No. SC100069

In the
Supreme Court of Missouri

THE STATE OF MISSOURI ex rel. JAYLA RUIZ-MORALES, JOHN KIMANI, AND VALARIE JOHNSON

Relators,

v.

THE HONORABLE DEBORAH ALESSI,

Respondent,

SALLY LENIGER,

Plaintiff.

Proceeding in prohibition from the Circuit Court of
St. Charles County, Missouri, No. 2211-CC01075
The Honorable Deborah Alessi

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This action involves the question of whether Relators' mandate to secure a severely disabled man using a pelvic harness "at all times" he was confined to a wheelchair—without affording any discretion to act otherwise—is a ministerial duty, the violation of which is actionable under Missouri law. Relators filed an application for a writ of prohibition after Respondent properly denied their motion to dismiss on the grounds of official immunity. Jurisdiction to determine whether a remedial writ should issue is therefore proper in this proceeding pursuant to MO. CONST. ART. V, § 4.1.

INTRODUCTION

Ronald was a severely disabled man in Relators' care. Pursuant to state and federal law in conjunction with Ronald's doctor's orders, Relators were required to always use Ronald's pelvic harness and seat belt when he was in his wheelchair. They ignored that order. No judgment was permitted, and none was exercised. They simply didn't do what they were supposed to do. As a result, Ronald died from hanging: a slow and agonizing death by strangulation because he wasn't strapped into his wheelchair. Relators were afforded zero discretion in completing the task of always securing Ronald's pelvic harness. Thus, their duty was ministerial, and they are not entitled to immunity.

Because the order being challenged is a denial of Relators' Motion to Dismiss, finding that a ***single*** ministerial duty was pled ends the analysis and requires denial of Relators' Petition. Relators do not come close to the massive burden they must carry to show Plaintiff's Petition clearly establishes "on its face and without exception" that their affirmative defense applies and that "plaintiff can prove no set of facts in support of [her]

claim which would entitle [her] to relief." *Nguyen v. Grain Valley R-5 Sch. Dist.,* 353 S.W.3d 725, 729 (Mo. Ct. App. 2011); *Murphy v. Stonewall Kitchen, LLC,* 503 S.W.3d 308, 310 (Mo. Ct. App. 2016). Although Plaintiff pled several ministerial duties that Relators breached, Relators' Petition is easily disposed of by examining the simple, lifesaving directive to always strap Ronald in his wheelchair. Relators were told when to strap him in ("as the client sits in the wheelchair"), exactly how to strap him in, and were permitted no discretion to deviate from the instructions. That is a ministerial duty.

Respondent correctly overruled Relators' motion to dismiss. A writ should not issue.

STATEMENT OF FACTS

Ronald, a seventy-year-old severely disabled man, died in Relators' care at St. Louis Developmental Disabilities Treatment Centers - St. Charles Habilitation Center ("the Center") on June 29, 2020. **Respondents' Appendix ("App") A3-4**. The Center is a medical facility and institution operated by the Missouri Department of Mental Health. **App A3.** Ronald had a mental age of three months old and a motor skills age of six months old. **App A6.** As a result, Ronald was non-verbal, non-ambulatory, and completely dependent upon others for basic needs and survival. **App A6.** Due to his extensive medical conditions and disabilities, Ronald had been a resident at several Missouri Department of Mental Health facilities since June 12, 1974. **App A6.**

While residing at the Center, Ronald had a history of sliding down and out of his wheelchair. **App A6.** To combat this very serious danger, the Center's Occupational Therapy Physical Therapy (OTPT) department fitted Ronald's wheelchair with a harness that was placed in his groin area between his legs. **App A7.** Relators were trained by the

OTPT department on how to use and secure the harness because Ronald was not capable of doing so himself. **App A7.**

Relator Ruiz-Morales was a developmental assistant and care provider for Ronald. **App A5.** Relators Kimani and Johnson were nurses and/or care providers for Ronald. **App A5.** Each Relator was responsible for Ronald's one-on-one care, including, care, intervention, treatment, administration of medicine, feedings, cleanings, dressing, general assistance, supervision, and any and all treatments ordered by Ronald's physicians or other medical care providers. **App A5.** Relators were all certified to provide medical care, treatment, support, supervision, and assistance to Ronald. **App A7.**

