

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**JUNE P. NGUYEN, ET AL.,**

**APPELLANTS**

**vs.**

**GRAIN VALLEY R-5 SCHOOL DISTRICT, ET AL.,**

**RESPONDENTS**

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DOCKET NUMBER WD73182

DATE: December 13, 2011

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Appeal from:

The Circuit Court of Jackson County, Missouri  
The Honorable Jack R. Grate, Judge

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Appellate Judges:

Division Three: James E. Welsh, P.J., James M. Smart, Jr. and Joseph M. Ellis, JJ.

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Attorneys:

Leland F. Dempsey, for Appellants

Jo Stephanie Warmund, for Respondent Grain Valley R-5 School District

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# MISSOURI APPELLATE COURT OPINION SUMMARY COURT OF APPEALS -- WESTERN DISTRICT

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WD73182

Jackson County, Missouri

Before Division Three: James E. Welsh, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

June Nguyen and Bob Haynes (“the Plaintiffs”) appeal from the Circuit Court of Jackson County’s dismissal of Dr. Chris Small, Theresa Nelson, Keri Peterson, Ryan Evans, Francie Aumua, Robin Wagoner, and Denise Beach from a wrongful death action filed by Plaintiffs related to the death of their eleven-year-old daughter, Sabrina Nguyen, resulting from a head injury Sabrina sustained at school. In short, Plaintiffs had alleged that the gymnasium was a dangerous condition for children to be running around in; that the activities the children were engaged in were dangerous; that the children were insufficiently supervised; that Peterson, Evans, and Aumua were negligent in their treatment and handling of Sabrina’s injuries; and that the other defendants were negligent in their training and supervision of Peterson, Evans, and Aumua.

Following an evidentiary hearing, the circuit court concluded that all of the individual defendants named in the petition were protected from liability by official immunity. The trial court noted that the Plaintiffs had not identified any specific statutory or regulatory duty that had been breached by the defendants and concluded that they, therefore, failed to establish that the individual defendants’ actions were ministerial. The trial court then certified the matter for appeal.

**REVERSED IN PART AND REMANDED.**

**Division Three holds:**

- (1) Where the trial court entertains matters and evidence outside the pleadings on a motion to dismiss, the motion to dismiss is converted into a motion for summary judgment, and the judgment is reviewed by this Court as such.
- (2) The judicially-created doctrine of official immunity protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.

(3) As the party asserting the affirmative offense of official immunity, the individual defendants bore the burden of pleading and proving that they are entitled to that defense. In its judgment, the trial court improperly shifted this burden to the plaintiffs, stating that the defendants were entitled to official immunity unless the plaintiffs identified in their petition a ministerial duty established by a statute or regulation that had been violated by the defendants.

(4) To the extent a few prior cases have required the pleading of a ministerial duty imposed by statute or regulation to state a claim against a public employee that is not barred by official immunity, those cases have inaccurately stated the standard adopted by the Missouri Supreme Court and should not have been followed. A petition must merely assert that the state employee violated "either a statute or a departmentally-mandated duty," and a departmentally-mandated duty may arise from departmental rules, the orders of a superior, or the nature of the position for which the defendant was employed.

(5) Despite having concluded that the trial court misstated and misapplied the law, because our standard of review of summary judgment is essentially *de novo*, this Court must still consider whether the Respondents demonstrated undisputed facts establishing their affirmative defense and entitling them to judgment as a matter of law.

(6) The Plaintiffs' petition avers that the health aide, Aumua, in her treatment of Sabrina, carelessly and negligently failed to adhere to the applicable rules, policies, and guidelines established by the Revised Statutes of the State of Missouri, the Missouri Department of Education, the Missouri Department of Health and Senior Services, the Missouri State Board of Nursing, and Defendant Grain Valley R-5 School District. Respondents, who bore the burden of pleading and proving the affirmative defense of official immunity, did not assert in their motion that Aumua had complied with the applicable district rules, policies, and guidelines; that the rules, policies or guidelines afforded her discretion in their implementation; or that she had been granted the discretion to disregard the rules, policies, and guidelines. Furthermore, the evidence presented at the hearing did not establish as an undisputed fact that Aumua had complete discretion in her treatment of students, and Respondents did not present any evidence at the evidentiary hearing regarding what treatment Aumua did provide to Sabrina, and the treatment that was or was not provided by Aumua was certainly not pleaded as an undisputed fact. In short, Respondents did not establish through undisputed facts that Aumua was entitled to official immunity.

(7) The Plaintiffs' petition makes similar claims against teachers Evans and Peterson, asserting that they had failed to follow the proper safety and injury guidelines, policies, rules and/or regulations including those mandated by Missouri statutes, the Missouri Department of Education, the Missouri Department of Health and Senior Services, the Missouri Board of Nursing, and the Grain Valley R-5 School District. The plaintiffs asserted that the teachers failed to properly supervise the children, failed to properly examine Sabrina's injury, failed to notify emergency medical services, and negligently failed to inform the nursing aid or Sabrina's parents of the extent of her injury. These pleadings do not, on their face, establish that the actions of Evans and Peterson in treating Sabrina were discretionary. In their motion to dismiss, Respondents made no averments related to the teacher's treatment of Sabrina's injuries or any discretion they were afforded related to such treatment, and the evidence presented at the evidentiary hearing did not establish that teachers were afforded discretion in treating head injuries sustained by students. Since Respondents failed to plead, let alone establish through

uncontroverted facts, that their actions were discretionary, they failed to demonstrate that they were entitled to official immunity as a matter of law.

(8) The allegations against defendants Small, Nelson, Wagoner, and Beach relate to hiring policies, training of employees, and general supervision of employees. No allegations were made indicating any direct involvement these individuals had in the physical education class or the treatment of Sabrina. This type of supervisory conduct and policy making is discretionary and covered by official immunity. Summary judgment in favor of these defendants was, therefore, proper.

(9) In sum, the trial court erred in the granting of summary judgment and dismissing the Plaintiffs' claims against Aumua, Evans, and Peterson on the basis of official immunity. The trial court's judgment as to those defendants is reversed, and the cause is remanded for further proceedings consistent with this opinion. As it relates to Small, Nelson, Wagoner, and Beach, the judgment is affirmed.

Opinion by Joseph M. Ellis, Judge

Date: December 13, 2011

**This summary is *UNOFFICIAL* and should not be quoted or cited.**