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MICHELLE V. STALLINGS

March 31, 2008

Hon. Thomas F. Simon
Clerk, Supreme Court of Missouri
P.O. Box 150
Jefferson City, MO 65102

**DUPLICATE
OF FILING ON**

MAR 31 2008

IN OFFICE OF

re: *Southers, et al., v. City Of Farmington, Missouri*, No. SC99612

CLERK SUPREME COURT

Dear Mr. Simon:

I write in response to the Court's 3/13/08 Order requesting a letter brief on the issue of an employer's potential liability for an employee's conduct that goes beyond ordinary negligence.

Introduction

Where a liability theory against a police officer rests on the allegation of a violation of a departmental policy,-- which alleged violation removes the officer's discretion that would otherwise exist under statute,-- and where that alleged violation goes beyond ordinary negligence,-- no respondeat superior liability exists.

Southers acknowledged and admitted on the record during oral argument that more than ordinary negligence here was required to establish liability.¹ Additionally and even without such an admission, to the extent Ratliff was following emergency system instructions, Ratliff's liability could only exist under a "gross negligence" standard in any event. R.S.Mo. 190.307.

¹ Respondents have not yet obtained access to a transcript of oral argument. But if memory correctly serves, this acknowledgement came in response to a question from either Justice Limbaugh or Justice Price at a point approximately five minutes into Southers' argument.

Beyond Ordinary Negligence

Analyzing the (in)applicability of respondeat superior to conduct beyond ordinary negligence calls first for identifying what conduct goes beyond ordinary negligence.

The Eastern District Court of Appeals had indeed complained of the Legislature's use of the term, "gross negligence", and once opined that Missouri courts do not recognize differing degrees of negligence. *Boyer v. Tilzer*, 831 S.W.2d 695, 697 – 698, (Mo.App. E.D. 1992). But in that same opinion, that court nevertheless gave the term teeth by holding that the defendants before it could not be liable under the jury instruction for ordinary negligence. The *Boyer* court affirmed the judgment for the defendants before it, finding, "[a] thorough review of the evidence in this case, . . . , provides no basis for finding a degree of fault beyond ordinary negligence." *Id.* The *Boyer* opinion found no gross negligence because no evidence supported a finding of "*conscious* indifference tantamount to *willful and* wanton abrogation of professional duties." *Id.* [emphasis added].

Also in the context of discussing gross negligence, this Court set out a contrast of "ordinary negligence" to something beyond ordinary negligence:

The applicable standard of care, for ordinary negligence, is what the normal member of Dr. Tendai's profession would have done when treating a patient with IUGR under similar circumstances. *See State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 159 (Mo. banc 2003). Dr. Cameron testified that his definition of the standard that Dr. Tendai violated was "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of this profession," which is a definition of ordinary negligence. Dr. Cameron testified that the standard of care for treatment of IUGR requires bi-weekly monitoring and non-stress testing. Dr. Tendai violated that standard of care by his failure to procure this testing for S.G., Dr. Cameron testified.

There is a wide difference between "ordinary negligence" and "gross negligence." Not every deviation from a profession's standard of care is gross negligence—professionals make mistakes that neither show *conscious* indifference to their duties nor gross deviations from their profession's standards. There was nothing in Dr. Cameron's testimony to

support a conclusion that Dr. Tendai's conduct showed *conscious* indifference to his professional duty or otherwise grossly violated the standard of care.

Tendai v. Missouri State Bd. of Registration for Healing Arts, 161 S.W.3d 358, 367 (Mo. 2005) [emphasis added].

In the context of police officers (and even before R.S.Mo. 190.307), this Court recognized that an even higher standard may apply:

Schooler v. Arrington, 106 Mo.App. 607, 81 S.W. 468 (1904), holds that a public officer may be held liable for persons injured in the performance of discretionary duties only if “*willful* wrong, malice or corruption” is shown. We do not now have to decide whether this is the proper standard or whether some variation of it is appropriate. The evidence in this record, taken most strongly from the plaintiffs' point of view, provides no basis or finding of any degree of fault beyond ordinary negligence.

Green v. Denison, 738 S.W.2d 861, 868 (Mo. 1987). This “willful wrong” definition is the applicable standard Respondents would support, as it arises specifically in the context of police officers. But the other above-mentioned definitions might also apply, should the Court opt for one of them despite Respondents’ urging.

