IN THE
MISSOURI SUPREME COURT

LEE DAVIS,	)	
	)	
Plaintiff/Respondent	)	
	)	
v.	)	Appeal No. SC87138
	)	
LAMBERT-ST. LOUIS INTERNATIONAL AIRPORT, et al.	)	
	)	
	)	
Defendants/Appellants.	)	

Appeal from the
Circuit Court of the City of St. Louis, Missouri
Honorable Donald Lang McCullin, Judge

BRIEF OF AMICUS CURIAE THE STATE OF MISSOURI

JEREMIAH W. (JAY) NIXON
Attorney General

ROBERT PRESSON
Mo. Bar No. 23256
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases:

Statutory Authority:
Error! No table of authorities entries found.

STATEMENT OF FACTS

According to the Court of Appeals, "[t]his case arises out of a motor vehicle collision between Lee Davis and William Powell. At the time of the collision, Powell was responding to an emergency call in furtherance of his duties as a police officer for the Lambert-St. Louis International Airport, which is owned and operated by the City of St. Louis." *Davis v. Lambert-St. Louis International Airport*, 2005 WL 2276714 (Mo. App. E.D.) pp. 1.

"Davis sued Powell and the Airport, alleging that during the course and scope of his employment, Powell negligently operated his motor vehicle in a number of respects, including failing to keep a careful lookout, driving too fast and failing to maintain control of his vehicle. Davis sought to hold the Airport vicariously liable for Powell's negligence under the doctrine of *respondeat superior,* making no allegations of direct negligence by the Airport." *Id.*

"At trial, it was undisputed that Davis heard Powell's siren and saw the vehicle's emergency lights as Powell approached the intersection and that Powell was responding to an emergency. . . . According to the judgment, the jury found that Powell was 25% at fault for the accident and Davis was 75% at fault . . . The court . . . ordered only the Airport to pay." *Id*.

Consistent with those facts, the Court of Appeals concluded "that at the time of the collision, Powell was responding to an emergency call in his emergency vehicle and was operating his lights and siren as required by section 304.022. And we find nothing in the record to indicate that his decisions regarding how fast to travel or which traffic regulations to disregard amounted to an abuse of discretion or anything more than ordinary negligence." *Id*. at 2.

The Court of Appeals held that Powell was not liable pursuant to the doctrine of official immunity, but that this immunity was personal to him. As a result, his employer, the Airport, was vicariously liable for his negligence under the doctrine of *respondeat superior*. But the court transferred the case to this Court under Missouri Rule 83.02. *Id*. at p. 7.

Interest of Amicus Curiae

The doctrine of official immunity is essential to ensure the appropriate performance of the duties the State **—** Missouri's largest governmental employer **—** imposes upon its employees. Imposing liability on the State, even if the employee is personally protected, could hamper the appropriate performance of State imposed duties. Also, imposing greater liability on the State could significantly and adversely impact the financial interests of the State. Moreover, the State of Missouri also has an interest in the proper functioning and financial stability of its political subdivisions, municipal corporations and other public entities, all of which will be affected by the decision of the Court of Appeals.

ARGUMENT

Imposing vicariously liability on a government employer when a public officer is protected by official immunity is an incorrect application of both the doctrine of official immunity and the General Assembly=s waiver of sovereign immunity in auto accidents.

Introduction

This case involves, first, application of Aofficial immunity,@ *i.e.*, the immunity given to certain governmental officials **B** particularly those in law enforcement **B** when they are acting in good faith. There should be no question whether official immunity barred suit against Officer Powell. Indeed, the facts as stated by the court of appeals **B** facts that appear to have been largely uncontested at trial **B** demand that result. They establish mere negligence, while official immunity requires that to state a claim a plaintiff establish bad faith or malice. In other words, the facts here lead inexorably to the conclusion that the plaintiff neither stated nor proved a claim of liability against Officer Powell. There simply was no cognizable tort claim against Powell.

That should have been the end of the case. But the trial court **B** and the court of appeals **B** then took an extraordinary step: the considered whether Officer Powell=s governmental employer could be held liable under the doctrine of *respondeat superior* for the negligence despite the undisputed fact that negligence is not enough to state a claim against the employee. That step is impermissible; *respondeat superior* cannot be used to obtain relief where the failure to obtain relief from an employee is the result of failing to state or prove a claim that the employee=s actions fell below the required standard. In other words, when the events fall within the scope of those that may be covered by official immunity, the absence of bad faith or malice eliminates the tort claim against the employee and leaves no claim to be brought against the employer in lieu of the employee.

