

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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APPEAL NO. ED88733

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DEBRA SOUTHERS, Individually and as Next Friend of  
RODNEY I. CLARK, a minor, and LAKODA D. CLARK, a minor,  
and TERRY LARSON and KATHLEEN HAMMETT,

PLAINTIFFS/APPELLANTS

v.

THE CITY OF FARMINGTON and BYRON L. RATLIFF  
and LARRY LACEY and RICHARD BAKER,

DEFENDANTS/RESPONDENTS

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APPEAL FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY  
STATE OF MISSOURI

CAUSE NO. 04CV614699

THE HONORABLE KENNETH W. PRATTE  
PRESIDING JUDGE, DIVISION 2

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**BRIEF OF APPELLANT**

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HIS POLICE VEHICLE OR CHANGE ITS COURSE PRIOR TO COLLISION AND IN VIOLATION OF MISSOURI STATUTE 304.022 GOVERNING THE OPERATION OF AN EMERGENCY VEHICLE, AND (2) RESPONDENT LARRY LACEY OMITTED TO PERFORM THE DUITES MANDATED BY FARMINGTON'S VEHICULAR PURSUIT POLICY TO CONTROL THE POLICE PURSUIT, AND (3) RESPONDENT RICHARD BAKER FAILED TO PROPERLY IMPLEMENT VEHICULAR PURSUIT POLICIES AND TRAIN POLICE PERSONNEL IN SUCH PROCEDURES, AND (4) THERE EXISTS NO ISSUE THAT RESPONDENTS LACEY, RATLIFF AND BAKER WERE ACTING AS THE AGENTS OF RESPONDENT CITY OF FARMINGTON AT THE TIME OF THE ACTS AND OMISSIONS REFERENCED IN THE PLEADINGS.....24

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## JURISDICTIONAL STATEMENT

This appeal arises from summary judgment entered in favor of Defendants City of Farmington, Byron Ratliff, Larry Lacey and Richard Baker<sup>1</sup> and against Plaintiffs Debra Southers, Terry Larson and Kathleen Hammett<sup>2</sup> on Plaintiffs' action for wrongful death and personal injury. Legal File<sup>3</sup> at 2-10; 301-308. Appellants brought the pending case in the Circuit Court of St. Francois County, Missouri. LF 2-10. In the trial court below, the Honorable Kenneth W. Pratte entered judgment in favor of Respondents. LF 296-299. Appellants filed their Notice of Appeal in the time provided by law. LF 301.

Appellants' appeal raises no issues within the exclusive appellate jurisdiction of the Supreme Court of Missouri as set forth in Article V, Section 3 of the Constitution of Missouri. Mo.Const. Art. V, § 3. Thus, this case falls within the general appellate jurisdiction of the Missouri Court of Appeals. Id. Territorial jurisdiction rests with the Eastern District Court of Appeals. Section 477.050 R.S.Mo. (2004).

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<sup>1</sup> Hereinafter referred to as "Respondents" rather than "Defendants".

<sup>2</sup> Hereinafter referred to as "Appellants" rather than "Plaintiffs".

<sup>3</sup> Hereinafter referred to as "LF".

## STATEMENT OF FACTS

This case arises out of a high-speed vehicular pursuit of a fleeing felony suspect by the Farmington Police Department on May 12, 2004. The marked police vehicle operated by Respondent Ratliff collided broadside with a motor vehicle operated by decedent Monica Clark and occupied by her two minor children, Lakoda and Rodney Clark, and her grandmother, Janice Mourtray. Monica Clark and Janice Mourtray died at the scene. The two minor Clark children were ejected from their vehicle and sustained serious personal injuries.

This negligence case is before the Court following summary judgment as a matter of law in favor of Respondents Ratliff, Lacey, Baker, and the City of Farmington on the grounds that:

(1) . . . “there is no evidence of any negligence by any individual defendant that caused this accident”;

(2) . . . “whatever applicable duties of the defendants to act, or omit to act, were duties owed to the general public and not particularly to plaintiffs or their next friends or decedents” and thus, by implication Respondents are shielded from liability under the public duty doctrine; and

(3) Respondents are immune from liability under the official immunity doctrine. LF 296-299.

### I. The Parties

Appellants Terry Larson, Debra Southers and Kathleen Hammett are the surviving children of Janice Mourtray and sue for the wrongful death of their

mother. The minor appellants Rodney and Lakoda, acting through their next friend and natural grandmother Debra, sue both for their own personal injuries, and for the wrongful death of their mother Monica Clark.

Respondents Ratliff, Lacey and Baker are police officers employed by Farmington. LF 184. Baker was chief of the Farmington Police Department on the date of the collision. LF 234. Sergeant Lacey was the ranking officer on duty and on the street during the high-speed pursuit, and as such was the “field supervisor”. LF 195, 212, 236. Officer Ratliff was the patrol officer operating the police cruiser which collided with the motor vehicle operated by Monica Clark. LF 187.

## II. The Vehicular Pursuit Policy

The Farmington Police Department had adopted a “Vehicular Pursuit Policy” prior to May 2004 which prescribed mandatory procedures to be followed during a pursuit. LF 212, 216. The policy mandated that a pursuit should not be initiated unless the immediate danger to the public created by the pursuit is less than the potential danger should the suspect remain at large. LF 217. According to the policy, the initiating officer must consider the traffic conditions in the pursuit area as well as the likelihood of identifying the suspect at a later date. LF 217. The policy mandates that any pursuit shall be limited to two patrol cars “unless expressly authorized by the field supervisor”. LF 219. The patrol cars are designated as “primary” and “backup” vehicles. LF 219. The policy mandates

that other officers shall not join the pursuit “unless instructed to do so by the field supervisor”. LF 220.

### III. The Scene

The collision occurred on southbound Maple Valley Drive between Maple and Liberty Streets in the City of Farmington. LF 186. Maple Valley Drive is an asphalt surface, two lane road that runs generally north and south. LF 186. The roadway connects Maple on the north with Liberty on the south. LF 186. The stretch of Maple Valley Drive between Maple and Liberty is approximately one-half mile long. LF 45. The topography is “pretty hilly”; the land rises and crests south of Maple Street and then extends southwardly downhill into a valley before beginning to rise again at Liberty Street. LF 186.

The high-speed pursuit began at 4:29 o’clock on a weekday afternoon during a period of congested rush-hour traffic conditions. LF 59-60, 187, 192, 204-205, 211. The area in which the collision occurred is residential. LF 59-60, 186. The speed limit on Maple Valley Drive is 35 miles per hour. LF 61, 186. An apartment complex and hospital, Parkland Heath Center, are located just east of Maple Valley Drive. LF 59-60, 186. The apartment complex is situated south of the hillcrest mentioned above. LF 59-60, 186.

### IV. The Pursuit

The high-speed vehicular pursuit followed the telephone report of an armed robbery at the Super 8 Motel. LF 204. The caller provided a description of the suspect and the van in which the suspect left. LF 193.

Officer Barton first spotted the van and the suspect<sup>4</sup> identified by the caller on Maple Valley Drive just south of the Super 8. LF 193, 226. He obtained and radioed the license plate number to all on-duty officers. LF 193, 226. When Barton started to follow the van, it took off southwardly at a high rate of speed on Maple Valley Drive. LF 193, 226. Barton immediately initiated high speed pursuit, activated his patrol car's lights and siren, and reported by radio that he was in pursuit. LF 226. The suspect and Barton reached speeds of 90 miles per hour as they drove south on Maple Valley Drive. LF 226.

Sergeant Lacey was the ranking officer on the street during the high-speed vehicular pursuit and was thus the "field supervisor" during the chase. LF 195, 212, 236. Lacey was near the hotel when he heard Barton's report; he activated his lights and siren, entered Maple Valley Drive at Maple Street, and followed close behind Barton on Maple Valley Drive in pursuit of the fleeing vehicle. LF 207-208. Lacey never issued any order, instruction, or directive to any officer at any time during the pursuit. LF 194-195, 210-211, 213, 226.

The pursuit policy mandated the duties of the field supervisor during a vehicular pursuit: ". . . the field supervisor *shall* assume responsibility for the monitoring and control of the pursuit as it progresses. The field supervisor *shall* continuously review the incoming data . . . and the field supervisor *shall* be responsible for the coordination of the pursuit . . ." LF 218-219 (emphasis added). The language of the policy is mandatory. LF 218-219.

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<sup>4</sup> Suspect was later captured and identified as Walter O'Neal. LF 205.

Sergeant Lacey was also the second police car in the line of pursuit and as such was the “backup” as defined by the pursuit policy. LF 208-209.

