

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

STEPHANIE MCCORMACK,)
GRANT ALEC MCCORMACK, by and)
through his Next Friend, STEPHANIE)
MCCORMACK, and NATALIE GRACE)
MCCORMACK, by and through her Next)
Friend, STEPHANIE MCCORMACK,)

Plaintiffs,)

vs.)

Case No. 0831-CV08952

EBENEZER FIRE PROTECTION)
DISTRICT, and JOSHUA C. DOUGLAS,)

Defendants.)

JUDGMENT

Pending before the Court is a Motion for Summary Judgment filed on behalf of Defendant Joshua C. Douglas. The case at issue is one for wrongful death wherein Plaintiffs allege that the decedent, Sergeant Gary McCormack (“Sergeant McCormack”), died as a result of injuries he sustained in a motor vehicle accident. Plaintiffs allege the accident was caused by the negligence of Defendant Joshua C. Douglas, a volunteer firefighter (“Firefighter Douglas”), who was at the time of the accident acting within the scope and course of his employment with Defendant Ebenezer Fire Protection District. Firefighter Douglas asserts that he was not negligent in causing the motor vehicle accident, but seeks summary judgment based on the immunity protections of official immunity, and the public duty doctrine.

I. Facts of the Case

Although the parties disagree on the legal effect and consequences of the facts, there is little disagreement on the relevant facts themselves.

On October 6, 2007, there was a vehicle accident that occurred on Whitetail Road and Highway 13 in Greene County, Missouri. Emergency personnel were summoned to respond to that accident. Officers from the Greene County Sheriff's Department, including, Sergeant McCormack, responded to the emergency call. Defendant Ebenezer Fire Protection District provided emergency ambulance and medical services pursuant to statute and likewise responded. Firefighter Douglas was among those emergency personnel who responded to the call.

Pursuant to standard procedure, Firefighter Douglas radioed the Ebenezer Fire Protection District dispatcher and advised that he was "en route" on the emergency call. The district dispatcher then instructed Firefighter Douglas to respond to the emergency by first driving to Station One to retrieve an ambulance-type emergency vehicle stored there that contained rescue and medical assistance equipment.

While there is not necessarily an agreement, the Court concludes that both Sergeant McCormack and Firefighter Douglas responded to the emergency with lights and sirens activated. While not irrelevant, this fact is not ultimately determinative of the issues presented.

In responding to the emergency, Sergeant McCormack was traveling westbound on Route WW. At that same time, Firefighter Douglas was traveling northbound on Farm Road 145. Route WW and Farm Road 145 intersect in Greene County, Missouri.

Unfortunately Sergeant McCormack and Firefighter Douglas arrived at the intersection at the same time and a collision occurred.

Sergeant McCormack was injured in the accident and died as a result of those injuries. Firefighter Douglas was injured in the accident, and has no present memory of the collision, or many of the details relating to the emergency response.

II. Procedural Status

Plaintiffs' action pends on the allegations of their Second Amended Petition for Damages. Plaintiffs' petition alleges generally the negligence of Firefighter Douglas, and further alleges that negligence caused the motor vehicle accident, and the injuries and death of Sergeant McCormack. Finally, Plaintiffs allege that at the time of the accident, Firefighter Douglas was acting within the scope and course of his employment with Ebenezer Fire Protection District.

Firefighter Douglas has denied the allegations of negligence, and has filed his Motion for Summary Judgment asserting the immunity protections offered by official immunity and the public duty doctrine. That motion is presently at issue before the Court. Defendant Ebenezer Fire Protection District has denied Plaintiffs' allegations, and separately raised the issue of sovereign immunity and the limited waiver of that immunity afforded by statute. Those matters are not presently at issue before the Court.

