IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC88612

DEBRA SOUTHERS, et al.,
Plaintiffs/Appellants,

vs.

THE CITY OF FARMINGTON, MISSOURI, et al.,
Defendants/Respondents.

From The Circuit Court Of St. Francois County, Missouri,
No. 04cv614699
The Honorable Kenneth W. Pratte, Presiding Judge

RESPONDENTS' SUBSTITUTE BRIEF

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STATEMENT OF FACTS

The purported "Statement Of Facts" in the brief of Plaintiffs/ Appellants ("Southers") routinely disregards the parties' Rule 74.04 stipulations. This Statement first clarifies the stipulations. For the sake of having a single set of facts, this Statement then sets out the full facts as the parties' summary judgment submissions presented them. Finally, this Statement describes this case's procedural history.

Stipulated Facts That Southers' Brief Disregards Or Tries To Gainsay

The parties have **stipulated** and agreed under Rule 74.04 that non-party Officer ***Barton was the only pursuing officer***. L.F. 161, para. 36; L.F. 292, para. 36.

As to Defendant Byron Ratliff, instead of being in pursuit of the suspect (O'Neal) on May 12, 2004, the parties unanimously agreed that Ratliff was driving to a spot where it was anticipated that Barton would soon be confronting the armed suspect so as to assist Barton in that confrontation. L.F. 32, paras. 12, 14; L.F. 156, paras. 12, 14.

The parties stipulated that Barton's imminent confrontation with that armed suspect constituted a call of an "officer in need of aid", which is an "emergency call of the highest priority." L.F. 32, para. 12;

L.F. 156, para. 12. Ratliff drove in response to that call in an emergency vehicle with lights and siren activated. L.F. 31-32, paras. 11, 14, 21, 23; L.F. 156, paras. 11, 14, 21, 23.

Ratliff was driving on a half-mile stretch of road that he could see the length of, and which had a total of *six* southbound-facing cars (and "several" northbound-facing cars),-- all of which were pulled over to the side of the road. L.F. 32-33, para. 18; L.F. 157, para. 18.

The parties agree that while responding to this emergency, Ratliff kept such a lookout and maintained such regard for the safety of others that he actually noticed one of those six pulled-over car's (Ms. Clark's) brake lights flicker, at which Ratliff took his foot off the accelerator. L.F. 33, para. 21; L.F. 157, para. 21. The parties agree that Ms. Clark then "suddenly veered directly out in front of him." L.F. 33, para. 21; L.F. 157, para. 21. Ratliff then braked "as fast as he could to try to avoid the accident, but slid into [Ms. Clark's] car, with his police car's lights and siren still activated". L.F. 33, para. 23; L.F. 157, para. 23.

<u>The Facts As Actually Supported By The Record</u>

On May 12, 2004, around 4:30 p.m., Farmington police Corporal Byron Ratliff was driving in response to an emergency situation. L.F.

32, para. 12; L.F. 156, para. 12 (See also, L.F. 42-45, paras. 4, 8-11, 14-20) The emergency was an officer in need of aid: a call of the highest priority. L.F. 32, para. 12; L.F. 156, para. 12. The officer in need of aid was Lindell Barton, a non-party to this case, who was relatively new to the force. L.F. 154, bottom left quatro portion [p. 10], l. 17-22; L.F. 161, para. 36; L.F. 292, para. 36. An armed robbery had just occurred. L.F. 43, paras. 8-9. The armed suspect was heading south on Maple Valley Drive at approximately ninety miles per hour in a reportedly stolen van. L.F. 43, paras. 10-11; and L.F. 154, bottom right quatro portion [p. 12], l. 1-13. Barton was in pursuit of the suspect about a half mile farther down from (south of) Ratliff on Maple Valley Drive. L.F. 44-45, paras. 16-18. Ratliff was not pursuing the suspect, rather he was driving to a spot he anticipated Barton and the suspect would be, to help protect Barton in anticipation of Barton's confrontation with this armed suspect. L.F. 161, para. 36; L.F. 292, para. 36; L.F. 32, paras. 12, 14; L.F. 156, paras. 12, 14.

While Ratliff was driving his marked police car southbound on Maple Valley Drive, he had his emergency lights and siren on. L.F. 31-32, paras. 11, 14, 21, 23; L.F. 156, paras. 11, 14, 21, 23 (See also, L.F.

42-44, paras. 5, 14; and L.F. 44-46, paras. 14, 16, 20-21) In front of him, as far as he could see (which view included the entire half mile stretch of Maple Valley Drive, despite the surrounding countryside being "pretty hilly") cars were pulled over to the side of the road. L.F. 32-33, para. 18; L.F. 157, para. 18 (See also, L.F. 44-45, para. 18) Despite there being a hospital and apartment building at some unspecified distance to the east of the road, and despite it being near Farmington, Missouri's "congested rush hour", the *total* number of pulled-over southbound vehicles over this half-mile stretch was about *six*. L.F. 32-33, para. 18; L.F. 157, para. 18.

Suddenly, one of these cars pulled directly out in front of Ratliff. L.F. 33, para. 21; L.F. 157, para. 21 (See also, L.F. 45-46, paras. 21-22; and L.F. 47, paras. 4-5) That car did not ease its way into the street, rather it veered sharply as though making a left turn directly across Ratliff's car's front. L.F. 45-46, paras. 21-22; L.F. 47, paras. 4-5 (See also L.F. 33, para. 22 and the sentence spanning L.F. 57-58.) Ratliff hit the brakes and skidded into that car. L.F. 33, para. 23; L.F. 157, para. 23. (See also L.F. 50, 82, 85, Aff. of Terry Moore, Missouri State Highway Patrol Reconstruction Report 04-0512C094-41.) A non-party

witness who was just *south* of the accident, reported that he "could easily see and hear" Ratliff's approach "in more than enough time to pull over and stay pulled over". But he then saw that Ms. Clark "pulled directly out in front of" Ratliff. L.F. 47, para. 6.