Ratliff also heard Barton’s radio transmission announcing the initiation of the pursuit. LF 190-191. On his own initiative, Ratliff activated his lights and siren and joined the pursuit closely behind Baker and Lacey southwardly on Maple Valley Drive. LF 193. Ratliff joined in the pursuit despite receiving no order from his field supervisor to do so and with the knowledge that at least two other vehicles were in pursuit. LF 193, 210-211, 213.

Motor vehicles headed both north and south on Maple Valley Drive, including Monica Clark’s, had pulled to the side of the road in deference to the speeding suspect and the lights and sirens of the three pursuing police vehicles. LF 85, 187-189, 211. After the fleeing suspect, Barton and Lacey passed Clark’s vehicle without incident, Clark proceeded to move her vehicle to the left, back onto southbound Maple Valley Drive. LF 85, 187-189, 211. It is possible that the sirens of the passing cars caused Clark to misperceive the location of the sirens of the oncoming car. LF 277. As Clark pulled her vehicle back onto the roadway, the patrol car driven by Ratliff collided broadside with the Clark vehicle. LF 85, 187-189, 211.

The collision occurred adjacent to the entrance of the apartment complex and about 300 feet north of Hazel Lane. LF 59, 85, 187. The patrol car impacted Clark’s car in the southbound lane of Maple Valley Drive. LF 59. The northbound lane of the road was not obstructed in any way at its intersection with Hazel Lane.

LF 61. At impact, Ratliff was driving his patrol car at a speed between 67 and 71 miles per hour. LF 87. Clark's car was propelled approximately 42 feet from the place of impact. LF 83. Passenger Janice F. Moutray was ejected approximately 113 feet away from the place of impact. LF 83. Passenger Rodney Clark was ejected approximately 100 feet from the vehicle. LF 84.

V. The Procedural History before the Trial Court

Appellants filed suit against Farmington, Ratliff, Lacey and Baker in the Circuit Court of St. Francois County. LF 2-10.

1. Appellants' Petition alleges that Ratliff operated his patrol car in a negligent manner and violated Missouri statutes directing that a driver of an emergency vehicle must "not endanger life" when exceeding the maximum speed limit. LF 4-5.

2. Appellants' Petition alleges that Lacey failed to perform mandatory duties to control the pursuit demanded by departmental policy and Missouri law. LF 5.

3. Appellants' Petition alleges that Baker failed to properly train officers under his direction about the pursuit policy. LF 5.

4. Appellants' Petition alleges that Farmington, the employer of Ratliff, Lacey and Baker, is vicariously liable under the doctrine of *respondeat superior*. LF 2-10.

Respondents filed their Motion for Summary Judgment. After hearing, the Honorable Kenneth W. Pratte granted the motion filed by Respondents and entered judgment against all Appellants.

**POINTS RELIED ON**

**I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE INDIVIDUAL RESPONDENTS BAKER, LACEY, AND RATLIFF BECAUSE THERE WAS NO EVIDENCE OF ANY NEGLIGENCE BY ANY INDIVIDUAL RESPONDENT THAT CAUSED THIS ACCIDENT BECAUSE, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO APPELLANTS, IN THAT THE EVIDENCE DEMONSTRATED THAT (1) RESPONDENT BYRON RATLIFF DROVE AT A RATE OF SPEED THAT WAS HIGH, EXCESSIVE AND DANGEROUS UNDER THE CIRCUMSTANCES AND CONDITIONS EXISTING, FAILED AND OMITTED TO SLACKEN THE SPEED OF HIS POLICE VEHICLE OR CHANGE ITS COURSE PRIOR TO COLLISION AND IN VIOLATION OF MISSOURI STATUTE 304.022 GOVERNING THE OPERATION OF AN EMERGENCY VEHICLE, AND (2) RESPONDENT LARRY LACEY OMITTED TO PERFORM THE DUTIES MANDATED BY FARMINGTON'S VEHICULAR PURSUIT POLICY TO CONTROL THE POLICE PURSUIT, AND (3) RESPONDENT RICHARD BAKER FAILED TO PROPERLY IMPLEMENT VEHICULAR PURSUIT POLICIES AND TRAIN POLICE PERSONNEL IN SUCH PROCEDURES, AND (4) THERE EXISTS NO ISSUE THAT RESPONDENTS LACEY, RATLIFF AND BAKER WERE ACTING AS THE AGENTS OF**

**RESPONDENT CITY OF FARMINGTON AT THE TIME OF THE ACTS  
AND OMISSIONS REFERENCED IN THE PLEADINGS.**

Oberkramer v. City of Ellisville, 650 S.W.2d 286 (Mo.App.E.D. 1983)

Oberkramer v. City of Ellisville, 706 S.W.2d 440 (Mo.banc 1986)

Section 304.022 R.S.Mo. (2002)

Restatement (Second) of Torts, § 291

**II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALL RESPONDENTS, BECAUSE RESPONDENTS ARE NOT SHIELDED FROM LIABILITY UNDER THE PUBLIC DUTY DOCTRINE, IN THAT (1) RESPONDENT CITY OF FARMINGTON PREVIOUSLY WAIVED ITS SOVEREIGN IMMUNITY AS (A) THIS CAUSE ARISES OUT OF INJURIES CAUSED BY THE NEGLIGENT OPERATION OF A MOTOR VEHICLE AND (B) RESPONDENT FARMINGTON PURCHASED LIABILITY INSURANCE THAT COVERS THE OCCURRENCES REFERENCED IN THE PLEADINGS AND (2) EVIDENCE ADDUCED SUGGESTS THAT EACH OF THE INDIVIDUAL RESPONDENTS FAILED TO ACT IN COMPLIANCE WITH BOTH MISSOURI STATUTE AND THE POLICE DEPARTMENT’S OWN “VEHICULAR PURSUIT” POLICY.**

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

Warren v. State of Missouri, 939 S.W.2d 950 (Mo.App.W.D. 1997)

Green v. Missouri Dep’t of Trans., 151 S.W.3d 877 (Mo.App.S.D. 2000)

Davis v. Lambert-St. Louis Int’l Airport, 193 S.W.3d 760 (Mo.banc 2006)

Section 537.600 R.S.Mo. (2000)

**III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALL RESPONDENTS, BECAUSE RESPONDENTS ARE NOT IMMUNE FROM LIABILITY VIA OFFICIAL IMMUNITY, IN THAT (1) OFFICIAL IMMUNITY SHALL NOT SHIELD THE SOVEREIGN FROM LIABILITY FOR THE ACTIONS OF ITS EMPLOYEE EVEN IF THE EMPLOYEE IS ENTITLED TO OFFICIAL IMMUNITY AND (2) THE ACTS AND OMISSIONS OF THE INDIVIDUAL RESPONDENTS COMPLAINED OF BY APPELLANTS WERE NOT SUBJECT TO AN EXERCISE OF ANY DEGREE OF REASON.**

Davis v. Lambert-St. Louis Int'l Airport, 193 S.W.3d 760 (Mo.banc 2006)

Harris v. Munoz, 43 S.W.3d 384 (Mo.App.W.D. 2001)

**IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO TRANSFER VENUE, BECAUSE, PURSUANT TO SECTION 508.130 R.S.Mo., THERE EXISTED CAUSE TO BELIEVE THAT APPELLANTS CANNOT HAVE A FAIR TRIAL IN ST. FRANCOIS COUNTY, IN THAT RESPONDENTS ARE THE CITY OF FARMINGTON AND ITS PUBLIC OFFICIALS AND POLICE OFFICERS TOWARD WHOM THE INHABITANTS OF ST. FRANCOIS COUNTY ARE FAVORABLY BIASED, PREJUDICED AND INFLUENCED.**

LaGrange Elevator Co. v. Richter, 129 S.W.2d 22 (Mo.App. 1939)

Sweeney v. Sweeney, 283 S.W. 736 (Mo.App. 1926)

Mix v. Kepner, 81 Mo. 93 (Mo. 1883)

State ex rel. McNary v. Jones, 472 S.W.2d 637 (Mo.App. 1971)

Section 508.130 R.S.Mo (2000)

## ARGUMENT

### Standard of Review

To obtain summary judgment pursuant to Rule 74.04, a movant must establish the right to judgment as a matter of law and the absence of any genuine issue as to any material fact required to support the right to judgment. ITT Comm'l Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 378 (Mo.banc 1993). The burden rests with the movant to demonstrate a right to judgment flowing from material facts about which there exists no genuine dispute. Id. at 380.

