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March 21, 2008

Honorable Thomas F. Simon
Clerk of the Supreme Court
State of Missouri
P.O. Box 150
Jefferson City, Missouri 65102

Sent via Federal Express

In re: Debra Southers, et al, Appellants –vs-
City of Farmington, Missouri, et al, Respondents
Missouri Supreme Court No. SC88612

Dear Mr. Simon:

We are in receipt of the Order of the Court entered March 13 directing the parties to submit a letter brief. Pursuant to the Order, please consider this correspondence Appellants' letter brief addressing the matter.

Specifically, the Court directed each party to answer the following question:

“If an employee’s conduct is beyond ordinary negligence, does it fall outside the scope of his employment and can his employer be liable for that conduct?”

The answer: “The employee’s conduct remains within the scope of his employment so long as the conduct is done in the performance of the employer’s business. In such a circumstance, the employer shall be liable for injuries caused by the conduct.” This answer is supported by multiple cases in which a Missouri court affirmed the vicarious liability of an employer for injury caused by the reckless or outrageous conduct of its employee. Those cases are discussed and cited below.

The gist of the question presented by this Court seems to be whether the conduct of an employee that is “beyond ordinary negligence” may fall within the scope of the employee’s employment. After all, an employer is liable for the negligent actions of its employee if the actions were done within the scope of his employment duties. Davis v. Lambert-St. Louis Int’l Airport, 193 S.W.3d 760, 765 (Mo.banc 2006); Linam v. Murphy, 232 S.W.2d 937, 941 (Mo. 1950). Yet, the question posed by the Court suggests a second inquiry:

“What type of conduct is ‘beyond ordinary negligence’?”

Our research has discovered only two cases in which the appellate courts of this State have used the phrase – “beyond ordinary negligence.” In the first case, this Court considered the parameters of the official immunity doctrine in the context of claims made by bystanders injured during the course of an arrest. Green v. Denison, 738 S.W.2d 861, 862-863 (Mo.banc 1987). In its discussion, this Court noted a then eighty-three year old Kansas City Court of Appeals decision suggesting that a public officer may be held liable for injuries resulting from the performance of discretionary duties only if “willful wrong, malice or corruption” is shown. Id. at 868; see Schooler v. Arrington, 81 S.W. 468 (Mo.App.K.C. 1904). In holding that the individual officers were protected by the doctrine of official immunity in that negligence case, the Court noted that “the evidence in the record. . . provides no basis or finding of any degree of fault *beyond ordinary negligence.*” Green, 738 S.W.2d at 868 (emphasis added). The Court did not further define or discuss the phrase.

Five years later, the Eastern District utilized the phrase while considering a case brought by the family of a woman killed by a mental patient. The family sued a psychiatrist employed by the state who had released the patient from a state mental health facility. See Boyer v. Tilzer, 831 S.W.2d 695, 696-697 (Mo.App.E.D. 1992). That court used the phrase in discussion of a statute directing that certain public officials shall not be civilly liable for discharging a mental patient so long as the official performed her duties “in good faith and without gross negligence”. Id. at 697. In its review of the evidence in view of the statute, the court concluded that the evidence put forward at trial “provides no basis for finding a degree of fault *beyond ordinary negligence.*” Id. at 698 (emphasis added). Again, the court did not further define the phrase, though the court noted in a related discussion of “gross negligence” a separate opinion of this Court directing:

The plaintiff gains nothing by branding the negligence “gross” because Missouri has consistently refused to recognize differing degrees of negligence.

Id. at 697; *see also* Sherrill v. Wilson, 653 S.W.2d 661, 664 (Mo.banc 1983).

However, despite the infrequent use of the phrase, Missouri courts have considered situations involving allegations that an employee's negligent conduct was "beyond ordinary" – cases involving the propriety of the submission of punitive damages against an employer premised upon the conduct of its employee. In multiple cases, Missouri courts have upheld a punitive damage submission against an employer where agency and the scope of employment were not at issue. *See Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426 (Mo.banc 1985); Flood v. Holzwarth, 182 S.W.3d 673 (Mo.App.S.D. 2005); Smith v. Courter, 575 S.W.2d 199 (Mo.App.K.C. 1978). In each of these cases, the employer's liability was premised upon the negligent conduct of an employee. And, in each case, the plaintiff put forth evidence suggesting that the employee's conduct went beyond mere negligence – in fact, conduct suggesting a conscious disregard for the rights of others. In Hoover's Dairy, this Court recognized that where liability is established by negligence, the negligent conduct may further rise to the level of "reckless" so as to warrant punitive damages. The Court quoted and cited the following language from a previous opinion:

