



**In the
Missouri Court of Appeals
Western District**

**JASON FRIDAY, AS REPRESENTATIVE
OF WRONGFUL DEATH CLASS OF
LINDA FRIDAY,**

Appellant-Respondent,

v.

MICHAEL MCCLURE, ET AL.,

Respondent-Appellant.

**WD80134
Consolidated with WD80161**

OPINION FILED:

OCTOBER 24, 2017

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Robert M. Schieber, Judge**

**Before Division Two: Anthony Rex Gabbert, Presiding Judge, Thomas H. Newton, Judge,
Gary D. Witt, Judge**

This case concerns an appeal by Appellant/Cross-Respondent Mike McClure (“McClure”) and a cross-appeal by Respondent/Cross-Appellant Jason Friday (“Friday”).

McClure appeals a trial court’s denial of his motions for directed verdict and judgment notwithstanding the verdict (JNOV) in a negligence claim brought by Friday. McClure raises two points on appeal. First, he argues the trial court erred, because Friday’s negligence claim was barred by the doctrines of official immunity and public duty. Second, he argues the trial court erred, because Friday did not have a submissible negligence claim, in that extant evidence only established an intentional tort. We reverse.

Friday cross-appeals the trial court's dismissal by *res judicata* of an underlying trespass claim Friday had refiled. He contends the trial court erred, because *res judicata* does not apply where there was no final judgment on the merits of the initial claim. We affirm the trial court's dismissal of Friday's trespass claim.

Factual Background

McClure is a police officer with the Kansas City Police Department. On February 12, 2007, he and Officer Keli Theison ("Theison") answered a 911 call made by Friday's mother ("Ms. Friday"), with whom Friday lived. When the officers arrived at Ms. Friday's residence, Friday informed them Ms. Friday no longer needed help. The officers informed him protocol required they check on her because she had made the call. The officers knew Ms. Friday had been arrested the previous day while exhibiting "bizarre" and "possibly emotionally disturbed" behavior. Before Friday led the officers into his mother's bedroom, Ms. Friday yelled she did not need their help and commanded them to leave. Upon entering, McClure asked Ms. Friday if she was okay and then proceeded to turn the volume down on her stereo. McClure testified that, as he adjusted the volume, he might have inadvertently brushed Ms. Friday's leg. Ms. Friday suddenly jumped from her bed, grabbed a gun, and pointed the gun at Theison. McClure then drew his sidearm and fatally shot Ms. Friday.

Procedural History

On February 2, 2010, Friday filed a wrongful death claim (*Friday I*) against McClure and Theison on behalf of Ms. Friday. The claim pled theories of conversion, trespass, assault, negligence, and battery, resulting in Ms. Friday's death. On January 30, 2014, McClure filed a motion to dismiss the wrongful death claims, arguing Friday's alleged torts were not the natural and probable cause of Ms. Friday's death. On February 13, 2014, the trial court granted McClure's

motion with respect to Friday's claims for conversion, trespass, and assault, finding they "are not cognizable claims under Section 537.080" and thus "fail to state a claim upon which relief may be granted."¹ The next day, Friday filed a voluntary dismissal without prejudice of the remaining battery and negligence claims. He did not appeal.

On December 8, 2014, Friday refiled his wrongful death claim (*Friday II*). *Friday II* pled theories of wrongful death arising from trespass, battery, and negligence. Friday contends the second trespass claim contained new facts regarding causation. On May 15, 2015, McClure filed a motion to dismiss, arguing *res judicata* barred the new trespass claim, as it was essentially identical to *Friday I*. On July 29, 2015, the court ruled that because *Friday I* was dismissed on the merits, *res judicata* barred re-litigation of the trespass issue. On July 1, 2016, Friday filed a motion for reconsideration, which the trial court denied.

On July 25, 2016, McClure and Theison filed a motion for leave to file an answer out of time, which the court granted. In their answer, the officers pled official immunity and public duty as bars to Friday's negligence claims, because the fatal shooting was discretionary, and the officers violated no particular duty owed to Ms. Friday.