Summary judgment shall be entered if the motion and response show the absence of a genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Gambill v. Cedar Fork Mut. Aid Soc'y, 967 S.W.2d 310, 311 (Mo.App.S.D. 1998). In reviewing the grant of summary judgment, the appellate court must scrutinize the record in the light most favorable to the party against whom judgment was rendered. Arbeitman v. Monumental Life Ins. Co., 878 S.W.2d 915, 916 (Mo.App.E.D. 1994); Gambill, 967 S.W.2d at 312. Summary judgment shall only be maintained where facts are not in dispute so that the prevailing party can be determined as a matter of law. Rogers v. Frank C. Mitchell Co., 908 S.W.2d 387, 388 (Mo.App.E.D. 1995). Appellate review of a summary judgment is essentially *de novo*. Gambill, 967 S.W.2d at 312.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE INDIVIDUAL RESPONDENTS BAKER, LACEY, AND RATLIFF BECAUSE THERE WAS NO EVIDENCE OF ANY NEGLIGENCE BY ANY INDIVIDUAL RESPONDENT THAT CAUSED THIS ACCIDENT, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO APPELLANTS, IN THAT THE EVIDENCE DEMONSTRATED THAT (1) RESPONDENT BYRON RATLIFF DROVE AT A RATE OF SPEED THAT WAS HIGH, EXCESSIVE AND DANGEROUS UNDER THE CIRCUMSTANCES AND CONDITIONS EXISTING, FAILED AND OMITTED TO SLACKEN THE SPEED OF HIS POLICE VEHICLE OR CHANGE ITS COURSE PRIOR TO COLLISION AND IN VIOLATION OF MISSOURI STATUTE 304.022 GOVERNING THE OPERATION OF AN EMERGENCY VEHICLE, AND (2) RESPONDENT LARRY LACEY OMITTED TO PERFORM THE DUTIES MANDATED BY FARMINGTON'S VEHICULAR PURSUIT POLICY TO CONTROL THE POLICE PURSUIT, AND (3) RESPONDENT RICHARD BAKER FAILED TO PROPERLY IMPLEMENT VEHICULAR PURSUIT POLICIES AND TRAIN POLICE PERSONNEL IN SUCH PROCEDURES, AND (4) THERE EXISTS NO ISSUE THAT RESPONDENTS LACEY, RATLIFF AND BAKER WERE ACTING AS THE AGENTS OF RESPONDENT CITY OF FARMINGTON AT THE TIME OF THE ACTS AND OMISSIONS REFERENCED IN THE PLEADINGS.

This cause of action is founded upon negligence. In any negligence case, plaintiff must demonstrate the existence of a duty, breach of that duty by defendant and damage proximately caused by the breach. In its motion, Respondents contended that Ratliff did not breach any duty owed by the officer. Respondents alleged that “there was no negligent conduct that proximately caused Plaintiffs’ damages”. LF 29. Specifically, Respondents asserted, “Ratliff committed no negligent act”. LF 35. The trial court agreed, finding “there is no evidence of any negligence by any individual Defendant that caused this accident”. LF 298. The conclusion of the trial court ignores evidence suggesting that Ratliff operated his police vehicle in a manner that unreasonably risked injury and that Ratliff, Lacey and Baker acted in direct contravention of department policy during the police pursuit of Walter O’Neal.

A. The Duty Owed by Police Officials in Pursuit of a Motor Vehicle

To prevail against Respondents, Appellants must identify a duty owed by each police officer, a breach of that duty and damage to Appellants proximately caused by the conduct of each officer. Oberkramer v. City of Ellisville, 650 S.W.2d 286, 290 (Mo.App.E.D. 1983). While operating his police vehicle, an officer is required to observe the care which a reasonably prudent person would exercise in the discharge of official duties of like nature under like circumstances. Oberkramer v. City of Ellisville, 706 S.W.2d 440, 441 (Mo.banc 1986). During a vehicular chase, an officer must pursue the fleeing motorist in a manner that is neither careless, reckless or wanton. Id. at 442. Under the doctrine of *respondeat*

*superior*, an employer is responsible for the negligent acts of its employees performed during the course of employment. Studebaker v. Nettie's Flower Garden, Inc., 842 S.W.2d 227, 229 (Mo.App.E.D. 1992).

In this case, each officer's duty is defined, in part, by statute. Section 304.022.5(2) provides that an emergency vehicle "in pursuit of an actual or suspected law violator" may:

Exceed the prima facie speed limit so long as the driver does not endanger life or property.

Section 304.022.5(2)(c) R.S.Mo. (2002)<sup>5</sup>. In Oberkramer, this Court acknowledged that the statute provides that the driver of a police vehicle may exceed "the prima facie speed limit" so long as he does not endanger life or property and gives an adequate warning. Oberkramer, 650 S.W.2d at 291. The Court added that the driver of the emergency vehicle is held to the "highest degree of care". Id.

According to this Court, the statute expresses a policy judgment made by the General Assembly that the risk of injury inherent in operating an emergency

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<sup>5</sup> See also Section 300.100 R.S.Mo. (2000). In addition to directing that an officer in pursuit of a "suspected violator. . . may exceed the maximum speed limits so long as he does not endanger life or property", Section 300.100 provides that such an officer may not, under any circumstances, act in "reckless disregard for the safety of others". See Section 300.100.4 R.S.Mo. (2000).

vehicle will be tolerated in certain circumstances in the interest of promoting law and order. Oberkramer, 650 S.W.2d at 292. However, the tolerance is limited.

This Court remarked:

A heightened risk of injury is acceptable only so long as it does not become unreasonable – only so long as the utility of the conduct continues to outweigh the magnitude of the risk.

Id.

Therefore, in Oberkramer, this Court held that a plaintiff effectively pleads a breach of duty when facts are alleged which raise the magnitude of risk beyond that contemplated in Section 304.022. Id. In sum, the Court stated, a plaintiff must plead and prove that the police official engaged in conduct which created “an unreasonable risk of harm”<sup>6</sup>. Id. Remanding the cause to the trial court to permit plaintiffs to amend their petition, this Court further recognized that police officials possess a duty to adequately instruct and properly supervise their officers during the course of a high speed pursuit. Id. at 293, 297-298.

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<sup>6</sup> This Court adopted the definition of “unreasonable risk” set forth in the Restatement of Torts: “Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done”.

Oberkramer, 650 S.W.2d at 292, *citing* Restatement (Second) of Torts, § 291.

Three years later, the Supreme Court reconsidered Oberkramer following dismissal of plaintiffs' amended petition. *See Oberkramer*, 706 S.W.2d at 440. Plaintiffs amended the petition, further alleging only facts describing the conduct of the pursued vehicle attempting to avoid apprehension. *Id.* at 441. The Supreme Court affirmed dismissal, concluding that negligence must be predicated on the actions of the police personnel in pursuing a vehicle. *Id.* at 442. In so holding, that Court stated that an officer possesses the obligation to operate his emergency vehicle "in a manner that is neither careless, reckless, or wanton". *Id.* Importantly, the Supreme Court cited with approval appellate opinions from other jurisdictions finding liability where police personnel failed to follow written department policy. *Id.*

B. Evidence Demonstrated that Respondents Breached Their Duty to Appellants

In this case, evidence demonstrates that each individual defendant owed a duty to Appellants, each breached that duty and Appellants suffered injury as a result of the breach. Duty, here, is defined by statute as well as by the policy employed by the Farmington Police Department. *See* LF 217-222. Titled

“Vehicular Pursuit”, the policy acknowledges the potential danger posed by police pursuit of a fleeing vehicle<sup>7</sup>. The policy directs:

Vehicular pursuit of fleeing suspects presents a danger to the lives of the public, officers and suspects involved in the pursuit. It is the policy of this department to protect all persons [sic] lives to the extent possible when enforcing the law. In addition, it is the responsibility of the department to assist officers in the safe performance of their duties. To effect these obligations, it shall be the policy of the department to regulate the manner in which the vehicular pursuit is undertaken and performed.

LF 217.

The policy limits the circumstances in which Farmington’s police force may conduct a vehicular pursuit by dictating when a pursuit may be engaged, how the pursuit shall be managed and factors directing the pursuit’s termination. LF 217-220. Pursuant to the policy, a field supervisor shall assume responsibility for monitoring and controlling the pursuit as the pursuit progresses. LF 218-219. In controlling the pursuit, the field supervisor shall direct police vehicles into or out of the pursuit, approve and coordinate pursuit tactics and continuously review

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<sup>7</sup> “VEHICULAR PURSUIT: An active attempt by an officer in an authorized emergency vehicle to apprehend fleeing suspects who are attempting to avoid apprehension through evasive tactics”. LF 217.

incoming information to determine whether the pursuit should be continued or terminated. LF 219. Unless expressly directed by the field supervisor, a vehicular pursuit shall be limited to two vehicles – a primary officer and one backup vehicle. LF 219. Indeed,

Normally, not more than one backup vehicle shall be involved in a pursuit. Other officers are not permitted to join in the pursuit, unless instructed to do so by the field supervisor.

