

SUPREME COURT OF MISSOURI

Case No. SC99928

CHRISTINA FORESTER

Appellant,

vs.

CHRYSTAL MAY

Respondent.

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Phelps County Circuit Court. The trial court granted defendant May's motion to dismiss and entered judgment November 19, 2021. [Appeal Doc. 7]. Appellant Forester filed her notice of appeal November 23, 2021. [Appeal Doc. 8]. The Court of Appeals, Southern District, reversed. *Opinion SD37325*. Jurisdiction in the Missouri Supreme Court is proper because the Supreme Court sustained May's application under Rule 83.04 for transfer following opinion.

STANDARD OF REVIEW

The standard of review for a trial court's grant of a motion to dismiss is *de novo*. When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim. Plaintiffs' petition states a cause of action if its averments invoke principles of substantive law that may entitle the plaintiff to relief.

Lynch v. Lynch, 260 S.W.3d 834, 836 (Mo. 2008) (internal citations and quotations omitted). In reviewing a motion to dismiss, the Court "will consider only the grounds raised in the motion to dismiss in reviewing the propriety of the trial court's dismissal of a petition." *Travelers Property and Casualty Company of America v. Manitowoc Co.*, 389 S.W.3d 174, 176 (Mo. 2013).

STATEMENT OF FACTS

A. Children's Division Procedures.

The Children's Division of the Missouri Department of Social Services operates a Child Abuse and Neglect Hotline ("Hotline") through which Children's Division staff receive reports of alleged and suspected child abuse or neglect. [Appeal Doc. 2, ¶¶ 7-8].

When a Hotline call is received, Children's Division staff first determine if the allegation of abuse or neglect meets the legal criteria to be accepted as a Child Abuse and Neglect report. The criteria are: 1) the child is under the age of 18; 2) the alleged perpetrator has care, custody, and control of the child; and 2) the allegations meet the legal definition of abuse or neglect. [Appeal Doc. 2, ¶ 9]. If these criteria are met and a report is received, the Children's Division must then determine if the report merits investigation or if the report should instead be accepted as a family assessment. [Appeal Doc. 2, ¶ 10].

When the Children's Division opens an investigation into the abuse or neglect of a child under the age of four, "such investigation shall include an evaluation of the child by a SAFE CARE provider ... or a review of the child's case file and photographs of the child's injuries by a SAFE CARE provider." [Appeal Doc. 2, ¶ 18, *citing* Section 210.146.1, RSMo]. The Children's Division **requires** that all SAFE CARE referrals be completed and submitted "as soon as possible, but **no later than seventy-two (72) hours**" after receipt of the child abuse

and neglect report. [Appeal Doc. 2, ¶ 21 (emphasis in original, citing *Child Welfare Manual, Section 2, Chapter 5.3.5, and Practice Points PP19-IA-07*)].

The caseworker responsible for making the required SAFE CARE referral must complete the “SAFE-CARE Provider Evaluation Referral form (CD-231)” and send the completed CD-231 form by encrypted email to *DSS.CD.SafeCare-Referral@dss.mo.gov*. [Appeal Doc. 2, ¶ 24, Appeal Doc. 3].

The CD-231 form is a one-page document the caseworker completes by: 1) filling in the child’s name, date of birth, and gender; the alleged perpetrator’s name and relationship to the child; and the name and contact information of the caseworker and the caseworker’s supervisor; 2) identifying the category of abuse or neglect at issue by checking the appropriate box, stating the reported concern, and providing any “additional information obtained from contacts”; and 3) providing “medical information” by stating if and by whom the child has received medical attention, stating whether the child has an injury, stating whether the caseworker has medical records for the reported incident, and describing the specific injuries. [Appeal Doc. 2, ¶ 25, Appeal Doc. 3].

The Children’s Division explains that a failure by a caseworker to complete the CD-231 form and timely transmit it in the manner required by the Children’s Division “may result in the child receiving inadequate medical attention.” [Appeal Doc. 2, ¶ 26].

B. Madison Stodulski's Death.

The Children's Division received a child abuse and neglect hotline call at the center of this case on December 5, 2019 from the Rolla Police Department. The call alleged that Reginald and Sassy Stolduski were abusing or endangering their daughter, Madison. [Appeal Doc. 2, ¶ 31]. Respondent Chrystal May, a caseworker employed by the Children's Division, was assigned to the Hotline call. May immediately opened an investigation. [Appeal Doc. 2, ¶¶ 28, 33].

The Children's Division had received a prior Hotline call a month earlier, on November 5, 2019, alleging that Reginald and Sassy were abusing or endangering Madison. The caller said, "there is a concern of exposure to drugs in the home. There are concerns that Reggie Stodulski (Dad) has been so high that the child has walked in the road toward traffic." [Appeal Doc. 2, ¶ 27].