The State=s waiver of sovereign immunity in ' 537.600.1(1) does not modify that result. That statute waives the government=s immunity to suit, not the immunity that may be given to an employee. Here, again, the key was the employee=s liability, which ' 537.600.1(1) does not purport to waive.

A. Official immunity is a definition of duty, not a defense.

The doctrine of official immunity and the related public duty rule Aare not matters of affirmative defense, but rather serve to delineate the legal duty which the defendant official owes to the plaintiff.@ *Green v. Denison*, 738 S.W.2d 861, 865 (Mo. banc 1987). *See also McGuckin v. City of St. Louis*, 910 S.W.2d 842, 844 (Mo. App. 1995); *Scher v. Purkett*, 847 S.W.2d 76, 78 (Mo. App.

1992); *Green v. Missouri Dept. of Transportation*, 151 S.W.3d 877, 883 (Mo. App. 2005). While the public duty rule specifies to whom a duty must be owed in order for there to be an actionable tort, the doctrine of official immunity specifies the nature of the duty owed and the type of conduct that will constitute a breach of that duty. AThe official immunity doctrine holds that a public official is not civilly liable to members of the public for negligence strictly related to the performance of discretionary duties.@ *Green,* 738 S.W.2d at 865. Generally, public officers performing discretionary duties are liable only for acts done in bad faith or with malice. *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 446 (Mo. banc 1986). *Schooler v. Arrington*, 81 S.W. 468 (Mo.App. 1904)(public officers liable for Awillful wrong, malice or corruption@).

In general, a litigant suing the State or its officers is required to file a petition demonstrating a viable theory of recovery. *State ex rel. Mo. Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). To state a viable theory or recovery, a plaintiff who sues a government official must consider the impact of both official immunity and the public duty rule. Thus to state a claim against a public officer protected by official immunity, the plaintiff must do more than merely allege negligence. To impose liability where the defendant may have acted within the scope of official immunity, the plaintiff must plead (and ultimately prove) facts that would establish bad faith or malice. *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d at 447. And, because of the public duty rule, the plaintiff seeking relief from a government official must plead facts demonstrating the existence of a legal duty to the plaintiff personally. *Green*, 151 S.W.3d at 883.

Because it requires plaintiffs to plead facts showing a greater fault than mere negligence, official immunity raises a question of subject matter jurisdiction for failure to state a claim. It is not a defense that may be waived by failing to raise it in the trial court. It can be raised at any time, even on appeal. *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 537 n. 1 (Mo. banc 1988); *Spotts v. City of Kansas City*, 728 S.W.2d 242, 248 (Mo. App. 1987).

The first question was, for the trial court, and still is whether the plaintiff has stated a claim against Officer Powell. And because both the trial court and the court of appeals recognized that the facts placed Powell within the realm of official immunity, the plaintiff was required to state and ultimately to prove facts that would establish bad faith or malice.

B. Plaintiff failed to establish a claim against Powell

The Court of Appeals B consistent with the judgment of the circuit court B found that Powell was entitled to official immunity because he was a public officer responding to an emergency and employing his vehicle=s lights and siren as required by ' 304.022 RSMo. That was consistent with other decisions holding that in such circumstances police officers are exercising their discretion and protected

by official immunity. *McGuckin,* 910 S.W.2d 842; *State ex rel. City of Fulton v. Hamilton,* 941 S.W.2d 785, 788 (Mo.App. 1997). That was also consistent with the plaintiff=s claims. Plaintiff merely pled that Powell was negligent. And the Court of Appeals concluded that negligence was all that the evidence at trial demonstrated.

Because Powell was protected by the doctrine of official immunity, plaintiff failed to plead or prove a claim against him. It was not that Powell had a defense to a claim that plaintiff established **B** and thus unlike *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, 829-31 (8th Cir. 2005). Spousal immunity, as explained in these cases, does not relate to an element of the alleged tort. It is a disqualification of the plaintiff from bringing the action. On the other hand, official immunity defines an essential element of any tort**B**the duty owed by the defendant.

By relying on decisions such as *Mullaly*, *Rosenblum*, and *Riordan*, the Court of Appeals mistakenly treated official immunity as a defense that was personal to the officer, rather than a description of the duty owed and the conduct that is actionable. This mistake then led to an erroneous application of the doctrine of *respondeat superior*.

C. *Respondeat Superior* does not impose liability upon an employer if there is no ground for recovery against its employee.

The general principle is that *respondeat superior* imposes liability on an employer for a tort committed by an employee acting in the scope of employment. *City of Fulton v. Hamilton,* 941at 788. The Court of Appeals did not disagree: **A**[W]here a claim is made under the doctrine of *respondeat superior* and the judgment truly exonerates the employee because of the absence of negligence, the employer is also exonerated.@ *Davis* at 3. But the court failed to realize that an employee may be exonerated by things other than the absence of negligence. In general, a defendant may be exonerated by the plaintiff=s failure to establish any element of the alleged tort. And if an element of the tort requires something more than negligence, then merely showing negligence also exonerates the defendant.

For instance, in *Jackson v. City of Wentzville*, 844 S.W.2d 585, 588-589 (Mo. App. 1993) a police officer=s conduct was governed by the public duty rule. As a result, the officer=s alleged negligence did not breach any duty owed to the plaintiff individually. Without the existence of a duty and a breach

thereof, *respondeat superior* afforded no ground for recovery against his employer. *Schutte v. Sitton*, 729 S.W.2d 208, 211 (Mo. App. 1987).

Failing to establish that an employee=s conduct is the proximate cause of injury to the plaintiff is also fatal to establishing a tort. Exoneration of the employee by failing to establish proximate cause also bars recovery against the employer pursuant to *respondeat superior*. *Stanley v. City of Independence*, 995 S.W.2d 485 (Mo. banc 1999); *Peoples v. Conway*, 897 S.W.2d 206, 208 (Mo. App. 1995).

But most pertinent to this case is the principle that failing to establish that a defendant=s conduct violates the relevant standard of duty is fatal to the existence of a cause of action. Most often a breach of the standard of duty is demonstrated by showing negligence. But not always. For example, under ' 632.440 RSMo certain public officers and private individuals are not liable for acts required by law so long as they act in good faith and without gross negligence. Evidence that did not show Afault beyond ordinary negligence@ failed to establish a cause of action. *Boyer v. Tilzer*, 831 S.W.2d 695, 698 (Mo.App. 1992). This statutory standard is very similar to the standard of official immunity. *Id*. Both require a showing of fault beyond mere negligence. See also *Bunting v. Huckstep*, 853 S.W.2d 448 (Mo. App.993).

When official immunity applies and the plaintiff fails to allege or prove such a higher level of fault and so fails to allege or prove a claim against the defendant officer, there is no *respondeat superior* claim against the officer=s employer. *Peoples v. Conway*, 897 S.W.2d 206, 208 (Mo. App. 1995); *State ex rel. Conway v. Dowd,* 922 S.W.2d 461 (Mo. App. 1996); *McGuckin*, 910 S.W.2d at 844-845. Again, when, because of such an evidentiary deficiency there is no recognized tort by the public officer, there is no tort by the officer, and there is nothing for which the public employer can be held vicariously liable.

D. Section 537.600.1(1) RSMo alters neither the nature of a cause of action against a public officer nor the doctrine of *respondeat superior*.

The State=s waiver of sovereign immunity in ' 536.600 does not change the analysis. That statute does not create a new cause of action. Instead, it provides a remedy for a cause of action which the immunity had previously barred. *Wilkes v. Missouri Highway & Transportation Comm=n*, 762 S.W.2d 27, 28 (Mo. banc 1989); *McGuckin*, 910 S.W.2d at 844. As a result, 537.600.1(1) does not alter the legal principles applicable to torts by public officers, nor the doctrine of *respondeat superior*. If, under applicable principles, there is no cause of action, then there is no liability to impose on the State or any other public entity.

Here, the waiver of sovereign immunity did not create state liability for negligent operation of motor vehicles by public officers or employees. It merely allows recovery for such negligence when other applicable legal principles create liability therefor. Thus, in non-emergency situations police officers are not exercising discretion pursuant to the doctrine of official immunity. They are bound by the same rules of the road and liable for negligence as are private drivers. *Davis-Bey v. Missouri Dept. of Corrections*, 944 S.W.2d 294, 297 (Mo. App. 1997); *McGuckin*, 910 S.W.2d at 845; *Brown v. Tate*, 888 S.W.2d 413, 415 (Mo. App. 1994). Because there is a recognized cause of action against officers in such a situation, the waiver of sovereign immunity will allow the doctrine of *respondeat superior* to impose liability on the employer.

But when official immunity applies, a heightened standard is required to demonstrate a breach of duty. When the evidence is insufficient to establish that higher fault, there has been no breach of duty and hence no tort by the officer. Although the waiver of sovereign immunity will still allow application of the doctrine of *respondeat superior*, it does not change the result. Without a tort by the employee, *respondeat superior* will not impose liability on the employer.

The Court of Appeals= conclusion to the contrary B that *respondeat superior* imposes liability on a government employer even though the public officer has not committed a tortBis a misunderstanding and misapplication of the doctrines of official immunity and *respondeat superior*. It results in an expansion of liability under ' 537.600.1(1) beyond that intended by the General Assembly.

E. Public policy embodied in the doctrines of official immunity and *respondeat superior* and the waiver of sovereign immunity in ' 537.600.1(1) is contrary to the holding of the Court of Appeals.

Although the Court of Appeals stated that public policy considerations were consistent with its conclusion, Judge Ahrens noted that Athere are equally compelling policy considerations in favor of protecting governmental employers from liability.@ *Davis* at 9. As he explained:

> Employers, in the face of exposure to liability resulting from emergency responses, may implement policies restricting officers from exercising their statutory discretion under Section 304.022 in responding to emergency calls. Exposing the governmental employers to liability may, therefore, impair the performance of the individual officers. As a result, the public in general and victims in particular may not receive the prompt assistance they need, and criminal suspects may be given increased opportunity to flee due to delays in emergency responses by the officers.

Id.

But in this instance it was not for the Court of Appeals to choose between those Aequally compelling policy considerations.@ It was for the General Assembly. Sovereign immunity is now codified. *State ex rel. Regional Justice Information Service Commission v. Saitz*, 798 S.W.2d 705, 706 (Mo. banc 1990). A modification of sovereign immunity must come from the legislature, not the courts. *State ex*

rel. Missouri Dept. of Agriculture v. McHenry, 687 S.W.2d 178, 182 (Mo. banc 1985).

Section ' 537.600 did not create a new cause of action. It merely waived Athe immunity of the public entity.@ The issue here, of course is not Athe immunity of the public entity@; it is the immunity of the employee.

Moreover, when read in the context of the General Assembly=s treatment of emergency vehicle use, it seems apparent that the General Assembly did not intend to create a new obligation for government employers to bear liability for otherwise authorized acts of employees. Section 537.600.1(1) simply removed the barrier of sovereign immunity in one context. In ' 304.022 RSMo., the General Assembly specifically addressed situations for emergency vehicles. The General Assembly has considered the public policy arguments and concluded that the public interest is better served by allowing drivers of emergency vehicles to exercise their discretion when they come within the statute authorizing them to ignore certain normal rules of the road. When that statute applies, the doctrine of official immunity dictates that mere negligence does not violate the standard of duty. And when there is no wrongful conduct by the employee, the doctrine of *respondeat superior* dictates that there is no liability to impute to the employer.

As the court of appeals majority recognized, several previous decisions had applied this principle. And the General Assembly did not modify the sovereign immunity statute after those earlier decisions. In contrast, when this Court held that purchase of insurance was necessary for a waiver of sovereign immunity, the legislature quickly modified the statute. *Bartley v. Sp. Sch. Dist. of St. Louis*, 649 S.W.2d 864 (Mo. banc 1983); *State ex rel. Mo. Hwy & Transp, Comm=n v. Applequist*, 698 S.W.883 (Mo. App. 1985). The inaction of the General Assembly following decisions holding that there is no *respondeat superior* liability for governmental employers for the conduct of public officers responding in emergency vehicles is a strong indication that those decisions correctly determined the legislature=s intent.

CONCLUSION

For the reasons stated above, the Court should reaffirm that where a plaintiff allegedly injured by the use of an emergency vehicle in an emergency by a government employee pleads and proves mere negligence, the official immunity that bars that suit is not pierced by the State=s waiver of sovereign immunity.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ROBERT PRESSON
Assistant Attorney General
Mo. Bar No. 23256
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

ATTORNEYS FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing and a 3 **2** " labeled diskette

containing this brief were served, first class postage pre-paid, this 11th day of October 2005, to:

Charles Billings
1735 S. Big Bend Blvd.
St. Louis, MO 63117

Edward Hanlon
City Hall, Room 314
1200 Market St.
St. Louis, MO 63103

_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the limitations contained in Missouri Rule 84.06, and that the brief contains 3,173 words.

The undersigned further certifies that the diskette simultaneously filed with the hard copies of the brief has been scanned and is virus free.

_____
—

Assistant Attorney General