Pursuant to state and federal law, particularly 42 C.F.R. § 441.301, the Center developed and maintained an Individual Support Plan (ISP) for Ronald. **App A7.** The Missouri Division of Developmental Disabilities requires an ISP for those persons receiving services or support through the Division and is used to describe the type of support and services that each patient needs. **App A7.**

Ronald's ISP contained specific orders from doctors, physicians, the OTPT department, and other medical team personnel that were required to be followed by all staff at the center. **App A7.** The physical therapy component of Ronald's ISP confirms the harness was to be used "whenever" he was in his wheelchair:

> episodes of increased variable extensor tone in bilateral lower extremities in supine and sitting with hips in adduction, knees in extension, and ankles in plantar flexion and eversion. Due to his unsafe static sitting posture, an anti-thrust pelvic harness is used whenever he is in his W/C.

Respondent's Appendix ("R. App") A1.

In addition to requiring use of Ronald's harness whenever he was in his wheelchair, the ISP required Relators to provide twenty-four-hour supervision. **App A8.** Ronald's ISP required Relators to check on Ronald every thirty (30) minutes. **App A8.** It required Relators to examine Ronald's incontinence pad every two hours. **App A8.** It required Relators to reposition Ronald every two hours. **App A8.** The Center communicated the ISP orders to all staff and medical personnel who interacted with Ronald. **App A8.**

Ronald's physician's orders mandated that it was the responsibility of the staff member(s) placing Ronald in his chair to ensure the proper use of the seatbelt and pelvic harness. **App A8.** The physician's orders directing the use of the pelvic harness were required to be followed by all staff at the Center, including medical personnel. **App A8.** Ronald's physician's orders were communicated to all staff and medical personnel who interacted with Ronald. **App A9.**

Relators had a responsibility to follow the OTPT department's instructions and to ensure the pelvic harness was fastened when Ronald was in his wheelchair. **App A9.** Relators were required to notify the OTPT department immediately if Ronald's adaptive equipment, including the pelvic harness, was damaged or missing. **App A9.** The Center mandated that Relators strictly abide by a resident's ISP and physician orders. **App A9.** Relators were not afforded any discretion to deviate from Ronald's ISP or physician orders. **App A9.**

On June 29, 2020, Ronald was in his bed for most of the day. **App A10.** Relators were all on duty and assigned to care for the residents of Home 8, where Ronald resided. **App A10.** Around 5:00 p.m., Relator Ruiz-Morales removed Ronald from bed and placed

him in his wheelchair. **App A10.** When placing Ronald in his wheelchair, Relator Ruiz-Morales did not secure Ronald's pelvic harness. **App A10.**

Around 5:30 p.m., Relator Ruiz-Morales brought Ronald out of his room and placed him in the living room, where he sat in the wheelchair without the pelvic harness secured. **App A10.** Relators all viewed Ronald sitting in the living room in his wheelchair but did not check to make sure Ronald's pelvic harness was secured. **App A10.** Around 5:50 p.m., Relator Ruiz-Morales took Ronald to his bedroom, where she left him sitting upright in his wheelchair without his pelvic harness secured. **App A10.**

After 5:50 p.m., Relators never checked to make sure Ronald's pelvic harness was secured. **App A10.** They never examined his incontinence pad. **App A10.** They never repositioned Ronald. **App A11.** Had Relators assessed Ronald's pelvic harness and seatbelt, performed the mandatory thirty-minute checks, examined his incontinence pad, or repositioned him—all as required by his physician orders and ISP—Relators would have noticed Ronald's pelvic harness was not secured. **App A11.**

Around 8:05 p.m., Relators observed Ronald with his legs touching the floor, buttocks on the wheelchair footrests, and head on the seat of the wheelchair with the wheelchair seatbelt around his neck. **App A11.** He was pronounced dead at 9:27 p.m. **App A11.** The St. Charles County Medical Examiner determined Ronald's cause of death was "hanging." **App A11.**