In the accident, Ms. Clark and one of her passengers, Janice Moutray, died. Ms. Clark's other two passengers, both minor children, were hurt and have recovered. Ratliff was also hurt, though his injuries were not life threatening.

Procedural History

Southers sued for the wrongful death of Ms. Clark and Mrs. Moutray, and on behalf of Ms. Clark's other two other passengers.[1]

[1] The Plaintiffs/Appellants are Debra Southers, Terry Larson, and Kathleen Hammett. All claim to be survivors of Ms. Clark and Ms. Moutray under the Missouri Wrongful Death Act, §537.080 R.S.Mo. (2000), and Ms. Southers also sues in her capacity as Next Friend of the two minor children. This brief refers to Plaintiffs/Appellants collectively as "Southers", which is the last name of the only Plaintiff suing for the claims of all four people riding in Ms. Clark's car.

Southers filed that suit in the Circuit Court for St. Francois County, Missouri. Southers makes four claims: 1) negligence against Ratliff; 2) negligence against Officer Larry Lacey (Ratliff's sergeant, for his alleged failure to properly "manage" Ratliff at the time); 3) Police Chief Rick Baker (for his alleged failure to train Ratliff and Lacey in the police department's pursuit policy); and 4) the City of Farmington, Missouri on a respondeat superior theory arising out of the three negligence claims against the three individual officers.[2] Southers has never claimed negligence against Farmington arising out of any other employees' actions. And Southers has never claimed that Lacey or Baker are liable under a respondeat superior theory.

Southers requested a change of venue under Supreme Court Rule 51.04, alleging the residents of St. Francois County would be prejudiced against the claims. The Defendants filed a statement of opposition per Rule 51.04. The Circuit Court held an evidentiary

[2] This brief refers all three officers collectively as "the Officers", to the City Of Farmington as "Farmington", and to all four Defendants/ Respondents collectively as "Respondents".

hearing, found that Southers failed to adduce sufficient evidence of prejudice, and denied the requested venue change. Southers sought a writ of prohibition, which both the Missouri Court of Appeals for the Eastern District and this Court denied.

The Defendants filed a summary judgment motion under Supreme Court Rule 74.04. The parties exchanged and filed their numbered factual stipulations per that rule. L.F. 31-33; L.F. 155-162; L.F. 285-295. After oral argument and briefing, the Circuit Court then granted the motion entering judgment against Defendants on all claims. L.F. Southers appealed and the Court of Appeals for the Eastern District affirmed via an unpublished opinion. This Court then granted Southers' request for transfer.

STATEMENT OF ISSUES

I Should this Court take up the issue of the public duty doctrine's application to employing governmental entities with this case?

II A. Under the agreed-upon facts, an officer responding to an emergency call of the highest priority, with lights and siren on, and keeping a careful lookout, drove over the speed limit,-- but did not drive so fast that those even farther away from him than Plaintiffs' decedent could not hear and see him coming in plenty of time to yield. Plaintiffs' decedent nevertheless failed to yield and, the parties stipulate, veered suddenly into the officer's path. The officer immediately braked but could not avoid the accident. Is the evidence insufficient to establish that the officer breached his duty of care?

B. The parties stipulated to the Circuit Court per Supreme Court Rule 74.04 that at the time of the accident, police officer Barton was the only officer in pursuit. There is no claim against Barton or against any party arising out of Barton's (in)actions. May one of the parties now argue that the Circuit Court erred because an additional officer (not Barton) is claimed to have been in pursuit?

III A. The public duty doctrine applies to negligence claims against public officers where the (in)actions alleged arose out of a duty owed to the general public and not to just the person(s) injured. Police officers react to emergency situations to protect the general public and not just to any one (or set of) person(s). Plaintiffs here seek liability arising out of police officers' reactions to emergency situations. Does the public duty doctrine defeat Plaintiffs' claims against the officers?

B. The public duty doctrine destroys the fundamental element of duty in negligence claims. Missouri courts have therefore applied it to defeat negligence claims against employers sued on any respondeat superior theory where the doctrine applies to the officers' actions. Does the public duty doctrine apply to Southers' claim against Farmington?

IV Official immunity shields public officers from individual civil liability arising from their discretionary acts, including especially their conduct in driving with lights and siren on in response to emergency calls. Plaintiffs here seek civil liability against the individual officers for their discretionary actions, including driving with lights and siren on in response to an emergency call. Does official immunity shield the officers from Plaintiffs' claim?

V A. Sovereign immunity shields a governmental entity from all state civil liability except injuries directly caused by a hazardous condition of the entity's real property or by the entity's actor's driving. Plaintiff's claims against Farmington relating to Chief Baker and Sergeant Lacey arise out those officers' alleged failure to train officers and alleged failure to issue radio commands, respectively. Does sovereign immunity shield the City of Farmington from Plaintiffs' claims arising out of those two officers' alleged actions?

B. The exception to sovereign immunity relating to operation of a motor vehicle requires that driving to have been the direct cause of the injuries claimed. Plaintiffs' decedent violated a criminal statute that caused the accident by failing to yield to an emergency vehicle. Did Plaintiffs' decedent cause the accident thus breaking the chain of direct causation between the officer's driving and the accident?