LF 219-220.

In addition, the policy requires Farmington’s officers conduct a pursuit in a specified manner. The policy provides that consideration must be given to the condition of the road surface upon which the pursuit is conduct, the amount of traffic in the area and the likelihood of identifying the suspect at a later time. LF 217. Further, the policy directs that officers engaged in the pursuit “shall at all times drive in a manner exercising reasonable care for the safety of. . . all other persons. . . within the pursuit area”. LF 219. Finally, the policy mandates that:

Pursuit shall be immediately terminated in any of the following circumstances:

- a. Weather or traffic conditions substantially increase the danger of pursuit beyond the worth of apprehending the suspect;

\* \* \*

c. The danger posed by continued pursuit to the public, the officers or the suspect is greater than the value of apprehending the suspect(s).

LF 220.

Evidence presented to the trial court demonstrates that Respondents unreasonably endangered life in contravention of applicable law and department policy during the pursuit of Walter O'Neal. Testimony adduced before the court establishes that police personnel operating multiple cars chased O'Neal at speeds around 90 miles per hour, through a residential neighborhood with limited visibility, during congested rush hour traffic conditions, despite knowing information which would have led to the apprehension of O'Neal at a later time. The actions of police personnel violated not only the statute mandating that an emergency vehicle driver shall not unreasonably endanger life but also police department policy directing the manner in which a pursuit shall occur.

The utility of the police pursuit of Walter O'Neal was outweighed by the risk of serious harm and death posed by the place, time and manner in which Respondents conducted the pursuit. At the time of the pursuit, police personnel had the description of the driver, the make of the vehicle he operated, the vehicle's license plate number, and the direction of the fleeing vehicle. Nevertheless, the pursuit was initiated at about 4:30 in the afternoon on Thursday, May 12, 2004. LF 187, 192, 204-205, 211. Officer Lindell Barton initiated the pursuit. LF 225-

226. At the time, Officer Barton had less than one year of experience on the date of the pursuit. LF 224.

Officer Barton pursued O’Neal south onto Maple Valley Drive. LF 226. Maple Valley Drive is an asphalt surface, two lane road that generally runs north and south through Farmington. LF 59-60, 186. The roadway connects Maple and Liberty Streets; the distance between the two streets is approximately one-half mile. LF 45. The topography between those streets is “pretty hilly”; the land rises and crests south of Maple Street where the road heads downhill and into a valley before beginning to rise again at Liberty Street. LF 45.

The pursuit occurred through one of the most congested neighborhoods in Farmington. LF 59-60, 187, 192, 204-205, 211. An apartment complex and hospital, Parkland Heath Center, are located east of Maple Valley Drive along the stretch of road. LF 59-60, 186. The apartment complex is situated south of the hillcrest mentioned above. LF 59-60, 186. The collision between the vehicles driven Respondent Ratliff and Monica Clark eventually occurred adjacent to the complex entrance. LF 59-60, 186.

Respondent Lacey joined the pursuit at the intersection of Maple Valley Drive and Maple Street. LF 207-208. Per the pursuit policy, Lacey was the field supervisor of the chase. LF 195, 212, 236. He was the ranking officer on duty and on the street during the pursuit. LF 195, 212, 236. As field supervisor, Lacey had the authority and duty to manage the pursuit of the fleeing vehicle. LF 218.

Further, Lacey was also the backup to the primary pursuing patrol car operated by Officer Barton. LF 207-208.

Ratliff followed Lacey on Maple Valley Drive despite receiving no direction from Lacey “to join in the pursuit”. LF 192-193, 210-211, 213. Ratliff testified:

Q: Were you aware that other officers were also involved in pursuit at the time you crested the hill?

A: The only ones I was aware of was me and Sergeant Lacy.

Q: And Barton?

A: And Barton, yes.

\* \* \*

Q: Do you recall Lacy on the radio?

A: No. I don't remember hearing Sergeant Lacy say anything, really.

LF 193-194. Ratliff also testified:

Q: And whose in charge here?

A: Sergeant Lacy.

Q: You never heard any transmission from Sergeant Lacy?

A: No, sir.

LF 195. In fact, Lacey did not issue any order to any officer at any time regarding what any officer should be doing about the fleeing vehicle. LF 194, 210-211, 213,

226. Despite serving as field supervisor, Lacey offered no direction or guidance to the officers under his command. LF 194, 210-211, 213, 226.

The patrol car driven by Ratliff collided with the automobile driven by Monica Clark on Maple Valley Drive about 300 feet north of Hazel Lane. LF 59-60, 85-87, 187-189. Prior to the impact, Ratliff failed to swerve or take other action to evade the collision. LF 59-60, 85-87, 187-189 The patrol car impacted Clark's car to the west (in the southbound lane) of the center of Maple Valley Drive. LF 59-60. The northbound lane of the road was not obstructed in any way at its intersection with Hazel Lane. LF 61, 194.

Further, Ratliff was operating his police car at a speed two times greater than the speed limit. LF 186. The posted speed limit on Maple Valley Drive was 35 miles per hour at the point of impact. LF 61, 186. Speeds of the pursuing patrol cars exceeded 70 miles per hour, or twice the posted speed limit. LF 186, 226. At impact, Ratliff was driving his patrol car at a speed between 67 and 71 miles per hour. LF 87.

The assistance of Ratliff in apprehending O'Neal was neither requested nor mandatory. LF 194, 210-211, 226. A fourth officer, Leroy Beard, joined the pursuit at Liberty Street. LF 227-228, 238. Officer Beard's patrol car blocked Liberty Street at its intersection with Maple Valley Drive. LF 209. O'Neal was taken into custody when the vehicle he was driving left the roadway near Maple Valley Drive's intersection with Liberty Street. LF 227. Officer Beard traveled to

the intersection via U.S. Highway 67. LF 227. Highway 67 runs parallel to Maple Valley Drive.

The chase began, occurred and continued despite the fact that department personnel had a description of the driver, the make of the vehicle he operated, the vehicle's license plate number, and the direction of the fleeing vehicle – south and out of town. LF 193, 226. Ratliff drove his vehicle at an extreme speed through a high-traffic part of town despite the absence of any instruction to exceed the speed limit or join the pursuit. LF 190-193. And, the chase involved too many patrol cars pursuant to the department pursuit policy, including the police car involved in the collision – Ratliff's car. LF 219.

Sufficient facts exist to demonstrate that the conduct and omissions of Respondents may serve as the proximate cause of Appellants' injuries. Ratliff's patrol car met Clark's car on Maple Valley Drive because Lacey failed to direct, in any manner, the course and direction of the pursuit, Ratliff was involved in the pursuit contrary to department policy, Lacey failed to direct Ratliff to end his pursuit after becoming aware of Ratliff's involvement and the presence of another officer ahead and available to provide assistance to the primary pursuing officer, Ratliff's vehicle was traveling at more than two times the posted speed limit and, because, Monica Clark did not have sufficient time to take evasive action to avoid the crash due to the speed of Ratliff's patrol car. The force of the impact ejected Rodney and Lakoda Clark from the vehicle; Monica Clark and Janice Moutray, died at the scene due to the severity of the injuries. LF 83-84. Viewed in a light

most favorable to Appellants, the facts establish that the negligence of Respondents caused or contributed to cause the injury sustained by Appellants. The trial court wrongly granted summary judgment.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT CITY OF FARMINGTON, BECAUSE FARMINGTON IS NOT SHIELDED FROM LIABILITY UNDER THE PUBLIC DUTY DOCTRINE, IN THAT (1) RESPONDENT CITY OF FARMINGTON PREVIOUSLY WAIVED ITS SOVEREIGN IMMUNITY AS (A) THIS CAUSE ARISES OUT OF INJURIES CAUSED BY THE NEGLIGENT OPERATION OF A MOTOR VEHICLE AND (B) RESPONDENT FARMINGTON PURCHASED LIABILITY INSURANCE THAT COVERS THE OCCURRENCES REFERENCED IN THE PLEADINGS AND (2) EVIDENCE ADDUCED SUGGESTS THAT EACH OF THE INDIVIDUAL RESPONDENTS FAILED TO ACT IN COMPLIANCE WITH BOTH MISSOURI STATUTE AND THE POLICE DEPARTMENT'S OWN "VEHICULAR PURSUIT" POLICY.