ARGUMENT

Relators incorrectly claim, "the use of the pelvic harness was not mandated by law and thus cannot be a ministerial duty." **Relators' Brief**, p. 5. First, this Court has long held

that ministerial duties arise outside the context of statute or regulations. *See State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 445 (Mo. 1986) (petition must "aver the existence of either a statutory ***or departmentally-mandated*** duty") (emphasis added). Doctor's orders that are to be carried out by others are ministerial duties. *Rush v. Senior Citizens Nursing Home Dist. Of Ray Cty.*, 212 S.W.3d 155, 161 (Mo. Ct. App. 2006). This duty was clearly pled. **App A11.** ("Ronald's physician orders mandated the use of the pelvic harness and seatbelt at all times when Ronald was in his wheelchair."). But even if doctor's orders were not enough, on their own, to establish a ministerial duty, Plaintiff pled—contrary to Relator's argument—that Ronald's doctor's orders were mandatory because of state and federal law:

> **31. Pursuant to state and federal law, particularly 42 C.F.R. § 441.301, the Center developed and maintained an Individual Support Plan (ISP) for Ronald.**
>
> **32. The Missouri Division of Developmental Disabilities requires an ISP for those persons receiving services or support through the Division and is used to describe the type of**
> **support and services that each patient needs.**
>
> **33. Ronald's ISP required him to receive a level of care consistent with an Intermediate Care Facility for Mental Retardation (ICF/MR), now commonly referred to as Intermediate Care Facility for Individuals with Intellectual Disability (ICF/IID) or Developmental Disability (ICF/DD).**
>
> **34. Ronald's ISP, by reference and incorporation, contained specific orders from doctors, physicians, the OTPT department, and other medical team personnel that were required to be followed by all staff at the center.**

App A7.

Relators rely heavily on *Alsup*, helping make Respondent's point. In *Alsup*, this Court held that an act is discretionary, and therefore subject to immunity, if there is room

for variation in when and how a particular task is done. *State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187, 191 (Mo. banc. 2019). Plaintiff's Petition clearly demonstrates Relators were afforded no such discretion: "Ronald's physician orders ***mandated*** the use of the pelvic harness and seatbelt ***at all times*** when Ronald was in his wheelchair." **App A8.**

Nothing about Ronald's physician's orders or individual support plan (ISP) can be construed to fall within the "discretionary" category as outlined in *Alsup*. Put slightly different, Relators did not have "authorization to choose." Relators were mandated by Ronald's physician's orders to, among several pled duties, use the pelvic harness "at all times when Ronald was in his wheelchair." Relators ignored this order and did not strap him in. Nothing in the petition allows any room for deviation from the requirement that Ronald must be strapped in "as the client sits in the wheelchair," pursuant to a specified procedure. That's the only question at this stage.

What's more, Relators, as medical providers, have an even harder hill to climb: "When the issue of official immunity involves a publicly employed medical professional, there is a second step to the analysis." *Thomas v. Brandt*, 325 S.W.3d 481, 484 (Mo. Ct. App. 2010); *Kemp v. McReynolds,* 621 S.W.3d 644, 656 (Mo. Ct. App. 2021). Even if every single duty pled by Plaintiff is discretionary, Relators, as medical providers, cannot be dismissed unless the court also finds that each duty was breached during a true emergency situation. "A true emergency situation is a ***strict*** requirement involving rapidly evolving circumstances where medical personnel have limited information." *Id.* (emphasis added). Here, Relators were medical providers who breached duties mandated by Ronald's ISP and physician orders. This was not an emergency. It was routine, everyday care. Thus,

the defense of official immunity is not available because Relators were not acting in a "rapidly evolving emergency situation."

Relators did not have discretion to ignore Ronald's ISP and physician's orders. They were negligent, and immunity does not attach to negligent failure to follow ministerial duties. Further, Relators are medical providers who cannot show this was a true emergency. Relators' Petition should be denied.

LEGAL STANDARD

"A writ of prohibition does not issue as a matter of right." *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. 1985) (citing *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. 1983). "Whether a writ should issue in a particular case is a question left to the sound discretion of the court to which application has been made." *Id.* "Because this extraordinary legal remedy provides litigants with abundant opportunity to circumvent the normal appellate process, we are mindful that courts should employ the writ judiciously and with great restraint." *Id.* "A court should only exercise its discretionary authority to issue this extraordinary remedy when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventive action." *Id.* "Absent such conditions, the court should decline to act." *Id.*

"Where an affirmative defense is asserted in a motion to dismiss, a trial court may dismiss the petition ***only*** if the petition clearly establishes 'on its face and without exception' that the defense applies and the claim is barred." *Nguyen*, 353 S.W.3d at 729 (emphasis added). "As the part[ies] asserting the affirmative defense of official immunity, the individual defendants [bear] the burden of pleading and proving that they are entitled

to that defense." *Id.* at 730. When ruling on a motion to dismiss, the trial court must assume "that all of plaintiff's averments are true, and liberally grant to plaintiff all reasonable inferences therefrom." *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. 2009). "Indeed, under principles of modern pleading, a petition is not to be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Murphy*, 503 S.W.3d at 310.

