IN THE SUPREME COURT OF MISSOURI

Case No. SC100200

STATE ex rel. JAMES HENSON,

Relator,

v.

THE HONORABLE HEATHER R. CUNNINGHAM,

Respondent.

Original Proceeding in Prohibition

REPLY BRIEF OF RELATOR JAMES HENSON

BRINKER & DOYEN, L.L.P.
Jeffrey J. Brinker, #30355
Thomas S. Powell, #74795
34 N. Meramec Avenue, 5th Floor
Clayton, Missouri 63105
Telephone: (314) 863-6311
Facsimile: (314) 863-8197
jbrinker@brinkerdoyen.com
tpowell@brinkerdoyen.com
Attorneys for Relator
James Henson

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I. Henson is entitled to an order prohibiting Respondent from taking any action other than granting Henson's Motion for Judgment on the Pleadings because Henson is immune from suit under the Missouri Workers' Compensation Act in that he was a co-employee of Anderson, and Respondent's Brief presents no valid arguments to the contrary.

Henson, as Anderson's co-employee, is immune pursuant to § 287.120.1 from the claims alleged against him in Plaintiffs' Second Amended Petition, and therefore the trial court exceeded its jurisdiction in denying Henson's Motion for Judgment on the Pleadings. However, in its Brief, Respondent argues that the statute's limited exception to immunity applies, and that § 287.120.1 immunity should not be determined at the pleadings stage. In doing so, Respondent misinterprets prior holdings from this Court and relies on fictional scenarios that amount to nothing more than speculation.

As this Court found in *Brock v. Dunne*, the "plain and ordinary meaning" of § 287.120.1 requires that "immunity will shield a co-employee's negligent act unless the plaintiff can establish the co-employee engaged in affirmative conduct that constitutes at least negligence and the co-employee must purposefully and dangerously cause or increase the risk of injury through that conduct." 637 S.W.3d 22, 29 (Mo. banc 2021). Where a plaintiff acknowledges the defendant is a co-employee, like here, it is the plaintiff's burden to establish that the exception to statutory immunity applies. *Id.* It is not enough for a plaintiff to allege facts showing that a co-employee committed a "purposeful act" or simply

knew his action could or would cause a particular result; rather, the act must have been done "with the *purpose for a desired outcome*" to cause or increase the risk of injury. *Id.* at 28–30 (emphasis in original). While the exception may be triggered by a "reasonable inference" of intent, instead of direct evidence, any such inference cannot be "unreasonable, speculative or forced." *Id.* Likewise, the "fact that an intentional act may increase the risk of injury to others does not unequivocally lead to the conclusion that the actor intended to increase the risk of injury." *Id.* at 30. Therefore, in *Brock*, evidence that the defendant co-employee acted outside the safety rules by instructing an employee to continue working on a laminating machine without a guard demonstrated only mere negligence and did not invoke the exception to statutory immunity. *Id.*

Here, Respondent claims Plaintiffs pleaded sufficient facts to at least create a question of material fact as to whether the exception applies. But the Second Amended Petition contains no well-pleaded facts to support even a "reasonable inference" that Henson had the intent to cause or increase the risk of harm to anyone. Respondent's recitations of conclusory allegations that Henson willfully or knowingly violated workplace rules improperly conflate an alleged "purposeful act" with an act done "with the purpose for a desired outcome." The fact Plaintiffs "specifically pled the language of the exception" is immaterial as such legal conclusions cannot be considered on a motion for judgment on the pleadings. *Gross v. Parson*, 624 S.W.3d 877, 883 (Mo. banc 2021). At most, the factual allegations of the Second Amended Petition demonstrate only mere negligence, which alone cannot negate § 287.120.1 immunity.

Respondent editorializes on how it could be inferred that Henson "harbored ill will toward Anderson" and was "acting in retaliation against Anderson." However, these allegations of ill-will and retaliation are completely absent from Plaintiffs' Second Amended Petition, which focuses solely on Henson's failure to follow MHTC's rules. Respondent's attempts to rewrite the Second Amended Petition are nothing more than "unreasonable, speculative or forced" inferences insufficient to trigger the exception. It is telling that in discussing Henson's purported ill will, Respondent cites extrinsic documents which were not attached to Plaintiffs' Second Amended Petition, and not the pleadings themselves. *See* *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. E.D. 2010) ("A right to judgment on the pleadings must be established by the allegations in the opposing party's pleadings…matters not properly incorporated into the pleadings may not be considered."). Regardless, even these improperly cited documents[1] do not show Henson intended to cause or increase the risk of harm to anyone. Respondent's argument that Henson has failed to identify any other prospective motive other than hostility toward Anderson is flawed as well because it was Plaintiffs' burden alone to allege sufficient well-pleaded facts establishing that the exception applies, but Plaintiffs failed to do so.