So, “beyond ordinary negligence” requires a finding that there was (depending on this Court’s choice of the proper definition in this context):

- “conscious indifference amounting to a willful and wanton abrogation of professional duties”; or
- “conscious indifference to their duties”; or
- “willful wrong, malice or corruption”.²

² The phrase “gross deviations from their profession’s standards” also appears in the above-cited sources. But that phrase uses the term “gross” to help define itself. And the *Tendai* case it comes from involved medical care issues, which specifically relate to that profession’s standards. These observations tend to make that particular phrase less useful in understanding what might be “beyond ordinary negligence” here.

Application Of Respondeat Superior

The question of respondeat superior depends on the facts and circumstances in evidence in each particular case; no single test is conclusive. *Sharp v. W. & W. Trucking Co.*, 421 S.W.2d 213, 220 (Mo. banc 1967). An employer may be liable for an employee's acts that are within the scope of employment and done for the purpose of performing work the employer assigned. *Henderson v. Laclede Radio, Inc.*, 506 S.W.2d 434, 436 (Mo.1974). The employee must be engaged in the furtherance the employer's business and not simply acting during the time of employment. *Gardner v. Simmons*, 370 S.W.2d 359, 364 (Mo.1963). In this regard, actions in violation of the employer's specific rules are instructive. This Court has found in at least one context that if an employee engages in actions that the employer had explicitly prohibited, then that factor weighs heavily against a finding of respondeat superior. *Gibson v. Brewer*, 952 S.W.2d 239, 245 -246 (Mo.1997).

Ensuring and promoting lawful conduct are police officers' *raison d'etre*. Obedience to lawful authority lies at the very heart of furthering a police officer's employer's business. It would seem illogical, to say the least, to hold a police officer's employer liable on a respondeat superior theory for conduct that allegedly violated lawful rules and regulations.

Here, Southers' theory of liability against Ratliff rests on a claim that he violated R.S.Mo. 304.022 because by engaging in any sort of pursuit at all, he violated a departmental policy. This alleged violation, Southers urges, removes application of both the public duty doctrine and official immunity. If this Court were to agree with this argument,-- thus overruling *Cooper v. Planthold*, 857 S.W.2d 477, 479-480 (Mo.App. E.D. 1993) (holding that violation of internal departmental policies does not create any sort of liability or remove the officer's actions from the public duty doctrine where the policy violated creates no special duty unique to the plaintiff),-- then it would be determining that liability rests on an action that violated Farmington's explicit instructions to Ratliff such that Ratliff violated R.S.Mo. 304.022 by driving over the speed limit outside of that statute's authority.

Answering the Court's question contemplates a finding beyond mere acceptance of Southers' assertion and the overruling of *Cooper v. Planthold*:

To the extent such an alleged violation occurred (or there is a genuine factual issue as to whether it occurred) and may give rise to liability, the violation would have to amount to purposefully or at least knowingly unlawful conduct. This is because any of the standards described above describing conduct that goes beyond ordinary negligence call for either intent or scienter. ("*conscious* indifference", "*willful and wanton* abrogation", "*willful* wrong", [emphasis added]).

So here, *if* a fact-finder were to conclude that Ratliff violated the policy, *and* were to find that he violated it in such a way that rose beyond ordinary negligence, then it must be found that Ratliff so acted willfully, or at least knowingly. **That is, for such a finding to occur, a fact-finder would have to determine that Ratliff violated the law fully intending or at least knowing that he was doing so.** Keeping in mind that police officers' employers hire them *for the very purpose of deterring unlawful conduct*, it would reach the height of inconsistency to hold a police officer's employer liable under respondeat superior based on such a theory.

Conclusion

For all the foregoing reasons, and for those expressed in their original brief, Respondents respectfully request this Court to affirm the holdings below of the Missouri Court of Appeals for The Eastern District and of the Circuit Court.

Kindest Regards,



Mark H. Zoole #38635
Counsel for Respondents

Certificate Of Service

The undersigned certifies that a true and correct copy of the foregoing was mailed via U.S. Mail, first-class postage pre-paid, to Mathew J. Devoti, 100 North Broadway, Ste. 1000, St. Louis, MO, 63102, on this 31st day of March, 2008.