May was the caseworker assigned by the Children's Division to respond to the earlier November 5, 2019 Hotline call. [Appeal Doc. 2, ¶ 28]. After the first Hotline call, May attempted, but failed, to make contact with the Stodulskis at their apartment twice on November 6, 2019, once on November 7, and again failed on November 9, 2019. [Appeal Doc. 2, ¶ 29]. Having failed to make in-person contact with Reginald or Sassy, May sent a letter to Reginald Stodulski November 15, 2019 asking him to call her back. [Appeal Doc. 2, ¶ 30]. May made no further attempts to contact the Stodulskis until the Children's Division received the December 5, 2019 call from the Rolla Police Department. [Appeal Doc. 2, ¶ 31].

The December 5, 2019 Hotline call was accepted by the Children's Division as a Child Abuse and Neglect report. It was designated a "Level 1" priority, requiring a face-to-face meeting between May and Madison within three hours. [Appeal Doc. 2, ¶ 32]. Upon receiving the December 5 report, May began an investigation, which included visiting the Stodulski's home, making contact with law enforcement, and collecting physical evidence. [Appeal Doc. 2, ¶ 33].

When May arrived at the Stodulski's apartment, law enforcement officers were already present, including members of the South Central Drug Task Force present inside the home. [Appeal Doc. 2, ¶ 34]. The officers told May they had a search warrant for the Stodulskis' home and that they had reason to believe Reginald was involved with a recent drug overdose. [Appeal Doc. 2, ¶ 35]. May was also told at that time that narcotics were found inside the Stodulskis' home and that the narcotics were accessible to Madison because narcotics were found in Madison's shoes and in a candy bowl. [Appeal Doc. 2, ¶ 36].

In her report, May wrote: "On December 5, 2019, a child abuse/neglect report was received by the 25th Children's Division alleging unsafe/inadequate shelter of Madison Stodulski by Reginald Stodulski. Reginald Stodulski did have care, custody, and control of the child at the time of the allegations. Child did have significant injuries to her persons." May's report then repeats the statement, but references Sassy instead of Reginald the second time. [Appeal Doc. 2, ¶ 38].

May met with Reginald and Sassy at the Rolla Police Department later that day, December 5, 2019, and asked them to take drug tests and to allow Madison

to be drug tested. [Appeal Doc. 2, ¶ 41]. Reginald and Sassy agreed. *Id.* Because of the seriousness of the situation, May met with Reginald, Sassy, and Reginald's mother, Laura Miller, December 6, 2019. [Appeal Doc. 2, ¶ 42]. They agreed Madison would stay with Laura, her grandmother, until Sassy's, Reginald's, and Madison's drug test results came back, at which point the group would meet again to discuss next steps. *Id.* They also agreed that Sassy and Reginald would not have unsupervised visits with Madison at that time. *Id.*

May received the drug test results December 11, 2019. The parents' drug tests were negative, but Madison tested positive for opiates, morphine, and heroin. [Appeal Doc. 2, ¶ 43]. May attempted to contact Sassy to discuss Madison's positive drug test on December 11, December 12, and twice on December 17, but was unsuccessful in reaching her. [Appeal Doc. 2, ¶ 44]. May finally spoke with Sassy December 20, 2019. [Appeal Doc. 2, ¶ 45]. May, however, never attempted to contact Reginald or Laura to discuss Madison's positive drug test results. May never informed the police about Madison's positive drug test. [Appeal Doc. 2, ¶¶ 46-47].

The Rolla Police Department received a call December 21, 2019 about an almost two year old infant at the Stodulski residence who was unresponsive and not breathing. [Appeal Doc. 2, ¶ 48]. Upon their arrival, Rolla police officers discovered Madison unconscious and not breathing. [Appeal Doc. 2, ¶ 49]. The officers attempted unsuccessfully to resuscitate Madison. *Id.* Paramedics arrived and transported Madison to Phelps Health, where she was pronounced dead. *Id.*

The Medical Examiner's Office conducted an autopsy December 23, 2019. The autopsy determined that Madison died from a fentanyl overdose. [Appeal Doc. 2, ¶ 50]. Madison's death was declared a homicide. *Id.* Madison was only 22 months old. [Appeal Doc. 2, ¶ 2].