I. Point Relied on I: The development and implementation of Ronald's ISP was mandated by Missouri law in Mo. Code Regs. tit. 9, § 45-3.010

Relators take the Court all the way back to *Marbury v. Madison*, air grievances against appellate decisions that have nothing to do with the facts of this case, and ultimately ask the Court to "make clear" the ministerial duty exception to official immunity requires a mandate of legal authority. As stimulating as the history lesson was, however, Relators' lead argument ends before even attempting to explain how a legal mandate is lacking in this case.

To the contrary, as Plaintiff pled in the petition (**App A7**), the development and implementation of Ronald's ISP was legally mandated through Missouri regulations issued by the Department of Mental Health:

> *PURPOSE: This rule prescribes procedures for* ***development*** *and* ***implementation*** *of individual support plans for all individuals receiving services from the Division of Developmental Disabilities.*
> …….
> Every individual referred to a qualified provider of targeted case management who is a participant of MO HealthNet or who receives any services funded by the division, including services under a home and community-based waiver or services funded only by general revenue, **shall** have an individual support plan (ISP).

Mo. Code Regs. Ann. tit. 9, § 45-3.010. Ironically, Relators' trip down memory lane even tries to clarify this Court's decision in *Twiehaus* to sound the alarm about runaway lower court decisions. *See* **Relators' Brief**, p. 10 ("This Court's use of the phrase 'departmentally-mandated duty' in *Twiehaus* undoubtedly referred to valid regulations issued by the Department of Mental Health (the relator's employer)").

Based on valid regulations issued by the Department of Mental Health (Relators' employer) in § 45-3.010, Relators were legally required to implement Ronald's ISP. Under this regulatory framework, "[t]raining, supports, therapies, treatments and/or other services to be provided for the individual become part of the ISP." Mo. Code Regs. Ann. tit. 9, § 45-3.010. In accordance with federal law found in 42 CFR 441.301(c)(2)—which was also pled in the petition (**App A7**)—"the ISP shall reflect the services and supports that are important for the individual to meet the needs identified through an assessment of functional need..." *Id.* Missouri regulations even require the ISP "[r]eflect the services and supports (paid and unpaid) to assist the individual to achieve identified goals, **and the providers of those services and supports**." Mo. Code Regs. Ann. tit. 9, § 45-3.010

In accordance with the law, an ISP was developed for Ronald. **App A7**. Relators were therefore legally mandated to implement the ISP as Ronald's providers ordered. Those orders include the Physical Therapy ISP order mandating that "[d]ue to his unsafe static sitting posture, an anti-thrust pelvic harness is used **whenever** he is in his W/C." **R. App. A1.**

The legal mandate here is similar to *Alsup*, where a statute required school districts to adopt a written policy addressing the use of restrictive behavioral interventions. *State*

ex rel. Alsup v. Kanatzar, 588 S.W.3d 187, 189 (Mo. 2019). While the ultimate decision here is contrary to *Alsup* due to the lack of discretion afforded Relators, the analysis is the same. When a statute or regulation authorizes or mandates action as it does here, the "legal mandate" prong of the test is met, and the Court must analyze whether the duty created is discretionary or not. *See id*. (analyzing whether written policy developed pursuant to statute afforded discretion).

Here, Plaintiff pled Relators were given specific orders, pursuant to an Individual Support Plan that was required by Missouri law, from Ronald's physicians and care team. So, prohibition is inappropriate because the duties at issue are legally mandated.

II. Point Relied on II: There is no basis to afford medical care providers the protection of official immunity outside of emergency situations

Even if this Court finds that Relators' duties were all discretionary, official immunity does not apply "unless they are acting in a 'true emergency situation.'" *Kemp*, 621 S.W.3d at 656 (citing *Thomas*, 325 S.W.3d at 484). "A true emergency situation is a strict requirement, involving rapidly evolving circumstances where ***medical personnel*** have limited information." *Id.* (emphasis added). The *Nguyen* court explained the difference in the official immunity standard when applied to medical providers:

> We also note that a wealth of case law has established that government employees providing medical treatment in non-emergency situations are not entitled to official immunity regardless of whether any rules, policies, orders, or regulations were violated.