VI. Did the trial court follow the correct procedure on Southers' Rule 51.04 motion for change of venue?

ARGUMENT

Introduction

The intermediate appellate court used the public duty doctrine to reach its result. While not immediately clear from that court's opinion, the public duty doctrine is not the only basis for affirming the summary judgment. Still, because it served as the intermediate court's reasoning, Respondents expand on that issue here. But the primary ground for affirming the judgment actually lies in the fact that the evidence simply does not support the finding of any negligent act in the first place.

Standard Of Review

In reviewing grants of summary judgment, the standard is de novo. An appellate court reviews the summary judgment submissions as if they had been presented to the appellate court in the first instance. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id*., at 376.

I. This Is Not The Case In Which To Review The Public Duty Doctrine's Applicability To Employing Governmental Entities.

The intermediate appellate court's reasoning suggests a question as to the effect, if any, of *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763-763 (Mo. banc 2006) on the public duty doctrine. Neither party in *Davis* apparently mentioned the public duty doctrine, nor does the opinion touch on it.

Unlike official immunity in the years leading up to *Davis*, Missouri cases do not split on the public duty doctrine. The courts ***that have been asked*** to apply the public duty doctrine to employing governmental entities, including this Court, have done so. *Heins Implement Co. v. Missouri Highway & Transp. Comm'n.*, 859 S.W.2d 681, 694 (Mo. banc 1993); *Green v. Missouri Department Of Transportation*, 151 S.W.3d 877, 881-883 (Mo.App.S.D. 2004); and *Berger v. City Of University City*, 676 S.W.2d 39, 41 (Mo.App.E.D. 1984). But *Davis'* conclusion suggests that the legislature's sovereign immunity statute, RSMo. 537.600, showed an intent to simply make governmental entities liable for officials' negligence regardless of affirmative defenses that would shield the individual official from

liability. So an interesting and new question arises: Does the result of *Davis* apply to the public duty doctrine? Respondents explain why the answer is "no" in Section III of this Brief, but the first and most important question to ask is whether this case presents the right situation in which to address the question at all.

Here, alternative grounds for affirming the grant of summary judgment exist: There simply was no unreasonable or negligent act in the first place. In *Davis*, no party apparently argued or suggested such a point to any court at any level. And for all that is apparent from the opinion, the facts in *Davis* might not have warranted such an argument; it is impossible to tell. But here, the lack of evidence supporting any claim of negligent conduct stands out. (See Section II, below) It served as the primary argument supporting the summary judgment motion. L.F. 29; L.F. 35. And that point served as the primary reason for the Circuit Court's grant of summary judgment in the first place. L.F. 298.

To be sure, summary judgment in a negligence case because of a simple lack of negligent conduct is unusual. But the undisputed facts here establish that Southers' decedent's committed a statutory violation. That violation proximately caused the accident. Ratliff did

nothing at all other than his job as an officer responding to an emergency of the highest order. While not relied on in the intermediate appellate court below, the argument on the lack of negligent conduct in the first instance serves as an ample, simple and just basis for affirmation. (See Section II, below.)

Were this Court to ever hold that the public duty doctrine does not apply to employing governmental bodies, it would be undoing its own precedent and that of other courts. *Heins*, 859 S.W.2d at 694; *Green*, 151 S.W.3d at 881-883; and *Berger*, 676 S.W.2d at 41. While that naturally lies within this Court's power to do, such a sweeping change is not necessary to even consider here. This Court should affirm this case on the grounds that the evidence on the record fails to establish any negligent conduct in the first place.

II. <u>There Is Insufficient Evidence Of Any Underlying Negligence To Create An Issue Of Fact For A Jury.</u>

A. Ratliff Committed No Negligent Act.

No evidence shows any negligent act that caused this accident other than Southers' decedent's own statutory violation. There is no genuine issue of material fact on this point: Ratliff was driving with his

lights and siren on. He was paying careful attention with due regard for foreseeable hazards. L.F. 44-45, paras. 16, 19-21. The only action of Ratliff's that Appellants claim to have been negligent was that he was driving quickly. But Ratliff was privileged,-- and indeed his job required him,-- to do drive quickly at that point. RSMo. 304.022. The parties agree that Ratliff drove an emergency vehicle in with lights and siren on in response to an emergency of the highest priority. L.F. 31-32, paras. 11, 14, 21, 23; L.F. 156, paras. 11, 14, 21, 23; L.F. 32, para. 12; L.F. 156, para. 12.

It would be negligent for an officer to ***not*** drive very fast in response to a high priority emergency demanding his immediate presence. Officers responding to emergencies are expected, by law, to act with "daring and dispatch". *Hockensmith v. Brown*, 929 S.W.2d 840, 847 (Mo.App. W.D. 1996). It is simply not negligent for an officer to drive over the speed limit in response to an emergency.

Is there any limit on an officer's speed in responding to an emergency situation, such that speed alone can never serve as grounds for negligence? Perhaps. But notably here, Ratliff was *not* driving so quickly that those in front of him,-- indeed, even those farther in front

of him than Ms. Clark,-- did not hear and see his emergency lights in ample time "to pull over and stay pulled over". L.F. 47. This fact provides this Court with a useful guidepost: High speed alone is not negligent conduct by an officer driving with lights and siren on in response to an emergency as long as that speed was not so excessive as to prevent those in the way of the potential harm caused by that speed to take ample notice of the officer's approach and to yield as required by law. This standard will serve as a useful for one for officers, departmental policy-makers, litigants, counsel and other courts to use in resolving the matter of police driving in response to emergencies.