When May began her investigation December 5, 2019, she was legally required to make a SAFE CARE referral about Madison "no later than" 72 hours after starting her investigation — that is, by December 8, 2019. [Appeal Doc. 2, ¶ 53]. May did not make a SAFE CARE referral by December 8. [Appeal Doc. 2, ¶ 56]. Instead, she waited until May 18, 2020, five months after Madison died, before making the required referral. *Id.*

Obviously, a referral made months after Madison's death was too late to save her. May's May 18, 2020 SAFE CARE referral was made five days after Forester sent a Chapter 610 record request to the Children's Division seeking records about SAFE CARE provider referrals for Madison. It appears that this record request triggered the pointless referral, which appears intended solely to cover up May's failure to make the required referral months earlier. *Id.*

If May had fulfilled the ministerial duty she owed to Madison and made her required SAFE CARE referral within 72 hours of the Children's Division receiving the December 5, 2019 Hotline call, as required by law, the "significant injuries" to Madison that May observed December 5, 2019 could have been confirmed by a SAFE CARE provider, who could have then taken steps to keep Madison safe. [Appeal Doc. 2, ¶ 57].

If May had not violated the ministerial duty she owed to Madison to make the SAFE CARE referral, Madison would have been removed from a place of danger and would still be alive today. [Appeal Doc. 2, ¶ 58].

C. Procedural History.

Christina Forester, Madison's grandmother, was appointed *plaintiff ad litem* June 23, 2021 for purposes of prosecuting a wrongful death claim against May. [Appeal Doc. 1, pg. 9, Appeal Doc. 2, ¶ 2].

May moved to dismiss Forester's petition on two grounds: 1) that May is entitled to sovereign immunity in her official capacity; and 2) that May is entitled to official immunity in her individual capacity. [Appeal Doc. 4].

The trial court granted May's motion to dismiss and entered judgment November 19, 2019, holding: "The Court grants the Motion to Dismiss for two reasons. The Court finds that the Defendant's actions as alleged are discretionary and she is therefore entitled to official immunity. Additionally, the Court finds that the late filing of the SAFE CARE referral, while egregious, was not a cause of the minor's death." [Appeal Doc. 7].¹

¹ Forester confirmed in her opposition to May's motion to dismiss that May was only being sued in her individual capacity. [Appeal Doc. 5]. Sovereign immunity, therefore, does not apply and is not addressed in this brief. "[T]he doctrine of sovereign immunity is uniquely applicable to a governmental entity and is not applicable to an individual public official." *Green v. Missouri Depart. of Transportation*, 151 S.W.3d 877, 882 (Mo. App. 2004).

POINTS RELIED ON

I.

The trial court erred in dismissing Forester’s petition on grounds of official immunity because May had a ministerial duty to make a timely SAFE CARE referral and had no official immunity for her failure to do so in that once May opened her investigation December 5, 2019, she no longer had discretion about whether, when, or how to make a SAFE CARE referral.

State ex rel. Alsup v. Kanatzar, 588 S.W.3d 187 (Mo. 2019)

State ex rel. Gorzik Corp. v. Mosman, 315 S.W.2d 209 (Mo. 1958)

State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443 (Mo. 1986)

Section 210.146.1, RSMo.

II.

The trial court erred in dismissing Forester's petition on the ground that May's egregiously late SAFE CARE referral made five months after Madison's death was not the cause of death because causation was not a ground on which the trial court could grant May's motion to dismiss in that May did not assert lack of causation in her motion to dismiss and the issue of causation was never briefed or argued by the parties.

Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254 (2015)

*Travelers Property and Casualty Company of America v.
Manitowoc Co.*, 389 S.W.3d 174 (Mo. 2013)

III.

The trial court erred in dismissing Forester's petition on the ground that May's egregiously late SAFE CARE referral made five months after Madison's death was not the cause of death because Forester never alleged that the five-month delay in making a SAFE CARE referral caused Madison's death in that Forester alleged that it was May's failure to make a SAFE CARE referral within 72 hours of opening her investigation that caused Madison's death.

State v. Shrout, 415 S.W.3d 123 (Mo. App. 2013)

Black's Law Dictionary 1647 (10th ed. 2014)

IV.

The trial court erred in dismissing Forester's petition on the ground that May's egregiously late SAFE CARE referral made five months after Madison's death was not the cause of death because Forester adequately alleged a causal connection between May's failure to make a timely SAFE CARE referral and Madison's death in that Forester alleged that but for May's failure to make a SAFE CARE referral within 72 hours of initiating her investigation, Madison would still be alive today.

