

IN THE
MISSOURI SUPREME COURT

No. SC87138

LEE DAVIS
Plaintiff-Respondent,

v.

LAMBERT-ST. LOUIS INTERNATIONAL AIRPORT
and
WILLIAM POWELL
Defendant-Appellants.

Appeal from the Circuit Court of the City of St. Louis
Division No. 20
Hon. Donald L. McCullin, Judge

SUBSTITUTE BRIEF OF RESPONDENT LEE DAVIS

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STATEMENT OF FACTS

Plaintiff Lee Davis filed suit alleging that defendant William Powell negligently operated a St. Louis Airport Police patrol vehicle in St. Louis County striking Plaintiff Lee Davis' vehicle and causing him injury. (LF 12, Tr. 44-46) Mr. Davis further alleged that William Powell was acting within the course and scope of his employment as a police officer with Defendant Lambert-St. Louis International Airport. (LF 11) The case was tried in the Circuit Court of the City of St. Louis, before the Honorable Donald L. McCullin.

At trial, Plaintiff Lee Davis testified he was operating a Boeing security vehicle and was about to exit the Boeing property onto Banshee Road when he heard a siren and saw lights heading east on Banshee Road. (Tr. 16-17) Mr. Davis testified that he stopped his vehicle before entering the roadway. (Tr. 27) He remained stopped waiting for the emergency vehicle to pass, but the driver slammed on his brakes, lost control of his patrol car and struck Mr. Davis' vehicle on the front left side. (Tr. 42-46) Mr. Davis estimated that Powell was traveling approximately 90 mph before applying his brakes. (Tr. 28) Mr. Powell testified that he applied his brakes when he saw Mr. Davis' stopped vehicle but he skidded into the Davis

vehicle. (Tr. 118-119) Mr. Powell testified that the Davis vehicle was in the travel portion of Banshee Road when he applied his brakes. (Tr. 118) Powell claimed Davis was contributorily negligent in failing to yield the right of way and keep a careful lookout. (Tr. 110-111, LF 15) Mr. Powell pled as an affirmative defense that he was protected by official immunity. (LF 15) The trial court ruled Davis was not protected by official immunity (Tr. 108-109) and refused Powell's affirmative defense instruction. (Tr. 107, LF 23)

The jury returned a verdict assessing twenty-five percent (25%) of the fault to Defendants William Powell and the remaining seventy-five percent (75%) of fault to Plaintiff Lee Davis. (LF 16) The jury found Plaintiff's damages to be \$25,000.00 for a net verdict against Defendant Lambert-St. Louis International Airport in the amount of \$6,250.00. (LF 17)

Defendants timely filed a motion for new trial/JNOV in which they raised the issue of official immunity as to William Powell and claimed immunity for his employer sued under a *respondeat superior* theory. (LF 19-24) The trial court did not rule on Defendants' motion, which was deemed denied on August 17, 2004 under Rule 78.06. (LF 2) Defendants then filed their notice of appeal on August 19, 2004. (LF 25)

The Court of Appeals, Eastern District issued its opinion on September 20, 2005 affirming the judgment but transferred the case to this

Court because of the general importance of the issues involved and to reexamine existing law as to whether a governmental employer should be immune from liability when sued under a *respondeat superior* theory where the negligent employee is protected from liability under the doctrine of official immunity. (App. Appendix A 6-27)

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANTS WILLIAM POWELL AND LAMBERT ST. LOUIS INTERNATIONAL AIRPORT BECAUSE DEFENDANT WAS NOT BLANKETLY PROTECTED BY OFFICIAL IMMUNITY UNDER 304.022.5 RSMo. IN THAT

- (A) EVEN IF HIS LIGHTS AND SIRENS WERE ACTIVATED, DEFENDANT POWELL STILL HAD A DUTY TO EXERCISE REASONABLE DISCRETION AND PROCEED “AS MAY BE NECESSARY FOR SAFE OPERATION ... NOT TO ENDANGER LIFE OR PROPERTY” IN ORDER TO BE PROTECTED UNDER §304.022.5 AND THE EVIDENCE SHOWED POWELL LOST CONTROL OF HIS VEHICLE, FAILED TO SWERVE, AND STRUCK PLAINTIFF’S STOPPED VEHICLE, AND
- (B) IT IS DEFENDANT’S BURDEN TO PROVE COMPLIANCE WITH §304.022 AND ANY INSTRUCTIONAL ERROR BY THE TRIAL COURT IN FAILING TO SUBMIT AN AFFIRMATIVE DEFENSE INSTRUCTION WAS WAIVED BY APPELLANT.