This analysis is not affected by the federal cases cited by Respondent, which are distinguishable from the present case. Both cases concerned a motion to remand based on fraudulent joinder, not a motion for judgment on the pleadings. *See generally* *Taylor v.*

[1] In fact, the documents cited do not even relate to Henson, only Relator Love, that Respondent try to somehow link Henson's actions to the discipline of Love.

Clark Equip. Co., 2022 WL 1640372 (E.D. Mo. 2022); *Joyner v. HZ OPS Holdings, Inc.*, 2022 WL 17583151 (E.D. Mo. 2022). Further, both cases involved harm caused directly by the defendant co-employee. In *Taylor*, the co-employee defendant himself allegedly struck the plaintiff with a Bobcat loader despite knowing the plaintiff was likely behind him. 2022 WL 1640372, at *4. *Joyner* involved a co-employee who attacked the plaintiff with a box cutter or knife on multiple occasions at work. 2022 WL 17583151, at *3. Those facts are inapposite here, where the alleged accident was caused by a third party's negligent operation of a motor vehicle.

In a last-ditch effort, Respondent claims that Henson's position would result in co-employees being "precluded from pursuing remedies against another co-employee for work-related injuries." This is patently false. Henson merely asks that Plaintiffs be required to allege sufficient facts showing the exception to immunity applies, as mandated by the "plain and ordinary meaning" of § 287.120.1.

Respondent additionally argues that application of immunity under § 287.120.1 cannot be decided on the pleadings. In support of this argument, Respondent effectively claims that because the courts in *Brock* and *Bestgen v. Haile*, 643 S.W.3d 647 (Mo. App. W.D. 2022), decided immunity on motions for judgment notwithstanding the verdict and for summary judgment, respectively, it is impossible that immunity could also be determined based on a plaintiff's inadequate pleadings. However, nowhere does it hold that immunity cannot be decided based on the pleadings, and to find otherwise would defy common standards of civil procedure.

Respondent's position ignores this Court's repeated holding that "'[i]mmunity' connotes not only immunity from judgment but also immunity from suit." *State ex rel. Mo. Dept. of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). It further ignores that courts have, in fact, applied immunity under § 287.120.1 to dismiss claims against co-employees at the pleading stage. *See, e.g.*, *Madry v. George Koch Sons, LLC*, 2022 WL 579246, at *3 (E.D. Mo. 2022) (citing *Brock* and granting defendants' motion to dismiss). Finally, Plaintiffs specifically pleaded that Henson was Anderson's co-employee who is otherwise entitled to the immunity afforded by § 287.120.1. When the plaintiff admits the fact of employment and the application of the workers compensation statutes, the burden shifts to the plaintiff to establish that the co-employee's alleged actions came within the statutory exception to the general rule of statutory immunity. *Brock*, 637 S.W.3d at 29; *Madry*, 2022 WL 579246, at *3. Therefore, Plaintiffs plead themselves out of an argument that the issue of immunity should not be addressed on a motion for judgment on the pleadings.

Lastly, Respondents' remaining arguments are without merit. Respondents argue that the workers' compensation laws do not provide a remedy in this case, and therefore are inapplicable, because Anderson had no dependents at the time of death. But "[t]he immunity provided by § 287.120 has never been interpreted to require that the injured worker actually receive workers' compensation benefits from the employer." *Shaw v. Mage Industries, Corp.*, 406 S.W.3d 466, 473 (Mo. App. W.D. 2013). Therefore, the exclusivity provisions of §§ 287.120.1 and .2 apply "even where the Act did not require the payment of compensation because the deceased work did not have dependents entitled to prosecute

a workers' compensation death-benefits claims," as Respondent claims is the case here. *Id*; *Page v. Clark Ref. & Mktg., Inc.*, 3 S.W.3d 385, 387–88 (Mo. App. E.D. 1999); *Combs v. Cty. of Maryville*, 609 S.W.2d 475, 476–78 (Mo. App. W.D. 1980). In contrast, the cases cited by Respondent involve conduct outside the scope of employment, unlike here where Plaintiffs specifically alleged Henson was in the course and scope of his employment.