Dibrill v. Normandy Associates, 383 S.W.3d 77 (Mo. App. 2012)

Hensley v. Jackson County, 227 S.W.3d 491 (Mo. 2007)

ARGUMENT

- I. The trial court erred in dismissing Forester’s petition on grounds of official immunity because May had a ministerial duty to make a timely SAFE CARE referral and had no official immunity for her failure to do so in that once May opened her investigation December 5, 2019, she no longer had discretion about whether, when, or how to make a SAFE CARE referral.**

“Official immunity ... protects public officials sued in their individual capacities from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.” *State ex rel. Barron v. Beger*, 655 S.W.3d 356, 360 (Mo. 2022) (citation omitted). “The official immunity doctrine, however, does not provide public employees immunity for torts committed when acting in a ministerial capacity.” *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. 2008).

Whether an act can be characterized as discretionary depends on the degree of reason and judgment required. A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued. A ministerial function, in contrast, is one of a clerical nature 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 his own judgment or opinion concerning the propriety of the act to be performed.

Id. (internal citations omitted).

Dating back to as early as 1986, this Court has recognized that a ministerial act can arise from “either a statutory or departmentally-mandated duty.” *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 445 (Mo. 1986). In the nearly forty years since *State ex rel. Twiehaus* was decided, Missouri’s appellate courts have

consistently recognized that a government employee's duty to perform a ministerial act can arise from statute, regulation, or a departmental mandate. "To be liable for official acts, a public employee must violate either a departmentally-mandated duty or a duty imposed by statute or regulation." *Woods v. Ware*, 471 S.W.3d 385, 392 (Mo. App. W.D. 2015). "Simply put, a plaintiff must plead facts establishing an exception to official immunity, including the existence of a statutory or departmentally-mandated duty, to survive a motion to dismiss for failure to state a claim." *Stephens v. Dunn*, 453 S.W.3d 241, 251 (Mo. App. S.D. 2014). "[A] public employee is only liable for a ministerial act if the conduct violates either a departmentally-mandated duty or a duty imposed by statute or regulation." *A.F. v. Hazelwood School District*, 491 S.W.3d 628, 631 (Mo. App. E.D. 2016).

Here, Forester alleged that May had a ministerial duty to make a SAFE CARE provider referral by completing the CD-231 form and transmitting it no later than December 8, 2019; that May breached that ministerial duty; and that but for May's breach, Madison would have been removed from her place of danger and would still be alive today. [Appeal Doc. 2, ¶¶ 53-58]. The critical question is whether May had discretion in deciding whether, when, or how to make a SAFE CARE referral. May did not have discretion. Thus, May is not protected by official immunity.

Section 210.146.1, RSMo., states that an investigation involving a victim under four years of age, "**shall** include an evaluation of the child by a SAFE

CARE provider” (emphasis added). The Children’s Division’s Child Welfare Manual requires that all such SAFE CARE referrals be completed within 72 hours of the investigation being opened. To make the SAFE CARE referral, the case-worker responsible, in this case May, must complete the “SAFE-CARE Provider Evaluation Referral form (CD-231)” and send the completed CD-231 form by encrypted email to *DSS.CD.SafeCareReferral@dss.mo.gov*. [Appeal Doc. 2, ¶ 24].

May opened her investigation December 5, 2019. She opened her investigation after the Children’s Division received a Hotline call from the police reporting that Madison, a child under the age of four, was being abused or neglected.

Based on these facts, May had no discretion whether to complete the CD-231 form and transmit it by email within 72 hours of starting her investigation. She had to do it. May had no discretion **whether** to make a SAFE CARE referral because she had opened a child abuse and neglect investigation involving a victim younger than four years old. May had no discretion **when** to make the SAFE CARE referral because the Children’s Division manual required May to complete the SAFE CARE referral “within 72 hours of the investigation being opened.” In this case, that 72-hour period ended no later than December 8, 2019. Finally, May had no discretion on **how** to make the SAFE CARE referral because the Children’s Division manual required her to fill out the standard one-page CD-231 form and email the completed form to a specific email address.

None of these acts required May to exercise *any* judgment “in determining *how or whether* [making a SAFE CARE referral] should be done.” *Southers*, 263 S.W.3d at 610 (emphasis added). The SAFE CARE referral had to be made on the required form and sent to the required email address within the required time regardless of whether May thought it was appropriate to do so, regardless of whether she thought the CD-231 form was the best way of conveying the information, and regardless of whether she thought that the situation was not urgent enough to require 72 hours notice. May’s opinions, thoughts, beliefs, and judgments on these issues meant nothing given the Children’s Division’s clear and unqualified directions to act.

This fits the definition of a ministerial duty. May thus had a ministerial duty to make her SAFE CARE referral no later than December 8, 2019. She did not do so. May thereby breached her ministerial duty, a duty that in this case she owed to 22-month old Madison.