A. William Powell was not shielded by official immunity under §304.022 RSMo.

Defendant relies on §304.022.5 RSMo. to cloak his negligent actions with the protection of official immunity. Section 304.022.5 RSMo. (2004) states:

- (1) The driver of any vehicle referred to in subsection 4 of this section shall not sound the siren thereon or have the front red

lights or blue lights on except when such vehicle is responding to an emergency call or when in pursuit of an actual or suspected law violator or when responding to, but not, returning from, a fire;

- (2) The driver of an emergency vehicle may:
 - (a) Park or stand irrespective of the provisions of Sections 304.014 to 304.026;
 - (b) Proceed past a red or stop signal or stop sign but only after slowing down as may be necessary for safe operation;
 - (c) Exceed the *prime facie* speed limits as long as the driver does not endanger life or property;
 - (d) Disregard regulations governing direction of movement or turning in specified directions.

While this statute grants some authority to public officials to violate proscribed “rules of the road”, the statute is not without limitations.

Oberkramer v. City of Ellisville, 706 S.W.2d 440, 441-2 (Mo. banc 1986) In *Robinson v. Gerber*, 454 S.W.2d 933, 938 (Mo. App. E.D. 1970), the driver of an ambulance, who was traveling northbound, was found negligent and liable to a driver who was proceeding in a southbound lane of traffic. The Court in *Gerber* reasoned that § 304.010 RSMo. requires that every person operating a motor vehicle on the highways of Missouri shall exercise the highest degree of care and neither it nor § 304.022 RSMo. pertaining to emergency vehicles make any exceptions. *Id.* In other words, the driver of an

emergency vehicle authorized by § 304.022 RSMo. to do things constituting a violation of what are known as the “rules of the road”, must exercise the highest degree of care. The highest degree of care is defined as the care a very careful and prudent person would ordinary use under the same or similar circumstances. *Id.*

This emphasis on safety and exercise of due care is codified in Section 304.022.5 which contains expressed limitations on a driver of an emergency vehicle when performing his duties. The statute allows the officer to disregard a “red or stop signal or stop light, *but only after* slowing down as may be necessary for safe operation.” [Emphasis Added] § 304.022.5.2(b) RSMo. 2004 In addition, the statute allows the officer to “exceed speed limits, *as long as* the driver does not endanger life or property.” [Emphasis Added] §304.022.5.2(c) RSMo. 2004 The emphasized language implies that the power of a police officer to violate statutory “rules of the road” is not boundless. The inclusion of this language implies that if the officer fails to operate his vehicle in a safe manner as proscribed by the statute, the officer is liable under the theory of negligence and not protected by official immunity. *Oberkramer v. City of Ellisville*, 706 S.W.2d at 441. A police officer is required under §304.022 “to observe the care a reasonably prudent person would exercise in the discharge of official duties under like

circumstances.” *Id.* An officer’s actions cannot “unreasonably” endanger life or property. *Id.*

Official Immunity is not a shield if the public official operating an emergency vehicle has not first complied with the requirements of §304.022.5. *Pace v. Pacific Fire Protection District*, 945 S.W.2d 7, 10 (Mo. App. E.D. 1997) If the statute requires more than lights and sirens, the statute’s provisions should be complied with *before* immunity protects discretionary actions. In this case Mr. Davis presented evidence that Mr. Powell failed to meet the statute’s requirements by locking his brakes, losing control of his vehicle and failing to swerve to avoid a stopped car. If Powell failed to exercise the highest degree of care to meet the requirements of § 304.022 RSMo., he cannot enjoy the protection of official immunity even if his actions would otherwise be categorized as discretionary. *Id.*