Southers' decedent, Ms. Clark, caused the accident. Hers were the only negligent acts. She violated RSMo. 304.022 by failing to yield to an emergency vehicle. She abruptly pulled out from the side of the road, turning sharply to the left, crossing directly into the path of a police car with its lights and siren on. L.F. 83-88. Ratliff maintained a careful lookout. Ratliff braked immediately. But Ms. Clark's action made the accident inevitable. Her criminal conduct caused the accident. Ratliff's conduct was simply not negligent.

There is really no dispute about this. None of the Plaintiffs were witnesses to this accident. All the witnesses, including one completely neutral eyewitness, unanimously state that Ms. Clark pulled out abruptly in front of Ratliff leaving him with absolutely no time to avoid the accident. L.F. 47, paras. 4-6. Additionally, even the Missouri State Highway Patrol's report leaves no doubt that Ratliff was attentive to his surroundings and reacted to the situation in the only way he could, while Ms. Clark's inattentiveness and failure to yield to an emergency vehicle were the sole causes of the accident. L.F. 55-58, 81-88.

B. Lacey And Baker Committed No Negligent Act That Proximately Caused The Accident And It Would Not Affect The Outcome Of This Case Even If They Did.

The alleged (in)actions of Lacey and Baker are too far removed from the car accident to serve as the basis for negligence. They drove no cars involved in the accident and were not even present when it occurred. No evidence establishes anything negligent or unreasonable about Lacey's management of the pursuit, which is stipulated to have involved only Officer Barton anyway. And no evidence establishes

anything negligent or unreasonable about Baker's training of his officers in pursuit situations.

In any event, official immunity shields Lacey and Baker from individual liability. (See, Section IV below, and *Davis*, supra.) And since neither is alleged to have been operating a motor vehicle that directly caused the accident, sovereign immunity would shield Farmington from liability for those two Officers' alleged negligence. (See, Section V below and RSMo. 537.600.) Thus, those two Officers' alleged negligence would not affect this case's outcome.

C. The Vehicle Pursuit Policy Does Not Establish Negligence.

1. Southers stipulated that Barton was the only officer in pursuit.

The parties agreed under Rule 74.04 that Ratliff was not a pursuing officer. L.F. 161, para. 36; L.F. 292. The portions of the policy that Southers relies on simply did not apply to Ratliff. It was the

non-party Barton alone,-- the parties have agreed,-- and not any other officer, who was in pursuit.[3]

Southers is estopped under Rule 74.04 from asserting that any officer other than Barton was in pursuit of the suspect. Southers not only admitted, but also actually *asserted,* in the Rule 74.04 numbered Paragraph 36 that Barton, and only Barton, was in pursuit. L.F. 161. All parties agreed. L.F. 292. The parties cannot now accuse the court below of error based on some contradiction of a fact that they had stipulated to that court as being true and undisputed.

Allowing parties to gainsay what they established via Rule 74.04 would destroy that rule's purpose. In modern motion practice, with voluminous records, circuit courts cannot be expected to sift through the entirety of the record to seek out material factual disputes for the parties. Rule 74.04 calls upon the parties to separate the wheat from the chaff by declaring those facts that are, and are not, in dispute. If a party

[3] There is not, and has never been, any claim pleaded against Farmington arising out of Barton's alleged actions. See, Appellants' Brief, p. 16.

could contradict a fact that was agreed upon via Rule 74.04, then circuit courts could rely upon the Rule 74.04 separately numbered facts. Instead, circuit courts reviewing summary judgment motions would have to sift through the record to determine whether the parties truly intended to establish the facts that they had already unambiguously stated were true. Such a system would render the rule meaningless. It would allow parties to sandbag both opponents and the circuit courts. Circuit court judges have enough to do just making rulings based on what the parties agree to, much less taking on that additional burden of re-considering the facts that the parties already established by rule.

At oral argument below, Southers suggested its Rule 74.04 stipulation was a mere mistake or inadvertence of some sort. The record belies that suggestion. Southers ***also*** admitted in other numbered paragraphs that, Ratliff,-- far from being "in pursuit",-- was driving to a spot where it was anticipated that Barton would soon be confronting the armed suspect so as to assist and protect Barton in that imminent confrontation! L.F. 32, paras. 12, 14; L.F. 156, paras. 12, 14. Such a situation, Southers further stipulated, constituted its own emergency

call. L.F. 32, para. 12; L.F. 156, para. 12. These additional stipulations oppose are inconsistent with the idea of Ratliff having been in pursuit.

2. Even without the stipulation, Ratliff did not violate the policy.

Even if the stipulation had not been made, and even if it is assumed for the sake of argument that Ratliff was a "pursuing" officer along with Barton, then Southers still would not be able to show that Ratliff violated the pursuit policy. The policy allows for one additional officer to join in the pursuit without any specific authorization as the "primary backup". L.F. 219-220. Ratliff had already activated his lights and sirens and had turned south onto Maple Valley Drive before Sgt. Lacey did. By the time Lacey turned onto Maple Valley Drive, Lacey indeed became the next officer (a half mile back) behind Officer Barton on Maple Valley, but Ratliff was, if involved in the pursuit at all[4], the second car temporally involved and therefore would have been the "primary backup". L.F. 156-157, paras. 7-9, 11-12, and 16-17. Nothing in the policy provides that if a third car gets involved and happens to

[4] And again, this argument is arguendo; the parties have already stipulated that neither Ratliff nor Lacey were pursuing officers at all.

jump the line between the initiating officer and the primary backup officer, then that somehow changes that primary backup officer's status.

