

sur-reply on December 11, 2017, but withdrew said motion on December 14, 2017. On December 21, 2017, the parties appeared by counsel of record and argued the motion for summary judgment. The Court took the matter under submission.

This Court has carefully and thoughtfully reviewed the filings by all parties, and has adopted in whole or part many of the findings contained therein without further attribution or acknowledgement. The Court, after considering the parties oral arguments, legal briefing, written arguments, exhibits and deposition testimony presented with said briefing finds that the motion for summary judgement and response(s) filed by the parties creates a sufficient record to rule on the motion.

Despite the parties inability to agree in the various filings of material facts, the underlying facts of this tragic night are not in dispute. The interpretation of those facts is hotly contested. On April 19, 2014, CJ, an eleven (11) month old infant experienced difficulty breathing. He had a tracheostomy tube to assist his breathing since shortly after birth. His mother, NT, had suctioned his tracheostomy tube and provided him breathing treatment sometime before 9:00 p.m. At approximately 10:24 p.m. she contacted 911 and reported her child had breathing problems and respiratory distress. At approximately 10:31 p.m., firefighter/paramedic CH and MM arrived at the residence. Either NT or Firefighter CH suctioned CJ after the paramedics arrived at Plaintiff's residence. At some point CJ was transported to the ambulance. Firefighter CH performed a bone drill to initiate a direct IV at approximately 10:52 PM. Thirty-two seconds later the patient arrived at DePaul Health Center. During the approximately twenty-one minutes from the firefighter/paramedics arrival at the residence and the delivery to DePaul Health Center, CJ oxygen levels decreased.

APPLICABLE STANDARD

Summary judgment allows a trial court to enter judgment for the moving party where the party demonstrates a right to judgment as a matter of law based on facts about which there is no genuine dispute. *ITT Commercial Fin. Corp. v. Mid Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). For purposes of summary judgment, a “genuine issue” exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. *Id.* at 382. “A ‘genuine issue’ is a dispute that is real, not merely argumentative, imaginary or frivolous.” *Id.* Summary judgment is proper where the “genuine issues” raised by the non-movant are merely argumentative, frivolous, or imaginary. *Id.*

“A material fact in the context of summary judgment is one from which the right to judgment flows.” *Columbia Mut. Ins. Co. v. Heriford*, 518 S.W.3d 234, 240 (Mo App. 2017) (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc 2011)). Uncontroverted material facts established via Rule 74.04(c) numbered paragraphs and responses are those facts that “demonstrate [the movant’s] right to judgment regardless of other facts or factual disputes.” *Pemiscot County Port Authority v. Rail Switching Services, Inc.*, Case No. SD34570, 2017 WL 1885292, at 3 (Mo. App. S.D. May 9, 2017).

PLAINTIFF’S PETITION

Plaintiff has filed a third amended petition raising four (4) counts of negligence against the City of Hazelwood, and each of the three (3) individual firefighter/paramedics. In response to the suit, the City asserted sovereign immunity. The firefighter/paramedics claim official immunity and the public duty doctrine require their dismissal.

COUNT I-CITY OF HAZELWOOD

Sovereign immunity is the longstanding common law rule that the State is not subject to tort liability without its consent. *Metropolitan St. Louis Sewer District v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. banc 2016). Sovereign immunity is the rule, not the exception. *Id.* at 921–22. It is not an affirmative defense, and therefore the plaintiff bears the burden of pleading with specificity those facts giving rise to an exception to sovereign immunity when suing a public entity. *Richardson v. City of St. Louis*, 293 S.W.3d 133, 137 (Mo.App.E.D.2009). Two such exceptions are those found in Section 537.600, for injuries arising out of the operation of a motor vehicle or a dangerous property condition, neither of which is alleged here.

Instead, Plaintiff alleges that the Defendant was covered by a liability insurance policy which expressly covered their provision of emergency medical services waiving sovereign immunity up to the limit of the applicable insurance policy. In addition, Plaintiff pleads that Defendant charges a fee for use of its emergency medical services and infers that cost renders the function of providing emergency services into proprietary function of the City.

Examination of Exhibit J, the Public Entity Liability Insurance Policy, as submitted by Defendant reveals at page 54, “Notwithstanding any other provision, it is expressly agreed that our liability under this policy is limited to only those claims against insureds for which there is no governmental immunity pursuant to the laws of the State of Missouri.” By the clear language of the policy, the City did not waive sovereign immunity when it purchased an insurance policy that disclaimed coverage for any actions that would be prohibited by sovereign immunity. *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368 (Mo. banc 2016).

“The fact that a municipality charges a fee for its services is not determinative of whether it is performing a proprietary or governmental function.” *Richardson. City of St. Louis*, 293 S.W.3d 133, 138 (Mo. App. 2009). Based upon similar factual allegations, the Court stated, “. . . we find that the City’s operation of the Bureau of Emergency Medical Services, as alleged in this case, was a governmental function.”

THEREFORE, Defendant City of Hazelwood is entitled to summary judgment based upon sovereign immunity.