The Eastern District Court of Appeals concluded to the contrary in *Costello v. City of Ellisville*, 921 S.W.2d 134 (Mo. App. E.D. 1996) and *Creighton v. Conway*, 937 S.W.2d 247 (Mo. App. E.D. 1996). The court drew a bright line requiring only lights and sirens to cloak an official with immunity and held that §304.022.5.2 (b) and (c) merely “suggest how the driver of an emergency vehicle proceed” and were not mandatory. *Costello*, 921 S.W.2d at 137. This reasoning runs counter to the plain language of the

statute and renders §304.022.5.2 (b) and (c) meaningless. The Court has a duty to read the statute in its plain, ordinary and usual sense giving effect to all provisions as written. *Bosworth v. Sewell*, 918 S.W.2d 773 (Mo. banc 1996); *State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 224-225 (Mo. banc 1986) The statute's clear intent is to codify a minimum standard of care before the immunity afforded by the statute applies. Labeling §304.022.5 (b) and (c) as "suggestions" to guide discretionary acts and therefore not mandatory to comply with the statute puts the cart before the horse.

In this case, the jury found that Lambert-St. Louis International Airport's employee, William Powell, was negligent in operating his emergency vehicle even though he was justified in proceeding through the intersection against the traffic signal at a speed over the limit under the conditions of §304.022.5 RSMo. The Plaintiff's theory of negligence was not that Mr. Powell proceeded through the intersection against the light or at speeds in excess of the limit. The Plaintiff's theory of negligence was that Defendant in operating his emergency vehicle at 90 mph locked his breaks, lost control and failed to swerve to avoid Mr. Davis who had stopped to allow Mr. Powell to proceed through the intersection. (Tr. 162-164)

The evidence showed Mr. Powell did not “slow down to proceed safely through the intersection or travel at a speed which did not endanger life and property.” He did not comply with §304.022.5(b) and (c). The Court in *Creighton v. Conway* recognized that the evidence must show a driver exercised “reasonable discretion” in determining speed and observance of traffic regulations. 935 S.W.2d at 251. The “highest degree of care” is required for compliance. *Oberkramer*, 706 S.W.2d at 441. This is how the trial court instructed the jury. (Tr. 107-109) The trial court ruled that Powell owed a duty to exercise reasonable discretion and the highest degree of care in operating his vehicle through the intersection against the light. (Tr. 107-110) The jury found Powell negligent because he did not use reasonable discretion to swerve to avoid the collision. Under these circumstances, the doctrine of official immunity does not apply. Plaintiff made a submissible case of negligence against Mr. Powell and his employer Lambert-St. Louis International Airport.

B. Waiver of Instructional Error

Furthermore, the “emergency vehicle defense” is conditional in nature and the burden is on the defendant to raise and prove it. *Robison v. Cameron*, 118 S.W.3d 638, 643 (Mo. App. S.D. 2003) (citing *Robinson v. Gerber*, 454 S.W.2d at 937-8) It is not an element of Plaintiff’s case to prove

absence of justification. *Id.* In the Motion for New Trial, Defendants raised instructional error in the trial court's failure to submit Powell's affirmative defense. (LF 21) The issue, however, was not raised on appeal. Appellants have waived any argument of instructional error concerning the failure to submit an affirmative defense. §84.04(e) RSMo.; *Chang v. Lundry*, 117 S.W.3d 161, 163 (Mo. App. S.D. 2003)

The Court cannot assume from the judgment entered (LF 16-17) that the trial court determined official immunity applied as a matter of law. The Court of Appeals, Eastern District in the majority opinion makes the assumption that the trial court ruled Powell was entitled to official immunity. (Appellants' Appendix A-8) This assumption is not supported by the record on appeal. In fact, the opposite should be assumed as the trial court:

- a) denied Powell's Motion for Summary Judgment on the issue prior to trial (LF 4);
- b) denied the Defendant's Motion for Directed Verdict at the close of Plaintiff's case (LF 5);
- c) denied Defendant's Motion for Directed Verdict at the close of the entire case (LF 3);
- d) refused to submit Powell's proposed affirmative defense instruction because it was not the correct law (LF 23, Tr. 108-109) and;

- e) denied Defendant's Motion for Judgment
Notwithstanding the Verdict and Motion for New Trial
by operation of Rule 78.06 (LF 2, 19-22)