May in her briefs below chose not to address the statutes and official policies that dictate precisely whether, how, and when SAFE CARE referrals must be made. Instead, May chose to address the issue of “investigations” generally, in broad-sweeping terms, hoping that the discretion generally granted to investigations and investigators would submerge the actual issue in this case, that is: What discretion, if any, did May have with respect to the SAFE Care referral? May stated below: “Nothing in these statutes or the form that was attached to the Third Amended Petition removes discretion from May, who makes the decisions

about when to start an investigation, what actions to take during the investigation, and what future steps to take.” [Appeal Doc. 4, pg. 5].

May’s broad argument about discretion in investigations, generally, is not tied to the specific factual allegations and issues in this case. *How is the requirement to make a SAFE CARE referral within 72 hours discretionary?* May never asks the question, let alone attempt to answer it. *Where is the discretion in filling out a specific one-page form and transmitting it to a specific email address?* Again, May never answers the question. Indeed, May never even addresses any of the specifics of the petition because May only claims “discretion” in a kind of generalized, hand-waving way that ignores every specific of the case and, critically, the specific reporting obligations imposed upon her by Missouri statute, enacted by the General Assembly and signed by the Governor, and by the Children’s Division’s explicit, unambiguous written policies and procedures.

The Court of Appeals panel below recognized May’s refusal to engage in the proper legal analysis when it stated that, “in determining if official immunity applies, the focus is on the specific act or omission from which the alleged liability arises, not the general nature of the job.” *Forester v. May*, No. SD37325, *slip op.* at *6-7 (Mo. App. 2022).

May seeks to evade the longstanding rule evoked by the Court of Appeals by contending in her application for transfer in this Court that the appellate panel had simply “created its own standard.” *Application for Transfer at 7*. Not true.

The appellate court did not create a new standard. Rather, the court’s focus on *the particular act* alleged to be negligent follows longstanding, settled law.

“For more than a century, this Court has held that a ministerial or clerical duty is one in which **a certain act** is to be performed upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to [the public official’s] judgment or opinion concerning the propriety or impropriety of the act to be performed.” *State ex rel. Alsup*, 588 S.W.3d at 191 (Mo. 2019), citing *State ex rel. Forgrave v. Hill*, 272 Mo. 206, 198 S.W. 844, 846 (Mo. banc 1917) (emphasis added, internal quotations omitted).

In the 106 years since *State ex rel. Forgrave* was decided, there has been no confusion among the courts of this state about where the focus lies. Indeed, as recently as last December, this Court reiterated “the central question is whether there is any room whatsoever for variation in when and how **a particular task** can be done.” *State ex rel. Barron*, 655 S.W.3d at 360, citing *State ex rel. Alsup*, 588 S.W.3d at 191 (emphasis added).

Courts applying the ministerial duty test consistently focus on the particular act alleged to have been performed negligently. In *Jungerman v. City of Rayton*, 925 S.W.2d 202, 206 (Mo. 1996), this Court held: “The mere act of inventorying and securing an arrestee’s property in a prescribed manner during booking, is not a protected discretionary function in light of the lack of policy-making or expertise involved.”

Booking officers may be responsible for more than just “securing an arrestee’s property,” and some of their other responsibilities may require an exercise of discretion. But regardless of whether a booking officer engages in discretionary acts in other parts of her job, inventorying an arrestee’s property does not involve discretion. Because the booking officer was alleged to have been negligent in performing *that particular task*, that is where the Court focused.

J.M. v. Lee’s Summit School District, 545 S.W.3d 363 (Mo. App. 2018), a case relied upon by the court below, is also instructive. There, a student sued a school volunteer alleging that the student was injured when the volunteer negligently failed to supervise an after-school softball game. *Id.* at 367-68. According to the student, the volunteer had been instructed by the school district to require any person playing catcher to wear a facemask. *Id.* at 371. The trial court granted the volunteer’s summary judgment motion, holding that the volunteer had official immunity because he had discretion in deciding how to supervise the softball game. *Id.* at 368. The court of appeals reversed.

The court of appeals held that because the volunteer “received direction from district staff *requiring* use of the protective equipment and because it was Board Policy to use protective equipment as directed, any discretion [volunteer] may have had regarding the use of the facemask was removed.” *Id.* at 373. It was irrelevant that the volunteer *generally had discretion* in supervising softball games because the focus, as always, was on the particular act that was allegedly performed negligently and about which the volunteer had no discretion.