As stated in Henson's original Brief, § 287.120.1's immunity also applies to bar the wrongful death claim arising out of the death of Jaxx for the same reasons discussed above as the only relationship that could serve as the basis for that claim would be the co-employee relationship between Henson and Anderson. Additionally, Respondent's lengthy discussion of whether Jaxx was a "dependent" under the Workers' Compensation Act—which was not directly discussed in Henson's Writ Petition and is arguably outside this Court's jurisdiction—misinterprets the interaction between Missouri's life at conception statute, § 1.205, RSMo, and the Workers' Compensation Act. In *State v. Knapp*, this Court interpreted § 1.205 and found it applies and effectively modifies other statutes in light of its mandate that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons." 843 S.W.2d 345, 346–47 (Mo. banc 1992). As such, Jaxx was a "dependent" under § 287.240(b)(3), which defines "dependent" as a "natural, posthumous, or adopted child," and was subject to the Workers' Compensation Act's exclusive remedy provisions.

II. Henson is entitled to a permanent writ of prohibition because the Second Amended Petition does not allege facts that support the existence of a duty to either Anderson or Jaxx.

Henson is entitled to a permanent writ of prohibition because the Second Amended Petition does not allege facts that support the existence of a common law duty to either Anderson or Jaxx. Nothing in Respondent's brief supports a different conclusion.

A. The allegations of the Second Amended Petition do not support the existence of a duty in negligence against Henson with respect to Anderson.

The law is very clear that a co-employee does not have a common law duty in negligence to ensure workplace safety for fellow employees because the duty to maintain a safe workplace is a nondelegable duty of the employer, not an individual employee. This Court has identified five broad categories of such nondelegable duties:

1. provide a safe place to work.

2. provide safe appliances, tools, and equipment for work.

3. give warning of dangers of which the employee might reasonably be expected to remain in ignorance.

4. provide a sufficient number of suitable fellow servants.

5. promulgate and enforce rules for the conduct of employees which would make the work safe.

McComb v. Norfus, 541 S.W.3d 550, 554 (Mo. banc 2018); *Kelso v. WA. Ross Constr. Co.*, 85 S.W.2d 527, 534 (Mo. 1935). A co-employee's breach of these duties does not subject

her to personal liability for resulting injury because the "[n]ondelegable duties are duties of the employer to his employees and not of fellow servants to each other." *Kelso*, 85 S.W.2d at 534. An employer "breaches that duty where it charged an employee with the responsibility to provide a reasonably safe work environment, but the employee did not so provide." *McComb*, 541 S.W.3d at 556 (quoting *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 800 (Mo. banc 2016)).

Here, with respect to the wrongful death claim arising out of the death of Anderson, the facts alleged in the Second Amended Petition make it clear that Plaintiffs seek to hold Henson liable for a breach of the nondelegable duty of MHTC to provide a safe workplace. As a matter of law, this is not a duty that a court can impose on Henson, a fellow employee of Anderson.

B. The facts alleged in the Second Amended Petition do not support the imposition of a duty in negligence on Henson with respect to the death of Jaxx.

In its brief, Respondent functionally abandons any claim that an existing common law duty could be imposed on Henson to guard against harm to Jaxx. Instead, Plaintiffs argue at length that this Court should fashion a new duty out of whole cloth, asserting that an injury such as the one Jaxx sustained was "foreseeable." Respondent's argument is misplaced.

First, this Court does not need to fashion a new duty to train or supervise because these duties already exist at common law in Missouri. Consequently, there is no need to create a new duty that would displace the already existing common law duties. *See A.R.R.*

v. Tau Kappa Epsilon Fraternity, Inc., 649 S.W.3d 1, 13 n.10 (Mo. Ct. App. 2022) ("Thus, we are not at liberty to start afresh in a landlord tenant/premises liability case where the elements which create a duty of care in such cases have already been established."). However, such duties, under Missouri law, can only be imposed on an employer because only the employer has the right to control the fellow employees. For instance, in a workplace setting, a duty to supervise an employee to protect a third party can only be imposed on an employer. It is well-settled that:

> "Negligent supervision, like any other tort, involves a breach of a duty defendant owes plaintiff which causes plaintiff to suffer damages. The duty to supervise is a narrow one, requiring the existence of a relationship between the plaintiff and defendant that the law recognizes as the basis of a duty of care. ***Such a duty has only been recognized in Missouri in child/caretaker relationships and master/servant situations***."

A.R.R., 649 S.W.3d at 15 (internal quotations and citations omitted; emphasis added).

This case obviously does not involve a duty to supervise a child. Therefore, to impose a duty on Henson to supervise his subordinates to protect them from causing harm to third parties (such as Jaxx), Plaintiffs would need to establish Henson was Anderson and his crews' employer, which is clearly not alleged. *See* *Nickel v. Stephens College*, 480 S.W.3d 390 (Mo. Ct. App. 2015) (discussing RESTATEMENT (SECOND) OF TORTS § 317 (1965)). The master/servant relationship is the critical component that creates the duty. Missouri courts have chosen not to broaden such duty beyond this limit in a workplace context.