The language of the judgment is explained by the fact that defendant Lambert-St. Louis International Airport admitted agency. (Tr. 112-113) The jury's verdict assessed a percentage of fault to both Defendants. (Tr. 183) Plaintiff argued in closing that Powell had not complied with §304.022 even though his lights and sirens were activated. (Tr. 162-164) The only converse instruction allowed by the Court and argued by the defense was the theory that Powell could not have reasonably been expected to swerve to avoid the accident. (Tr. 173-174) At the instruction conference, the trial court rejected Defendants' argument that only lights and sirens were required. (Tr. 107-109) The case was submitted to the jury on Powell's negligent failure to avoid the accident and the jury returned a verdict assessing 25% fault to Mr. Powell. Plaintiff made a submissible case against both Defendants. This Court must affirm the judgment.

II.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANT LAMBERT-ST. LOUIS INTERNATIONAL AIRPORT UNDER A *RESPONDEAT SUPERIOR* THEORY BECAUSE EVEN IF ITS EMPLOYEE WILLIAM POWELL WAS PROTECTED BY OFFICIAL IMMUNITY HIS EMPLOYER IS NOT PROTECTED AND CAN BE HELD LIABLE WHEN IT'S EMPLOYEE IS FOUND NEGLIGENT.

Even if the Court were to find official immunity shields Mr. Powell from liability for negligence, the statute does not shield his employer sued under a *respondeat superior* theory. St. Louis-Lambert International Airport argues that it cannot be vicariously liable to Mr. Davis because if immunity applies to Mr. Powell, Mr. Davis can't make a submissible case of negligence and, therefore, his employer cannot be liable. This reasoning is incorrect.

Sovereign immunity and official immunity are distinct legal concepts *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 294 (Mo. App. E.D. 1983). Governmental entities are protected not by personal immunities of their employees but by sovereign immunity. *Id.* In Missouri, the Legislature chose to ***absolutely waive*** sovereign immunity under certain circumstances including negligent operation of a motor vehicle. *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992); §537.600.2 RSMo. 2004. “At the core of §536.600 is governmental liability under *respondeat superior* for its employee’s negligent operation of a motor vehicle.” *Best v. Schoemehl*, 652 S.W.2d 740, 742 (Mo. App. E.D. 1983) The Legislature intended for municipalities to assume liability for negligence of their employees in automobile collisions. *Wollard*, 831 S.W.2d at 203. In enacting §536.000 the

Legislature established a policy in favor of governmental compensation to private individuals for damages caused by a public employee's negligence.

Official immunity on the other hand is a personal defense intended to protect the individual employee for discretionary acts. *Kanagawa v. State by & Through Freeman*, 685 S.W.2d 831, 836 (Mo. banc 1985). The personal nature of spousal immunity has also been recognized. *Mullally v. Langenberg Brothers Grain Co.*, 98 S.W.2d 645 (Mo. 1936); *Rosenblum v. Rosenblum*, 965 S.W.2d 1082 (Mo. App. 1936) The purpose of official immunity is to encourage the public officials to act conclusively without fear of being personally liable when making decisions in the scope and course of their employment. *Brown v. Tate*, 888 S.W.2d 413 at 415 (Mo. App. W.D. 1994) Official immunities do not protect ministerial or non-discretionary functions. *Anderson v. Jones*, 902 S.W.2d 889, 891 (Mo. App. E.D. 1995) Operating a motor vehicle is considered a non-discretionary or ministerial function unless the driver meets a specific statutory exception. *Id.* at 891-2.

Section 304.022 RSMo. takes the operation of a motor vehicle in an emergency situation out of the category of ministerial. The Legislature in enacting § 304.022 allows the operator of an emergency vehicle to violate certain “rules of the road” if certain criteria are met. *Pace v. Pacific Fire Protection District*, 945 S.W.2d at 10. If a public official complies with all

provisions of §304.022 official immunity becomes justification for otherwise negligent actions. The underlying negligent act is established but the affirmative defense shields the official from immunity. *Robinson v. Gerber*, 454 S.W.2d at 938; *Robison v. Cameron*, 118 S.W.3d 638, 645 (Mo. App. S.D. 2003)