The matter was tried to a jury on the surviving negligence claim. At the conclusion of Friday's evidence, McClure made a motion for directed verdict, which the court denied. McClure also proffered a battery instruction prior to the verdict director's delivery. The court rejected the instruction. On August 8, 2016, a jury returned its verdict in favor of Theison but against McClure on Friday's negligence claim. McClure filed his motion for JNOV on September 7, 2016. The motion was denied on October 14, 2016. McClure filed a notice of appeal later that same day.

¹ All statutory references are to RSMo 2000 (as supplemented through 2016), unless otherwise specified.

Analysis
McClure's Appeal

McClure argues the trial court erred in denying his motions for directed verdict and JNOV, because: (1) Friday's negligence claim was barred by the doctrines of official immunity and public duty; and (2) Friday did not have a submissible negligence claim, in that extant evidence only established an intentional tort. We need not address McClure's first point, because we conclude Friday's negligence claim was not submissible.

"The standard of review for the denial of a judgment notwithstanding the verdict ... is essentially the same as review of the denial of a motion for directed verdict." *Bauer v. Bowes*, 350 S.W.3d 478, 481 (Mo. App. 2011) (quotes and citation omitted). "If the record contains probative facts to support the conclusion reached by the jury, we will affirm." *Fletcher v. Kansas City Cancer Center, LLC*, 296 S.W.3d 474, 476-77 (Mo. App. 2009) (quotes and citation omitted). "If a party makes a case under any theory submitted to the jury, the motion for directed verdict and motion for judgment notwithstanding the verdict are properly denied." *Id.* at 477.

To make a submissible negligence case, a plaintiff "must prove the existence of a duty to be performed by the defendant, a breach of that duty, and a resulting injury caused by the breach." *Brown v. Bailey*, 210 S.W.3d 397, 407 (Mo. App. 2006) (citation omitted). "To establish causation, the plaintiff must prove that the defendant's conduct is *both the cause in fact and the proximate cause* of a plaintiff's resulting injury." *Id.* (emphasis added). "To prove causation in fact in a wrongful death action, a plaintiff must establish that 'but for' defendant's acts or omissions, the decedent would not have died." *Id.*

Here, it is undisputed that the cause in fact of Ms. Friday's death was McClure's intentional shooting. Friday's brief even "concedes that McClure intended to shoot Linda Friday at the time

of the shooting.” This concession alone is dispositive of Friday’s underlying negligence claim, because “[t]he theories of negligence and intentional tort are contradictory and mutually exclusive.” *Hockensmith v. Brown*, 929 S.W.2d 840, 845 (Mo. App. 1996) (citation omitted). “Evidence of an act purposefully done negates negligence.”² *Id.* While Friday offered evidence probative of proximate cause, he offered no evidence McClure’s antecedent acts were both the proximate cause *and* the cause in fact of wrongful death. He cannot have a submissible negligence claim while conceding the actual cause of death was an intentional act.³ It is a legal impossibility. Accordingly, there was no evidence to support the trial court’s denial of directed verdict and JNOV. McClure’s point is granted.

Friday’s Cross-Appeal

Friday contends the trial court erred in dismissing his refiled claim, because *res judicata* does not apply where there was no final judgment on the merits of the initial claim. “Because a determination of *res judicata* necessarily depends upon proof of the prior judgment, we review the motion to dismiss under the same standards as a motion for summary judgment.” *Spath v. Norris*, 281 S.W.3d 346, 349 (Mo. App. 2009). “The propriety of summary judgment is a question of law subject to our *de novo* review.” *Id.* at 350. “We give no deference to the circuit court’s ruling and

² To be clear, this rule applies only where the defendant intended to injure the plaintiff. If an officer intentionally fires his weapon and unintentionally injures a third party, the third party might have a submissible negligence claim against the officer. See, e.g., *Green v. Denison*, 738 S.W.2d 861 (Mo. banc. 1987) (involving a police shootout leading to accidental injury of innocent bystanders) (*abrogated on other grounds* by *Davis v. Lambert-St. Louis Int’l Airport*, 193 S.W.3d 760 (Mo. banc 2006)).