Missouri caselaw makes it clear that whether and to what extent May had discretion generally in carrying out her investigation was irrelevant once she started the investigation and triggered the required reporting. This is because the focus must be, as it always is, on the “particular task” May failed to perform, that is, making a timely SAFE CARE referral. When analyzed in this manner, as this Court’s decisions require, it is clear that to whatever extent May had discretion in performing other aspects of her job, *her discretion did not extend to whether, when, and how to make a SAFE CARE referral.*

May’s statement that she had discretion in deciding *whether to start an investigation* is a bonafide red-herring. May started an investigation. This was alleged in Forester’s petition and must be accepted as true for purposes of May’s motion to dismiss. It does not matter whether May had discretion in deciding whether to start an investigation. Once May started her investigation, certain duties flowed from that decision, including May’s ministerial duty to make a SAFE CARE referral within 72 hours.

Finally, the fact that May could have made a SAFE CARE referral at any time within the mandated 72-hour period does not convert her ministerial duty into a discretionary one. Courts have uniformly rejected the notion that a requirement that a ministerial act take place *within* a specific time makes the act discretionary.

In *State ex rel. Gorzik Corp. v. Mosman*, 315 S.W.2d 209, 211 (Mo. 1958), for example, this Court held that a statute requiring a judge to “enter” a judgment

“within three days after the cause shall have been submitted to him for his final decision,” created a ministerial duty. The duty was ministerial even though the judge could have entered his final decision on the day the case was submitted or on first, second, or the third day after, because the judge was obliged to act by the third day. He could not do so sometime later. *Mosman* is controlling even though that case involved a writ of mandamus and not an action for damages. This Court has established that “the test for whether a task is ‘ministerial’ for purposes of a writ of mandamus is precisely the same as the test for whether that task is ‘ministerial’ such that official immunity will not apply.” *State ex rel. Alsop*, 588 S.W.3d at 191 (Mo. 2019).

That an action be commanded to occur “within” a stated time does not turn a ministerial action into a discretionary one is a rule of longstanding in Missouri. In *State v. Macke*, 594 S.W.2d 300, 309 (Mo. App. 1980), for example, the court held that a statutory duty to return a search warrant within ten days was ministerial even though the warrant could have been properly returned anytime during those ten days. In *Winterowd v. Brenneman*, 636 S.W.2d 170, 175-176 (Mo. App. 1982), a city charter provision requiring the “Clerk, within ten days after a petition shall have been filed, to determine its sufficiency and make his certificate setting forth the particulars in which it is insufficient, if it is found to be insufficient,” imposed a ministerial duty on the City Clerk. Again, the duty was ministerial even though the Clerk could have made his certification anytime during those ten days.

Courts in other states reach the same conclusion. For example, in *Boston v. Hartford Accident & Indemnity Company*, 822 So.2d 239, 251 (Miss. 2002), the Mississippi Supreme Court held that a statutory “duty to schedule a medical and psychiatric examination within twenty-four (24) hours of Decedent’s detainment [was] a ministerial function which would disqualify [government employees] from the protection of qualified immunity.” *See also Lawrence v. State*, 601 So.2d 194, 195 (Ala. App. 1992) (statutory requirement that police officers issuing traffic tickets complete and sign a ticket and serve a copy of that ticket within 48-hours is ministerial).

Here, placing a deadline within which May had to make her statutorily-mandated SAFE CARE referral did not give her discretion. The 72-hour deadline imposed by the Children’s Division eliminated May’s discretion about when to make a referral by requiring her SAFE CARE referral be made within a specified time, that is, within 72 hours.

Forester’s petition sufficiently alleged that May had no discretion in deciding whether, when, and how to make a SAFE CARE referral on Madison’s behalf. May, therefore, owed a ministerial duty to Madison to make a SAFE CARE referral within 72 hours of starting her investigation. Because May breached this ministerial duty owed to Madison, the trial court erred in dismissing Forester’s petition on the ground that May is protected by official immunity.

The trial court’s judgment should be reversed and the case remanded.

II. The trial court erred in dismissing Forester’s petition on the ground that May’s egregiously late SAFE CARE referral made five months after Madison’s death was not the cause of death because causation was not a ground on which the trial court could grant May’s motion to dismiss in that May did not assert lack of causation in her motion to dismiss and the issue of causation was never briefed or argued by the parties.

The trial court held that in addition to May being protected by official immunity, dismissal was also proper because May’s decision to make her SAFE CARE referral five months after Madison died was not the cause of Madison’s death. [Appeal Doc. 7].

While the substance of the trial court’s decision is addressed in Section 3 below, a threshold issue is whether the sufficiency of Forester’s petition as to the element of causation was an appropriate basis on which the trial court could dismiss the case. It was not.

May filed her motion to dismiss asserting two grounds, sovereign immunity (to the extent May was sued in her official capacity) and official immunity (to the extent May was sued in her individual capacity). [Appeal Doc. 4]. Lack of causation was never raised in May’s motion. *Id.* Causation was never discussed in Forester’s response brief. [Appeal Doc. 5]. And causation never raised its head in May’s reply brief. [Appeal Doc. 6].

On appeal, this Court, “**will consider only the grounds raised in the motion to dismiss** in reviewing the propriety of the trial court’s dismissal of a petition.” *Travelers Property & Casualty Company of America v. Manitowoc Co.*, 389 S.W.3d 174, 176 (Mo. 2013) (emphasis added); *see also Breeden v.*

Hueser, 273 S.W.3d 1, 6 (Mo. App. 2008) (Court of Appeals “must affirm the trial court’s ruling if the motion to dismiss could have been sustained on any of the meritorious grounds *raised in the motion*, regardless of whether the trial court relied on that particular ground. It will not, however, affirm the grant of a motion to dismiss *on grounds not stated in the motion*”) (emphasis added; citation and brackets omitted).

The rule that a petition can only be dismissed on grounds raised in a party’s motion protects fundamental issues of procedural fairness. It furthers the adversarial process by putting one’s opponent on notice and providing them an opportunity to respond. The United States Supreme Court, for example, has held that while a district court can raise the issue of standing *sua sponte*, “elementary principles of procedural fairness” require that the district court must give the plaintiff the opportunity to provide evidence of standing. *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270-271 (2015); *see also Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (“A district court can only dismiss an action on its own motion as long as the procedure employed is fair. To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond”) (citations and internal quotation omitted).

Because the issue of lack of causation was never raised in May’s motion to dismiss, and because Forester was never notified that causation was a potential

issue, the trial court could not dismiss Forester’s petition on this ground and this Court should not affirm the trial court’s decision on this ground.

That the issue of causation was not raised below is particularly important given the amendment to Rule 55.27(g)(2) in 2012, which removed the phrase “or on appeal” as being one of the times when a defense of failure to state a claim can be raised. Today, “the defense of failure to state a claim is waived when not presented to the trial court and cannot be raised for the first time on appeal.” *Main v. Fariss*, 561 S.W.3d 104, 106 (Mo. App. 2018), citing *Stander v. Szabados*, 407 S.W.3d 73, 81 (Mo. App. 2013).

Thus, by not raising and presenting the issue of causation in the trial court, May waived it. It was improper for the trial court to grant May’s motion to dismiss on the unasserted ground of lack of causation.

III. The trial court erred in dismissing Forester’s petition on the ground that May’s egregiously late SAFE CARE referral made five months after Madison’s death was not the cause of death because Forester never alleged that the five-month delay in making a SAFE CARE referral caused Madison’s death in that Forester alleged that it was May’s failure to make a SAFE CARE referral within 72 hours of opening her investigation that caused Madison’s death.

Even if the issue of causation had been raised and preserved for appeal — it was not — the trial court’s decision to dismiss for lack of causation was not based on or supported by the record.

The trial court recognized that May’s decision not to make a SAFE CARE referral until *five months* after Madison died was egregious. [Appeal Doc. 7].

Forester agrees. The trial court held that while this five-month delay was egregious, May's decision to make a SAFE CARE referral five months after Madison died was not the cause of her death. *Id.* Again, Forester agrees.

Forester *never* alleged that May's May 18, 2020 SAFE CARE referral caused or contributed to cause Madison's December 23, 2019 death. Such an allegation would have been absurd. Rather, Forester alleged that: 1) according to the Children's Division, SAFE CARE referrals must be timely made because the failure to do so "may result in the child receiving inadequate medical attention"; 2) if May had fulfilled the ministerial duty she owed to Madison and made a SAFE CARE referral within 72 hours of the Children's Division receiving the December 5, 2019 Hotline call, as required by law, the "significant injuries" to Madison that May identified on December 5, 2019 could have been confirmed by a SAFE CARE provider, who could have then taken steps to keep Madison safe; and 3) but for May violating her ministerial duty to make a timely SAFE CARE referral, Madison would have been removed from a place of danger and would still be alive today.

Thus, Forester alleges a causal connection between May's *failure* to timely make the required SAFE CARE referral *by December 8, 2019* and Madison's death on December 23, 2019.

Instead of making a decision based on the parties' arguments or the allegations in the petition, the trial court created this flawed strawman argument, thus illustrating the importance of the adversarial process. *See Black's Law*

Dictionary 1647 (10th ed. 2014) (strawman argument is a “tenuous and exaggerated counterargument that an advocate makes for the sole purpose of disproving it”); *see also State v. Shrout*, 415 S.W.3d 123, 124-125 (Mo. App. 2013) (“We reject this appeal by mother ... because her points each assume and proceed with a false premise — basically putting up and knocking down a straw man — leaving the true bases ... effectively unchallenged”).

The trial court addressed a putative causal connection between Madison’s December 23, 2019 death and May’s subsequent May 18, 2020 SAFE CARE referral that was never alleged, and then held that the later-in-time event did not cause the earlier. Absent time travel, this strawman cannot stand.

The trial court’s decision dismissing the lawsuit for lack of causation should be reversed.

IV. The trial court erred in dismissing Forester’s petition on the ground that May’s egregiously late SAFE CARE referral made five months after Madison’s death was not the cause of death because Forester adequately alleged a causal connection between May’s failure to make a timely SAFE CARE referral and Madison’s death in that Forester alleged that but for May’s failure to make a SAFE CARE referral within 72 hours of initiating her investigation, Madison would still be alive today.

As noted, May never raised lack of causation as an issue in her motion to dismiss. The parties never briefed the issue of causation. And the trial court did not address the causation issue actually alleged in the petition. Nevertheless, because the trial court raised its causation strawman as a ground for dismissal,

Forester will address the issue, but without any intent to waive her arguments about issue preservation set out in the preceding point relied on.

As a threshold matter, courts rarely dismiss petitions on the basis of lack of causation. In *Dibrill v. Normandy Associates*, 383 S.W.3d 77, 89 (Mo. App. 2012), for example, the court held that considering causation, “was not appropriate on a motion to dismiss,” because “[m]atters of foreseeability and proximate cause must be left for the court and jury after presentation of evidence.” *See also English v. Empire District Electric Company, Inc.*, 220 S.W.3d 849, 856 (Mo. App. 2007) (“determination of proximate cause is dependent upon the particular facts of each case and is generally an issue reserved for the trier of fact”).

This is not one of those rare cases where causation presents an issue of law. Forester’s actual causation allegation is that if May had performed her ministerial duty, a SAFE CARE provider could have seen Madison’s “significant injuries” and could have had Madison removed from the home before she ingested the fentanyl that killed her.

These allegations must be accepted as true and “construed liberally in favor of the plaintiff.” *Lynch*, 260 S.W.3d at 836.

Causation was sufficiently pleaded.

Whether Madison’s parents are also to blame for leaving the drugs where Madison could reach them is not a basis for dismissal. *May’s job was to protect Madison from her parents*. That’s what the Children’s Division does. “The negligence of the defendant need not be the sole cause of the injury, as long as it is one

of the efficient causes thereof, without which injury would not have resulted.” *Hensley v. Jackson County*, 227 S.W.3d 491, 496 (Mo. 2007) (citation omitted). A “plaintiff need not show that the very injury resulting from defendant’s negligence was foreseeable, but merely that a reasonable person could have foreseen that injuries of the type suffered would be likely to occur under the circumstances.” *L.A.C. v. Ward Parkway Shopping Center Company, L.P.*, 75 S.W.3d 247, 258 (Mo. 2012) (citation omitted).

Here, it was certainly foreseeable that Madison could die if May did not make a timely SAFE CARE referral. The Children’s Division recognized the clear causation between making timely SAFE CARE referrals and protecting children in danger when it informed investigators like May that the failure to make a timely SAFE CARE referral, “may result in the child receiving inadequate medical attention.” [Appeal Doc. 2, ¶ 26].

The petition adequately alleged causation.

Thus, while the sufficiency of Forester’s causation allegations is not an issue raised in the trial court or preserved for appellate review, Forester in any case met her burden in pleading causation.

CONCLUSION

May had a ministerial duty to refer Madison to a SAFE CARE provider no later than December 8, 2019. May did not make a SAFE CARE referral by December 8, 2019. She continued not to make a SAFE CARE referral December 11, 2019 when she received drug test results showing that Madison had tested

positive for opioids. May continued not to make a SAFE CARE referral at any time before Madison died of a fentanyl overdose December 23, 2019.

Madison's overdose and death was foreseeable given that Madison lived in her drug dealer parents' home. May's inexcusable breach of a ministerial duty owed to Madison, a reporting duty designed specifically to protect kids like Madison, is not protected by official immunity. The trial court's judgment should be reversed and the case should be remanded for further proceedings and trial.

Respectfully submitted,
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CERTIFICATES

The undersigned attorney for appellant Christina Forester certifies as required by Rule 84.06(c) as follows:

- This brief complies with the limitations contained in Rule 84.06(b).
- The brief contains 7,732 based on the word count function in Google Documents, not including those portions of the brief permitted to be excluded under Rule 84.06(b).
- The electronic PDF version of this brief filed with the court has been scanned for viruses and was determined to be virus-free.
- Copies of this brief were served on all counsel of record through the court's electronic filing system on February 17, 2023.

/s/ Matt Vianello