Missouri Court of Appeals
Western District

TRACY RANK,	)	
	)	**WD87706 consolidated with WD87707**
Appellant-Respondent,	)	
v.	)	**OPINION FILED:**
	)	
PETTIS COUNTY AMBULANCE DISTRICT, ET AL.,	)	**December 9, 2025**
	)	
Respondent-Appellant/Respondents.	)	
	)	

Appeal from the Circuit Court of Cooper County, Missouri
The Honorable Keith Michael Bail, Judge

Before Division Three: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge, and Thomas N. Chapman, Judge

Tracy Rank appeals the judgment of the Cooper County Circuit Court granting summary judgment in favor of Greg Nehring, Dave Clippert, Allen Rohrbach, and James Bales (collectively "Individual Defendants") on her claims of negligent supervision, negligence, and fraudulent misrepresentation. The Pettis County Ambulance District cross-appeals the summary judgment in favor of Rank on her claim of indemnification. The judgment is affirmed in part and reversed in part, and the case is remanded for further proceedings.

Background

The Pettis County Ambulance District ("PCAD") is a political subdivision of the State of Missouri managed by a Board of Directors. At all relevant times, Nehring was the Chairman of the Board of Directors, Clippert was the Vice President, Rohrbach was the Secretary, and Bales was the Treasurer.

PCAD hired Michael Gardner as its District Administrator on December 4, 2012. It hired Rank as its Human Resources Manager on July 1, 2013. At the time she was hired, Rank was in a romantic relationship with Gardner, and she learned about the PCAD position through Gardner. The whole time Rank lived with Gardner, he was the District Administrator of PCAD.

Rank never directly reported to the PCAD Board of Directors; she reported to the District Administrator, who was always Gardner. Individual Defendants were not Rank's direct supervisors, and none of them offered input into her position. She was not evaluated by any of the Individual Defendants.

On March 24, 2017, Nehring was presented with checks from PCAD's bank that were purported to have his signature on them but did not. At the bank, Clippert was shown quite a few checks made payable to Gardner and Rank. That same day, Nehring and Clippert contacted the Sedalia Police Department and provided it with checks written to and endorsed by Gardner that had signatures they believed were forged. They also presented to the police several checks issued on the account of PCAD made payable to

Tracy Rank and purportedly endorsed by Rank.[1]

Gardner was arrested and admitted that he forged the checks in question. Thereafter, PCAD fired Gardner. On March 29, 2017, Rank was arrested and charged with felony stealing. Rank was later charged with additional felonies including forgery. After her arrest, PCAD suspended Rank from her employment. On April 11, 2017, PCAD terminated Rank's employment by a letter signed by Nehring. The letter provided, "The decision of termination was the result of apparent discrepancies in accounts payable." On January 18, 2018, the criminal charges against Rank were dismissed without prejudice. On February 5, 2018, Gardner entered a plea of guilty in the Circuit Court of Pettis County to stealing $25,000 or more from PCAD and forgery and was sentenced to 10 years imprisonment.

On July 20, 2021, Rank filed her first amended petition against PCAD and Individual Defendants.[2] Count I for negligent supervision against Individual Defendants alleged that Individual Defendants were negligent in supervising Gardner, which resulted in Rank's arrest and termination of her employment. Count II for negligence against Individual Defendants alleged that they were negligent in their duties as members of PCAD's Board of Directors, which resulted in funds and property of PCAD being misappropriated by Gardner and Rank's arrest and termination of her employment.

[1] Rank denied that she endorsed the checks, supporting the denial with her affidavit.

[2] The matter was transferred from Pettis County to Cooper County upon the parties' agreement.

Count III asserted malicious prosecution against Individual Defendants alleging that Individual Defendants' actions instigated the filing of criminal charges against Rank. Count IV for indemnification against PCAD alleged that it was responsible under its by-laws for the attorney's fees and expenses incurred by Rank in a proceeding in which she became involved by reason of her service as an employee of PCAD, specifically her defense of the criminal charges filed against her and subsequently dismissed. Count V for injurious falsehood against PCAD and Individual Defendants alleged that the defendants made false statements regarding Rank's employment and criminal charges. Finally, count VI asserted fraudulent misrepresentation against PCAD and Individual Defendants alleging that they represented in the April 11, 2017 letter that Rank's employment was terminated for "apparent discrepancies in accounts payable" when they knew they lacked authority to terminate her. Thereafter, Rank voluntarily dismissed her claims in counts V and VI against PCAD.

On May 5, 2023, Rank filed a motion for summary judgment on her indemnification claim against PCAD (count IV) arguing that PCAD was liable to her in the amount of $33,667.72 for attorney's fees and expenses that she incurred in her criminal case under article 13 of the PCAD bylaws. She asserted that she incurred the expenses by reason of her service as the human resource director of PCAD in successfully defending the criminal case.