3. Neither Lacey nor Baker violated the pursuit policy.

Southers' own exhibits established that Sgt. Lacey was indeed trying to listen to the various officers' radio reports but could not (and, in the short amount of time it takes to travel the relevant length of Maple Valley Drive at fifty to ninety miles per hour, had no time anyway to) issue any orders that would have "manage[d]" the pursuit of Walter O'Neal, and even if Lacey had known of Ratliff's position at the time he would not have done anything differently. L.F. 207, bottom right quatro portion, [Lacey depo page 32], l. 7-18; L.F. 208, top right quatro portion [depo p. 35], l. 1-12; L.F. 209, top right quatro portion [p. 39], l. 12-23; L.F. 209-210, bottom right and top left quatro portions respectively [pp. 40-41], l. 4-7; L.F. 210-211, bottom right and top left quatro portions respectively [pp. 44-45], l. 19-8; L.F. 211-212, bottom right and top left quatro portions respectively [pp. 48-49], l. 8-17; and L.F. 226, bottom right quatro portion [Barton depo p. 12], l. 10-25; and L.F. 228, top left quatro portion [p. 17], l. 6-16. The policy's directions

to the supervising officer must be read so as to not be violated unless that officer had a reasonable chance under the particular facts of each case to even observe those provisions in the first place. See, L.F. 237

Southers further makes the mistake of assuming that in order to "manage" the pursuit, Lacey needed to have been hogging the air waves issuing orders rather than listening, gathering information, leaving the airways open for communication by others reporting in their positions, and himself concentrating on driving to the spot where Barton may soon be lying in his own blood. Not all "management" involves a constant stream of orders. Sometimes a manager manages best through silence, especially if no particular orders would improve matters. In any event, managers must first gain information to give reasonable orders. Until a manager gains sufficient information, that manager's subordinates in their respective locations are in a far better position to decide what to do. It is non-sensical to have expected Lacey to immediately begin ordering in and out of the pursuit officers (including Ratliff) whose locations he was not even yet aware of!

As to Baker, nothing in the policy requires the Chief to provide any specified amount or type of training or supervision, or to do

anything at all. L.F. 216-222. Chief Baker was not even in town on May 12, 2004. L.F. 236. Even if every factual allegation against Chief Baker were true (and it is not), nothing in the policy describes the amount of training he should provide for individual officers.

Finally, and as set forth above, Ratliff simply was not in pursuit. Thus, Lacey cannot have violated the policy by allegedly "failing" to direct Ratliff to not pursue, and Baker cannot have violated the policy for failing to train Ratliff to heed it. The parties agreed to Judge Pratte that Officer Barton was the only one ever pursuing the suspect. L.F. 161, para. 36; L.F. 292. The policy is not violated by a supervisor's alleged failure to order out of a pursuit an officer who was not in the pursuit in the first place. Nor is the policy violated by a supervisor's alleged failure to train an officer to obey when that officer did not disobey it.

III. As An Alternative Ground For Affirming The Judgment, The Public Duty Doctrine Defeats The Negligence Claim Against All Defendants.

A. The Public Duty Doctrine Applies To The Officers' Actions.

The parties agree that Ratliff drove in response to an emergency situation. L.F. 32, paras. 11-14; L.F. 156, paras. 11-14. ***The duty of care that a police officer owes in response to emergency situations is to the public as a whole.*** Police officers have exceptional duties in reacting to emergencies. "[T]hey are covered by a panoply of legal powers and duties necessary to control the people and place where rescue is required. They are expected to act with daring and dispatch to protect life and property. … [T]he official whose *primary* public duty is to confront danger is the fireman or policeman." *Krause v. U.S. Truck Co., Inc.*, 787 S.W.2d 708, 713 (Mo. 1990).[5]

[5] In *Davis*, the parties did not raise, and this Court therefore did not address, the public duty doctrine as it would apply to an officer's driving in emergency situations.

Generally, the public duty doctrine bars liability for a public employee's actions that arise from duties owed to people other than the plaintiff alone. *Deuser v. King*, 24 S.W.3d 251 (Mo.App. E.D. 2000). "The public duty doctrine recognizes that public officers normally owe a duty only to the general public, not to individuals. Thus, a breach of a duty owed by a public official only to the general public will support no cause of action brought by an individual who is injured thereby." *Norton v. Smith*, 782 S.W.2d 775, 777 (Mo. App. E.D. 1989). A particular individual is owed a specific duty when that individual has a "special, direct, and distinctive interest" in an official's performance of a duty. *Id*. The public duty doctrine is not an affirmative defense; rather, it is the test for determining the essential element of "duty" in a negligence case involving a public official's actions. *Green v. Missouri Department Of Transportation*, 151 S.W.3d 877 (Mo.App. S.D. 2004).

The public duty doctrine applies especially broadly to the (in)actions of police officers. *Deuser*, 24 S.W.3d at 254. "Missouri courts have broadly construed the meaning of public duties involving police officers." *Id*., citing, *Cooper v. Planthold*, 857 S.W.2d 477 (Mo.App. E.D. 1993). Responding to emergencies goes to the heart of

police officers' public duties. By contrast, when denying the public duty doctrine's application to officers' driving police cars, courts have been careful to specify that the public duty doctrine does not apply due to the **non**-emergency nature of the driving at issue. See, e.g., *Brown v. Tate*, 888 S.W.2d 413 (Mo.App. W.D. 1994).

