IN THE
MISSOURI SUPREME COURT

NO. 87138

LEE DAVIS,

Plaintiff-Respondent,

vs.

LAMBERT-ST. LOUIS INTERNATIONAL AIRPORT
and
WILLIAM POWELL

Defendants-Appellants,

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

SUBSTITUTE BRIEF OF APPELLANTS LAMBERT-ST. LOUIS INTERNATIONAL AIRPORT and WILLIAM POWELL

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JURISDICTIONAL STATEMENT

Defendants-Appellants William Powell and Lambert-St. Louis International Airport appealed to the Missouri Court of Appeals, Eastern District, from a judgment in the amount of Six Thousand Two Hundred Fifty Dollars and 00/100 ($6,250.00) rendered against them in an action for personal injuries to Plaintiff-Respondent Lee Davis. On September 20, 2005, that Court issued an opinion in which two members of the panel believed that defendant William Powell should be entitled to official immunity, but that the judgment against his employer Lambert-St. Louis International Airport should be affirmed. (Appendix, A-6 - A-19). The majority then transferred the case to this Court pursuant to Rule 83.02. (Id.). The concurring opinion agreed with the majority in holding that defendant William Powell should be protected by official immunity, but stated that the judgment against his employer should therefore be reversed. (Appendix, A-2- - A- 27). The concurring opinion agreed that the case should be transferred to this Court pursuant to Rule 83.02. (Id.).

STATEMENT OF FACTS

Plaintiff Lee Davis filed the underlying lawsuit on July 11, 2002, alleging that defendant William Powell negligently operated a motor vehicle on or about August 4, 1997, at or near the intersection of Banshee Road and Lindbergh Boulevard in St. Louis County, Missouri, striking plaintiff Lee Davis' vehicle causing personal injuries. Plaintiff 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.[1] (L.F. 11)

The case was tried in the Circuit Court of the City of St. Louis, Division No. 20, before the Honorable Donald L. McCullin on May 12th and 13th, 2004. The jury returned a verdict assessing twenty-five percent (25%) of the fault for the August 4, 1997, accident to defendants William Powell and Lambert-St. Louis International Airport, and the remaining seventy-five percent (75%) of fault to plaintiff Lee Davis. (L.F. 16) The jury found plaintiff's damages to be $25,000.00, for a net verdict against defendants in the amount of $6,250.00. (L.F. 17)

At no time during the trial was there any dispute as to whether defendant William Powell had his emergency lights and siren activated at the time of the accident. Plaintiff's

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[1] Lambert-St. Louis International Airport is owned and operated by the City of St. Louis. *See, e.g.*, City of Bridgeton v. City of St. Louis, 18 S.W.3d 107, 110 (Mo. App. E.D. 2000).

counsel conceded during his opening statement that defendant William Powell did have both his emergency lights and siren activated and, further, that there was no dispute of those aforementioned facts. (Transcript, p. 5, lines 21-23). Plaintiff Lee Davis testified during direct examination that "[a]s I was about to exit the gate I heard a siren coming from westbound headed eastbound on Banshee road." (Transcript, p. 16, lines 10-11). Plaintiff William Powell testified under direct examination that "Okay, number one, I turned on my emergency lights and engaged my siren." (Transcript, p. 115, lines 24-25).

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

After briefing and oral argument in the Missouri Court of Appeals, Eastern District, that Court issued its opinion on September 20, 2005, transferring the case to this Court because of the general importance of the issues involved and to reexamine the existing law on the issue of whether a governmental employer should be immune from liability when sued under a respondeat superior theory where the allegedly negligent employee is protected from liability under the doctrine of official immunity.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANT WILLIAM POWELL BECAUSE THE RECORD DEMONSTRATES ON ITS FACE THAT DEFENDANT WAS PROTECTED BY OFFICIAL IMMUNITY IN THAT IT IS UNDISPUTED THAT DEFENDANT'S EMERGENCY LIGHTS AND SIREN WERE OPERATING AND THAT HE WAS RESPONDING TO AN EMERGENCY AT THE TIME OF THE ACCIDENT.