Personal immunity does not transfer to the governmental employer sued under *respondeat superior*. *Oberkramer*, 650 S.W.2d at 294. Official immunity is not an affirmative defense available to the government. Likewise, sovereign immunity or the limits imposed in §537.600 et seq. are not defenses available to the individual government employee. *Cottey v. Schmitter*, 24 S.W.3d 126, 129 (Mo. App. W.D. 2000) When the sovereign is sued it can take advantage of immunities afforded it but cannot benefit from the personal immunities enjoyed by it's employees in their official capacity. *Bachmann v. Welby*, 860 S.W.2d 31, 34 (Mo. App. 1993) The personal immunity granted public officials is intended to protect the individual employee. In contrast, the Legislature specifically waived the sovereign immunity protection for the negligent actions of their employees while operating motor vehicles. This Court must give effect to the intent of both statutes.

Appellants cite *Costello v. City of Ellisville*, 921 S.W.2d 134 (Mo. App. E.D. 1996); *Creighton v. Conway*, 937 S.W.2d 247 (Mo. App. E.D. 1996); *Jackson v. City of Wentzville*, 844 S.W.2d 585 (Mo. App. 1993) and *State ex rel. Conway v. Dowd*, 922 S.W.2d 461 (Mo. App. E.D. 1996) which hold that the official immunity exonerating a public employee also exonerates his employer because liability is derivative under a *respondeat superior* theory. These cases, however, fail to distinguish between the personal immunity afforded under §304.022 and sovereign immunity which is waived under §537.600 RSMo. Furthermore the cases fail to consider the conditional nature of the defense and the burden of Defendants to prove it.

The “emergency vehicle defense” on which Defendants base their claim of official immunity is conditional in nature and the burden is on the defendant to raise and prove it. *Robison v. Cameron*, 118 S.W.3d 638, 643 (Mo. App. S.D. 2000) It is not an element of the plaintiff’s case contrary to Appellant’s assertion. If official immunity applies, Defendant is not “exonerated” from negligence, but rather plaintiff is barred from collecting or obtaining a judgment against the official by reason of his or her personal immunity. *Id.* *Respondeat superior* still applies to hold the employer responsible for the negligence of this employee unless the employer is also

protected by sovereign immunity. *Oberkramer*, 650 S.W.2d at 294. In this case, sovereign immunity was specifically waived by §537.600 RSMo.

A number of other states hold that *respondeat superior* still operates despite the employee's personal immunity. see *Hooper by and through Hooper v. Clements Food Co.*, 694 P.2d 943, 944 (Okla. 1985); *Savage v. State*, 899 P.2d 1270, 1272-77 (Wash. 1995); *Taplin v. Town of Chatham*, 453 N.E.2d 421, 423 (Mass. 1983). Recently in *Sikander v. City of Wilmington*, 2005 WL 2841612 (Del Super. Oct. 19, 2005) the Delaware superior court citing the Missouri Court of Appeals, Eastern District majority opinion in this case with approval, transferred the cause to the Supreme Court of Delaware for consideration of this issue.

In balancing statutes granting personal immunities to public officials with statutes waiving sovereign immunity of the government, the court must give effect to both statutes. The Court must consider all statutes relating to the same or similar subject matter giving effect to both statutes *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). The general rule of construction is that statutes are intended to be read consistently and harmoniously. *Id.* If the Legislature intended to relieve government employers of liability in §304.022 it could have stated it in the

statute. Absent such a statement the waiver of sovereign immunity enacted in §537.600.1 RSMo. controls.

CONCLUSION

Section 304.022 requires more than lights and sirens to shield public officials from liability. When Defendant Powell acted without reasonable discretion or highest degree of care in driving his emergency vehicle through the intersection his conduct was negligent and such conduct was not protection by official immunity. Neither is his employer protected by official immunity even if its employee is immune. The trial court did not err in denying the Motion for Directed Verdict and Motion for New Trial and should affirm the trial court's judgment.

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CERTIFICATE OF SERVICE AND
COMPLIANCE WITH RULE 84.06 (b) and (c)

The undersigned hereby certifies that on this 15th day of November, 2005 one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed postage pre-paid, to:

Mr. Edward Hanlon
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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06 (b), and that the brief contains 3,396 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Charles H. Billings
Mary L. Bruntrager

APPENDIX

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