This distinction between application of the public duty doctrine to emergency driving and the duty of ordinary care to non-emergency driving only makes sense. When driving in non-emergencies, police officers are very much like anyone else when driving. The people foreseeably harmed by their driving decisions are merely others on the road. But when responding to emergencies, an officer's duties expand dramatically. The officer responding to an emergency has a duty to act with "daring and dispatch". *Krause*, supra; and *Hockensmith v. Brown*, 929 S.W.2d 840, 847 (Mo.App. W.D. 1996). The officer then drives with concern for not only others on the road but also for those people at the scene of the emergency, those who may come to be at the scene of the emergency, and the public at large with its interest in prompt, higher-than-speed-limit response time to "an emergency call of the highest priority". All those other people,-- the public as a whole,-- are

foreseeably harmed by the officers' driving decisions in response to an emergency.

Here, the parties agree that Ratliff was reacting to an emergency situation. L.F. L.F. 32, para. 12; L.F. 156, para. 12 (See also, L.F. 42-45, paras. 4, 8-11, 14-20). The parties agree it was an emergency "of the highest priority". L.F. 32, para. 12; L.F. 156, para. 12. The people Ratliff's driving at the time foreseeably affected included: his fellow officer in rendering physical protection, and perhaps medical aid, *immediately*; protecting and perhaps giving medical aid to any persons who might also happen to be in harm's way at Barton's confrontation with the armed suspect *immediately*; making himself available to render aid to other persons elsewhere in the City who might call for police while Ratliff was so engaged; to everyone in the community who has an interest in emergencies of the highest priority receiving attention at a greater speed than normal speed limits would allow; and to the City itself. His duties in responding the officer in need of aid call were not owed to Plaintiffs alone or any other specific person[s].

Were cities and officers held liable for alleged errors under such circumstances, then "the effect would be to lessen the effect of law

enforcement and unreasonably endanger individuals in situations that are already dangerous enough." *Murray v. Leyshock*, 915 F.2d 1196, 1201 (8th Cir. 1990).

Similarly, the claims against Lacey and Baker must fail on account of the public duty doctrine. The acts of negligence claimed against Lacey all relate to how he reacted to this emergency situation. Again, an officer's actions in responding to an emergency such as this arise out of duties owed to the public. Those duties include those owed to his fellow officers, others who might be in harm's way at Barton's anticipated meeting with the armed suspect, and others who might simultaneously call for police help elsewhere in Farmington,-- not solely to those pulled over on Maple Valley Drive and who might pull out in the path of an emergency vehicle. Even an officer's duty to follow an internal police policy arises out of a duty owed to the public at large, not to mention his/her employer(s), as opposed to any particular individual.[6]

[6] Southers' own purported "expert" agreed with this very point. L.F. 279 [upper right quatro, depo. p. 84, l. 2-18].

The acts of negligence claimed against Baker all relate to how he went about implementing policies and training the police officers under him. Actions in this regard also plainly arise out of duties owed to the general public (including the officers themselves) and not to Southers alone.

B. The Public Duty Doctrine Applies To Farmington.

The public duty doctrine applies to both public officials and the governmental entities employing them. *Heins Implement Co. v. Missouri Highway & Transportation Commission*, 859 S.W.2d 681, 694 (Mo. banc 1993) ("The public duty doctrine shields public officers, and the governmental bodies that employ them, from liability for injuries or damages resulting from the officer's breach of a duty owed to the general public as opposed to particular individuals."). See also, *Green v. Missouri Department Of Transportation*, 151 S.W.3d 877, 881-883 (Mo.App.S.D. 2004); and *Berger v. City Of University City*, 676 S.W.2d 39, 41 (Mo.App.E.D. 1984).

This rule of law makes sense, and is even conceptually necessary, even after *Davis*. The public duty doctrine differs from qualified immunity in a conceptual way, and that difference is crucial here.

Unlike qualified immunity, the public duty doctrine is not actually an immunity, or any other type of affirmative defense at all. A defendant need not even plead it to use it. Rather, the public duty doctrine defines the essential element of duty in negligence cases involving public officials. *Green v. Missouri Department Of Transportation*, 151 S.W.3d 877 (Mo.App. S.D. 2004); see also, *Spotts v. City of Kansas City*, 728 S.W.2d 242, 248 (Mo.App. W.D. 1987).

Absent the plaintiff establishing the fundamental elements of negligence, of course, there can be no liability on any respondeat superior basis. *Stanley v. City of Independence,* 995 S.W.2d 485, 488 (Mo. banc 1999). There is simply no tort at all. To now conclude that the public duty doctrine does not apply to governmental entities would make no sense given the doctrine's conceptual underpinnings. Extending the *Davis* result to the public duty doctrine, unlike to official immunity and other defenses, would require this Court to effectively re-write the doctrine's nature entirely.

Davis itself foreshadowed this distinction and explains why such a difference would be determinative:

> To be certain, if an employee is exonerated from liab-

> ility because the employee has not committed a tort, the governmental employer also is exonerated. *Stanley v. City of Independence*, 995 S.W.2d 485, 488 (Mo. banc 1999). But here, the jury found that Powell was negligent; he committed a tort. Official immunity does not deny the existence of this tort; rather, it provides that Powell will not be liable for damages caused by his negligence.

Davis, 193 S.W.3d at 765 -766. That opinion's footnote 8 necessarily suggests that where a doctrine *does* negate the element of duty (as official immunity does not, but the public duty doctrine does), the same result cannot apply. Thus, *Davis* itself effectively teaches that its result cannot conceptually apply to the public duty doctrine, which does negate the element of duty.

This Court may well believe that the legislature's sovereign immunity statute evinced an intent to shift the economic burden of all governmental motor vehicle operations, including perhaps even in emergency situations. But if the legislature intended to re-write the legal difference between affirmative defenses and a plaintiff's

fundamental elements of negligence, then it should make that intent clearer than by simply waiving a single affirmative defense.