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)

McGuckin v. City of St. Louis, 910 S.W.2d 842 (Mo. App. E.D. 1995)

II

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANT LAMBERT ST. LOUIS AIRPORT UNDER A RESPONDEAT SUPERIOR THEORY BECAUSE ITS EMPLOYEE WILLIAM POWELL WAS PROTECTED BY OFFICIAL IMMUNITY AND UNDER EXISTING LAW AN EMPLOYER CANNOT BE HELD LIABLE WHEN ITS EMPLOYEE IS PROTECTED BY OFFICIAL IMMUNITY.

Green v. Denison, 738 S.W.2d 861 (Mo. banc 1987)

State ex rel Conway v. Dowd, 922 S.W.2d 461 (Mo. App. E.D. 1996)

ARGUMENT

Standard of Review

This appeal arises from the trial court's denial of defendants' motion for judgment notwithstanding the verdict. A defendant is entitled to judgment notwithstanding the verdict if the plaintiff failed to present a submissible case. Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996). Where the issue is a question of law, the reviewing court reviews the trial court's conclusions regarding judgment notwithstanding the verdict de novo. Id. at 204.

In this brief, defendants set forth two points: first arguing why defendant William Powell was entitled to official immunity[2] and second, why, as a result of defendant Powell's immunity his employer Lambert-St. Louis International Airport should likewise be immune when sued under a respondeat superior theory.

[2]Although both the majority and dissent in the Court of Appeals agreed that defendant William Powell was entitled to official immunity, defendant must reassert the point here lest it be deemed abandoned. Rule 83.08(b).

I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANT WILLIAM POWELL BECAUSE THE RECORD DEMONSTRATES ON ITS FACE THAT DEFENDANT WAS PROTECTED BY OFFICIAL IMMUNITY IN THAT IT IS UNDISPUTED THAT DEFENDANT'S EMERGENCY LIGHTS AND SIREN WERE OPERATING AND THAT HE WAS RESPONDING TO AN EMERGENCY AT THE TIME OF THE ACCIDENT.

The doctrine of official immunity protects public officials from liability for the negligent performance of discretionary acts which they perform in the exercise of official duties. Green v. Denison, 738 S.W.2d 86l, 865 (Mo. banc 1987). Official immunity has been held in numerous cases to apply to public officials operating emergency vehicles while responding to emergency calls with their emergency lights and sirens in use. Bachman v. Welby, 860 S.W.2d 31 (Mo. App. E.D. 1993); Creighton v. Conway, 937 S.W.2d 247 (Mo. App. E.D. 1996); Costello v. City of Ellisville, 921 S.W.2d 134 (Mo. App. E.D. 1996); Pace v. Pacific Fire Protection District, 945 S.W.2d 7 (Mo. App. E.D. 1997); State ex rel. City of Fulton v. Hamilton, 941 S.W.2d 785 (Mo. App. W.D. 1997); State ex rel. Conway v. Dowd, 922 S.W.2d 461 (Mo. App. E.D. 1996). Once the driver has brought himself within the requirements of § 304.022 RSMo (lights and sirens), he is shielded from liability. McGuckin v. City of St. Louis, 910 S.W.2d 842 (Mo. App. E.D. 1995). McGuckin held that a driver must have both the lights and sirens operating at the time of the accident in order to be shielded from liability. McGuckin, at 845. In this case,

the evidence adduced at trial was uncontroverted that defendant-appellant William Powell had his emergency lights and siren activated at the time of the accident with plaintiff.

Under the doctrine of official immunity, the focus is not on whether there is evidence of negligence, rather, the focus is on whether the defendant's lights and siren were operating, and whether or not the driver reasonably believed he was responding to an emergency. Creighton, at 250, n.3, and 251. This point is illustrated quite clearly by the Costello Court:

> [P]arents argue the evidence supported the jury's finding that Cox was negligent in the operation of his vehicle and that Cox was not entitled to Official Immunity as a matter of law. Although we agree the evidence could support a finding of negligence on behalf of Cox we find *any* (our emphasis added) negligence committed was integrally bound to the officer's use of discretion in determining how to respond to an emergency, thus fitting squarely within the Doctrine of Official Immunity and precluding liability on Cox's part.

Costello, at 135.

In this case, the evidence presented clearly established that defendant-appellant William Powell was protected under the doctrine of official immunity.

II

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANT LAMBERT ST. LOUIS AIRPORT UNDER A RESPONDEAT SUPERIOR THEORY BECAUSE ITS EMPLOYEE WILLIAM POWELL WAS PROTECTED BY OFFICIAL IMMUNITY AND UNDER EXISTING LAW AN EMPLOYER CANNOT BE HELD LIABLE WHEN ITS EMPLOYEE IS PROTECTED BY OFFICIAL IMMUNITY.

Once defendant-appellant William Powell established that official immunity protects him from liability, the existing law clearly exonerates his employer, defendant-appellant Lambert St. Louis International Airport, from any liability as well, despite the fact that there exists a statutory waiver of sovereign immunity under § 537.600 RSMo. *See, e.g.,* Jackson v. City of Wentzville, 844 S.W.2d 585, 589 (Mo. App. E.D. 1993); State ex rel. Fulton, at 788; State ex rel. Conway, at 463; Creighton, at 251; Fonseca v. Collins, 884 S.W.2d 63, 67 (Mo. App. W.D. 1994). The Court in State ex rel. Conway, at 463, specifically held that when a public official is entitled to the protection of official immunity from tort liability and the sovereign is sued under a theory of respondeat superior, its liability would be derivative, thus the sovereign could not be held liable.

In the majority opinion below, the Court of Appeals, Eastern District states that these cases fail to follow the prevailing law that the immunity of an agent does not protect the principal where the former is protected by a personal immunity as opposed to a privilege. Slip op at 7-9. (Appendix A-12 - A-14). However the cases relied on by the

majority Mullally v. Langenberg Brothers Grain Co., 98 S.W.2d 645 (Mo. 1936), Rosenblum v. Rosenblum, 96 S.W.2d 1082 (Mo. App. 1936), and Riordan v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 416 F.3d 825 (8th Cir. 2005), all involve a limited immunity based upon the personal relationship between the injured party and the individual tortfeasor, i.e., husband and wife or parent and child. Liability was imposed upon the defendant employer in those cases because the employees' immunity was wholly personal: it derived from the unique fact that the injured party was related to the individual employee, not from the nature of the act or delict by the employee. Where, as in this case, it is the nature of the individual employee's action that insulates the employee from liability, it is a general immunity from suit by any injured third party - something more in the nature of a privilege to act, rather than an immunity from suit by a distinct class of potential plaintiffs. It is an immunity in the nature of a "privilege" to act because it shields the officer from liability to any third party injured as opposed to an immunity that inheres from the employee's pre-existing relationship with the plaintiff. Further, it is an immunity that would apply equally to any other employee of the employer who committed the same act under the same or similar circumstances. In contrast, in Mullally, Rosenblum and Riordan, had the negligent actor been any employee other than one related to the plaintiff, there would have been no question as to the liability of the individual employee or the employer.

The majority opinion of the Court of Appeals notes that McQuillen, Municipal Corporations, Section 53.65 (3rd Ed. 2003) states a general rule that the official immunity

of an employee does not insulate the governmental employer. Slip op. at p. 8, n. 5. (Appendix A-13). However, the treatise cites only a single case, Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994), to support this proposition. Significant authority holds the contrary as well. See e.g., Fedke v. City of Chaska, 685 N.W. 2d 725, 731 (Minn. Ct. App. 2004) (holding that common sense approach extends official immunity of employee to his employer since granting official immunity to a police officer but allowing suit against his employer would have chilling effect on actions of police officers); Pletan v. Gaines, 494 N.W. 2d 38, 42 (Minn. 1992) (holding that purpose of official immunity is defeated when vicarious official immunity does not apply because the consequences will be a chilling effect in police pursuits). Similarly, in Hollis v. City of Brighton, 885 So. 2d 135, 142 (Ala. 2004), the City was not held liable for the negligence of its volunteer firefighters when the firemen failed to put out the fire at the plaintiffs' house in addition to refusing to allow plaintiffs to fight the fire. The court noted that the liability of the master depends on liability of the servant, therefore a verdict for the employee will equate with a verdict for the employer. Id.

There is a fundamental problem with the Court of Appeals' analysis of the employer's liability in this case: although the majority recognizes that there can be no respondeat superior liability where the employee is exonerated, i.e., determined not to have been negligent, the majority fails to recognize that the plaintiff in this case did not make a submissible case of negligence against defendant William Powell. This is because official immunity is not an affirmative defense that defendant Powell had to plead and prove, but is

a doctrine that defines what the plaintiff must plead and prove in order to find a public officer like defendant Powell liable. See Green v. Denison, 738 S.W.2d 861, 865 (Mo. banc 1987) (Official immunity is "not [a] matter of affirmative defense, but rather serves to delineate the legal duty which the defendant official owes the plaintiff."). As Point I makes clear, and the Court of Appeals agreed, defendant William Powell was protected by official immunity, i.e., the plaintiff did not make a submissible case of negligence against him.

The majority also seeks to distinguish earlier cases by making a distinction between the governmental employer's liability resting upon the absence of negligence instead of an immunity from liability. But this argument overlooks one of the primary underpinnings of official immunity: to relieve public officials not only of potential liability, but the time, harassment and inconvenience of participating in discovery attending litigation. See, e.g., State ex rel Mo. Dept. of Agriculture v. McHenry, 687 S.W.2d 178, 181 (Mo. banc 1985), in which this Court granted a writ of prohibition based on the defendants being entitled to official immunity, observing that "'[i]mmunity' connotes not only immunity from judgment but also immunity from suit. (citations omitted) Immunity claims have jurisdictional aspects. It is not always satisfactory to leave a case pending against a public agency or a public officer, with prospects for burdensome discovery and trial..." 687 S.W.2d at 181. If, as a majority of the Court of Appeals held, the employer enjoys immunity only where the employee is found free of negligence, then this basis for official immunity is meaningless. He/she must first be found negligent before liability can be imposed upon the employer. The employee will always be integrally involved in the litigation.

Another basis for the doctrine of official immunity as explained in Green v. Denison, 738 S.W.2d at 865, is that "[t]he fear of personal liability should not hang over public officials as they make judgments affecting the public safety and welfare." However, in reality, if you simply shift the financial responsibility for those discretionary decisions from the individual officer to his or her employer, you are not going to remove the restrictions on the officer's conduct. As a practical matter, any judgment that would be rendered against a police officer is likely, in most cases, to be paid by his employer anyway. But even if fear of personal liability was a legitimate consideration in affording a police officer official immunity, in place of that fear will be employer- mandated restrictions and limitations adopted for its financial protection that will limit the options available to the employee - which the employee must heed or face the peril of disciplinary action. It is only a change in the nature of the threat, from a potential liability judgment to potential loss of employment.

The question may be asked: why should an individual citizen be made to pay for an accident like this one instead of society as a whole, by making the governmental entity financially accountable? The facts of this case show just what will happen. Every time a person is involved in an accident with an emergency vehicle with its lights and sirens on, they will file suit alleging that the officer was negligent. And it doesn't matter that the other driver was himself negligent in failing to yield right of way to an emergency vehicle. That will just be factored into the apportionment of fault. The case will either have to be settled or tried. That will be the case every time someone on an emergency run is involved

in an accident. Officers will be much less likely in the future to rush to respond to incidents. They will be because their employers will mandate those policies. And, ultimately, there will be incidents in which citizens will be faced with life-threatening situations to which the police will respond, but the response will be with less urgency. Some of those incidents will turn out bad because of it. Then who pays? It is not society. It is not the governmental entity. It is the citizen who became a victim of crime because the police did not get there in time. Essentially, the change in the law that the plaintiff urges, and the majority opinion of the Court of Appeals would adopt, simply changes which members of society will suffer. The innocent victim of a crime or someone like the plaintiff in this case, whose injury was brought about only because he failed to yield to an emergency vehicle.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgement below.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

The undersigned counsel of record hereby certifies that:

1. Counsel for Appellants William Powell and Lambert St. Louis International Airport are Edward J. Hanlon, MBE #26405, and Daniel J. Emerson, MBE #56808, 314 City Hall, St. Louis, MO 63103, (314) 622-3361.

2. The brief to which this certificate is attached complies with the limitations contained in Rule 84.06(b) and Local Rule 360.

3. The brief contains 3,612 words in WordPerfect 8.0 format.

_____

Edward J. Hanlon #26405

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing and one (1) diskette containing same were mailed via first-class mail, postage pre-paid, this ___day of October, 2005, to Mr. Charles Billings, Esq., 1735 South Big Bend Road, St. Louis, MO 63117.

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APPENDIX