On November 6, 2023, PCAD filed its own motion for summary judgment on the indemnification claim asserting that Rank did not reasonably incur the fees related to her

criminal prosecution nor did she incur the fees by reason of her duties as a PCAD employee.

On April 10, 2024, Individual Defendants moved for summary judgment on the five tort claims against them (counts I, II, III, V, and VI) on several grounds. First, they argued that all of the tort claims were barred by official immunity. They also argued that the negligence claims (counts I and II) were barred by the public duty doctrine and that the negligence, injurious falsehood, and fraudulent misrepresentation claims (counts I, II, V, and VI) were barred by section 213.070.2,[3] which provides that the Missouri Human Rights Act is the exclusive remedy for common law tort claims brought against an employer. Next, they argued that they were entitled to summary judgment on the negligent supervision claim (count I) because they were not Rank's employer. Individual Defendants further argued that they were entitled to summary judgment on the negligence claims (counts I and II) because Rank could not demonstrate that their alleged failure to supervise Gardner proximately caused her alleged injuries. Finally, they asserted that they were entitled to summary judgment on the fraudulent misrepresentation claim (count VI) because the termination letter did not contain any materially false statements and the PCAD Board of Directors was authorized to terminate an employee.

Thereafter, Rank voluntarily dismissed the malicious prosecution and injurious falsehood claims (counts III and V) against Individual Defendants and filed her response

[3] All statutory references are to RSMo 2016 unless otherwise indicated.

to their motion for summary judgment.

The trial court entered its judgment on November 12, 2024. It granted Individual Defendants' motion for summary judgment on counts I, II, and VI "for the reasons set forth in the Individual Defendants' Motion and their Memorandum in Support." It also granted Rank summary judgment on count IV for indemnification and awarded her $33,667.72 ($25,000 for her attorney's fees and $8,667.72 for costs) incurred in defending the criminal charges against her. Finally, it awarded Rank prejudgment interest at the rate of 9 percent per annum which commenced on January 19, 2018 (the date all criminal charges were dismissed and Rank's attorney's fees and expenses were liquidated) and post-judgment interest until satisfaction of the judgment.

This appeal by Rank and cross-appeal by PCAD followed.

Standard of Review

Appellate review of the trial court's grant of summary judgment is *de novo*. *Green v. Fotoohighiam*, 606 S.W.3d 113, 115 (Mo. banc 2020). The appellate court applies the same criteria as the trial court in determining whether summary judgment was proper. *Id.* Summary judgment is proper if the moving party is entitled to judgment as a matter of law and no genuine issues of material fact exist. *Id.* The record is reviewed in the light most favorable to the party against whom judgment was entered, and that party is entitled to the benefit of all reasonable inferences that may be drawn from the evidence. *Id.* at 116.

To make the requisite showing for summary judgment, the movant must attach to the motion a statement of uncontroverted material facts that "state[s] with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts." *Id.* (quoting Rule 74.04(c)(1)). The nonmovant is then required to file a response either admitting or denying the movant's material facts. *Id.* at 117. Denials may not rest upon the mere allegations or denials of the party's pleading, but must be supported with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial. *Id.* (quoting Rule 74.04(c)(2)). A response that does not comply with the rule with respect to any numbered paragraph in movant's statement is an admission of the truth of that paragraph. *Id.* (quoting Rule 74.04(c)(2)). A court determines "whether uncontroverted facts established via Rule 74.04(c) paragraphs and responses demonstrate movant's right to judgment regardless of other facts or factual disputes." *Id.* at 118 (internal quotes, citation, and alterations omitted). Circuit and appellate courts are not required to sift through the entire record to identify disputed issues, which would cause a court to impermissibly act as an advocate for a party. *Id.* "Summary judgment rarely if ever lies, or can withstand appeal, unless it flows as a matter of law from appropriate Rule 74.04(c) numbered paragraphs and responses alone." *Id.* at 117-18 (internal quotes, citation, and emphasis omitted).

RANK'S APPEAL

Rank raises eight points on appeal challenging the trial court's grant of summary judgment in favor of Individual Defendants on her claims for negligent supervision, negligence, and fraudulent misrepresentation. Her points correspond to the various grounds raised by Individual Defendants to support their motion for summary judgment. Because Individual Defendants were entitled to summary judgment based on official immunity, which Rank challenges in her point one, point one is dispositive of Rank's appeal, and the remaining points need not be considered.

In point one, Rank contends that the trial court erred in granting Individual Defendants summary judgment because they waived or were not entitled to official immunity. 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. Alsup v. Kanatzar*, 588 S.W.3d 187, 190 (Mo. banc 2019) (internal quotes and citation omitted). "The purpose of this doctrine is to allow public officials to make judgments affecting the public safety and welfare without the fear of personal liability. This is because, if an officer is to be put in fear of financial loss at every exercise of his official functions, the interest of the public will inevitably suffer." *Id.* 190-91 (internal quotes, citations, and alterations omitted). "[S]ociety's compelling interest in vigorous and effective administration of public affairs requires that the law protect those individuals who, in the face of imperfect information and limited resources, must daily exercise their best judgment in conducting

the public's business." *Id.* at 191 (internal quotes and citation omitted). "[W]hen a public official asserts the affirmative defense of official immunity, she should be afforded such immunity so long as she was acting within the scope of her authority and without malice." *Id.*

"'Immunity' connotes not only immunity from judgment but also immunity from suit." *Id.* at 190 (internal quotes and citation omitted). "Courts applying the doctrine of official immunity must be cautious not to construe it too narrowly lest they frustrate the need for relieving public servants of the threat of burdensome litigation." *Id.* at 191 (internal quotes and citation omitted). "Official immunity does not apply, and a public official may be held personally liable for the damages the official caused, in two narrow exceptions: (1) when a public official fails to perform a ministerial duty required of the official by law, or (2) when a public official acts in bad faith or with malice." *State ex rel. Love v. Cunningham*, 689 S.W.3d 489, 495 (Mo. banc 2024).

In point one, Rank first posits that Individual Defendants "waived or are not entitled to official immunity in that the Individual Defendants failed to obtain a bond [and] enacted indemnification provisions…in the PCAD bylaws[.]" Specifically, Rank asserts that they failed to obtain bonds as required by section 190.075 and PCAD's own bylaws. Chapter 190 governs the creation, incorporation, and management of ambulance districts and requires the board of directors of a district to adopt bylaws containing the rules for election of officers, meetings of the board, and the transaction of other business of the district. § 190.055. Regarding surety bonds, section 190.075 provides, in pertinent

part:

> All officers and employees authorized to receive or retain the custody of money or to sign vouchers, checks, warrants or evidence of indebtedness binding upon the district shall furnish surety bond for the faithful performance of their duties and the faithful accounting for all moneys that may come into their hands in an amount to be fixed and in a form to be approved by the board.

Article 3, section 3.19 of the PCAD bylaws provides nearly identical language:

> All officers and employees authorized to receive or retain custody of money, or to sign vouchers, checks, warrants or evidence of indebtedness binding upon the District, will furnish security bond for the faithful accounting of all funds that are to be approved by the Board of Directors. The costs of all bonds shall be paid for by the Pettis County Ambulance District.

Article 13 of the bylaws provides that PCAD shall indemnify officers or other employees for expenses and liabilities reasonably incurred in connection with any threatened, pending or complete action in which they may become involved by reason of their service in such capacity. Rank argues that because section 190.075 requires, and because Individual Defendants and PCAD provided for the bond and indemnification provisions in the bylaws, it can be inferred that they intended to waive any official immunity to which they would normally be entitled.

Rank relies on two cases for her argument, *Bryan v. Missouri State Highway Patrol*, 963 S.W.2d 403 (Mo. App. W.D. 1998) ("*Bryan I*"), and *Bryan v. Pogue*, 18 S.W.3d 529 (Mo. App. W.D. 2000) ("*Bryan II*"). In those cases, Denise Bryan was severely and permanently injured when the car she was driving collided with a cow and then was rear-ended by another vehicle on Highway 65 near Marshall. *Bryan I*, 963

S.W.2d at 405. Approximately 33 minutes before the accident, Missouri State Highway Trooper J.P. Lysaught responded to a different accident that had occurred on Highway 65 involving a car driven by Garret and Phoebe Jones and a cow. *Id.* The trooper investigated the Jones accident for approximately 30 minutes but was unable to locate the cow involved. *Id.* Trooper Lysaught left the scene to drive the Joneses to another location, and Bryan's accident occurred soon after a few hundred feet away. *Id.* Bryan, through her husband, filed a lawsuit against several parties including Trooper Lysaught. *Id.* The trial court granted summary judgment in favor of the trooper based on official immunity, and Bryan appealed. *Id.* at 405-06.

This court considered section 270.010, Missouri's Stock Law, which imposes civil liability on the owner of animals that run at large outside their enclosures and cause damages or injury and also imposes a duty on sheriffs and other police officers to restrain such animals. Relevant to the cases, section 270.010 provides:

> it is hereby made the duty of the sheriff or other officer having police powers, on his own view, or when notified by any other person that any of such stock is so running at large, to restrain the same forthwith….Any failure or refusal on the part of such officer to discharge the duties required of him by this section shall render him liable on his bond to any person damaged by such failure or refusal, which damages may be sued for and recovered in any court of competent jurisdiction.

This court reversed the summary judgment in favor of the trooper, finding that the question of whether he failed or refused to discharge his duty under section 270.010 was a question of fact for the jury. *Bryan I*, 963 S.W.2d at 406. It further found that if the jury ultimately found that Trooper Lysaught failed or refused to discharge his duty, he

would only be liable to the extent of his bond. *Id.* at 407. It explained that the officer's duty to restrain a cow under the statute is a discretionary act because the means to achieve the end is within the officer's discretion. *Id.* It continued,

> However, while we find that an officer's duty under § 270.010 involves a discretionary act, we also find that the legislature partially abrogated the common law doctrine of official immunity for the purpose of an officer's liability under § 270.010. The plain language of the statute indicates that a person damaged under this statute may sue an officer on his bond for his failure or refusal to discharge his duty under the statute. By implication, an officer cannot be held liable as to any amount of damages in excess of his bond.

Id.

Following remand, the trial court again granted summary judgment in favor of Trooper Lysaught, finding that the trooper was not required to file a bond under any statute and had not done so voluntarily, therefore, the statutory abrogation of official immunity to the extent of the trooper's bond did not apply. *Bryan II*, 18 S.W.3d at 530-31. Bryan appealed, and this court affirmed the judgment. *Id.* It found that under the plain language of section 270.010, an officer's liability for failing to restrain an animal is limited to the amount of his or her bond. *Id.* at 533-34. It explained that because it was conceded that Trooper Lysaught had no bond and was not required by any statute to have one, the official immunity doctrine applied. *Id.*

In *Bryan II*, this court, in dicta, further pointed out:

> Finally, we note that we do not face a situation in which Missouri statutes required an officer to obtain a bond yet the officer or his supervisors failed to do so, and do not address whether, in such a case, liability could be imposed at least to the minimum amount of the bond which the law had

required the officer to obtain.

Id. at 534.

Rank argues that, in the instant case, the bond requirements in section 190.075 and in article 3, section 3.19 of the PCAD bylaws filled in the missing piece (the requirement of a bond) and thus resulted in a waiver of official immunity. Rank's argument is entirely misplaced. Rank ignores the most salient portion of section 270.010 addressed in the *Bryan* cases – its express abrogation of official immunity for law enforcement officers when carrying out their duties in restraining livestock outside of their enclosures (to the extent of their bond). In *Bryan II*, the court found that the bond (if any) set the amount of abrogation/waiver of official immunity but did not find, nor did it imply in the aforementioned dicta, that a bond requirement would (in the absence of a specific abrogation of official immunity) result in waiver of official immunity. In this instance there is no express waiver/abrogation of official immunity in section 190.075, nor the PCAD bylaws. Likewise, nothing in the indemnification provision of the PCAD bylaws waives official immunity.[4]

Rank also asserts that even if Individual Defendants did not waive their official immunity, official immunity was inapplicable because Individual Defendants failed to perform several ministerial duties required by the bylaws. Specifically, she contends that Individual Defendants failed to prepare various financial reports, failed to request an

[4] The indemnification provision is fully set out in our discussion of PCAD's appeal below.

annual financial audit review, failed to keep true and accurate records, and failed to obtain a bond, and that these "simple" acts "were not highly discretionary."[5]

"[A] ministerial act has long been defined as merely 'clerical.'" *Alsup*, 588 S.W.3d at 191. "[A] ministerial duty compels a task of such routine and mundane nature that it is likely to be delegated to subordinate officials." *Id.* "'Rubber stamp' duties of public officials fall into the category of ministerial tasks."[6] *State ex rel. Morales v. Alessi*, 679 S.W.3d 467, 472 (Mo. banc 2023). "Such duties compel that a certain act is to be performed upon a given set 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." *Id.* (internal quotes, citation, and alternation omitted). "Thus, the central question is whether there is any room whatsoever for variation in when and how a particular task can be done. If so, that task – by definition – is not ministerial." *Alsup*, 588 S.W.3d at 191

The PCAD bylaws impose several duties on the Board of Directors and officers of the district. Article 3, section 3.10 of the bylaws provides that "[t]he Treasurer shall

[5] Rank also contends that Individual Defendants failed to conduct a grievance hearing upon her request as required by the bylaws. Her claims of negligent supervision, negligence, and fraudulent misrepresentation in her first amended petition were not, however, based on the lack of a grievance hearing.

[6] *See, e.g., State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 12 (Mo. banc 2023) (statute requiring attorney general to approve auditor's fiscal note summaries unless they violate legal content and form requirements imposed a ministerial duty); *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 131 (Mo. banc 1997) (statute requiring secretary of state to publish a final order of rulemaking imposed ministerial duty).

prepare or cause to be prepared all required financial statements…and shall keep full and accurate records of all financial affairs, funds, securities and locations of valuable papers and shall provide a report thereof to the Board on a monthly basis." Section 3.10 also provides that if the district "employs an accountant, attorney or other agent, the duties may be delegated to the agent." Article 3, section 3.11 directs that the Secretary "shall be custodian of the books, records, contracts and other documents of the Corporation." Article 3, section 3.19 provides, "The Board of Directors will keep a true and accurate account of its receipts and an annual financial review will be made of its books, records, and accounts." Article 8, section 8.00 further provides, "An annual financial audit review shall be performed by a qualified third party or CPA as determined by the Board of Directors." Section 8.02 mandates, "A monthly financial statement showing income, expenditures, and pending income shall be prepared by the Board Treasurer and or Finance Committee [comprising of the Treasurer and 3 other board members] and presented to the Board of Directors at the first regular monthly meeting of the Board." Finally, as discussed above, article 3, section 3.19 requires officers and employees to furnish a security bond for the faithful accounting of all funds.

"The central inquiry is not whether the law confers a duty to act but, instead, whether the public official retains ***any*** discretion in completing an act[.]" *Morales*, 679 S.W.3d at 472.

> The fact that a statute or regulation may confer authority – or even a duty – to act in a given situation says nothing about whether the act authorized or compelled is the sort of ministerial or clerical act to which official

> immunity does not extend. Thus, the relevant inquiry is not whether the law authorizes, regulates, or requires an action. Instead, it is whether the action itself is ministerial or clerical. And, even when a clerical or ministerial act appears to be authorized or required by statute, official immunity will still apply if the official retains authority to decide when and how that act is to be done.

Alsup, 588 S.W.3d at 192-93 (internal citations and footnotes omitted).

Here, the duties that Individual Defendants allegedly failed to perform were not clerical, ministerial, or "rubber stamp" acts. Individual Defendants had discretion on how the acts were to be completed and by whom. It is not enough that the bylaws required certain actions; rather, the issue is whether Individual Defendants had any discretion in carrying out the acts. *Morales*, 679 S.W.3d at 472; *Alsup*, 588 S.W.3d at 192-93. Individual Defendants had discretion on how to compile and review reports, how to obtain and review a financial audit of PCAD, how to keep records, and how to get bonded and in what amount. The tasks or duties in this case "could have been completed in various ways by various people." *Love,* 689 S.W.3d at 496 (quoting *Morales*, 679 S.W.3d at 473). Because the tasks required by the bylaws to be completed by Individual Defendants involved discretion, the ministerial exception of official immunity did not apply.

Finally, Rank argues that official immunity was inapplicable because Individual Defendants acted with bad faith or with malice. She asserts that Individual Defendants were wholly indifferent to the duties that they were required to perform under the bylaws and that they knew that failing to perform the required duties would be prejudicial or

injurious to other people or, at the very least, they were recklessly indifferent to any outcomes their inactions would have.

"[O]fficial immunity applies to all discretionary acts except those done in bad faith or with malice." *Love*, 689 S.W.3d at 496 (internal quotes and citations omitted). "The relevant definition of bad faith or malice in this context ordinarily contains a requirement of actual intent to cause injury." *Id.* (internal quotes and citation omitted). "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Id.* at 496-97 (internal quotes and citations omitted).

In her first amended petition, Rank alleged that Individual Defendants' actions "were willfully wrongful and in conscious disregard for the rights of Plaintiff." The petition, however, was devoid of any factual allegations that Individual Defendants intended to cause injury to Rank. Moreover, the summary judgment record did not show that Individual Defendants had the intent collectively or individually to injure or prejudice Rank. At most, Rank's pleading alleged, and the summary judgment record showed, only that Individual Defendants may have willfully and wrongfully failed to follow the PCAD bylaws. The summary judgment record simply lacked any facts to trigger the bad faith or malice exception to the application of official immunity. *See Carlton v. Means*, 688 S.W.3d 625, 631 (Mo. App. E.D. 2024) (affirming summary judgment for defendant based on official immunity; summary judgment record did not show that police officer had the requisite intent to injure or prejudice driver when he

collided with driver's vehicle while responding to an emergency call). The trial court did not err in granting summary judgment in favor of Individual Defendants on Rank's claims for negligent supervision, negligence, and fraudulent misrepresentation based on official immunity.

Rank's point one is denied. Points two through eight need not be considered.

PCAD's Cross-Appeal

PCAD raises four points on appeal challenging the trial court's summary judgment in favor of Rank on her claim for indemnification and award of prejudgment interest. In points one and two, PCAD contends that the trial court erred in granting Rank's motion for summary judgment and denying its motion because Rank sought reimbursement of attorney's fees and expenses in defending criminal charges of stealing, which were not incurred in her capacity as an employee of PCAD.[7] It asserts that a fair, reasonable, and practical interpretation of the indemnification bylaw would be that it is not responsible for the attorney's fees and costs of a former employee charged with stealing from it.

Rank sought indemnification of the expenses she incurred in her criminal case under article 13 of PCAD's bylaws. That provision provides, in pertinent part:

> *The Pettis County Ambulance District shall*, to the extent legally permissible, *indemnify each person who may serve or who has served at*

[7] Generally, the denial of a motion for summary judgment is not a final judgment and is not appealable. *Johnson v. Am. Fam. Mut. Ins. Co, S.I.*, 694 S.W.3d 529, 531-32 (Mo. App. W.D. 2024). "However, the denial of a motion for summary judgment may be reviewable when, as in this case, the merits of the motion for summary judgment are intertwined with the propriety of an appealable order granting summary judgment to another party." *Id.* at 532 (internal quotes and citation omitted).

> *any time as an officer, director, or employee of the corporation against all expenses and liabilities*, including, without limitation, counsel fees, judgments, fines, excise taxes, penalties and settlement payments, *reasonably incurred by or imposed upon such person in connection with any threatened, pending or completed action, suit or proceeding in which he or she may become involved by reason of his or her service in such capacity*; provided that no indemnification shall be provided for any such person with respect to any matter as to which he or she shall have been finally adjudicated in any proceeding not to have acted in good faith in the reasonable belief that such action was in the best interests of the corporation; and further provided that any compromise or settlement payment shall be approved by a majority vote of a quorum of directors who are not at that time parties to the proceeding….This Article constitutes a contract between the corporation and the indemnified officers, directors, and employees[.]

(emphasis added).

"Corporate articles and bylaws are to be construed according to general rules governing contracts." *Kansas City Univ. of Med. and Biosciences v. Pletz*, 351 S.W.3d 254, 259 (Mo. App. W.D. 2011) (internal quotes and citation omitted). The primary rule of contract interpretation is to ascertain the intention of the parties and to give effect to that intent. *Id.* at 261. Words and phrases used in bylaws are given their plain and ordinary meaning, and the document is considered as a whole. *Id.* "[O]nly when an ambiguity appears on the face of the contract do courts look outside the contract to determine the parties' intent." *TNT Amusements, Inc. v. BFC Enters., Inc.*, 613 S.W.3d 403, 409 (Mo. App. E.D. 2020). An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the words used, but the parties' disagreement about a term's meaning does not constitute an ambiguity. *Id.* Additionally, when interpreting contracts, courts attempt to avoid absurd results. *Id.* Contracts are

interpreted "to reach fair, reasonable, and practical results, for it is to be presumed that the parties contracted to that end." *Id.*

In this case, neither party established that it was entitled to judgment as a matter of law on Rank's claim for indemnification. Neither party's statement of uncontroverted material facts dispelled a genuine dispute as to whether Rank became involved in the criminal proceeding by reason of her service in her capacity as a PCAD employee, or whether she became involved in the criminal proceeding by reason of her own self-serving conduct (not in service in her capacity as a PCAD employee). In their competing motions for summary judgment, the parties relied on the undisputed facts that Rank was suspended and ultimately fired from her employment with PCAD and became involved in the criminal proceeding because she was accused of stealing from her employer to support their claims that they were entitled to judgment as a matter of law. Rank argued that she was entitled to indemnification for her expenses from her criminal case under article 13 of PCAD's bylaws based on these undisputed facts because she incurred the expenses related to her prosecution by reason of her service as an employee of PCAD. PCAD argued that it was entitled to summary judgment because Rank did not reasonably incur the fees related to her prosecution for stealing from PCAD and did not incur the fees by reason of her duties for PCAD. PCAD argued that to find otherwise would produce an absurd result.

Rank's criminal prosecution and subsequent dismissal alone, however, did not answer the question of whether Rank reasonably incurred the expenses from her criminal

case by reason of her service in her capacity as a PCAD employee. Stealing from an employer, including the receipt of its stolen funds, is not an act done in service of employment. Rather, stealing from an employer is outside the scope of employment because it is not an act related to one's job duties and is not performed to benefit the employer. If Rank participated in the theft of PCAD funds or knowingly received the stolen funds for her benefit, her actions were not done in service of her employment with PCAD. On the other hand, pursuant to this particular indemnification provision, an employee who incurs expenses related to a stealing charge might be eligible for reimbursement if they can prove that they did not knowingly participate in or knowingly benefit from the conduct in any manner and were only implicated in the events because of their status as an employee. Thus, if Rank was merely an unwitting employee of PCAD, whose identity Gardner appropriated to steal PCAD funds by writing checks to her and forging her endorsement, the expenses for her prosecution surrounding the stolen funds may have been incurred by reason of her service in her capacity as a PCAD employee.

The criminal charges against Rank alone did not establish that Rank was complicit in the theft of money from her employer PCAD. Likewise, dismissal of the charges without prejudice alone did not necessarily show that Rank was not involved in the theft of PCAD funds, or that she did not in some manner participate in, or knowingly benefit from, funds stolen from her employer. Rank's prosecution and the dismissal without prejudice did not determine whether Rank was required to defend the charges simply

because her name and related employee status was used by a fellow employee to steal from their employer and thus incurred the attorney fees "by reason of ….her service in such [employee] capacity" or whether she was required to defend the charges because she participated in, or knowingly benefited from, the theft of PCAD funds by her paramour and not in service of her capacity as a PCAD employee.

Furthermore, nothing else in the summary judgment record definitively established that Rank was a participant in, or at least complicit in, Gardner's theft of PCAD funds or that she was an unwitting employee that co-employee Gardner used to steal from the district. Although Rank's claim for indemnification was based on her involvement in criminal proceedings, the summary judgment record only contained vague facts that she was charged with stealing from PCAD and forgery of hourly time sheets of PCAD. Neither party set out material facts in separately numbered paragraphs regarding the specific charges or the circumstances surrounding the charges that would have shed light on whether Rank was a participant in the theft or an unwitting victim of Gardner. Neither party even bothered to include in its summary judgment record the actual criminal charges or indictment which were filed.

The only facts remotely related to whether Rank was knowingly involved in the theft of PCAD funds in the entire summary judgment record came in Rank's response to PCAD's motion for summary judgment where she set forth the following additional material facts:

2. On or before March 29, 2017, the District Administrator for the Pettis

> County Ambulance District [Gardner] forged the signature of Tracy Rank to negotiate checks payable to "Tracy Rank" from a Pettis County Ambulance District bank account.
>
> 4. Tracy Rank did not authorize the District Administrator of the Pettis County Ambulance District [Gardner] to endorse any check made payable to "Tracy Rank" from a Pettis County Ambulance District account.
>
> 5. Tracy Rank did not steal from the Pettis County Ambulance District.
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> 12. On March 29, 2017, the Pettis County Ambulance District Administrator [Gardner] admitted to forging the signature of Tracy Rank on the back of the checks drawn on a Pettis County Ambulance District Account and paid to the order of "Tracy Rank."
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> 13. On March 29, 2017, the Pettis County Ambulance District Administrator [Gardner] admitted to forging the signatures of Board Members Greg Nehring and Dave Clippert on checks drawn on a Pettis County Ambulance District account and paid to the order of "Tracy Rank."

Rank attempted to support paragraphs 2, 12, and 13 with the defendants' answers to three paragraphs of the first amended petition. The paragraphs, however, did not address any allegedly forged signatures of Tracy Rank, and the defendants' answers only admitted that the signatures of Clippert and Nehring were forged on checks written to and endorsed by Gardner.

Rank also attempted to support paragraph 2 of her additional material facts (that Gardner forged her signature on the subject checks) with her own affidavit, but she did not state in her affidavit that Gardner forged her signature without her knowledge and/or permission, in order to negotiate checks payable to her, only that she did not endorse and cash the checks and that the checks were "endorsed by someone signing 'Tracy Rank' on the back." This fact alone did not conclusively establish that Rank was not knowingly

involved in, or did not knowingly benefit from, the theft of PCAD funds.

Likewise, paragraph 4 (that Rank did not authorize Gardner to endorse her name on the PCAD checks) did not directly address whether she was an unwitting fellow employee whose status as a PCAD employee was used by Gardner to steal from PCAD, or whether she knew of the endorsement of her signature by Gardner and knowingly benefited from his theft of PCAD funds. Rank again attempted to support paragraph 4 with her affidavit; however, Rank did not state in her affidavit that she did not, in fact, authorize Gardner to endorse any check made payable to her.[8] Paragraphs 2, 4, 12, and 13, therefore, did not definitively establish Rank was not knowingly involved in the theft or that she did not otherwise knowingly benefit from the theft, and, more pointedly, whether her conduct (if any) which led to the criminal charges against her was conduct in service of her capacity as a PCAD employee.

Finally, Rank supported paragraph 5 (that Rank did not steal anything from PCAD) with her affidavit in which she stated such. PCAD denied the fact in paragraph 5 and supported its denial with Clippert's deposition in which he stated that he was told by Sedalia police that they were "looking into" Rank, that Rank was involved in the theft and it was related to gambling, and that Rank knew the theft was taking place.[9] Thus, a

[8] In her affidavit, Rank stated, "I did not sign or endorse or cash any of the 12 Pettis County Ambulance District checks payable to Tracy Rank and signed by Board Members Dave Clippert and Greg Nehring that are endorsed by someone signing 'Tracy Rank' on the back of the check that were the cause of the criminal charge against me."

[9] Only evidence that is admissible at trial can sustain or avoid summary judgment. *Bargfrede v. Am. Income Life Ins. Co.*, 21 S.W.3d 157, 163 n.9 (Mo. App. W.D. 2000). Rank, however, did

genuine issue of material fact existed as to whether Rank stole anything from PCAD, or may have knowingly benefited from the theft of PCAD funds.[10]

Rank also put forth facts regarding her suspension and termination of employment with PCAD to support her motion for summary judgment. The undisputed facts showed that PCAD fired Rank for "apparent discrepancies in accounts payable" even though she was not responsible for and did not have access to accounts payable. She was not responsible for receiving PCAD revenue or for paying its bills, and she was never in possession of the PCAD checkbook. The undisputed facts further indicated that Gardner was responsible for accounts payable and payment of PCAD bills and expenses, and that he pleaded guilty to stealing $25,000 or more from PCAD and forgery of checks issued by PCAD. The fact that Rank was not responsible for accounts payable did not address whether she participated in, or knowingly benefited from, Gardner's abuse of his duties as such. On the other hand, PCAD's stated reasons for Rank's discharge did suggest it believed she was involved in the theft, and supports the inference that Rank became

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not file a reply to PCAD's response to her statement of additional facts and did not object to Clippert's deposition as hearsay. Additionally, she did not raise the potential hearsay issue on appeal. "The rule that a failure to object to the foundation of documents at trial precludes raising the issue on appeal applies equally to summary judgment proceedings." *Id.*

[10] While Rank stated in her affidavit that "I did not receive, and I did not know of, the 12 checks payable to Tracy Rank and signed by Pettis County Ambulance District board members, Dave Clippert and Greg Nehring, until my arrest," she did not state such as an additional material fact in separately numbered paragraph in her response to PCAD's motion for summary judgment and did not specifically reference the statement in her affidavit to support the fact. The statement in the affidavit, therefore, could not be considered in these summary judgment proceedings. *Green*, 606 S.W.3d at 118, 121.

involved in the criminal proceedings by a purported abuse of her duties in her service as a PCAD employee.

Finally, the parties ignored the reasonable inference that might have been drawn from the undisputed evidence of Rank's romantic relationship with, and, more importantly, her cohabitation with Gardner throughout the entire time he was stealing from PCAD. Keeping in mind that the summary judgment record is viewed in the light most favorable to the party against whom judgment was entered (in the indemnification claim, PCAD), and that party is entitled to the benefit of all reasonable inferences that may be drawn from the evidence, *Green*, 606 S.W.3d at 115, Rank's cohabitation with Gardner might have supported the inference that she benefited from the theft of PCAD funds. However, the inference alone, or even in combination with evidence of Rank's prosecution, did not definitively establish that she knowingly received or benefited from funds stolen from her employer without more.

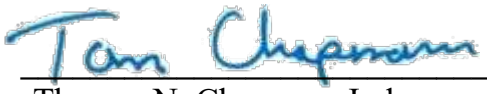
The summary judgment record failed to demonstrate whether Rank became involved in the criminal proceeding by reason of her own self-serving conduct or by reason of her service in her capacity as a PCAD employee. Neither party sufficiently addressed the issue in their statement of uncontroverted material facts. *See, e.g., Hartwell v. Am. Fam. Fid. Assurance Co.*, 607 S.W.3d 807, 814-15 (Mo. App. S.D. 2020) (insurer failed to establish prima facie claim that patient was not entitled to policy's full benefit for time spent at hospital when it failed to address or allege material facts showing that patient used medical center in a manner excluded from the definition

of "hospital" in the policy). At the very least, and for the purposes of our review, the parties did not dispel a genuine disputed and material fact – Rank's complicity in, or knowing benefit from, the theft of PCAD funds. Neither party established entitlement to judgment as a matter of law on the indemnification claim. The trial court, therefore, erred in granting summary judgment in favor of Rank for indemnification in the amount of $33,667.72 plus prejudgment interest. It did not err in denying PCAD's motion for summary judgment.

PCAD's point one is granted, and point two is denied. Points three and four regarding the award of prejudgment interest are moot and need not be addressed in this appeal.

Conclusion

The summary judgment in favor of Individual Defendants on Rank's claims for negligent supervision, negligence, and fraudulent misrepresentation is affirmed. The summary judgment in favor of Rank for indemnification in the amount of $33,667.72 plus prejudgment interest is reversed. The case is remanded for further proceedings consistent with this opinion.



Thomas N. Chapman, Judge

All concur.