Accomplishing such a policy-oriented result by the legislature, if indeed intended, requires abrogation of the conceptual underpinnings of the public duty doctrine. That would be within the legislative branch's political power to do as a matter of economic policy, but it should be clear if it is going to re-write the nature of tort law to accomplish that economic result. It is not the judiciary's burden to make and implement such policy decisions for the legislature. That is especially true where the legislature has, at best, drafted a poorly conceptualized statute to try to accomplish its supposed intent. Undertaking such a burden risks undermining the public confidence in the courts' roles as interpreters,-- not makers,-- of law.

IV. Official Immunity Shields The Officers From Individual Liability.

If nothing else, at least as to the Officers, official immunity eliminates any question of liability. If there is any remand of this case, it should be only as to Farmington, and not the individual officers.

A police officer responding to an emergency call has official immunity from civil liability with respect to any injuries arising from his driving,

as long as he drives with his lights and siren on and proceeds with due regard for the safety of others on the road. *Creighton v. Conway*, 937 S.W.2d 247 (Mo.App.E.D. 1996); *Bachmann v. Welby*, 860 S.W.2d 31, 34 (Mo.App. E.D. 1993). Recently, this Court affirmed this result and held unequivocally that under official immunity, **police officers *simply cannot be held individually liable* for accidents arising from their driving in response to emergencies**. *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763-763 (Mo. banc 2006). Any comparison of *Davis* to the facts here removes any doubt: official immunity applies to Ratliff's actions.

Official immunity protects public officers from civil liability arising from their performance of discretionary duties. *Green v. Denison*, 738 S.W.2d 861 (Mo. 1987). Discretionary duties involve "the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done…." *Rustici v. Weidemeyer*, 673 S.W.2d 762, 769 (Mo. 1984). A police officer's handling of an emergency situation such as the one Lacey confronted on May 12th rests fully within his judgment. See also, *Costello v. City Of Ellisville*, 921 S.W.2d 134, 136 (Mo.App. 1996);

and *Davis*, supra. Similarly, a police chief's decisions regarding what pursuit policies to implement and what vehicular pursuit training to provide for his officers are committed to his discretion. The decisions and (in)actions that Southers claims Lacey and Baker allegedly "negligently" made are protected by official immunity and cannot be the source of any liability to those officers.

V. As An Alternative Ground For Affirming, As To Farmington, Sovereign Immunity Applies.

Sovereign immunity bars all civil liability claims under state law except those claims based on hazardous property conditions or the operation of motor vehicles. RSMo. 537.600.

> Such sovereign … immunity as existed at common law … shall remain in full force and effect; except that, the immunity of the public entity from liability … is hereby expressly waived in the following instances: …
>
> 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. …

Mo.Rev.Stat. 537.600.

For this statutory waiver to apply, the alleged negligent actions or omissions must have more than the standard "but for" causal relationship; rather the injuries claimed must be "directly resulting from" the public employees' alleged (in)actions. *State, ex rel. Missouri Highway & Transportation Commission v. Dierker*, 961 S.W.2d 58 (Mo. 1998). In *Dierker*, there was no waiver of sovereign immunity for an alleged defect in the design of an overpass where an intervening criminal act occurred that actually caused the accident.

Here, Plaintiffs' decedent's own criminal act was the direct result of the accident. She failed to yield to an emergency vehicle in violation of several Missouri criminal statutes, including RSMo. 304.022. The statutory waiver of sovereign immunity does not apply to injuries that are directly caused by such a criminal action.

The allegedly negligent (in)actions of Lacey and Baker as they allegedly import liability to Farmington are easy to dismiss. Their alleged (in)actions are logically and legally far too remote from this accident to be considered "operation of motor vehicle" at all, much less the direct cause of the damages asserted here. Appellants themselves

acknowledge they face a virtually insurmountable hurdle in trying to claim that Lacey's and Baker's actions constitute "operation of a motor vehicle", and could merely ask the intermediate appellate court to "reconsider" its own precedent in that regard. Appellants' Brief, p. 44.

But even without the power of *stare decisis*, the characterization of Lacey's and Baker's conduct as "operation of a motor vehicle" simply makes no sense. Lacey's alleged negligence has nothing to do with how he operated his motor vehicle, rather strictly to do with how and when he did or did not radio officers into (or out of) the pursuit of O'Neal in accord with the pursuit policy. In these respects, Lacey may as well have been sitting at a radio at a desk. His (in)operation of any motor vehicle is irrelevant.

As to Chief Baker, his alleged negligence also has nothing to do with his operation of any motor vehicle. Rather, it relates solely to his alleged training and policy decisions, none of which can waive sovereign immunity as a matter of law. *Bittner v. City Of St. Louis Police Board Commissioners*, 925 S.W.2d 495 (Mo.App.E.D. 1996). And no such decisions, of course, logically constitute "operation of a motor vehicle" in any event.

Southers argues that Farmington purchased liability insurance thus waiving sovereign immunity. But the only suggestion of such alleged insurance (incompetently presented for summary judgment purposes anyway, by the way) applies exclusively (if at all) to Ratliff, and not to Lacey's or Baker's alleged actions, and not even to Farmington itself. L.F. 251. There is no evidence that ***Farmington*** has or had insurance for claims ***against it*** for Ratliff's actions that would be barred by sovereign immunity. In any event, whatever coverage Farmington may have had would naturally have been consistent with R.S.Mo. 537.740,-- not to mention the common-sense term of coverage that MOPERM would logically include in any policy issued to its member entities,-- and would have specifically excluded coverage of any claim that would be barred by sovereign immunity. See *Brown v. Forler*, 2007 WL 1018759 (E.D. Mo. 2007). But since there is no record evidence of any coverage of Farmington anyway, that non-record fact need not even come into play.

VI. The Court Properly Denied Southers' Attempt To Change Venue.

The parties and this Court have covered this ground before on Southers' earlier writ attempt. Though the standard of review then was

different, the outcome is the same. This matter is not a difficult or complex one to resolve. Missouri Supreme Court Rule 51.04 controls. As pointed out to Southers in every stage of the earlier writ process,-- and as Southers continues to completely ignore,-- the ancient cases relied upon to try to urge a different result ***pre-date*** the adoption of Rule 51.04. The Circuit Court held an evidentiary hearing on Southers' claim, found the evidence presented by Southers inadequate, and denied the motion. That is the exact procedure the rule says should be followed.

Missouri Supreme Court Rules 51.03 and 51.04 govern requests for change of venue. Southers did not make a timely application to invoke Rule 51.03 and therefore proceeded under 51.04. Southers' application referred to 508.130 R.S. Mo., which allows a party to petition the trial court for a change of venue because of objections to the inhabitants of the county. Section 508.140 provides in part that "the court or judge, as the case may be, shall consider the application, and if it is sufficient, the judge shall be disqualified or a change of venue shall be awarded." Section 508.140.1.

Supreme Court Rule 51.04, adopted in 1973, sets out the procedure to be followed when a party has requested such a change of venue for cause. *State, ex rel. American Family Mutual Insurance Company v. Koehr*, 832 S.W.2d 7, 8 (Mo.App.E.D. 1992). Supreme Court Rule 51.04(e) states, in pertinent part, "The adverse party, within ten days after the filing of the application for change of venue, may file a denial of the cause or causes alleged in the application…. ***If a denial is filed, the court shall hear evidence and determine the issues.***" Supreme Court Rule 51.04 (emphasis added). When a denial is filed, the movants are not relieved of their obligation to present evidence to prove the alleged prejudice that would justify their motion to change the venue based on cause. *American Family Mutual Insurance Company*, supra, at 8.

Southers' brief cites cases suggesting that, instead of following Rule 51.04(e), a trial court has a duty to instead automatically transfer the case immediately upon an application being filed in proper form. Southers argue that these cases require a court to grant the application and transfer venue on a party's unilateral demand, without regard to whether or not a denial is filed, and without regard to whether or not

any evidence actually supports the alleged "cause". But all the cases Southers rely upon for this proposition predate the adoption of Supreme Court Rule 51.04. Since the Rule's adoption, no opinion has suggested that such a procedure,-- directly contrary to the Rule's plain language,-- would be proper.

Even before Rule 51.04, the proper procedure for handling such motions was far from clear or free from disagreement. In *Carpenter v. Alton R. Co.*, 148 S.W.2d 68, 70 (Mo.App.1941), for instance, a change of venue was requested, but not granted. On appeal, the appellate court stated that "[t]he mere filing of an application for change of venue does not oust the court of jurisdiction. The court had jurisdiction to grant the change, or to deny it." *Carpenter*, 148 S.W.2d at 70. See also *Koenke v. Eldenburg, M.D.*, 803 S.W.2d 69, 69 (Mo.App. W.D. 1990).

Rule 51.04 resolved the matter. It set forth the procedure for determining the sufficiency of an application, which the statute says the court is supposed to make a determination on. Without this procedure that Rule 51.04 provides,-- and under Southers' position,-- any party could always obtain a change of venue as a matter of absolute, unilateral right simply by filing an application in proper form

regardless of whether the other parties contested the alleged "cause" or not. As long as the allegations are made in the correct format, Appellants necessarily argue, those allegations may never be tested. Under Southers' argument, change of venue "for cause" would become change of venue "at whim",-- any one party's whim. That is not good policy and Rule 51.04 teaches that it is not the law.

Accordingly, Judge Pratte proceeded properly by holding an evidentiary hearing on the matter. And at that hearing, by the way, Southers adduced practically no competent evidence of any import or persuasive value in any event. The court ruled against Southers on the facts. The denial of the Motion for Change of Venue was entirely proper.

CONCLUSION

This was a tragic and terrible accident. But that does not mean that Respondents are liable for it. No evidence shows any negligence by the Respondents that caused this accident. Rather, all the evidence points exclusively to the negligence of Southers' decedent as causing this accident. Even if there were such negligence, none of the Officers could be held liable anyway because of official immunity. And even if

there were such negligence, none of the Defendants (both Officers and Farmington) could be held liable anyway because of the public duty doctrine. And finally even if there were such negligence, Farmington could not be held liable for it anyway as it was too remote to be the direct cause of Plaintiffs' injuries. For all the foregoing reasons, Respondents respectfully request this Court to affirm the judgment.

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Certificate Of Compliance

The undersigned certifies that the foregoing brief complies with the limitations contained in 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 8,889 words.

The undersigned further certifies that a virus-free Word version of the foregoing brief is being provided via the simultaneously submitted disk in accordance with Rule 84.06.

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Certificate Of Service

The undersigned certifies that a copy of Respondents' Brief was mailed, and an electronic version was emailed, on this 12th day of October, 2007, via U.S. Mail, first-class postage pre-paid, to Mathew H. Devoti, Thomas J. Casey, and Danko Princip, 100 North Broadway, Ste. 1000, St. Louis, MO, 63102.

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