³ N.B., Rule 84.04’s briefing standards require the issue of submissibility be raised to trigger this rule’s application. “Compliance with appellate briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating ... on arguments that have not been made.” *Brown v. Ameristar Casino Kansas City, Inc.*, 211 S.W.3d 145, 147 (Mo. App. 2007) (citation and quotes omitted). The present case is thus distinguishable from *Conway v. St. Louis County, MO*, 254 S.W.3d 159 (Mo. App. 2008), a factually similar case that correctly proceeded as a negligence claim, because the dispositive issue of intentionality was never raised.

view the record in a light most favorable to ... the party against whom summary judgment was entered.” *Id.*

“The doctrine of *res judicata* operates to bar any claim that was previously litigated between the same parties or those in privity with them.” *Id.* “The defense precludes consideration of issues decided in the prior lawsuit, as well as those issues that the parties could have brought into the case at that time.” *Id.* We conclude the trial court’s motion to dismiss constituted a final judgment on the merits of Friday’s initial trespass claim, and *res judicata* bars its re-litigation.

Friday argues the motion to dismiss was not a final judgment, because the court’s order did not specify the motion was dismissed with prejudice. Rule 67.01 provides, “[a] dismissal without prejudice permits the party to bring another civil action for the same cause, *unless the civil action is otherwise barred*” (emphasis added). It is well established that “[t]he granting of a motion to dismiss for failure to state a claim can be a final judgment on the merits sufficient to raise the defense of *res judicata* in a later proceeding.” *Dunn v. Bd. of Curators of Univ. of Missouri*, 413 S.W.3d 375, 377 (Mo. App. 2013). “If a plaintiff has elected to stand on a dismissed petition and not plead further substantial facts, such dismissal is considered a final judgment for purposes of appeal.” *Id.* (citation omitted). “Thus, regardless of whether a case was dismissed without prejudice, the doctrine of *res judicata* precludes a plaintiff from re-filing a petition that was dismissed for failing to state a claim when it relies on the same substantial facts as those previously alleged.” *Id.* (citation omitted).

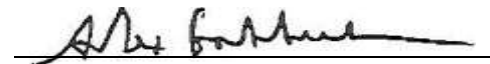
Friday argues the new trespass claim pled new substantial facts related to causation. We disagree. Rather than pleading new substantial facts, Friday’s refiled claim merely adds commentary and evidentiary minutiae to the original facts. For example, Friday’s original petition acknowledged Ms. Friday was “an emotionally disturbed individual ... out of touch with reality,

[making] outlandish claims regarding her relationship to George W. Bush.” A “new fact” Friday alleges in the second claim is that “mentally ill individuals may often behave unpredictably and violently,” thus supporting Friday’s theory that “[a] violent reaction by and harm to Linda Friday was the natural, probable, and foreseeable consequence of the Defendants’ entry into Linda Friday’s bedroom[.]” While Friday’s refiled claim might better explain his causation argument, the added details are not new substantial facts. “In order for a subsequent claim on the same transaction to be considered separate ... there must be new ultimate facts, as opposed to evidentiary details, that form a new claim for relief.” *Commonwealth Land Title Ins. Co. v. Miceli*, 480 S.W.3d 354, 364 (Mo. App. 2015) (quotes and citation omitted). Similarly, Friday’s original petition stated Ms. Friday “repeatedly asked [McClure] to leave in [a] manner that showed she was upset and agitated by his presence[.]” In his refiled petition, Friday adds, “many individuals do not like police officers and would find their presence in their homes offensive[.]” Again, Friday’s new claim adds only elaboration and minor details. Because the refiled claim pled no new substantial facts, *res judicata* precludes its re-litigation. Friday’s cross-appeal is denied.

Conclusion

We therefore conclude the trial court erred in denying McClure’s motions for directed verdict and JNOV, because the cause in fact of injury was an intentional act, rendering the negligence claim not submissible. We reverse the trial court’s denial of directed verdict and JNOV.⁴ We conclude the trial court did not err in dismissing Friday’s refiled trespass claim, because *res judicata* bars the re-filing of claims in which no new substantial facts are pleaded.

⁴ After the trial court held *res judicata* barred Friday’s trespass claim, only Friday’s battery and negligence claims remained. However, Friday only advanced the negligence claim, thus abandoning his battery claim. Since we determine the negligence claim was not submissible and uphold the dismissal of the trespass claim, nothing of Friday’s wrongful death case survives for remand.



Anthony Rex Gabbert, Judge

All concur.