The trial court granted judgment to all Respondents on the alternative basis that each was shielded from liability under the public duty doctrine. Specifically, the court ruled:

whatever applicable duties of the Defendants to act, or omit to act, were duties owed to the general public and not particularly to Plaintiffs or their next friends or decedents.

LF 298.

Analysis of the public duty doctrine in this case lends itself to widespread confusion. The confusion stems from a "maze of inconsistent decisions which

defy understanding,” as pertains the concepts of sovereign immunity, official immunity, and public duty doctrine. Oberkramer, 650 S.W.2d at 294. Each is a distinct legal concept. Id. The public duty doctrine shields public officials and, in some cases, governments from liability for damages resulting from the breach of the duty owed by an official to the general public. Green v. Missouri Dep’t of Trans., 151 S.W.3d 877, 881 (Mo.App.S.D. 2004). Sovereign immunity protects the government, but not individual officials, from tort liability for injuries which result from the performance of governmental functions. Oberkramer, 650 S.W.2d at 295.

Respondent Farmington is not protected from liability by sovereign immunity, nor by any public duty protection enjoyed by its officials. Important to the case at hand is the principle that the public duty doctrine *does not* shield a municipality from liability arising out of a negligent act or omission for which the government had previously waived its sovereign immunity, as Farmington did in this cause. Warren v. State of Missouri, 939 S.W.2d 950, 957 (Mo.App.W.D. 1997); *See* LF 298.<sup>8</sup> The trial court failed to recognize this principle in its judgment. Also, in reaching its holding, the court failed to consider whether the individual Respondents complied with applicable law as none are entitled to protection under the doctrine unless they demonstrate compliance. LF 298. None

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<sup>8</sup> In its Order, the trial court expressly stated that it did not consider whether Farmington had waived its sovereign immunity. LF 298.

of the individual Respondents complied with the applicable law, they are, therefore, not shielded from liability by the public duty doctrine.

A. The Public Duty Doctrine

In their motion, all Respondents, including Farmington, alleged that the public duty doctrine shielded each from liability. The public duty doctrine directs that a public employee shall not be liable to an individual injured by his negligence in the performance of a public duty. Brown v. Tate, 888 S.W.2d 413, 416 (Mo.App.W.D. 1994); Jungerman v. City of Raytown, 925 S.W.2d 202, 205 (Mo.banc 1996). The public duty doctrine shields public officials from liability for injuries or damages resulting from the breach of the duty owed by the official to the general public. Green, 151 S.W.3d at 881.

B. Notwithstanding any Public Duty Protection Enjoyed by the Individual Respondents, Respondent Farmington is not Entitled to Public Duty Doctrine Protection

However, a municipality cannot claim public duty protection where the sovereign has waived its sovereign immunity. Warren, 939 S.W.2d at 957. In this case, the public duty doctrine does not shield Farmington as its liability arises out of a negligent act or omission committed by the municipality's agents in the operation of motor vehicles. *See* Section 537.600 R.S.Mo. (2000); Warren, 939 S.W.2d at 957; Green, 151 S.W.3d at 882. Alternatively, Farmington is not entitled to public duty protection as the municipality purchased liability insurance

against the injury alleged by Appellants. *See* Section 71.185 R.S.Mo. (2000); Section 537.610 R.S.Mo. (2000); Oberkramer, 650 S.W.2d at 297.

1. Sovereign Immunity

Sovereign immunity protects the government from tort liability. Oberkramer, 650 S.W.2d at 294. Municipalities are protected by sovereign immunity in the performance of certain governmental duties. Jungerman, 925 S.W.2d at 204. A governmental duty is a function performed for the common good of all, such as the maintenance of a police force. Oberkramer, 650 S.W.2d at 295. However, the immunity enjoyed by municipalities, like Farmington, is not absolute. Jungerman, 925 S.W.2d at 204-205; Kunzie v. City of Olivette, 184 S.W.3d 570, 574 (Mo.banc 2006). The sovereign may waive or otherwise limit its immunity by statute. Oberkramer, 650 S.W.2d at 296.

2. The Waiver of Sovereign Immunity Pursuant to Section 537.600

Farmington is not entitled to any protection that may be enjoyed by its employees under the public duty doctrine as the sovereign waived its sovereign immunity under Section 537.600. In Missouri, the General Assembly has directed that sovereign immunity shall be waived in situations involving injuries caused by the negligent operation of a motor vehicle. Section 537.600; *See also* Warren, 939 S.W.2d at 955. In pertinent part, Section 537.600 directs:

1. Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in

effect prior to that date, shall remain in full force and effect; except that, the immunity of public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment;

\* \* \*

2. The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.

Section 537.600.

Nearly a decade ago, the Western District explained the rationale behind the rule that a sovereign shall not benefit from public duty protection held by its employee when it has waived immunity under Section 537.600. In Warren, an inmate brought suit against the State of Missouri and multiple prison officials for injuries he sustained while using a table saw in a prison furniture factory. Warren, 939 S.W.2d at 952. The inmate alleged that he sustained injury when the saw

kicked back because the saw lacked a safety guard. Id. The trial court granted the State's motion to dismiss on the basis that the State was immune under both the sovereign immunity and public duty doctrines. Id. at 953. The Western District reversed, holding that the State's failure to provide an adequate safety guard came within the dangerous condition exception to sovereign immunity identified in Section 537.600. Id. at 957. Under such circumstance, the court stated, the State could not be immune under the public duty doctrine. According to the court:

Were we to engraft a public duty exception to the otherwise absolute waiver contained in Section 537.600, as argued by the State, it would make that waiver largely meaningless, for the public duty doctrine is very broadly defined in Missouri. . . Such a reading of the statute would not only defeat its purpose, it would be contrary to common sense, for there would be very few dangerous conditions of public property which did not involve either a discretionary duty or a duty owed to the public rather than to an individual.

Id. at 958.

The Western District's analysis is consistent with the general principle that immunities are personal to the holder. Oberkramer, 650 S.W.2d at 294. As such, when the sovereign is sued for the negligence of one of its officers, the sovereign can take advantage of immunities afforded the sovereign but *cannot benefit* from any personal immunity enjoyed by its officers. Id.; See Green, 151 S.W.3d at 882-883; See also Rosenblum v. Rosenblum, 96 S.W.2d 1082, 1084 (Mo.App. 1936).

The holding also remains consistent with the refusal of Missouri courts to permit an employer to extend the shield of other personal immunities enjoyed by a negligent agent to avoid *respondeat superior* liability. In Rosenblum, the Kansas City Court of Appeals held that a trucking business may be liable for the conduct of its agent though the agent was personally immune from suit. Id. at 1084. And, in a recent case, the Supreme Court recognized that an airport authority may remain liable for the actions of its police officer through the employee enjoyed personal immunity. Davis v. Lambert-St. Louis Int’l Airport, 193 S.W.3d 760, 765-766 (Mo.banc 2006).

3. Respondent Farmington is Not Entitled to Public Duty Protection as the Injuries Alleged by Appellants Arise out of the Operation of a Motor Vehicle

Farmington waived its sovereign immunity through the operation of Section 537.600.1.1, which directs that sovereign immunity is “expressly waived” in the instance of:

Injuries directly resulting from the negligent acts or omissions by public employees *arising out of the operation* of motor vehicles...

Section 537.600.1.1 (emphasis added).

Specifically, the supervisory acts or omissions of Respondents Lacey and Barker in controlling the manner in which Respondent Ratliff physically operated his police cruiser constitute “negligent acts or omissions by public employees

arising out of the operation of motor vehicles,” as contained in Section 537.600.1.1.

Oberkramer imposes an initial impediment to such liability of Lacey and Baker under Section 537.600.1.1. This Court held in Oberkramer, under similar but distinguishable facts, that:

. . . the acts or omissions of supervisory personnel not present in the police vehicle, i.e., failure of police supervisors to offer instructions . . . can hardly be said to constitute participation in the operation of the vehicle . . . [and] . . . therefore . . . the alleged failure to request . . . instructions . . . [does] not fall within the statutory waiver for sovereign immunity.

Oberkramer, 650 S.W.2d at 296-297.

We ask this Court to reconsider its decision in Oberkramer and hold that the failure of a supervisory police officer to follow the mandatory pursuit policy of his department in directing the physical operation of vehicles in his charge during a police pursuit constitutes the “operation” of a motor vehicle within the ambit of Section 537.600.1.1. The Oberkramer decision was rendered twenty-four years ago and has not been submitted to appellate judicial scrutiny since.