Similarly, under Missouri law, a duty to train an employee to protect third parties from harm can only be imposed on the employer. Courts in those cases have found that "an employer-employee relationship is necessary to sustain a claim for negligent hiring and retention." *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d 650, 657 (Mo. App. E.D. 2015).

Even if this were a case where the Court is at liberty to fashion a new duty, there is simply no reason to do that here. Respondent has taken the position that the sole basis for determining whether a duty should be imposed is "foreseeability." This misstates the law. The determination of whether to impose a duty in negligence rests on the consideration of multiple facts. As this Court set out in *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 432 (Mo. banc 1985):

> The judicial determination of the existence of a duty rests on sound public policy as derived from a calculus of factors: among, them the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; consideration of cost and ability to spread the risk of loss; the economic burden upon the actor and the community. (internal quotations and citations omitted)

Courts have reiterated this multi-factored approach time and again. *See e.g. Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005); *Bowan ex rel. Bowan v. Express Med. Transporters, Inc.*, 135 S.W.3d 452, 457 (Mo. Ct. App. 2004). Critically,

a court must take into consideration the burdens that any duty may create when it is imposed.

It is readily apparent that this Court should not impose a general duty to supervise or train on an individual supervisor when one considers all the relevant factors. A supervisor typically is not in a position to discipline, fire, or control the terms and conditions of a co-employee's employment. Those rights are vested with the employer.

Furthermore, a supervisor is frequently removed from the activities of his subordinates who create a risk of harm to third parties. As in this case, a supervisor is not necessarily present when the underlying work is performed and may have no way to directly control the activities of subordinates.

Finally, an individual employee is also far less capable of bearing the burden of the cost of unsafe work practices by his subordinates. They are individuals with limited resources. Likewise, it is more difficult for an individual to spread the risk of loss through the purchase of insurance or other means.

There is simply no reason to create a new duty requiring an employee like Henson to supervise or train her subordinates to prevent a risk of harm to third parties.

III. Henson is entitled to a permanent writ of prohibition because the Second Amended Petition fails to allege facts establishing an exception to official immunity.

Henson is entitled to a permanent Writ of Prohibition because Plaintiffs' Second Amended Petition is devoid of well-pleaded facts establishing an exception to official immunity. Nothing in Respondent's Brief supports a different conclusion.

A. Official immunity protects all public employees even if the acts performed were not considered a sovereign function or performed in an emergency situation.

In its Brief, Respondent suggests official immunity should only apply to public employees who are "invested in some portion of sovereign functions of government exercised for the public's benefit" such as "titular heads" of a government department conducting "administrative policy decisions" which "go to the essence of governing" relying upon *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. App. E.D. 1981). However, the notion that Henson must have been performing some sovereign function of government or was some titular head of a government department for official immunity to apply was dispelled by this Court in *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008).

In *Southers*, this Court made clear that official immunity protects **ALL** public employees "from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts." *Id*. at 610; *Woods v. Ware*, 471 S.W.3d 385, 392 (Mo. App. W.D. 2015) (recognizing that *Eli Lilly* was decided before *Southers* holding that official immunity protects all public employees from "liability for alleged acts of negligence committed during their official duties for performance of discretionary acts). Since *Southers*, "Missouri courts have routinely extended official immunity to discretionary acts even when the public official's actions were not governmental in nature." *Richardson v. City of St. Louis*, 293 S.W.3d 133, 141 (Mo. App.

2009); *see e.g.* *Boever v. Special Sch. Dist. of St. Louis Co.*, 296 S.W.3d 487, 492 (Mo. Ct. App. 2009) (public school teachers and classroom aides).

In doing so, this Court made clear that official immunity protects public employees if they are alleged to have acted within the scope of their official duties and without malice. *See* *Alsup v. Kanatzar*, 588 S.W.3d 187, 190 (Mo. banc 2019). Thus, as Plaintiffs have pled Henson was a public employee and acting in his capacity as a supervisor at the time of his alleged negligent acts, he is entitled to the protection afforded by official immunity.

Respondent next suggests that official immunity protection only applies to situations involving emergency situations. However, this notion that emergency situation is required for official immunity to apply has only been applied by courts in the context of the operation of a motor vehicle and claims against first responders as evidenced by the cases cited by Respondent. *See* *Davis-Bey v. Missouri Dept. of Correction*, 944 S.W.2d 294 (Mo. App. W.D. 1997) (operation of a vehicle to transport prisoners to work duty); *Brown v. Tate*, 888 S.W.2d 413 (Mo. App. W.D. 1994) (police officer driving during nonemergency situation). However, even under such limited circumstances, this Court recently clarified that responding to an emergency is not necessary for the application of official immunity. *See* *Barron v. Beger*, 655 S.W.3d 356, 361 (Mo. banc 2022). Additionally, Missouri courts have routinely applied official immunity in non-emergency situations. *See* *Boever*, 296 S.W.3d at 492; *McCoy*, 480 S.W.3d at 426.