[A]n act or omission, though properly characterized as negligent, may manifest such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted. . . *Or there may be conscious negligence tantamount to intentional wrongdoing, as where the person doing the act or failing to act must be conscious of his conduct, and, though having no specific intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.*

Hoover's Dairy, 700 S.W.2d at 435 (*quoting* Sharp v. Robberson, 495 S.W.2d 394 (Mo.banc 1973) (emphasis in original; internal citations omitted). *See also* Flood, 182 S.W.3d at 681. These cases are instructive in that they set forth scenarios in which an appellate court affirmed the vicarious liability of an employer for injury caused by both the negligent *and reckless* conduct of its employee where agency was not at issue.

Of course, here, the issue presented by this Court does not suppose admission of agency or that the "beyond ordinary negligent" conduct of an employee occurs within the scope of employment. Yet, Missouri courts have found employees to have been acting within the course of employment and affirmed *respondeat superior* liability despite evidence establishing conduct exceeding mere negligence. *See* Linam, 232 S.W.2d at 937; Wagstaff v. City of Maplewood, 615 S.W.2d 608 (Mo.App.E.D. 1981). For instance, in Linam, this

Court reversed a directed verdict in favor of a partnership which operated a flight school in Joplin. Linam, 232 S.W.2d at 943. The partnership claimed that a flight instructor was acting outside the course of his employment when he “buzzed” a dam during a training flight, striking electrical wires over a river. Id. at 940-941. The partnership admitted that it employed the instructor but claimed that he was working outside the scope of his employment as the instructor was acting “for his own amusement” at the time of the crash. Id. at 941. This Court disagreed, finding that the motive of the instructor was immaterial; according to this Court, an act or omission is deemed to be within the scope of employment so long as the conduct is done in the performance of the employer’s business. Id. at 942.

Likewise, in Wagstaff, the Eastern District affirmed a judgment against a municipal employer despite a claim by the city that the nature of its police officer’s actions took them outside the scope of his employment. Wagstaff, 615 S.W.2d at 613. That case arose from the shooting death of a severely mentally retarded man during the course of an interrogation. Id. at 609-610. The municipality admitted that it employed the officer. But, the municipality asserted that the shooting was “outrageous and irresponsible” and, therefore, outside the scope of the officer’s employment. Id. at 610. The Eastern District disagreed, recognizing that an act is within the course of employment if:

The act is of the kind he is employed to perform, occurs within the authorized time and space limits and is performed, at least in part with, the intent of serving the employer.

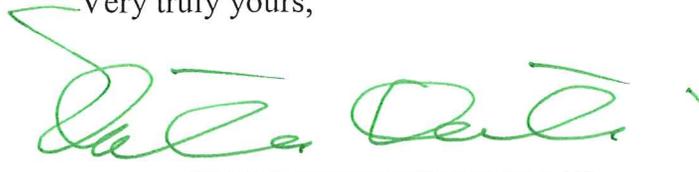
Id. at 610. The court added that an employer cannot escape liability where the employer sanctions the use of force under certain circumstances and the employee, intending to act for his employer, uses more than necessary force in an excess of zeal. Id. at 611.

An employee’s conduct that is beyond ordinary negligence may fall within the scope of his employment. In the cases cited above, the key inquiry appears to be whether the employee was acting in the performance of his employer’s business at the time of the act or omission at issue. If yes, the opinions suggest, then the employee’s conduct falls within the course of his employment – whether or not the employee acted in a reckless, outrageous or irresponsible manner. And, should the tortious conduct fall within the course of employment, then the employer shall be responsible for the resulting injury. Linam, 232 S.W.2d at 941; Smith, 575 S.W.2d at 209-210.

We trust that the above adequately answers the question posed by the Court. Thank you for the opportunity to address this matter.

Best wishes.

Very truly yours,

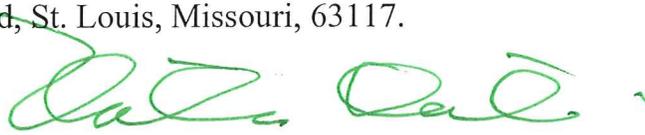


Matthew J. Devoti

MJD/mlr

Certificate of Service

A true copy of the foregoing has been served upon Respondents by depositing the same in the United States mail, postage pre-paid, this 21st day of March, 2008, addressed to the attorney of record herein, Mr. Mark H. Zoole, Attorney at Law, 1200 South Big Bend, St. Louis, Missouri, 63117.



Matthew J. Devoti