Notably, the facts of Oberkramer are distinguishable from the case at bar in one crucial aspect: there was no pursuit policy in place in Oberkramer. 650 S.W.2d 286. In the instant case, an explicit police pursuit policy was in effect, adherence to which was deemed mandatory in the policy itself. LF 217.

Likewise, the policy imposed specific duties upon the “field supervisor” (in this case, Respondent Sergeant Lacey) utilizing mandatory language. LF 218-219. The policy dictated that “the field supervisor shall assume responsibility for the monitoring and *control* of the pursuit as it progresses”. *Id.* (emphasis added). The policy further instructed that “the field supervisor shall be responsible for coordination of the pursuit...*directing pursuit vehicles* or air support units into or out of the pursuit . . . and coordination of pursuit tactics[.]” *Id.* (emphasis added).

The pursuit policy provides specific instructions to the “field supervisor” to “control,” “direct,” and “coordinate” police vehicles during a pursuit. LF 218-219. In essence, the “field supervisor” is ordered to participate in the operation of the police pursuit vehicles, thereby bringing the acts and omissions of Lacey and Barker within the realm of Section 537.600.1.1.

Additionally, we ask the Court to reconsider construction of the phrase “arising out of the operation of motor vehicles” contained in Section 537.600.1.1. Statutory construction is a question of law. Vogt v. Emmons, 158 S.W.3d 243 (Mo.App.E.D. 2005). When construing a statute, a trial court must attempt to ascertain the intent of the legislature by giving the words utilized in the statute their plain and ordinary meaning. *Id.*; Stotts v. Progressive Classic Ins. Co., 118 S.W.3d 655, 663 (Mo.App.W.D. 2003); State ex rel. Nixon v. Fru-Con Constr. Corp., 90 S.W.3d 533 (Mo.App.E.D. 2002). As such, this Court must give “each word, clause, and section meaning whenever possible”. Vogt, 158 S.W.3d at 249.

Indeed, Section 1.090 directs: “Words and phrases shall be taken in their plain or ordinary and usual sense. . . .” Section 1.090 R.S.Mo. (2000).

Section 537.600.1.1 directs that sovereign immunity shall be waived in all circumstances involving injuries “arising out of” the negligent “operation” of a motor vehicle. Merriam-Webster defines “arise” as: “. . .originate; ascend. . . .” Merriam-Webster Dictionary 37 ( 11<sup>th</sup> ed. 2004). The dictionary defines “operation” as: “a doing or performance of a practical work; an exertion of power or influence. . . .” Merriam-Webster Dictionary at 507. Giving the words “arising” and “operation” their plain and ordinary meaning, sovereign immunity shall be waived in all circumstances involving injuries “originating” out of “an exertion of power or influence” of a motor vehicle. Under the rules of construction, the use of the phrase “arising out of” in conjunction with the term “operation” must be given meaning. It cannot be treated as mere surplusage. If the legislature wanted to limit liability to those injuries caused by the actual operator of a motor vehicle, the General Assembly could have said:

Injuries directly resulting from the negligent acts or omissions  
by public employees *while operating* motor vehicles. . . .

But, the legislature did not so state.

As such, Appellants’ injuries originate from the negligent omission of Lacey to follow the Pursuit Policy in the direction of the police vehicles involved in the pursuit of the fleeing suspect as well as the actual operation of his vehicle by Ratliff. Under such a definition, Ratliff was exerting power and influence over his

patrol car as he caused it to move south on Maple Valley Drive. And, under the definition, Lacey and Baker exerted power and influence over Ratliff as both possessed authority to direct Ratliff in whether the officer should join the pursuit of Walter O'Neal and, in the case he did, to direct him how to proceed or, in fact, to cease pursuit. The injuries sustained by Appellants originated from the negligent acts and omissions of Lacey, Ratliff and Baker.

Appellants anticipate that in support of the judgment Farmington will cite this court to a ten year old appellate case. See Bittner v. City of St. Louis Police Bd. of Police Comm's, 925 S.W.2d 495 (Mo.App.E.D. 1996). Bittner is distinguishable from the case at hand. In Bittner, plaintiff sustained injury when his automobile was struck by a vehicle pursued by police officers employed by the City of St. Louis during the course of a high speed chase. Bittner, 925 S.W.2d at 497. Plaintiff alleged that the chase began as a result of a personal vendetta between certain officers and the individual driving the fleeing vehicle. Id. This Court affirmed judgment in favor of the police board, recognizing that plaintiff based her allegations against the board on actions purportedly taken by the officers outside the scope of their employment. As such, this Court concluded, the police board, as employer, could not be liable under the doctrine of *respondeat superior*. Id. at 498-499.

Bittner is distinguishable in that the allegations of the plaintiffs in that case are fundamentally different to the allegations made by Appellants here. The collision at issue involved a patrol car operated by Ratliff and a car driven by

Monica Clark. No dispute exists that Farmington employed Ratliff as a police officer at the time of the crash. The collision did not involve a vehicle fleeing from a police pursuit but a police car involved in the attempt to apprehend a suspect. And, unlike Bittner, Appellants here allege that the individual officers were acting within the course of their employment rather than outside such duties and responsibilities when they acted, or failed to act.

4. Waiver of Sovereign Immunity Pursuant to Section 537.610 & Section 71.185

Furthermore, any immunity possessed by Farmington by virtue of its status as sovereign is waived to the extent the municipality maintained insurance that covered the incidents referenced in the pleadings. Section 537.610; Section 71.185. In pertinent part, Section 537.610 provides:

[T]he governing body of each political subdivision of this state. . . may purchase liability insurance for tort claims. . .

***Sovereign immunity for the state of Missouri and its political subdivisions is waived*** only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of this state.

Section 537.610.1 (emphasis added). Likewise, Section 71.185 provides that a municipality shall be liable:

as in other cases of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.

Section 71.185.1. Section 71.185 applies only to municipalities. Spotts v. City of Kansas City, 728 S.W.2d 242, 246 (Mo.App.W.D. 1987). Under that statute, a municipality such as Farmington waives its sovereign immunity to the extent insurance it possesses covers the tort. Jungerman, 925 S.W.2d at 205-206. Waiver under Section 537.610 is much broader. In Kunzie, the Supreme Court stated that the procurement of insurance by a municipality constitutes an **absolute** and **complete** waiver of **all** immunities, including sovereign immunity and the public duty doctrine. Kunzie, 184 S.W.3d at 574.

Farmington is a municipality. As a municipality, Farmington may participate in the Missouri Public Entity Risk Management Fund. Section 537.705 R.S.Mo. (2000). MoPERM provides money to municipalities to pay “all claims for which coverage has been obtained” asserted against it as well as its officers and employees. Section 537.705.1. Farmington participates in the MoPERM; MoPERM insures Farmington, its police officers and police employees, against tort claims such as that made by Appellants against all Respondents in the pending

suit. Section 537.705; LF 248, 251.<sup>9</sup> As such, Farmington has waived sovereign immunity for the claims brought by Appellants in the pending case.

Farmington cannot escape liability on the basis of the public duty doctrine. A municipality, Farmington has waived the immunity offered to it as sovereign. Farmington is not entitled to claim any personal immunity available to its officers and employees under the public duty doctrine. Farmington remains liable to Appellants for the conduct of its police officers.

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<sup>9</sup> Appellants note that they, through their counsel, served discovery on Farmington inquiring about the specifics of coverage maintained by the municipality with MoPERM on May 12, 2004. LF 253-257. The discovery was served on July 20, 2006, only 13 days after Appellants received Defendants' Motion for Summary Judgment asserting that Farmington was immune to suit via the protection offered by sovereign immunity. Appellants also note that due to the proximity of the date this cause was set for trial (September 5, 2006) to the date Respondents served their motion (July 6, 2006), Appellants served their response and argued the motion's merits less than three weeks after receiving it. Under these circumstances, Appellants requested from the trial court time to supplement their Response with any materials received by them from Farmington in response to the discovery should the Court be inclined to grant judgment to Farmington on the basis of sovereign immunity. The trial court entered its judgment on August 22, 2006 and before Farmington responded to the discovery.

C. Respondents Lacey, Ratliff and Baker are not Entitled to Public Duty Protection

The public duty doctrine shields public officials from liability for injuries or damages resulting from the breach of the duty owed by the official to the general public. Green, 151 S.W.3d at 881. To bring a public officer within the protection offered by the doctrine, the Western District remarked, the officer must be engaged in some particular duty of his office or employment which. . . calls for his professional expertise and judgment.