B. Official Immunity Includes Immunity from Suit.

Respondent next suggests that because official immunity is an affirmative defense, Plaintiffs should be afforded the opportunity to conduct discovery on the issue. However,

when the factual allegations of a petition establish a public employee's challenged actions were within the scope of his official duties and there is no properly pled allegation of malice, the defendant may invoke the affirmative defense of official immunity in a motion for judgment on the pleadings. *Forester v. May*, 671 S.W.3d 383, 387 (Mo. banc 2023). To survive such motion, a plaintiff must plead facts affirmatively establishing an exception to official immunity. *Stephens v. Dunn*, 453 S.W.3d 241, 251 (Mo. App. 2014)). That is because "'[i]mmunity connotes not only immunity from judgment but also immunity from suit." *Alsup*, 588 S.W.3d at 190.

Here, Henson properly raised official immunity as an affirmative defense and Plaintiffs allege he was acting within the scope of his employment with MHTC at the time of his alleged negligent acts. As such, Plaintiffs are not entitled to conduct discovery unless it is found that they have properly pled facts establishing an exception.

C. Henson's alleged actions were supervisory in nature and therefore discretionary as a matter of law.

Throughout its Brief, Respondent suggests the ministerial exception may be established by simply alleging Henson violated a departmentally-mandated rule. For instance, they incorrectly cite *J.M. v. Lee Summit School Dist.*, 545 S.W.3d 363, 372 (Mo. App. W.D. 2018) for the proposition that "if a duty is imposed by departmentally-mandated policy, it is not discretionary." They also submit that alleging the violation of a departmentally-mandated duty sufficiently states a claim that is not barred by official immunity relying upon *Nguyen v. Grain Valley R-5 School Dist.*, 353 S.W.3d 725, (Mo.

App. W.D. 2011) and *McCoy*, 480 S.W.3d at 425. However, this is not a correct reading of these cases.

The *Nguyen* court stated that absent allegations a public employee violated a departmentally-mandated duty, a petition's pleadings "are insufficient to state a claim which is not barred by the doctrine of official immunity as a matter of law." *Id*. at 730. Plaintiffs' argument above suggests the converse is true in that a plaintiff's pleading obligation may be satisfied by simply identifying the source of an alleged duty. However, *McCoy* instructs otherwise as the departmentally-mandated rule must also prescribe a duty that was mandatory and not merely discretionary. *McCoy*, 480 S.W.3d at 425.

This Court has taken it a step further by clarifying that what Respondent is proposing (i.e. identifying the legal source of a mandatory duty) is merely the first step of the analysis. *Alsup*, 588 S.W.3d at 192. The relevant issue then becomes whether the nature of the action prescribed by the legal source is ministerial or discretionary. *Id*. at 192-193. The true test is "whether there is any room whatsoever for variation in when and how a particular task can be done." *Id*. at 191. Respondent's reading of *Nguyen* is exactly what this Court cautioned against by instructing courts not to construe official immunity too narrowly lest they frustrate the need for relieving public servants against threat of burdensome litigation. *Id*. at 191.

Respondent, though, would have this Court fall into that same trap by suggesting that merely identifying a departmentally-mandated rule was enough to overcome official

immunity. Specifically, in its Brief,[2] Respondent identifies the following safety rule as the source of the alleged ministerial duty owed by Henson:

> A protective vehicle shall be used when work is in progress. The protective vehicle shall be equipped with a TMA and flashing arrow panel at least 150 feet in advance of the work space.

Relying upon *Nguyen*, Respondent then argues the use of the term *shall* in the rule creates a ministerial duty by itself. However, identifying the source of the duty is simply the first step. The true test is whether Henson retained any authority to decide when and how to perform the act prescribed by the rule. *Gray-Ross v. St. Louis Pub. Sch.*, 643 S.W.3d 665, 672 (Mo. App. E.D. 2022).

In their Second Amended Petition, Plaintiffs allege the MHTC rule created a duty on Henson and three other supervisors to provide Anderson and her crew with a protective vehicle. The fact that four separate individuals were allegedly tasked with such duty alone suggests there were multiple ways in which the protective vehicle could have been assigned or provided to the crew. By definition, such an act was discretionary as matter of law. *See Alsup*, 588 S.W.3d at 191.