This case has been consolidated for discovery with another case arising out of the same motor vehicle accident, Greene County Case No. 0931-CV02318. That case pends on the Amended Petition for Damages of Firefighter Douglas. In his amended petition, Firefighter Douglas alleges the negligence of Sergeant McCormack and further alleges

that negligence caused the motor vehicle accident and the injuries to Firefighter Douglas. Firefighter Douglas initially filed his claim nominating a Defendant ad litem for Sergeant McCormack. Following Sergeant McCormack's assertion of immunity protection based on official immunity and public duty doctrine, Firefighter Douglas voluntarily dismissed his claim against Defendant ad litem for Sergeant McCormack. Finally, Firefighter Douglas alleges that at the time of the accident, Sergeant McCormack was acting within the scope and course of his employment with Greene County, Missouri, d/b/a Greene County Sheriff's Office. Defendant Greene County Sheriff's Office has denied Plaintiffs' allegations, and raised the issue of sovereign immunity and the limited waiver of that immunity afforded by statute. Those matters are likewise not presently at issue before the Court.

Neither Plaintiffs McCormack in the case against the Ebenezer Fire Protection District, or Plaintiff Firefighter Douglas in the case against the Greene County Sheriff's Office, allege that either Sergeant McCormack or Firefighter Douglas engaged in any conduct by which they intended to cause the motor vehicle accident, or intended to cause the injuries and damages consequent to that accident.

III. Official Immunity and the Public Duty Doctrine

Missouri has long-applied the doctrine of official immunity. *See e.g., Reed v. Conway*, 20 Mo. 22 (1854). This judicially-created doctrine protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts. *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. banc 2006). Official immunity is intended to provide protection for individual government actors who, despite limited resources and imperfect

information, must exercise judgment in the performance of their duties. *Id.* at 765. The goal of immunity protection is also to permit public employees to make judgments affecting public safety and welfare without concerns about possible personal liability. *Id.*

The public duty doctrine was first adopted by Missouri in *Parker v. Sherman*, 456 S.W.2d 577 (Mo. 1970). The public duty doctrine states that a public employee is not civilly liable for the breach of a duty owed to the general public, rather than a particular individual. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 205 (Mo. banc 1996). The public duty doctrine is based on the absence of a duty to the particular individual, as contrasted to a duty owed to the general public. Application of the public duty doctrine leaves the plaintiff unable to prove all the elements of his claim for negligence, namely the duty element. Absent a duty, there can be no cause of action.

Official immunity and public duty doctrine are both reviewed cogently and in detail by the Supreme Court of Missouri in *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008).

IV. Application of Official Immunity and Public Duty Doctrine

Both the application of official immunity and the public duty doctrine only provide protection for public employees for negligence committed during the course of their official duties for the performance of discretionary, as opposed to ministerial acts. *Davis* 193 S.W.3d at 763; *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443 (Mo. banc 1986).

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 a means to an end and discretion in determining how or whether an act

should be done or course pursued. *Kanagawa v. State*, 685 S.W.2d 831, 835 (Mo. banc 1985). 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.*

V. Exceptions to Official Immunity and Public Duty Doctrine

The application of official immunity is not without exception. The actions of the public servant will not be protected by official immunity if the conduct is willfully wrong or done with malice or corruption. *Schooler v. Arrington*, 81 S.W. 468, 469 (1904).

Similarly, the application of the public duty doctrine will not apply where defendant public employee acts in bad faith or with malice. *See Jackson v. City of Wentzville*, 844 S.W. 2d 585, 588 (Mo. App. 1993).

These exceptions to official immunity and public duty doctrine are considered by the Supreme Court of Missouri, in cases specific to the operation of motor vehicles in emergency situations, in both *Davis* and *Southers*. In each of those cases, the Court supported the application of immunity in favor of the public servant operating motor vehicles.

Other cases, although decidedly not involving the operation of a motor vehicle in an emergency situation, have perhaps added other adjectives to the list of what might constitute an exception to the application of official immunity or public duty doctrine. *See e.g., Rohrbough v. Hall*, 208 WL 4722742, E.D.Mo., filed October 3, 2008. In *Rohrbough*, the issue presented was the alleged use of excessive force by a police officer during an arrest. Plaintiff introduced evidence indicating that the officer’s acts were

“willfully wrong or done with malice or corruption.” *Id.* at 9. In that case, analyzing the circumstances of the arrest, the Court concluded there remained genuine issues of material fact which precluded summary judgment. Similarly in *Kern v. City of Gerald*, 2008 WL 44831775, E.D.Mo., filed Nov 4, 2008, the Court considered the defendants, Mayor and council members’, claim of official immunity on an arrestees claim that he was arrested upon circumstances that violated his civil rights. In considering the defendants’ Motion to Dismiss, the Court found plaintiff’s broad allegations that defendants acted recklessly and willfully in failing to properly train, hire and supervise the police officers would survive a Motion to Dismiss. The Court left open the query as whether a motion for summary judgment might be appropriate at a later time. *Id.*

Courts have in the past reviewed the meanings of these, and perhaps related terms. Malice exists when a defendant “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.” *Parris v. Huttie*, 2007 WL 2434058 at 10, W.D.Mo., filed August 21, 2007. Acts are wanton if they are “done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.” *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 447 (Mo. banc 1986) (internal citation omitted). Bad faith is “a dishonest purpose, moral ubiquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.” *Jones-El v. Roper*, 2008 WL 2682600 at 1, E.D.Mo, filed June 27, 2008, (quoting *Blue v. Harrah's North Kansas City, LLC*, 170 S.W.3d 466, 479 (Mo.App. 2005)).

Perhaps most important, in order to defeat a public servant's claim of immunity, bad faith or malice generally requires an actual intent to cause injury. *Blue*, 170 S.W.3d at 479 (citing *Davis v. Bd. Of Educ.*, 963 S.W.2d 679, 689 (Mo.App. E.D. 1998)).

VI. Allegations in Pending Case

Plaintiff's allegations of negligence against Firefighter Douglas are found in their Second Amended Petition for Damages. Plaintiffs allege a variety of driving related conduct i.e., excessive speed, lack of careful lookout, failure to yield, failure to obey traffic control devices, and operating the vehicle in a careless and imprudent manner. Plaintiffs allege further that Firefighter Douglas' conduct was contrary to Missouri statute and departmental policies. In addition, Plaintiffs have alleged:

29. Further, the conduct and action of Defendants, as set forth above, constitute willful misconduct, wantonness, and recklessness indicative of indifference to consequences and, therefore, the aggravating circumstances attending the death of Gary D. McCormack should be considered by the trier of fact in awarding damages.

Plaintiffs do not allege, and do not contend, Firefighter Douglas intended to cause the motor vehicle accident or intended to cause any injury.

VII. Firefighter Douglas' Immunity Protection

Plaintiffs would first urge the Court to find that Firefighter Douglas was not engaged in a discretionary act at the time of the motor vehicle accident, rather was engaged in a ministerial act. A finding that, if made, would defeat Defendants' claim of immunity. Plaintiffs suggest that Firefighter Douglas, having been told by his dispatcher to proceed to the station to pick up an ambulance, was no longer exercising discretion in his actions, rather was merely following the direction of the dispatcher. This Court finds

the opposite. The Court finds that Firefighter Douglas was operating his vehicle in an emergency situation and as such must use discretion in all aspects of that operation, including the speed at which to travel, the route to take, whether or not to obey traffic control devices, whether or not to obey departmental policy, indeed whether or not to follow the instructions of the dispatcher, and all other aspects of the emergency response. This is the very essence of the degree of reason and judgment required to conclude an act was “discretionary,” and as such would be accorded immunity protection.

Plaintiffs would further urge the Court to find, at the time of the incident at issue, Firefighter Douglas owed a specific duty to Sergeant McCormack, as opposed to the duty owed the public in general. A finding that, if made, would defeat Defendants’ claim of immunity based on the public duty doctrine. Although the public duty doctrine cannot insulate Firefighter Douglas from liability where a “duty is owed to particular individuals for the performance of ministerial duties in which a private individual has a special, direct, or distinctive interest,” this ministerial duty-based exception does not apply in the discretion-laden emergency situation in which Firefighter Douglas was involved.

Jungerman, 925 S.W.2d at 205 (internal citations and quotations omitted). This Court finds that Firefighter Douglas’ emergency response conduct arose from his duties owed to the public generally, and is therefore eligible for the protections of the public duty doctrine.

Accordingly, absent the application of an exception, this Court must find that Firefighter Douglas is entitled to immunity protection pursuant to both official immunity and the public duty doctrine.

VIII. Firefighter Douglas Exception to Immunity Protection

Plaintiffs have pled that Firefighter Douglas' conduct at the time of the incident was willful, wanton, and reckless. (See Para. 29 of Second Amended Petition quoted above.) However, there is no specific conduct of Defendant that is so characterized, beyond the allegations of negligent conduct earlier made. The Supreme Court of Missouri has specifically excepted from immunity conduct that is "willfully wrong," or done with "malice" or "corruption." *Southers*, 263 S.W.3d at 619. No other words were used by the Court in *Southers* to describe an exception. Perhaps other words may be used to describe an exception in certain circumstances, such as "recklessly," as applied to supervisory personnel in *Kern*.

Applying the definitions earlier reviewed, this Court finds no evidence has been presented which would support a conclusion that Firefighter Douglas' conduct was "wanton." To so find, the Court must conclude Firefighter Douglas intended his actions to have been prejudicial or injurious to others or perhaps find the acts were done for a wicked purpose, or done needlessly, manifesting a reckless indifference to the rights of others. The record is barren of any suggestion of ulterior motive on the part of Firefighter Douglas, or any evidence warranting an inference of actual or legal malice. The term "recklessly" adds little modification to the allegations of negligence, as Missouri does not recognize degrees of negligence. See *Fowler v. Park Corp.*, 673 S.W.2d 749, 755 (Mo. banc 1984) ("It . . . remains the [common] law of Missouri that there are no legal degrees of negligence."). More importantly, "recklessly" was not among the terms of exception used by the Supreme Court of Missouri in considering the

conduct of a public servant in the operation of a motor vehicle. *Southers*, 263 S.W.3d at 619.

Certain other terms associated with immunity exception would seem to have little application to the conduct of operating a motor vehicle. Terms such as “corruption,” “bad faith,” or “malice” may find meaning in the analysis of certain conduct that might be engaged in by a public servant, but not the operation of a motor vehicle. Those terms were likewise not among the terms of exception used by the Court in *Southers*.

The parties have not referred this Court to any case applying Missouri law, nor has this Court located a case, that has concluded that a public employee operating a motor vehicle in response to an emergency situation was not accorded the benefit of immunity. Likewise, the Court has not been referred to any case involving the application of immunity, where the public servant was operating a motor vehicle in an emergency situation, in which a court found there was a material issue of fact precluding the entry of judgment as a matter of law.

IX. Conclusion

It is consistent with the Supreme Court of Missouri’s conclusions in *Davis* and *Southers*, both cases involving the operation of a motor vehicle in an emergency situation, to conclude that Firefighter Douglas is entitled to the protection of immunity offered by both official immunity and public duty doctrine. This Court so concludes.

X. Judgment

Having considered the Motion for Summary Judgment filed by Defendant Firefighter Douglas, together with the response, reply and sur-reply, the Court finds there

is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law.

It is therefore, ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Defendant Joshua C. Douglas and against Plaintiffs. No cost assessment is made as the case remains pending and will proceed as to Plaintiffs' claims against Defendant Ebenezer Fire Protection District.

XI. No Just Cause for Delay

The parties have jointly requested the Court make a finding pursuant to Rule 74.01(b). The Court is in agreement. Therefore, the Court finds that even though fewer than all claims, and the rights and liabilities of fewer than all parties have been adjudicated, all claims of all Plaintiffs against Defendant Joshua C. Douglas have been fully adjudicated by entry of this Judgment, and there is no just reason for delay, and this Court certifies its Judgment herein as final for purposes of appeal.

Entered this 18th day of December 2009.



Michael J. Cordonnier
Judge of the Circuit Court, Division 1
Greene County, Missouri