Brown, 888 S.W.2d at 416. In such a circumstance, public employees, including police officers, may not be held civilly liable for breach of a duty owed to the general public rather than particular individuals. Deuser v. King, 24 S.W.3d 251 (Mo.App.E.D. 2000). When a statute, regulation or common law rules places limitations upon a public officer, the officer must demonstrate compliance with the statute before claiming the doctrine's protection. Green, 151 S.W.3d at 883.

As previously discussed, the conduct of the individual officers in this case is governed by both statute and departmental policy. As shown in Point II, Section B, above, facts exist demonstrating that each of the individual officers failed to act in compliance with both Missouri law and the "Vehicular Pursuit" policy.

Accordingly, none of the officers are entitled to protection under the public duty doctrine. Again, the trial court erred in granting summary judgment to all Respondents.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALL RESPONDENTS, BECAUSE RESPONDENTS ARE NOT IMMUNE FROM LIABILITY VIA OFFICIAL IMMUNITY, IN THAT (1) OFFICIAL IMMUNITY SHALL NOT SHIELD THE SOVEREIGN FROM LIABILITY FOR THE ACTIONS OF ITS EMPLOYEE EVEN IF THE EMPLOYEE IS ENTITLED TO OFFICIAL IMMUNITY AND (2) THE ACTS AND OMISSIONS OF THE INDIVIDUAL RESPONDENTS COMPLAINED OF BY APPELLANTS WERE NOT SUBJECT TO AN EXERCISE OF ANY DEGREE OF REASON.

Finally, the trial court found that Lacey, Ratliff and Baker may avoid liability to Appellants under official immunity. Official immunity is a common law doctrine relieving public officials from liability for acts of ordinary negligence committed during the course of official duties. Davis, 193 S.W.3d at 764; Harris v. Munoz, 43 S.W.3d 384, 387 (Mo.App.W.D. 2001). Official immunity protects public officials only in the performance of discretionary acts; ministerial acts are not protected by official immunity. Harris, 43 S.W.3d at 387.

Whether an act is discretionary or ministerial depends on the “degree of reason and judgment required” to perform the act. Davis, 193 S.W.3d at 763. An act is discretionary when it requires “the exercise of reason in developing a means to an end, and the employment of judgment to determine how or whether an act should be performed or a course pursued”. Harris, 43 S.W.3d at 387. Whether an act can be characterized as discretionary depends upon the degree of reason and

judgment required. Kanagawa v. State by and through Freeman, 685 S.W.2d 831, 836 (Mo.banc 1985). In contrast, ministerial acts require certain duties to be performed:

upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to [the officer's] own judgment or opinion concerning the propriety of the act to be performed.

Harris, 43 S.W.3d at 387; *See also* Jungerman, 925 S.W.2d at 205.

A. Under No Circumstance is Respondent Farmington Entitled to Official Immunity

Official immunity shall not shield Farmington from liability simply because its officers may not be liable for their negligence because of the protection offered by the doctrine. Official immunity applies only to individuals – never to the sovereign. Indeed, the function of official immunity is to protect individual government actors who must exercise judgment in the performance of their duties despite limited resources and imperfect information. Kanagawa, 685 S.W.2d at 836. The doctrine's aim is to allow officials to “make judgments affecting the public safety and welfare” without being burdened by the “fear of personal liability”. Davis, 193 S.W.3d at 765. As such, official immunity is personal to the officeholder. Id. Government employers cannot take advantage of immunities afforded to their employees. Id. In Davis, the Supreme Court concluded:

Even when official immunity protects a government employee from liability there remains a “tortious conduct” for which the governmental employer can be derivatively liable. A governmental employer may still be liable for the actions of its employee even if the employee is entitled to official immunity.

Id. at 766.

Here, Appellants have alleged that Farmington remains liable as a result of the negligence of its individual officers in the manner in which they conducted the high-speed vehicular pursuit of Walter O’Neal. Under the doctrine of *respondeat superior*, an employer is responsible for the negligent acts of its employees performed during the course of employment. Studebaker, 842 S.W.2d at 229. As the evidence shows that Lacey, Ratliff and Baker acted negligently during the course of their employment, Farmington shall be liable under *respondeat superior*.

B. Respondents Lacey, Ratliff & Baker are not Entitled to Official Immunity Protection as Each

In this case, the individual Respondents are not entitled to official immunity as their acts and omissions were **not** subject to an exercise of any judgment. In Harris, the Missouri Court of Appeals, Western District, held that official immunity did not bar a claim brought by an inmate against prison officials alleging that the officials had misplaced the inmate’s personal property. Harris, 43 S.W.3d at 388-389. In that case, the inmate alleged that the officials had failed to follow promulgated prison policy for

the care of his property. Id. at 388. The prison officials contended that they were entitled to official immunity because state statute delegated to them the discretion to establish policy for the disposal and safekeeping of inmate property. Id. at 389. The Court held that once a procedure for holding property in a prescribed manner is set, prison officials had a ministerial duty to follow the procedure. As such, the officials were not entitled to official immunity. Id.

In this case, the Farmington police department promulgated a policy prescribing the circumstances under which a vehicular pursuit may be initiated and continued, the manner in which police personnel shall conduct vehicular pursuits and who may participate in the pursuit. LF 216-200. Indeed, the pursuit policy directed Lacey, Ratliff and Baker exactly how they should act when confronted with a suspect fleeing by motor vehicle. Directing that the standards set forth within it are “mandatory,” the policy provided that a pursuit should not be initiated unless the immediate danger to the public created by the pursuit is less than the potential danger should the suspect remain at large. LF 217. And, according to the policy, the initiating officer must consider the traffic conditions in the pursuit area as well as the likelihood of identifying the suspect at a later date. LF 217. Further, the policy directs that any pursuit shall be limited to two patrol cars “unless expressly authorized by the field supervisor”. LF 219-220. According to the policy, other officers shall not join the pursuit “unless instructed to do so by the field supervisor”. LF 220.

The policy, in conjunction with Missouri law, mandated that Ratliff not speed or otherwise put the public under an unreasonable risk of harm when not engaged in a pursuit. The policy directed Ratliff not “to join in the pursuit” unless directed to do so. Ratliff received no such instruction at any time. Indeed, the policy directed that Lacey, as “field supervisor,” must provide instruction to all officers under his command. During his deposition, Lacey admitted that he issued no commands, provided no supervision, issued no directions to his subordinate officers. LF 210-211, 213, 226. Neither individual officer was required to exercise any judgment concerning the propriety of their actions. In fact, the department pursuit policy instructed the officers exactly how to act should the scenario which confronted them on May 12, 2004 arise. Under such circumstances, neither Ratliff nor Lacey are entitled to the grant of official immunity.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO TRANSFER VENUE, BECAUSE, PURSUANT TO SECTION 508.130 R.S.Mo., THERE EXISTED CAUSE TO BELIEVE THAT APPELLANTS CANNOT HAVE A FAIR TRIAL IN ST. FRANCOIS COUNTY, IN THAT RESPONDENTS ARE THE CITY OF FARMINGTON AND ITS PUBLIC OFFICIALS AND POLICE OFFICERS TOWARD WHOM THE INHABITANTS OF ST. FRANCOIS COUNTY ARE FAVORABLY BIASED, PREJUDICED AND INFLUENCED.

The propriety of venue in St. Francois County is an issue should this Court remand this cause for further proceedings. Appellants filed a Motion for Change of Venue after this cause was brought requesting the trial court transfer venue pursuant to Section 508.130. *See* LF 20-22; *See also* Section 508.130 R.S.Mo. (2004). Despite the direction of the statute, the court ordered an evidentiary hearing after which the court denied the motion. Contrary to the direction of Section 508.130, the case remains pending in St. Francois County.

A. Procedural Background

Appellants filed their venue motion pursuant to the provisions of Section 508.130. LF 20. In their motion, Appellants alleged that the inhabitants of St. Francois County are favorably biased, prejudiced and influenced toward

Respondents<sup>10</sup>. Appellants further alleged that they first learned of the information that served as the basis of such belief within ten days prior to the filing of the motion. LF 20. The motion was verified by Appellants' counsel, Thomas J. Casey. LF 21. Mr. Casey stated:

1. That he is the attorney of record for the plaintiffs herein.
2. That he has recently learned that the inhabitants of St. Francois County may be favorably biased, prejudiced, or influenced in favor of defendant to this action.
3. That as a result thereof, plaintiffs are unable to obtain a fair trial of this cause within St. Francois County.
4. That the facts and matters set forth in the foregoing Motion for Change of Venue are true, accurate, and complete to his best knowledge, information, and belief.