Additionally, a plain reading of the rule refutes Plaintiffs' claim. The rule required those working at the jobsite to ensure that a protective vehicle was in place. As noted above, Henson was not at the jobsite. Instead, he is being sued in his capacity as the crew's

[2] Relator notes the actual language of the safety rule does not appear anywhere in Plaintiffs' Second Amended Petition.

supervisor based on his purported failure to ensure that they were trained regarding the rule, were provided a safety plan, and that there was a procedure in place to ensure they were provided a protective vehicle. These actions involve implementing procedures to ensure his subordinates had the proper means and knowhow to safely setup their work zone, which involves discretion as a matter of law. *Southers*, 263 S.W.3d at 621 (supervisors' failures to stop a subordinate from violating safety policies and failing to implement proper safety policies and train subordinates regarding the same involve "highly discretionary supervisory and policy decisions" that are protected by official immunity).

Gray-Ross recently confirmed the holding in *Southers*. There, the plaintiffs alleged that public school supervisors failed to have a policy in place to prevent and manage violence at a school sporting event, including having a security guard present at the event. *Id.* at 668. The defendants' motion to dismiss was granted and affirmed on appeal. In its opinion, the Eastern District noted that the actions involved in creating policies and ensuring the same are implemented and adhered to by subordinates involve highly discretionary supervisory and policy decisions that official immunity is intended to shield as a matter of law. *Id.* at 673.

Plaintiffs attempt to distinguish *Gray-Ross* by arguing Henson "was not involved in creating any policies or trying to judge unknown future risks pertaining to crews working in unprotected traffic lanes." However, regardless of whether Henson created the rule, Henson's alleged failures involve ensuring that his subordinates complied with it and were properly trained regarding it, which are precisely the same types of duties *Southers* and *Gray-Ross* found to be discretionary as a matter of law.

Finally, Respondent relies on materials outside the pleadings to support its claim that Henson's actions were ministerial by virtue of the fact MHTC disciplined a fellow supervisor[3]. However, even if such subsequent remedial measures were admissible (or pled), Respondents fail to cite any cases supporting this position. The commonsense reason being that an employer may certainly discipline an employee for bad judgment. However, while bad judgment might subject a public employee to discipline, the *Alsup* opinion teaches that if the public employee retains *any* discretion in completing an act, it is discretionary and protected. *See* *Morales v. Alessi*, 679 S.W.3d 467, 472 (Mo. banc 2023) (citing *Alsup*, 588 S.W.3d at 192-93). Accordingly, MHTC's subsequent disciplinary actions are irrelevant to this issue and should not be considered by this Court.

D. Plaintiffs Fail to Allege Facts Establishing Actual Intent as Required for the Malice Exception.

In its Brief, Respondent suggests Plaintiffs pled sufficient facts to establish the malice exception. In support of this position, Respondent argues that the "actual intent to cause injury" element of malice only applies in emergency situations relying on *Carlton v.*

[3] The exhibit cited by Respondent is a disciplinary letter to Mike Love. While Respondent attempts to lump all supervisors together in its Brief, Respondent fails to identify any disciplinary actions taken towards Henson because of this incident. Furthermore, the alleged "behavioral violations" by Love noted in the letter involved "supervisory failures" to ensure that his subordinates received proper safety protocols and training on the same. All of these acts are discretionary under *Southers*.

Means, 2024 Mo. App. LEXIS 49 *7 (Mo. App. E.D. Jan. 30, 2024). However, the court in *Carlton* simply stated that evidence of actual intent to injure has always been required to show malice in cases involving discretionary acts of responding to an emergency. *Id*. Nowhere, though, does the court suggest that such requirement is limited to cases involving emergency response situations.

By contrast, this Court has made clear that the test for malice is a two-pronged approach by stating a defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty **and** which he intends to be prejudicial or injurious to another. *Alsup*, 588 S.W.3d at fn 7; *citing* *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 446 (Mo. banc 1986). Respondent misstates this approach by misquoting *Twiehaus* by suggesting malice can "'include intentional doing of a wrongful act without legal justification or excuse,' **or** an act 'done needlessly, manifesting a reckless indifference to the rights of others.'" That is not what this Court said in *Twiehaus*. The second part quoted by Respondent relates to the definition of "wanton," which is simply the first prong of the test. Both wanton conduct and intent to injure is clearly required to show malice. *Carlton*, at *10 ("reckless conduct along does not amount to malice; there must also be evidence that the official had the intent to injure or prejudice the plaintiff").