Nguyen, 353 S.W.3d at 732; *see also Richardson v. City of St. Louis ("Richardson I")*, 293 S.W.3d 133, 140 (Mo. Ct. App. 2009) ("courts have generally adhered to the rule that

government-employed physicians sued for their negligent treatment of individual patients are not entitled to official immunity").

Relators cite *Barron* in arguing that the Relators do not have to establish their acts occurred in an emergency. *See State ex rel. Barron v. Beger*, 655 S.W.3d 356, 361 (Mo. 2022). But *Barron* did not even involve medical providers. And it has nothing to do with the analysis here. In *Barron*, plaintiffs sued a police officer for injuries sustained after their vehicle was struck by the officer while in pursuit of another vehicle. *Id.* at 359. The Court held it did not have to determine if defendant officer was responding to an emergency, only whether her actions were ministerial. *Id.* at 361. The Court's ruling never addressed, much less overruled, the long-standing precedent on official immunity and emergency situations regarding medical providers. The "true emergency situation" doctrine has never applied to police officers and was not discussed in *Barron*. The "true emergency situation" is a strict requirement in actions involving medical personnel. *Barron* does not address it, let alone change it.

Relators' reliance on *Laughlin* is also unhelpful because *Laughlin* did not overrule the true emergency requirement for medical providers. Rather, *Laughlin* clarified that official immunity is not limited to public officials, holding "[w]hile *Southers* did not overrule *Eli Lilly*, this Court did not restrict official immunity only to those public officials' actions that 'go to the essence of governing.'" *Laughlin v. Perry*, 604 S.W.3d 621, 627 (Mo. 2020). And, contrary to Relators' argument, *Eli Lilly*, as explained in subsequent cases, is not the source of the true emergency requirement:

> In *Richardson*, this Court held that whether the actions of emergency medical responders are protected turns on the circumstances of the situation. When emergency responders are acting in a rapidly-evolving emergency situation with limited information, they are protected by official immunity. This Court in *Richardson* reasoned that in emergency situations, emergency responders' actions are more like those of a police officer responding to an emergency, whose actions are protected, than like a doctor treating patients in a hospital setting, whose actions are not.
>
> The *Richardson* court also questioned the vitality of *Eli Lilly's* "essence of governing" approach after our Supreme Court's opinion in *Southers*. The *Southers* opinion included a clarification of the doctrine of official immunity. As that discussion did not include any reference to the "essence of governing" approach, the Richardson court concluded that Southers rejected that approach.
>
> Without commenting on the vitality of *Eli Lilly*, we reaffirm the approach advanced in *Richardson*. When publicly-employed emergency medical personnel are treating patients, their negligent acts are protected by official immunity only if they are acting in a true emergency situation. This true emergency situation is a strict requirement.

Thomas, 325 S.W.3d at 484 (internal citations omitted). Therefore, the key to the emergency exception is the same linchpin that this Court has repeatedly (and recently) affirmed. That is, official immunity turns on whether the public employee "in the face of imperfect information and limited resources, must daily exercise their best judgment in conducting the public's business." *Laughlin*, 604 S.W.3d at 625. Because medical professionals do not face those challenges in the absence of a true emergency, the second step in the analysis is necessary to uphold the purpose of official immunity.

Consistent with this principle, "[t]he court should determine whether the situation involved a true emergency on a case-by-case basis by evaluating the totality of the circumstances." *Thomas,* 325 S.W.3d at 484. In *Thomas*, the decedent "called 9–1–1 complaining of chest pains and difficulty breathing." *Id.* at 482. The defendants, an EMT

and a paramedic, responded to the call. *Id.* The defendants diagnosed the man with acid reflux and left. *Id.* The decedent died the next day. *Id.* The court held the true emergency exception did not apply. *Id.* at 485. Specifically, it found the "time and information available to Respondents was more like that of a doctor treating a patient in a hospital than that of an emergency responder arriving to find a patient in critical and devolving condition." *Id.* at 484–85.

Clearly, this case is "more like that of a doctor treating a patient in a hospital" than an EMT showing up to a scene with no information. There was absolutely nothing wrong with Ronald until Relators breached their duties. Relators were medical providers and Ronald was in their care, at their mercy. Relators failed to secure Ronald in his pelvic harness as required by his ISP and physician's orders, they failed to check in on Ronald every thirty minutes, and they failed to reposition Ronald and change his incontinence pad every two hours. Relators failed to follow the simple, everyday mandates of Ronald's physicians. This situation is exactly like those "of a doctor treating a patient in a hospital." This is not the strictly construed situation with rapidly evolving circumstances and limited information. Relators knew exactly what type of care Ronald required and had strict orders to follow those mandates. So, even if every single one of Relators' duties were discretionary, this was not a true emergency and official immunity cannot apply.

III. Point Relied on III: Ministerial Duties Are Orders to The Public Employee to Perform a Task Without Using Their Own Judgment

A ministerial or clerical duty is one which is to be performed "upon a given state of facts in a prescribed manner" and "without regard to the [public official's] judgment or

opinion concerning the propriety or impropriety of the act to be performed." *Alsup,* 588 S.W.3d at 191.

Specifically, Plaintiff pled Ronald's physician's orders directing the use of the pelvic harness and seatbelt were required to be followed by all staff at the Center ***at all times***. **App A48.** Even more to the point, Ronald's medical providers ordered, "an anti-thrust pelvic harness is used ***whenever*** he is in his W/C." (emphasis added).

Relators know there is no discretion afforded in the directive to strap Ronald in at all times. So, Relators resort to misdirection and attempt to point out other tasks that involve discretion. But we aren't here because they failed to keep the harness as clean and dry as possible. We aren't here because they failed to lay the harness flat. We're here because they didn't strap Ronald in. Relators aren't entitled to official immunity because none of the "discretionary" tasks identified by Relators are allegations of negligence. The core allegation of negligence simply doesn't allow Relators to use their judgment:

- ***As the client sits in the wheelchair***, wrap the left leg strap around the **left thigh** and the right strap around the **right thigh**.

App A36. There is no room for deviation in this order. When Ronald was sitting in the chair, Relators were required to strap him in. Relators argue they could use judgment to remove the upper two straps if Ronald did not tolerate the harness. But Relators cannot point to anything in the Petition or its attachments that allowed to them deviate from the procedure of strapping his ***legs*** in with the ***lower*** straps as he sat down. Put another way, the harness uses multiple straps—upper and lower. And the straps have separate buckles—upper and lower. These are also referred to as shorter and longer straps in the instructions:

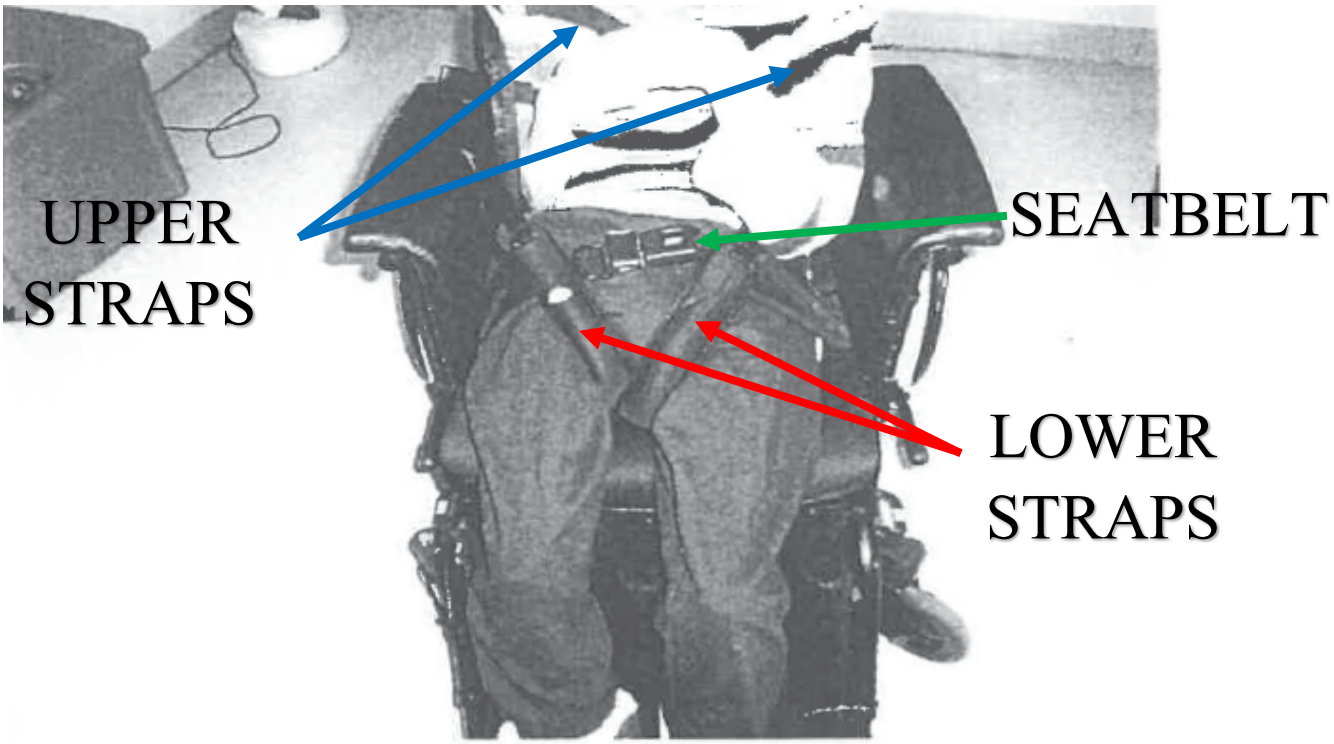
The shorter straps are attached to lower buckles in each side of the rear of the W/C uprights.

App A36.

Thread the long straps around to the rear of the wheelchair and click into the upper set of buckles.

App A36.

The lower straps secure his hips, and legs to the seat bottom, so he doesn't slide down:



App A36.

The upper straps simply hold his upper body to the back of the chair—they do nothing to prevent him from sliding down: that's the job of the lower straps that go around his thighs and hips. The instructions mandate using the lower straps. This case is not about the upper straps. This case is about the mandatory use of the ***pelvic*** harness. The important part of a ***pelvic*** harness, as one might imagine, goes around the pelvis—not the shoulders. Thus, Relators may have been able to loosen upper straps, but they were not allowed to

completely fail to use the harness. They always had to use the lower straps—the ***pelvic*** portion of the harness. Nothing—anywhere—says they could remove the lower straps.

Contrasting the restraint orders here with those in *Alsup* makes clear that the duty is ministerial here. In *Alsup*, this Court explained:

> Determining the need to restrain a school-age child – let alone determining and employing the proper means and manner to accomplish that restraint – are about as far from the sort of clerical or ministerial acts that can be compelled by a writ of mandamus as one can imagine. By the same token, therefore, they are equally as far from the sort of ministerial or clerical acts that fall outside the broad scope of official immunity. **Alsup had no clear and unequivocal duty to restrain Mariano, let alone a clear and unequivocal duty to use a particular restraint in a particular way.** To the contrary, Policy 2770 permitted Alsup to determine whether and when it was necessary to use physical restraint on a student. Policy 2770 also provided Alsup the authority to use physical restraint to the degree of force necessary, for as long as necessary, to protect Mariano and others nearby. If five in-school suspension teachers had been confronted with a child acting the way Mariano was acting, all five could have acted differently and yet each could have remained in compliance with Policy 2770. This is the very antithesis of a clerical or ministerial duty.

Alsup, 588 S.W.3d at 193–94. Here, Relators had a "clear and unequivocal duty to restrain" Ronald "at all times." And Relators had a clear and unequivocal duty to use a particular restraint (the lower straps of the pelvic harness) in a particular way (wrapped around each thigh at any time Ronald was in the wheelchair). In the language of *Alsup*, could five caretakers fail to strap Ronald's legs in and remain in compliance with his ISP? They could not, because his harness was absolutely mandatory. That is the very essence of a clerical or ministerial duty.

Relators were given explicit instructions that when Ronald was put in his wheelchair, his physician's orders mandated the use of his pelvic harness and seatbelt at

all times. In addition to requiring use of Ronald's harness whenever he was in his wheelchair, the ISP required Relators to provide twenty-four-hour supervision. **App A8.** Ronald's ISP required Relators to check on Ronald every thirty (30) minutes. **App A8.** It required Relators to examine Ronald's incontinence pad every two hours. **App A8.** It required Relators to reposition Ronald every two hours. **App A8.** If even one of the above duties is ministerial, then dismissal—and therefore prohibition—is inappropriate.

Nothing about the orders at issue in this case can be construed to fall into the "discretionary" category as outlined by this Court in *Alsup.* Relators did not have "imperfect information and limited resources." Rather, they had years of information, and careful planning and directives from Ronald's physicians. And none of these directives left room for variation or discretion. For instance, Relators were not ordered to "fairly" or "reasonably" provide twenty-four-hour supervision. They were ordered to provide twenty-four-hour care and to perform check-ups every thirty minutes. They did not have room to "fairly' or "reasonably" determine whether Ronald needed his adaptive equipment, including his pelvic harness. They were ordered to use the pelvic harness if Ronald was in his wheelchair. There was no room for judgment to be exercised.

Relators' actions are ministerial under any fair reading of the factors identified in *Southers*. "The determination of whether an act is discretionary or ministerial is made on a case-by-case basis, considering: (1) the nature of the public employee's duties; (2) the extent to which the act involves policymaking or exercise of professional judgment; and (3) the consequences of not applying official immunity." *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. 2008) *as modified on denial of reh'g* (Sept. 30, 2008).

Relators were developmental assistants and nurses assigned to Ronald. **App A4-5, A10.** Nothing in the Petition even remotely suggests that Relators were possessed of policymaking authority in their roles. So, the first *Southers* factor weighs entirely in favor of finding the duties pled are ministerial. Second, Relators did not need to exercise policymaking authority or professional judgment to carry out their jobs. Relators were mandated to use Ronald's pelvic harness and belt when he was placed in the wheelchair. Ronald's physicians had the power to authorize these duties. Relators were tasked with carrying out these orders. That is the very essence of a ministerial duty. Finally, denying official immunity would not harm anyone. It would protect those most vulnerable in our society. It would protect the severely disabled and the elderly by ensuring that public employees in care facilities are held to at least some standard of care, even if that standard is to simply obey the unyielding orders of superiors. Public policy weighs completely in favor of denying immunity.

Relators try to invent discretion in a Petition that clearly allows for none. That reverses the burden they carry. At this stage, the Court must not infer ***any*** discretion where it is not explicitly and "without exception" stated in the Petition. *Nguyen v. Grain Valley R-5 Sch. Dist.,* 353 S.W.3d 725, 729 (Mo. Ct. App. 2011). Moreover, even if Relators were correct that they had a choice as to how to perform these duties, this would still not render the duties discretionary under Missouri law because the "fact that written procedures cannot anticipate every circumstance does not transform a ministerial activity into a discretionary function." *Jungerman v. City of Raytown*, 925 S.W.2d 202, 206 (Mo. 1996),

abrogated on other grounds by Southers v. City of Farmington, 263 S.W.3d 603 (Mo. 2008).

The duties pled by Plaintiff allowed no room for the exercise of discretion and are therefore ministerial in nature. Relators violated these duties. Official immunity cannot apply.

CONCLUSION

Relators had zero discretion to ignore Ronald's ISP and physician's orders. They had no discretion as to when or how to carry out those orders. And immunity does not attach to negligent failure to follow ministerial duties. Further, Relators are medical providers who cannot show this was a true emergency prior to their breaches. Certainly, nothing on the face of the petition comes close to indicating this was an emergency. Had Relators simply followed the non-discretionary instructions in Ronald's ISP and physician's orders, Ronald would be alive.

The trial court correctly denied Relators' motion to dismiss. Relators' Petition should be denied.

Dated: August 15, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 15, 2023, the foregoing was electronically filed with the Clerk of Court using the Missouri Electronic Document Management System, which sent notification to all attorneys of record.

/s/ Patrick R. McPhail
Patrick R. McPhail

CERTIFICATE OF COMPLIANCE

I hereby certify that on August 15, 2023, pursuant to Rule 84.06(c), Respondent's Brief complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Times New Roman font, contains 5,750 words, as determined by Microsoft Word, and was electronically served on all counsel of record through Case.net.

/s/ Patrick R. McPhail