a statutory plan that has the obvious goal of expanding the availability of 911 services by providing a mechanism for tax financing. *See* §§190.300-340. Section 190.307 advances that goal by protecting the public agencies and individuals involved from liability unless a high standard is met. This promotes the availability of 911 by controlling costs so that funds may flow to provision of services. This legislative goal would be harmed were

the court to hold that an employee has less protection from liability under §190.307 than under the common law.

A second purpose is evident in §190.307—to advance the quality of 911 services by reducing the threat of liability that hangs over employees who must provide the services, often under intense pressure. The same purpose underlies the official immunity doctrine. That is, that the employees involved be allowed to perform their jobs without fear of second-guessing, even though hindsight might demonstrate errors that may be branded as negligent. *Green v. Denison,* 738 S.W.2d at 866. This legislative goal would also be harmed were the court to hold that an employee has less protection from liability with §190.307 than without it.

3. §190.307 compliments official immunity.

But even if the statutory and common law exceptions to immunity are substantively different, the court should not find that the statute limits official immunity. Retention of official immunity where §190.307 applies would still advance the purposes behind both. And retention would not render the statute meaningless because official immunity covers only a subset of the cases covered by the statute.

First, the statute protects persons that are not necessarily protected by official immunity. The City of Joplin provides services under a contract authorized in §190.315. That section makes clear that the contractor may be not only a public entity but also "any association or corporation." Subsection 2 of

§190.307 applies to "persons," which §190.300(5) defines to include individuals and all types of entities, including for-profit firms. Thus, §190.307 potentially applies to private contractors and their employees.

Secondly, the statute covers conduct that would not be immune under official immunity. There is no distinction in the statute between discretionary and ministerial acts. This works to encourage adoption of policies and procedures that might otherwise be seen to create ministerial duties not protected under official immunity.

4. §190.307 and official immunity are not in conflict.

The shared purposes and differing coverage of official immunity and §190.307 suggest that they are intended to co-exist. The wording of the statute is consistent with a legislative intent to:

- Leave existing official immunity law undisturbed, and
- Add protection for
  - Ministerial acts by public employees (especially considering that the public duty doctrine's application is an open question), and
  - Other persons not covered by official immunity (albeit limited to instruction-giving under subsection 2.)

The legislature may have viewed "willful and wanton misconduct or gross negligence" as consistent with existing exceptions to official immunity protection. Or it may have intended that the new protection for ministerial acts

and private persons be overcome at a slightly lower showing. Either would be consistent with the apparent purpose behind the overall statutory scheme. Had the legislature intended §190.307 to eliminate official immunity for those covered by the statute, it could have said so directly and clearly. The court should not interpret the statute to eliminate the common law doctrine.

D. Plaintiff's search for a ministerial duty

1. Plaintiff must establish breach of a ministerial duty.

Official immunity cases divide a public employee's actions into two categories: discretionary and ministerial. "A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued." *E.g.*, *Barthelette,* 756 S.W.2d at 537. A ministerial act "is one of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed." *Id.* To overcome official immunity, the plaintiff must show breach of a ministerial duty—one that is statutory or departmentally mandated. *See Twiehaus,* 706 S.W.2d at 445.

2. Policies and Procedures Manual §1.11 ¶4 did not mandate a duty.

In response to the motion for summary judgment, Plaintiff attempted to coax a ministerial duty from two separate documentary sources. First, plaintiff sought a ministerial duty in section 1.11, paragraph 4 of the policies and procedures manual for Golden's department. (Ex. I at 336-7). That paragraph reads, in its entirety: "Accuracy: Obtain specific information. NEVER ASSUME!!" (Ex. F3 at 69). The policy addresses the goal of obtaining specific accurate information from the caller. If this case were about a failure to obtain accurate information from the caller, the policy would not be sufficient to create a ministerial duty because it does not prescribe the manner in which specific information is to be obtained.

Nonetheless, Diana Golden did obtain specific, accurate information from the caller. Indeed, plaintiff emphasizes that the information Golden received from the caller was accurate, and contends that she had a ministerial duty to pass along the caller's words *verbatim* without adding any additional instructions. No statute or departmental mandate is cited in support of that novel claim.

But this case isn't about negligence in failing to obtain accurate information from the caller. Instead the petition alleges negligence in recording and passing on the information, and in failing to verify the information that was dispatched. (Ex. A at 3). The six words plaintiff cited have nothing to do with recording, relaying, or verifying information obtained from the caller. Specifically, they do not prescribe when a 911 operator may provide additional location instructions to the responding officer, or when she must check a map.

3. NFPA 1061 did not mandate a duty.

a. Compliance with it was not required.

Plaintiff's search for a ministerial duty next focused on what plaintiff contended were industry standards given force of law under a city ordinance. (Ex. L at 376). The city ordinance approved an agreement between the City of Joplin and the Jasper County Emergency Services Dispatch Board and authorized the City Manager to sign the agreement. (Ex. K1 at 354). Plaintiff claimed that the agreement incorporated APCO Project 33 (which plaintiff described as a key industry standard), that APCO Project 33 incorporated National Fire Protection Association (NFPA) Proposed Standard 1061 (a job-performance standard for Public Safety Telecommunicator); and, that NFPA 1061--given the force of law by virtue of the ordinance--imposed a ministerial duty on Diana Golden.[1] (Ex. L at 377).

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[1]The specific parts of NFPA 1061 that plaintiff claimed create a ministerial duty which Golden supposedly violated read:

> **Standard 4.2.3.** Extract pertinent information, given a request for public safety service, so that accurate information regarding the request is obtained.
>
> **Standard 4.3.5(B).** Requisite skills. Map and chart reading and use of resource lists.
>
> **Standard 4.4.3.** Relay information to other telecommunications

But neither the City nor the department mandated compliance with NFPA 1061. The agreement that referred--in paragraph 6--to APCO Project 33 did not exist on March 31, 2002--the date of the subject 911 call. (Ex. K2 at 363, 368). The 2003 agreement replaced a 1996 agreement that was still in effect on March 31, 2002. The 1996 agreement made no reference to APCO Project 33 or NFPA 1061. (Ex. K1 at 354-362).

Plaintiff also claimed that §1.04 ¶2 of the policies and procedures manual mandated compliance with NFPA 1061. Paragraph 2 of that section provides for basic APCO training, but makes no reference to APCO Project 33 or NFPA 1061.[2] No legal authority mandated that Diana Golden comply with APCO Project 33 or NFPA 1061.

And plaintiff claimed that APCO Project 33 and NFPA 1061constituted industry standards that *independently* imposed ministerial duties on Golden—

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personnel or entities, given processed date, so that accurate information regarding the request for service is provided. (Ex. L at 377).

[2] Paragraph 2 provides:

> If not already completed, all employees will be immediately enrolled in the Associated Public-Safety Communications Officers (APCO) Basic Telecommunicator Training course. This can either be in resident or by correspondence. The course will by successfully completed within the first year of employment. (Ex. F3 at 58).

whether or not mandated by law or departmental policy. But plaintiff offered no evidence to support either their status as industry standards or the authenticity of the documents that purport to contain them, and cited no case holding that an industry standard--supported by no other legal authority--can create a ministerial duty.

b. NFPA 1061 would not create a ministerial duty in any event.

Even if the City or department had mandated compliance with NFPA 1061, the specific language that plaintiff claimed to be pertinent does not impose a ministerial duty. Standard 4.2.3, like section 1.11 of the policy manual, reflects the objective of accurate information; 4.3.3.5(B) merely indicates that map and chart reading skills are required; 4.4.3 discusses relay of information to other personnel. None of them prescribe the manner of reaching those objectives. A ministerial duty doesn't come from a description of the result that is desired. There must be some prescribed manner of obtaining the result, which takes away the employee's discretion.

Neither of the two sources on which plaintiff based a ministerial duty prescribe the manner in which to respond to a 911 call. Nor do they turn the receipt of the call into a “clerical” task. There is no mandatory call script, or list of required actions. There is no mandatory rule that defines when maps must be consulted. On the contrary, those sources exhibit the reason and judgment that are required to perform the job. While in hindsight it is arguable whether Golden

should have checked a map before typing her instructions that were incorrect, doing so was not mandated by law or by her department. Based on the undisputed facts, Golden is immune from suit.

Argument

Point II

II. Relator is entitled to an order prohibiting Respondent from taking any action other than granting relator's motion for summary judgment, because under the public duty doctrine relator owed no duty to the decedent, in that relator's duties in responding to 911 calls are owed to the public at large and not privately to individuals in need of assistance.

A. Propriety of prohibition & standards for issuing the writ

Prohibition based on the public duty doctrine is proper. *See Barthelette,* at 538-539, *and State ex re. Southers v. Stuckey,* 867 S.W.2d 579 (Mo. App. W.D. 1993). The court should grant relief if the material facts are not genuinely disputed and show that relator is legally entitled to judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 380.

B. Missouri's public duty doctrine

The public duty doctrine recognized in Missouri is reflected in the statement, "a duty to all is a duty to none." In a negligence case, the doctrine negates the prima facie element of duty. The doctrine states that a public employee is not liable—even for breach of a ministerial duty—if that duty is owed to the general public rather than to a particular individual. *Jungerman v. City of Raytown,* 925 S.W.2d 202, 205 (Mo. banc 1996). *See also Heins*

Implement Company v. Missouri Highway & Transportation Commission, 859 S.W.2d 681, 694 (Mo. banc 1993).

C. §190.307 does not eliminate the public duty doctrine.

As discussed under point I, plaintiff argued below that if §190.307 applies to Golden, then it supersedes the official immunity and public duty doctrines, and in effect *creates* a private right of action. (Ex. L at 377). The same arguments that suggest that the section can and should be reconciled with the continued existence of official immunity apply to the public duty doctrine as well.

Retaining the public duty doctrine would not render the statute meaningless. The first subsection does not distinguish between public and private duties. A reasonable interpretation would be that the legislature intended to extend some protection in subsection one for breach of private, ministerial duties that would otherwise be actionable in ordinary negligence at common law. This reading would be consistent with the goal of improving 911 services by encouraging the adoption of detailed policies and procedures that might be read to impose ministerial duties. And the section reflects an intent that was not hostile to the public duty doctrine, but rather was unwilling to wait until the courts determined its applicability in 911 cases.

The second subsection also makes more sense as an expansion of the protection of the public duty doctrine rather than a replacement of it. For public

entities and their employees it removes the fear that this court will change course and adopt a special-duty exception in favor of a caller-plaintiff who detrimentally relies on instructions given through a 911 system. Secondly, subsection two potentially applies to private contractors and their employees, and so would have effect far beyond public-duty-doctrine situations.

Additionally, while wanton and willful misconduct may describe an intentional tort to which the public-duty rule would not apply, the statute's exception for gross negligence is not consistent with intent to eliminate the public duty rule. A beneficiary of the rule is not negligent—grossly or otherwise—because the element of duty is not met. Where a person owes no private duty, she cannot be considered grossly negligent for failure to perform that duty.

Reading §190.307 to eliminate the public duty rule would be inconsistent with cases that continue to apply the rule to public entities where governmental immunity has been waived by statute. In *Jungerman* this court concluded that a plaintiff must still overcome the public duty doctrine in order to assert a claim against a municipality even though its governmental immunity has been waived under §71.185 RSMo. *See Jungerman*, at 206, *and Claxton v. City of Rolla*, 900 S.W.2d 635 (Mo.App. S.D. 1995). To hold that §190.307—which generally limits liability—removes the public duty doctrine would be inconsistent with these cases, which retain the doctrine even against a statute that says a municipality "shall be liable" when the conditions in the statute are met.

D. Diana Golden had no private duty to Wesley Love.

While Missouri has not yet considered the doctrine's application to a 911 employee, a long line of cases has applied the doctrine to shield other public safety employees from liability.[3] To overcome the doctrine, a plaintiff must show that the defendant had a "private, direct and distinct" duty to the plaintiff. *Barthelette,* 756 S.W.2d at 538.

A private, direct and distinct duty is best illustrated by one of the few cases in which one was found. In *Jungerman*, this court found that a booking officer's duty to comply with detailed rules on inventorying, recording, and storing an arrestee's property was a private duty to an arrestee. *Jungerman* at 206. The court distinguished *Cooper v. Planthold,* 857 S.W.2d 477 (Mo.App. E.D. 1993), a case in which an arrestee hung himself with suspenders that were not taken from him as required by regulation. In *Cooper,* the court held that a police officer's duty to *remove* an arrestee's personal property was not a private

[3] *See e.g. Green v. Denison,* 738 S.W.2d 861 (Mo., Oct 13, 1987); *Beaver v. Gosney*, 825 S.W.2d 870 (Mo.App. W.D., 1992) (*police officer's duty to follow specific procedures when investigating a disabled vehicle was not a private duty*); *and GWT-PAT, Inc. v. Mehlville Fire Protection Dist.,* 801 S.W.2d 798 (Mo.App. E.D., 1991) (*firefighter's negligent venting of fire into neighboring property—no private duty to property owner).*

duty that flowed just to the arrestee, but was a public duty because it protects all those in custody, and the public's interest in safe jails. In *Jungerman*, by contrast, only the arrestee from whom property was taken had an interest in the *handling* of the property.

The present case resembles *Cooper* more than *Jungerman*. To be sure, a person in need of assistance has an interest in a 911 operator's performance of her duties. But the person in need of assistance isn't the only one with an interest when the call is received. All responding officers have an interest, as well as other members of the public that may be involved or near the scene. More broadly, just as this court recognized the public's interest in safe jails, the 911 operator's duties—along with those of other public safety employees—address the public's interest in public safety and emergency services.

E. Other states apply the public duty doctrine to 911 employees.

1. Application of the rule.

Other states have examined the doctrine's application to 911 operators and dispatchers. The leading case is *Muthukumarana v. Montgomery County*, 805 A.2d 372 (Md. 2002), which held that "a 911 employee generally owes no duty in tort for the negligent performance of his or her duties to an individual in need of emergency telephone services." *Id.* at 394-395. The court's exhaustive discussion of public duty issues is at pages 394-404.

Muthukumarana decided two consolidated cases, one of which—*Fried*—is factually similar to the present case. An intoxicated minor was severely abused at a party and was left outside unconscious and wearing insufficient clothing during a winter storm. An anonymous 911 caller reported the name of the housing development, correctly stating that the girl was behind a residence on "court K." But the 911 operator incorrectly relayed "court J" to the dispatcher. An officer responded but was unable to locate the girl, who died of hypothermia. *Id.* at 378-380.

The Maryland court compared the role of 911 personnel to that of police officers. In Maryland as in Missouri, the public duty doctrine limits the duty owed by police officers to persons in need of assistance. *Id.* at 395. The court found that "911 personnel play a significant role in coordinating, facilitating, and effectuating adequate emergency services responses." *Id.* at 397. Accordingly, the court applied the public duty doctrine, finding that the same standard that applies to responding officers applies to 911 personnel. *Id.* at 397. The Maryland court pointed out that other jurisdictions including California, the District of Columbia, Georgia, New York and Washington apply the public duty doctrine to 911 operators and dispatchers. *Id.* at 397 [see footnote 29].

2. Application of "special-duty" exceptions.

Missouri courts have consistently declined to adopt a special duty exception (which would withdraw public-duty protection where other facts create a special duty to a specific individual.) *Heins*, 859 S.W.2d at 695. But the

Maryland court's analysis of the exception shows that even if such an exception existed in Missouri, it would not apply in this case.

Maryland recognizes a two-pronged "special duty" exception to the public duty doctrine. The Maryland court found that the exception did not apply in *Fried* because the first prong—an affirmative act to assist the victim or a specific group that includes the victim—was not met. The court compared its special duty rule to that found in other states, cataloguing the various forms of special duty exception at length. *Muthukumarana* at 399-401. The second prong in Maryland's test reflects a consistent element in all formulations of the test: justifiable, detrimental reliance by the individual in need of services. *Id.*

Were this court to adopt a special duty exception, it would not apply in the present case. Wesley Love did not rely on Diana Golden. He did not place the call to 911. There is no evidence that he was aware that the call had been made. He did not decide to lie down in the street in reliance on the call. The same tragic result would have occurred had the 911-call never been made.

The court should hold that Diana Golden owed no private duty in tort to Wesley Love.

Argument

Point III

III. Relator is entitled to an order prohibiting Respondent from taking any action other than granting relator's motion for summary judgment, because relator is entitled to judgment as a matter of law under §190.307 RSMo, in that plaintiff has failed to plead—or place in genuine dispute—acts or omissions by relator that constitute willful and wanton misconduct or gross negligence.

A. Standard for granting the writ.

Again, the court should grant relief if the material facts are not genuinely disputed and show that relator is legally entitled to judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 380.

B. Section 190.307.1 protects Diana Golden.

1. Golden is an employee of a public agency.

Golden is an employee of the City of Joplin. Joplin is a public agency as defined in §190.300(6), which includes any city that provides or has the authority to provide fire fighting, law enforcement, ambulance, emergency medical, or other emergency services. Plaintiff admits that Golden is a city employee and has never argued that Joplin is not a public agency under the statute.

2. The petition alleges acts or omissions in connection with operating a system required by §§190.300-190.340.

Plaintiff's allegations of negligence all relate to Golden's actions in connection with operating the 911 system administered by the City of Joplin. That system is a system required by the statute by virtue of the agreement between the City and the Jasper County Emergency Services Dispatch Board. (Ex. K1). The agreement recites that JCESD is an entity formed under §§190.335 and 190.337. (Ex. K1 at 355). JCESD exercised its authority under §190.315 to contract with the City of Joplin for administration of emergency telephone services. Plaintiff has never disputed that JCESD is—in the words of §190.315—the "governing body imposing the tax authorized" by the statute. And nothing in §190.307 limits the protections of that section to persons employed directly by the governing body. Clearly, employees of a §190.315 contractor are covered by §190.307.

C. Section 190.307.2 protects Diana Golden.

Section 190.307.2 applies to a "person who gives emergency instructions" through a system established under the statute to "persons rendering services in an emergency at another location." Plaintiff attempts to limit the phrase "emergency instructions" to medical or other types of instructions given to—or through—the caller, and would exclude the

information Golden gave to the responding officer regarding the location of the man lying in the road. (Ex. I at 335).

The section would certainly cover direct instructions that might be detrimentally relied on by the caller or the person in need of services—the types of cases to which courts in other states might apply a "special duty" exception to the public duty doctrine for a public-employee defendant. But there is no basis for finding intent to limit the section's application to those cases. In the plain meaning of the words used, Golden instructed the officer regarding where to find the unconscious man lying in the middle of a street in the middle of the night—clearly an emergency situation.

D. Plaintiff hasn't pleaded wanton and willful misconduct or presented any evidence of facts that would support a finding of wanton and willful misconduct.

Under either subsection of §190.307, plaintiff must show wanton and willful misconduct or gross negligence to overcome the statute's protections. Plaintiff didn't plead and has never argued that Golden engaged in wanton and willful misconduct. The word "willfully" means intentionally or knowingly. *State v. Shuler***,** 486 S.W.2d 505 (Mo. 1972). An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Twiehaus*, at 447. The defendant must be aware that his

conduct probably would cause injury to another. 57A Am. Jur. 2d, Negligence §247.

There is no evidence that Diana Golden intentionally engaged in misconduct, was recklessly indifferent or had a wicked purpose, or that she was aware her conduct probably would cause harm. (In fact, whether her conduct caused harm is still very much disputed given that the responding officer would have been behind the other vehicle regardless of the directions conveyed. And if Golden had stopped to check a map, the additional delay might have caused the officer to arrive after Mr. Love was struck instead of as he was being struck.) While she may have made a mistake in failing to check a map, she did so with the belief that the information she conveyed was accurate and would help the officer find the decedent as quickly as possible.

E. Plaintiff hasn't pleaded gross negligence or presented any evidence that would support a finding of gross negligence.

1. Definitions of gross negligence

The underlying petition didn't use the term gross negligence, but plaintiff did argue in response to the motion for summary judgment that Golden's conduct constituted gross negligence. In interpreting the use of that term in §632.440, the *Boyer* court looked to *Duncan ,* 744 S.W.2d 524. *Boyer* at 697-698. While recognizing that Missouri courts do not recognize common law degrees of negligence, the *Duncan* court started with the proposition that the

statutory use of the term "gross negligence" connoted an improper conduct greater in either kind or degree or both than ordinary negligence. *Duncan*, at 532.

In difference-in-degree cases, gross negligence "signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences" and is "an extreme departure from the ordinary standard of care." *Id.* Difference-in-kind cases define the term as "conduct of such magnitude or reoccurrence as to infer, or indicate, or cause a presumption that the actor is indifferent to his obligations, to the probable consequences of his act or acts, and to the rights of others"; one court called it "such a want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness" implying "disregard of consequences or willingness to inflict injury." *Id.* The court approved the definition used by the Administrative Hearing Commission, which rejected the difference-in-degree approach in favor of the difference-in-kind approach. *Id.*

The *Boyer* court applied the definition approved in *Duncan*: "an act or course of conduct which demonstrates a conscious indifference to a professional duty." *Boyer* at 698. And the court observed that "conscious indifference to a professional duty" describes "a reckless act or more seriously a willful and wanton abrogation of professional responsibility…conduct so egregious as to warrant an inference of a mental state unacceptable in a professional…" *Id.*

2. No disputed facts support gross negligence.

Golden's conduct is not in dispute. A complete transcript of the 911 call is set forth in the appendix, pages A7-A13. The information that Golden relayed to the dispatcher is set forth in full at page A14. She admitted that she did not check a map before entering the erroneous instruction "to the west BM (black male) laying in the middle of the street." No evidence refutes her testimony that she believed that instruction to be correct.

She did not act in a manner that demonstrates a conscious indifference to her duties. She did not act recklessly or egregiously. As a 911 operator, she understood the importance of providing accurate information. She may have made a mistake in not checking a map. But she believed she knew the order of the streets, and thus her failure to check a map doesn't demonstrate conscious indifference to her duties.

The only evidence plaintiff offered to support a finding of gross negligence was the statement of plaintiff's expert that Golden's conduct was grossly negligent. (Ex H4 at 323). But the *Boyer* court squarely rejected the proposition that the labeling of an error as "grossly negligent" by an expert "does not make it so under the law." *Boyer* at 698. Rather, the court stated, it "demonstrated the prescience of Judge Blackmar's observation that 'a plaintiff could undoubtedly find qualified [experts] who would testify that the [defendant] exercised negligent judgment, especially when they are fortified by hindsight.'" *Id.* The bald legal conclusion of plaintiff's expert doesn't create a fact issue regarding gross negligence. Since no facts show willful and wanton

misconduct or gross negligence, Diana Golden is entitled to judgment and the court should grant relief.

Conclusion

The Court should hold that Diana Golden is legally entitled to judgment on any one of three independent grounds:

- Because the official immunity doctrine is undisturbed by §190.307, and protects Diana Golden in that she violated no ministerial duty, but acted in her discretion.
- Because the public duty doctrine is undisturbed by §190.307, and under it she owed no private duty to Wesley Love.
- Because —regardless of the status of the common law rules— §190.307 bars liability in that she did not commit willful or wanton misconduct or gross negligence.

The Court should make its preliminary writ of prohibition permanent.

Respectfully Submitted,

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The undersigned hereby certifies that one paper copy of Relator's Brief, and one electronic copy on disk, were served upon the persons listed below via U.S. Mail, postage prepaid, this 17th day of February, 2005:

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CERTIFICATE UNDER RULE 84.06(c) & (g)

The undersigned hereby certifies that the Relator's Brief complies with the limitations contained in Rule 84.06(b), and that the Relator's Brief contains 7292 words. The undersigned further certifies that the computer disk filed herewith has been scanned for viruses and is virus free.

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