Despite Respondent's argument to the contrary, Plaintiffs fail to allege any nonconclusory facts establishing any intent by Henson to injure Anderson or Jaxx. Instead, Respondent claims it can be inferred that Henson "harbored ill will toward Anderson" and was "acting in retaliation against Anderson." However, such allegations are completely

absent from the Second Amended Petition. As mentioned above, Respondent's reading of Plaintiffs' Second Amended Petition to the contrary amounts to nothing more than "unreasonable, speculative or forced" inferences which are insufficient to trigger the malice exception.

Plaintiffs simply allege Henson knowingly failed to provide Anderson and her crew with a protective vehicle. Even if such conclusory allegation was true, it does nothing to establish intent by Henson to injure Anderson or Jaxx, especially given the facts of this accident. Nor does the disciplinary actions taken towards Love for his alleged failures in performing his supervisory duties establish such intent on Love (or Henson for that matter) as employees are disciplined all the time for actions falling short of intentionally causing harm to fellow employee.

Finally, Respondent argues, for the first time in this litigation, intent can be inferred based on Anderson's request for "special treatment". The Second Amended Petition is devoid of any facts regarding to whom this request was specifically made, what the response was, or whether any alternative accommodations were offered. Regardless, Respondent asks this Court to take an enormous leap by finding Henson (and the other supervisors) engaged in a series of devious acts that included withholding safety training, safety plans and safety equipment all in the hope that an individual, who Henson never met, might drive erratically into Anderson's work zone and strike and kill both her and another crew member and seriously injure a third crew member, all as retribution for Anderson simply asking to be reassigned to a safer position. The facts of this case (and general logic) make this argument a hill that is simply too high to climb.

IV. Henson is entitled to a Writ of Prohibition because the Second Amended Petition does not allege facts that support that Plaintiffs' interests were special, direct, and distinctive compared to the public at large.

The public duty doctrine insulates all public employees from civil liability "based on the absence of a duty to the particular individual, as contrasted to the duty owed to the general public." *Southers*, 263 S.W.3d at 611. Importantly, and seemingly ignored by Respondent is that the public duty doctrine is not an affirmative defense, but rather delineates the legal duty the public employee owes the plaintiff. *Id*. The burden falls to the plaintiff to plead and prove that the public duty doctrine is inapplicable. *Id.* Respondent's argument that a jury should decide the issues of immunity is misplaced. Because Plaintiffs have failed to meet their high burden of establishing a special, direct, and distinctive interest, a permanent writ of prohibition is appropriate. From the outset, there is no case law that supports Plaintiffs' argument that "reliance on the public duty doctrine presupposes the existence of duty." Instead, the public duty doctrine negates the duty element of a plaintiff's claim. *Id*. at 612.

Missouri caselaw has established that the duty assigned to supervisors in the management, supervision, and training of employees is a duty owed to the public. In *Southers*, this Court held the public duty doctrine applied to a supervising police officer and police chief because the duties to supervise other police officers, implement procedures and policies, and train other officers were owed to the general public. *Southers*, 263. S.W.3d at 621. Similarly, this Court has found that when a decedent's interest in safety is indirect and indistinct from that of the public as a whole, a claim against a public employee

in a supervisor capacity is barred by the public duty doctrine. *State ex. rel. Barthelette v. Sanders*, 756 S.W.2d 536, 538 (Mo. banc 1988). Here, Anderson and by extension Jaxx's interest of safety on the roadway is indirect and indistinct from that of the public. This is because the policies in place are meant to protect both workers and the general public driving on the roadways.

The scene where the accident occurred was not solely closed off for the protection of workers as suggested by Plaintiffs. Logic dictates that closing off an area of a roadway is for the protection of the public as a whole as well. The reasoning being that closed workspaces could adversely affect roadway conditions and cause the general public to lose control of their vehicles. Plaintiffs pled as such in their Second Amended Petition (Ex. A, pp. 34, 37 at ¶¶ 178, 192). By closing off a workspace, the general public or how Plaintiffs pled, "human beings" are protected. This establishes that any duty Henson had was to the public as a whole, entitling Henson to the public duty doctrine.

This Court in *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. banc 1996) distinguished when a duty is owed to a specific person as opposed to the general public. There, the Court found that the plaintiff arrestee was a distinct, identifiable person and that injury to him was foreseeable when the City breached its duty by failing to inventory and secure *his* watch. *Id.* at 206. It continued and compared that specific duty to duties owed only to the public as a whole like failing to enforce gambling laws or failing to take safety measures at a public swimming area. *Id.*

Jungerman, in making these comparisons, cited to *Cooper v. Planthold*, 857 S.W.2d 477 (Mo. App. E.D. 1993). In *Cooper*, the court held that removing an arrestee's own

property protects all in custody, not just the arrestee and that maintaining safe jails is a duty owed to the public. *Id.* at 480. There, the arrestee hung himself with his own suspenders after police failed to remove them. *Id.* The Court of Appeals found that the public duty doctrine applied despite a mandated departmental procedure that used language containing "shall". *Id.* at 478. The plaintiff made the same argument Respondent makes here because Anderson and by extension Jaxx were in a "workspace closed off to the general public", they were particular, identifiable, individuals.