LF 21. Respondents filed a general denial of the motion on December 30, 2004.

LF 23. Respondents did not, in their denial, challenge the timeliness, sufficiency or form of the venue motion nor did Respondents file with the court any evidence in opposition to the motion. *See* LF 23.

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<sup>10</sup> At the time, Farmington and Ratliff were named defendants. Appellants joined Lacey and Baker following denial of the venue motion by the trial court.

Appellants noticed their venue motion for hearing. The parties argued the Motion for Change of Venue before Judge Pratte on January 28, 2005. Following the hearing, the trial court continued the motion and ordered the motion to be reset for additional hearing and presentation of evidence. LF 24. Pursuant to the Order, the motion was reset. Accordingly, the parties argued the venue motion before the court on April 22, 2005. The trial court heard testimony. *See* Transcript at 1-21. Following the evidentiary hearing, the court found the evidence inadequate and denied the Motion for Change of Venue. LF 25.

B. Change of Venue for Cause Pursuant to Section 508.130

Section 508.130 provides that a party may petition the trial court for a change of venue on the ground that the inhabitants of a county are prejudiced in favor of her adversary. In pertinent part, Section 508.130 directs:

Any party, his agent or attorney, may present to the court, or judge thereof in vacation, a petition setting forth the cause of his application. . . for a change of venue, and when he obtained his information and knowledge of the existence thereof;

Section 508.130. A Missouri statute has provided for a change of venue based upon the bias, prejudice or influence of a county's inhabitants since at least 1879. *See Mix v. Kepner*, 81 Mo. 93 (Mo. 1883). The language of the current statute has largely remained unchanged since at least 1919. *Sweeney v. Sweeney*, 283 S.W. 736, 737 (Mo.App. 1926). After 1919, the General Assembly amended the statute

to provide for the disqualification of a judge under that statutory scheme.

*Compare* Sweeney, 283 S.W at 737 and Section 508.130.

Section 508.130 provides a particular scheme under which a party possesses a right to a change of venue. The statute requires that the party seeking a change pursuant to the statute file an application setting forth the cause of the motion and when the applicant obtained her knowledge of such cause. LaGrange Elevator Co. v. Richter, 129 S.W.2d 22, 24-25 (Mo.App. 1939); Sweeney, 283 S.W. at 737. Additionally, the movant must attach to the application an affidavit attesting to the truth of the matters put forth in the motion and that she has just cause to believe that she cannot have a fair trial on account of the cause identified and alleged in the application. Richter, 129 S.W.2d at 24-25.

A motion based upon that statute must be made in strict compliance with the requirements put forth in the statute. Richter, 129 S.W.2d at 24. However, the trial court must find the motion sufficient when the motion complies with the provisions of the statute. In such circumstance, the movant has “at least” laid a *prima facie* basis on which the court shall ground its order transferring the cause to another venue. Mix, 81 Mo. at 93. When the venue motion complies with the requirements of the statute, the trial court must grant the motion; the duty of the court is no longer discretionary. Ralston v. Ralston, 166 S.W.2d 235, 237 (Mo.App. 1942); *See also* State ex rel. McNary v. Jones, 472 S.W.2d 637, 640 (Mo.App. 1971).

In Richter, the St. Louis Court of Appeals held that the trial court must sustain a venue motion based upon the bias of a county's inhabitants where the application complied with the requirements of Section 910 R.S.Mo. (1929), a predecessor to Section 508.130. Richter, 129 S.W.2d at 24-25. In that case, the trial court denied defendant's motion to change venue based on the alleged bias and prejudice of the inhabitants of Lewis County against defendant. Id. at 23-24. The application alleged that defendant could not have a fair trial in the Circuit Court of Lewis County because:

(a) the inhabitants of Lewis County, Missouri, are biased and prejudiced against this defendant;

(b) the plaintiff has undue influence over the inhabitants of Lewis County, Missouri.

Id. at 24. In addition, the application stated the date after which defendant learned of such information and alleged that defendant could not have a fair trial due to the asserted prejudice of the county's inhabitants. Id. The trial court denied the motion; defendant had filed his entire application in the form of an affidavit, rather than attaching an affidavit to the motion as prescribed by the statute. Id. at 25. Finding that the application was in "substantial compliance" with the statute's requirements despite its defect in form, the appellate court reversed the motion's denial and ordered the trial court to transfer the cause. Id. at 25.

Thirteen years earlier, the Kansas City Court of Appeals discussed the burden on the party requesting a venue change pursuant to Section 1360 R.S.Mo.

(1919)<sup>11</sup>. Sweeney, 283 S.W.736at 737-738. In Sweeney, the trial court denied a motion for change of venue filed by a defendant in a divorce case after hearing testimony regarding the basis of the motion. On appeal, defendant claimed that because her application was correct in form, contained all allegations demanded by the statute and was properly verified, the trial the court had no discretion but to sustain the application and grant the venue change. Id. at 737. The appellate court agreed. Recognizing that the motion stated the cause of the application and when movant obtained his information, the appellate court found that the motion was sufficient. Noting that “there was no counter affidavit filed”, the court found that defendant was not obligated to present any proof “except the verification of the application”. Id. at 737-738.

C. The Trial Court Erred when the Court Compelled an Evidentiary Hearing and Denied the Venue Motion

Here, Appellants filed a venue motion pursuant to Section 508.130. LF 20-22. In their motion, Appellants identified as the cause of their motion:

the defendants in this action are The City of Farmington and one of its public officials and police officers toward whom the inhabitants of St. Francois County are favorably biased, prejudiced, and influenced.

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<sup>11</sup> Section 1360 is the immediate predecessor to Section 910. See Section 508.130, “Historical and Statutory Notes”.

LF 20. Additionally, Appellants indicated in the venue motion that the information on which the motion was based was first ascertained within ten days prior to the filing of the motion. LF 20. The motion was verified by Appellants' counsel, Thomas Casey. Under oath, Mr. Casey verified the truth of the statements put forward in the motion and that he had just cause to believe that Relators "are unable to obtain a fair trial of this cause within St. Francois County". LF 21.

The Motion for Change of Venue complied with the requirements of Section 508.130. Indeed, Respondents did not, in their denial, challenge the timeliness, sufficiency or form of the venue motion nor did Respondents file with the court any evidence in opposition to the motion or solicit any testimony during the hearing. *See* LF 23; *See also* Transcript at 1-21. Under such circumstance, the trial court had no choice but to sustain the venue motion. *See Richter*, 129 S.W.2d at 24-25; *Sweeney*, 283 S.W. at 737-738; *See also Mix*, 81 Mo. at 93; *Ralston*, 166 S.W.2d at 237; *McNary*, 472 S.W.2d at 640.

Required to transfer the cause, the trial court erred when he failed to do so. Section 508.140 describes the duty of the court after a party or his attorney has filed a motion pursuant to Section 508.130. Section 508.140 R.S.Mo. (2004). Section 508.140 directs that, if reasonable notice has been given, the court:

shall consider the application, and if it is sufficient. . . a  
change of venue *shall be awarded* to some county in the same,

adjoining or next adjoining circuit, convenient to the parties for the trial of the case and where the causes complained of do not exist.

Section 508.140.1 (emphasis added). Upon remand, this cause shall be transferred from the Circuit Court of St. Francois County.

**CONCLUSION**

WHEREFORE, for the reasons set forth herein, Appellants Debra Southers, Individually and as Next Friend of Rodney I. Clark, a minor, and Lakoda D. Clark, a minor, and Terry Larson and Kathleen Hammett, respectfully request this Court make and enter its Order reversing the Judgment entered by the trial court granting Defendants' Motion for Summary Judgment and remanding this cause to the Circuit Court of St. Francois County for reinstatement and further proceedings.

RESPECTFULLY SUBMITTED,

CASEY & DEVOTI, P.C.

by

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**CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT**

**RULE 84.06(b) AND RULE 84.06(g)**

The undersigned certifies that the foregoing brief complies with the limitations contained Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 12,058 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Brief of Appellant in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of Respondent's Brief and a diskette containing same were deposited on this 12<sup>th</sup> day of January, 2007, in the United States mail, postage pre-paid, addressed to Mr. Mark H. Zoole, Attorney at Law, 1200 S. Big Bend Boulevard, St. Louis, Missouri, 63117.

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Danko Princip, #58542

Subscribed and sworn to before me this 12<sup>th</sup> day of January, 2007.

\_\_\_\_\_  
Notary Public

My commission expires: