IN THE SUPREME COURT OF MISSOURI

SC 87138

LAMBERT-ST.LOUIS INTERNATIONAL AIRPORT, et al.

Appellants,

vs.

LEE DAVIS,

Respondent.

APPEAL FROM THE
CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
DIVISION NO. 20
HONORABLE DONALD LANG MCCULLIN, JUDGE

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF RESPONDENT

LELAND F. DEMPSEY MO #30756
DEMPSEY & KINGSLAND, P.C.
1100 Main Street, Suite 1860
Kansas City, Missouri 64105
Telephone (816) 421-6868
Fax (816) 421-2610

Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys

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INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens. Whether a government agency is liable for the acts of its employees is a fantastically important question in many personal injury cases. Injured plaintiffs should be able to sue the agency itself for the acts of its employee, especially if the employee is protected by official immunity. Accordingly, this issue is of considerable interest to MATA and its members.

As discussed herein, MATA supports plaintiff/respondent Lee Davis' position that official immunity does not extend to the sovereign. Police agencies should be liable for the actions of their officers, even when the officer has official immunity. Allowing agency liability encourages higher standards of safety and allows deserving plaintiffs to recover. On behalf of the citizens of the State of Missouri, MATA urges this court to affirm the Court of Appeal's decision—that is to not allow official immunity to be shared by the sovereign, and to reject the defendant/appellant's position to unnecessarily expand the doctrine of official immunity.

CONSENT OF THE PARTIES

MATA has received written consent from all parties to file this brief. Therefore, MATA is filing this brief pursuant to Rule 84.05(f)(2).

STATEMENT OF FACTS

Plaintiff Lee Davis filed a lawsuit against defendant-appellant William Powell on July 11, 2002. Powell alleged that the defendant negligently operated a motor vehicle on August 4, 1997, at the intersection of Banshee Road and Lindbergh Boulevard in St. Louis County, Missouri. (L.F. 11)

Davis alleged that Powell failed to keep a careful lookout, drove too fast and failed to maintain control of his vehicle. *Davis v. Lambert-St.Louis International Airport*, 2005 WL 2276714 (Mo. App. E.D.) p. 1. Davis' car was struck by Powell, causing injuries to his vehicle in addition to injuries to his person.

Additionally, Davis sued the Lambert-St. Louis International Airport, which is owned and operated by the city of St. Louis. *City of Bridgeton v. City of St. Louis*, 18 S. W. 3d 107, 110 (Mo. App. E.D. 2000). Davis made no direct allegations of negligence against the airport, but sued under the doctrine of respondeat superior. *Davis*, 2005 WL 2276714 at p. 2.

Although the defendant turned his lights and sirens on, indicating that he was responding to an emergency, the Court of Appeals asserted that his decisions regarding how fast to travel or which traffic regulations to disregard amounted to "ordinary negligence." *Id*.

The jury found the defendant to be twenty-five percent at fault. *Id.* Of the $25,000 dollars in damages found by the jury, the defendants' share was $6,250.00. *Id*. Because Powell was found to be protected by the doctrine of official immunity, the Lambert-St. Louis International Airport was ordered to pay the plaintiff's judgment. *Id*.

The defendant filed an appeal, charging that the doctrine of official immunity extended to the airport, a government agency. The Court of Appeals denied the motion, but sent it to this Court because "a governmental entity's liability in these situations is an important question in which the general public has interest." *Id.* at 6.

ARGUMENT

First, this brief argues that when government employees are found to enjoy immunity, the government employer does not enjoy that same immunity. Second, it argues that if the defendant's theory of liability is adopted, negligent behavior and an impermissible expansion of official immunity occurs as a consequence. Thus, although Powell was found to enjoy official immunity, the Lambert-St. Louis International Airport should not receive the same immunity when sued under a respondeat superior theory.

I. A GOVERNMENT EMPLOYER IS VICARIOUSLY LIABLE FOR THE ACTIONS OF AN EMPLOYEE, EVEN IF THE EMPLOYEE ENJOYS OFFICIAL IMMUNITY.

The defendant argues that first, Lambert-St. Louis International Airport shares Powell's official immunity. Second, because Powell is a government employee, a police officer, and subject to the doctrine of official immunity, Powell incurs tort liability only if he acts in bad faith or with malice. The defendant argues that this changes the elements of the tort. In fact, argues the defendant, no tort has been committed unless bad faith or malice is present.

This argument is wrong in two ways. First, official immunity may not be shared with the sovereign. Second, the elements of the tort are not

changed. The defendant, if negligent has still committed a tort, although it may be the case that he is not liable for the tort because of official immunity.

Powell is entitled to official immunity. Official immunity protects public officials from liability for negligent acts committed during the course of their official duties while acting in a discretionary capacity. *Id*. While a police officer is responding to an emergency, official immunity protects him from tort liability for any alleged acts of ordinary negligence provided that the officer (1) responded to an emergency call in his emergency vehicle, (2) had activated his siren and lights and (3) reasonably exercised his discretion in determining his speed and observance of traffic regulations. *Creighton v. Conway*, 937 S.W.2d 247, 251 (Mo. App. E.D.1996). It was undisputed that Powell was responding to an emergency call and had activated his siren and lights. The record demonstrates that the defendant was negligent, but not malicious nor acting in bad faith.

Official immunity may not be shared by the sovereign. The plaintiff sued the Lambert-St. Louis International Airport on a theory of respondeat superior. Under the doctrine of respondeat superior, an employer is liable for the negligence of its employees, even if the employer was not directly negligent itself, as long as the employee's acts were within the scope of his duties to the employees. The *Oberkramer* court argues: "When the sovereign

is sued for the tortious acts of one of its officials, the sovereign can take advantage of immunities afforded to *it* but should not be able to benefit from any personal immunities enjoyed by the *official*." *Oberkramer v. City of St. Louis*, 910 S.W.2d 286, 294 (Mo. App. E.D. 1983) (emphasis added). Thus, even if Powell is entitled to official immunity, the Lambert-St. Louis International Airport is not entitled to Powell's immunities, but only to sovereign immunity.

The Lambert-St. Louis International Airport is clearly liable for the negligence of Powell. The legislature has expressly waived sovereign immunity with respect to the negligent operation of motor vehicles by public employees during the course of their employment. *See* § 537.600.1(1) RSMo 1994; *McGuckin v. City of St. Louis*, 910 S.W. 2d 842, 844 (Mo. App. E.D.1995). Powell, a public employee, while on an emergency call (within the course of employment) engaged in the negligent operation of his police car (a motor vehicle). Thus, the Lambert-St. Louis International Airport does not enjoy sovereign immunity in this case.

However, the Lambert-St.Louis International Airport goes on to argue that it is not liable for Powell's negligence because Powell has not committed a tort. The Lambert-St. Louis International Airport correctly asserts that in order to overcome official immunity, Davis must demonstrate that Powell

acted with malice or in bad faith. But, then the Airport argues that malice or bad faith is an essential element of a negligence action against a state employee. And so, unless Davis can demonstrate that Powell acted in bad faith or with malice, he is not entitled to invoke respondeat superior in order to impose vicarious liability on the Airport.

"[Official] immunity does not deny the existence of the tort itself." W. Prosser, *Handbook of the Law of Torts*, section 131 (4th ed. 1971). *Davis v. Lambert-St. Louis International Airport*, 2005 WL 2276714 (Mo. App. E.D.) p. 4. Thus, the airport is wrong to include malice or bad faith as an essential element of a negligence action against a state employee. Instead, two separate investigations must be made: (1) did the public employee commit a tort? And, then if the answer is "yes", (2) is the employee entitled to official immunity? Although the second investigation is contingent on the answer to the first, the second investigation does not *change* the elements of the tort of negligence, which requires neither bad faith nor malice.

If a claim is made under the doctrine of respondeat superior and the judgment truly exonerates the employee of liability because of the absence of negligence, the employer is also exonerated. *Peoples v. Conway*, 897 S.W. 2d 206, 208 (Mo. App. E.D. 1995). In this case, the Court of Appeals found that the evidence demonstrated that Powell had acted negligently with respect to

speed and observation of traffic regulations. So here, again the Airport does not escape liability because negligence is not absent.

If the defendant's logic is adopted, then the legislature's express waiver of sovereign immunity with respect to the negligent operation of motor vehicles by public employees would be superfluous. There would be many fewer instances where the sovereign could be held vicariously liable for an employee's negligent operation of motor vehicles. The only time then that a government agency could be held liable for an employee's negligence is when an employee was not acting in a discretionary capacity, but instead in a ministerial capacity. *State ex rel. Howenstine v. Roper*, 155 S.W. 3d 747, 751 (Mo. 2005).

A ministerial function is one in which a public officer is required to perform "upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to [an employee's] own judgment or opinion concerning the propriety of the act to be performed." *Charron v. Thompson*, 939 S.W. 2d 885, 886 (Mo. banc 1996). Thus, unless an actual law was violated, citizens would be unable to recover damages for harms caused by government agents.

The inability to find a government agency liable for harm resulting from the operation of a motor vehicle is especially relevant in the present

case. The plaintiff would almost never have recourse for injuries that occurred as a result of police negligence with respect to motor vehicles. The test for official immunity in the case of police response to emergencies requires that (1) the response is made in the emergency vehicle, (2) the lights and siren have been activated and (3) that the officer reasonably exercises his discretion in determining his speed and observance of traffic regulations. If all three of these requirements have been met, then the officer is protected from tort liability for any acts of ordinary negligence. *Creighton v. Conway*, 937 S.W.2d 247, 251 (Mo. App. E.D. 1996). On the defendant's theory of liability, the only time that the police officer and so the police agency (by way of vicarious liability) would be liable for negligent acts in emergency responses is if either the police officer failed to turn on his lights and siren or in the unlikely event that the police officer responded to the emergency in a vehicle other than an emergency vehicle.

If the police officer negligently violated any traffic regulations resulting in damages during an emergency call, then the plaintiff would have no recourse. Although it is certainly true that some accidents are caused by police officers failing to turn on their sirens and/or lights many accidents are caused by police officers negligently breaking traffic regulations in emergency situations. If a party who is obeying the traffic regulations is

struck by a speeding officer, or by an officer who negligently runs a red light, or any of countless other scenarios that may be imagined, then he will have no way of recovering his loss.

II. IF THE DEFENDANT'S THEORY OF LIABILITY IS ADOPTED THEN THERE IS NO NEED TO HAVE DISTINCT CONCEPTS AND TESTS FOR OFFICIAL IMMUNITY AND SOVEREIGN IMMUNITY.

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). The defendant argues that if a government employee is found to enjoy official immunity, then that immunity should be shared by the agency. If this is true then the concepts become at best less distinct and at worst indistinguishable. The sovereign would be immune anytime that the official was found to have immunity.

Thus, there would no need to have a distinct category for official immunity. The test for official immunity would become a part of the test for sovereign immunity.

This directly opposes current case law: "Official immunity protects public officials from liability for negligent acts…but it affords no protection to their governmental employers." *Id*. See also *McGuckin v. City of St. Louis*, 910 S.W.2d 842, 844 (Mo.App.E.D. 1995).

Although some recent Missouri cases have held that a plaintiff cannot recover against an official's employer under the doctrine of respondeat superior when the employee is entitled to official immunity, the case which

the recent decisions rely on, *Schutte v. Sitton,* relies on a misapplication of derivative liability principles. *Schutte v. Sitton,* 729 S.W. 2d 208, 210-211 (Mo. App. E.D. 1987). The *Schutte* court determines that a plaintiff may not recover on a theory of respondeat superior when an employee has official immunity, because prior case law holds that when there is no ground for recovery against an employee, there is no ground for recovery against the employer under a theory of respondeat superior. *Williams v. Venture Stores, Inc.*, 673 S.W. 2d 480, 483 (Mo. App. E.D. 1984); *Cacioppo v. Kansas City Public Co.*, 234 S.W. 2d 799, 803 (Mo. App. 1950).

III. THE DEFENDANTS' THEORY ENCOURAGES POLICE RECKLESSNESS, WHEREAS NOT ALLOWING OFFICIAL IMMUNITY TO BE SHARED ENCOURAGES A HIGHER STANDARD BY WHICH POLICE CONDUCT IS MEASURED AND FURTHER PROMOTES PUBLIC SAFETY.

One of the many problems with the expansion of the immunity doctrines is that governmental agencies will have less incentive to spend time and resources in the training of governmental employees. The legislature likely adopted the motor vehicle clause because traffic accidents involving governmental employees were on the rise. If this deterrent is only applicable to a handful of cases, it will be less meaningful to the agencies. And, if government agencies are spending less time advocating vehicle safety, then government employees will likely exercise less care in their operation of motor vehicles.

Consider in particular the case of police officers. If police agencies are never liable for the negligence of their police officers while driving, then not only the agency but the officer also will have less incentive to operate vehicles safely. If, for example, police carelessness with respect to traffic regulations results in more effective emergency response and there are no consequences to either the employee or the agency for their carelessness, then

the agency is likely to accept the occasional act of negligence in order to promote emergency response.

But as a public policy, this kind of calculation is unacceptable. Innocent citizens should not be at risk because reckless vehicle operation allows for better response time in emergency situations.

The defendant argues that allowing a government entity to be liable when its official is immune will create a "chilling effect." The defendant believes that this liability will not cause the police agency to promote responsible emergency response, but instead will cause the police agency to encourage the police force not to respond to emergency calls. This argument is unpersuasive when the agency in question exists specifically to promote and protect public safety.

The defendants' argument would be more worrisome if individuals were not protected by official immunity. An individual officer may be hesitant to respond to an emergency call if he were going to be personally liable for any accident that may occur. But, because of official immunity, the individual is generally not liable for negligence associated with emergency responses. Further, it is ridiculous to suppose that the whole agency would discourage a response to an emergency because of the potential liability *they* would incur in case of an accident.

CONCLUSION

For the reasons stated above, the Court should affirm the opinion of the Court of Appeals, that is that when a government employee is found to be protected by official immunity, the government employer may still be found liable on a theory of respondeat superior.

Respectfully submitted,

By: _____

Leland Dempsey Mo #30756
Dempsey & Kingsland, P.C.
1100 Main Street
City Center Sq. 1860
Kansas City, MO 64105-2112
Telephone: (816) 421-6868
Fax: (816) 421-2610
Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys

CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 2,951 words, as calculated by the Microsoft Word software used to prepare this brief.

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Leland F. Dempsey #30756

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of te foregoing was served, via First Class Mail, on this 14th day of November, 2005, to:

Charles Billings, Esq.
BRUNTRAGER & BILLINGS, P.C.
1735 South Big Bend Road
St. Louis, MO 63117
Counsel For Respondent

Edward Hanlon, Esp.
City Hall, Room 314
1200 Market Street
St. Louis, MO 63103
Counsel for Appellants

Jeremiah W. Nixon
P.O. Box 899
Jefferson City, MO 65102
Attorneys for Amicus Curiae

_____
Leland Dempsey #30756