But *Jungerman* and *Cooper* easily dispel that argument. The decedent in *Cooper* was detained, booked, and searched for the purposes of removing personal property. That, in and of itself does not prove that the public duty doctrine is inapplicable. In both scenarios, the policy in place is for the protection of the public as a whole. In *Cooper*, the policy protects other inmates as well as prison staff. Here, the policy protects drivers on the highway, as well as Anderson and Jaxx from injury. In both cases, there exist departmental policies that were implemented to protect the general public. This application similarly dispels Respondent's argument that because Henson knew Anderson and Jaxx were within the work zone, Henson owed them a duty beyond her duty to the general public. The defendant in *Cooper* knew the decedent when he failed to remove his personal belongings but that did not render the public duty doctrine inapplicable. *Id.* at 478.

Respondent has failed to meet this high burden of establishing that a special, direct, and distinctive interest exists in order for the public duty doctrine to be inapplicable. The duty owed by Henson was one that was owed to the public as a whole and Anderson and

Jaxx's interests were indistinct from the public's interest. For these reasons, the Court should enter a permanent writ of prohibition.

CONCLUSION

For the foregoing reasons, this Court should make its preliminary Writ of Prohibition permanent prohibiting Respondent from taking any further action in the underlying case other than granting Henson's Motion for Judgment on the Pleadings.

CERTIFICATE OF COMPLIANCE

I hereby certify that on March 11, 2024, pursuant to Rule 84.06(c), Appellants' Reply Brief complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Times New Roman font, contains 7,247 words, as determined by Microsoft Word, and was electronically served on all counsel of record through Case.net.

BRINKER & DOYEN, L.L.P.

By: */s/ Jeffrey J. Brinker*
Jeffrey J. Brinker, #30355
Thomas S. Powell, #74795
34 N. Meramec Avenue, 5th Floor
Clayton, Missouri 63105
Telephone: (314) 863-6311
Facsimile: (314) 863-8197
jbrinker@brinkerdoyen.com
tpowell@brinkerdoyen.com
Attorneys for Relator James Henson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically filed on March 11, 2024, with the Clerk of the Court using the CM/ECF system and was additionally emailed to:

Honorable Heather R. Cunningham
Circuit Judge
St. Louis County Circuit Court
Heather.Cunningham@courts.mo.gov

Tonya Musskopf and Austin Jarvis, Plaintiffs
THE CAGLE LAW FIRM, LLC
Andrew G. Mundwiller
andrew@caglellc.com
500 North Broadway
Suite 1605
St. Louis, MO 63102
(314) 241-1700
(888) 292-3677 – Facsimile

Stanley McFadden, Defendant
SANDERS WARREN & RUSSELL, LLP
Bradley S. Russell
b.russell@swrllp.com
Ryan J. Niehaus
r.niehaus@swrllp.com
11225 College Blvd., Suite 450
Overland Park, KS 66210
(913) 234-6100
(913) 234-6199 - Facsimile

Kristina Jordan, Defendant
REICHARDT NOCE & YOUNG LLC
Matthew H. Noce
mhn@reichardtnoce.com
12444 Powerscourt Drive
Suite 160
St. Louis, MO 63131
(314) 789-1199
(314) 754-9795 – Facsimile

Gary Ludwick, Defendant
HEPLERBROOM LLC
Bharat Varadachari
bharat.varadachari@heplerbroom.com
701 Market Street
Suite 1400
St. Louis, MO 63101
(314) 241-6160
(314) 241-6116 – Facsimile

Michael J Love, Defendant
RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION, L.L.C.
Debbie S. Champion
dchampion@rssclaw.com
Victor H. Essen, II
vessen@rssclaw.com
500 N. Broadway, Suite 1550
St. Louis, MO 63102
(314) 421-4430 / FAX: (314) 421-4431

Missouri Highway Transportation Commission, Defendant
BATY OTTO CORONADO
Theresa Otto
totto@batyotto.com
4435 Main Street
Suite 1100
Kansas City, MO 64111
(816) 531-7200
(816) 531-7201

/s/ *Jeffrey J. Brinker*
Counsel for Relator