COUNTS II-IV INDIVIDUAL DEFENDANTS

CH, MM and JK, all firefighter/paramedics, have all pled the affirmative defense of official immunity. Plaintiffs have filed identical negligence claims against each Defendant. Historically, the official immunity doctrine provided that public officers are immune from liability for discretionary decisions, so long as their motives were not tainted by fraud or malice. 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. *Davis v. Lambert-St. Louis Intern. Airport*, 193 S.W.3d 760, 765 (Mo. banc 2006). Its goal is also to permit public employees to make judgments affecting public safety and welfare without concerns about possible personal liability. *Id.* 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*, 193 S.W.3d at 763. The official immunity doctrine, however, does not provide public employees immunity for torts committed when acting in a ministerial capacity. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). Official immunity is available to publicly-

employed emergency responders only if they are acting in a true emergency situation. *Thomas v. Brandt*, 325 S.W.3d 481, 485 (Mo. App. 2010).

Whether an act can be characterized as discretionary or ministerial depends on the degree of reason and judgment required to perform it. *Southers* at 610. A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or a course pursued. *Id.* 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 proscribed manner, in obedience to the mandate of the legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.” *Id.* 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. *Id.*

The issues between Plaintiff and Defendants boil down to whether the duties of the paramedics were ministerial or discretionary. Plaintiffs argue that the duties were ministerial performed pursuant to strict protocol as in *Richardson v. Burrow*, 306 S.W.3d 552 (Mo. App. 2012). Defendants argue that their duties in determining the condition of the Plaintiff required their discretion and were rendered in a true emergency situation.

In determining whether or not these three (3) firefighter/paramedics are afforded the protections of official immunity, it must be determined whether their actions in responding to CJ's 911 call, assessing his medical condition and providing treatment regarding the same were discretionary or ministerial in nature. The three-prong test as set forth by the Missouri Supreme Court in *Southers v. City of Farmington*, establishes that the actions taken by these

firefighter/paramedics were discretionary in nature. *See Southers*, 263 S.W.3d at 610. The first prong of the test--the nature of the duties-- establishes that the acts were of a discretionary nature, in that they involved responding to and evaluating the patient's physical complaints and medical condition. The second prong of the test regarding the exercise of policymaking or professional expertise and judgment, further indicates that the alleged acts are discretionary in nature. Based on the facts alleged, these firefighter/paramedics utilized their professional expertise, experience and judgment to assess the patient. The third prong-- the consequences of withholding immunity--also supports a finding that the nature of the alleged acts is discretionary. As members of an ambulance service team, firefighter/paramedics provide an essential service to the public. The very nature of their positions requires quick decision making based on their professional expertise and situational facts presented to them despite limited resources and imperfect information.

In *Richardson v. City of St. Louis*, 293 S.W.3d 133, 142 (Mo. App. E.D. 2009), the Court of Appeals held that application of official immunity to the conduct of an EMT may be appropriate. The Court explained that an emergency medical responder's use of professional judgment and discretion in rapidly-evolving emergency situations with limited information is the type of circumstance in which official immunity is intended to provide protection. *Id.* However, after remand, in *Richardson v. Burrow*, 366 S.W.3d 552, 555 (Mo. App. 2012), the Court found that the admission by Defendant to the violation of a mandated protocol in rendering emergency treatment rendered the action ministerial and not discretionary.

In the present case, Plaintiff maintains that Defendants violated protocol on numerous occasions. The parties spend much of their briefs debating the issue of whether Defendant's were required to follow the pediatric protocol [Defendant's exhibit G] in their treatment of the patient. In examining the protocol and the related testimony by Defendants, it appears that the first

consideration in pediatric care is to determine “the presence of upper airway obstruction (stridor).” If such an obstruction is found, the next consideration is possible causes listed as a foreign object, croup or epiglottitis, or tracheostomy tube obstruction. If the tracheostomy tube obstruction is suspected, protocol mandates that contact be made with medical control for further instructions.

Defendants submitted deposition testimony indicates that the protocol was followed to the extent that upon examination of the infant, they determined that there was not an upper airway obstruction present. Having determined that no obstruction existed (whether erroneously or not), no further steps were to be taken on the protocol in question. Plaintiff insists that the testimony of the 3 paramedics is not to be believed, that the protocols are mandatory, and contact should have been made with the hospital.¹

Here, there is a different situation than that which prompted the remand in *Richardson II*. The facts alleged in Plaintiffs' Petition and the protocol in question require the Defendants to make an assessment of the patient based upon their training and experience before proceeding. Unlike a mandatory treatment such as requiring intubation when a patient's oxygen saturation rates are below 80%, there was no mandatory treatment if an upper airway obstruction was not found. Medical judgment in an evolving situation was required of the Defendants. Their determination that there was not an upper airway obstruction was discretionary, not ministerial. Plaintiff has failed to establish any ministerial duty required of Defendants which would defeat the affirmative defense of official immunity.

THEREFORE, firefighter/paramedics CH, MM and JK are entitled to summary judgment based upon official immunity.

¹ It is unclear if Plaintiff is asserting that Defendants ignored an obstruction and risked the life of an infant rather than make simple contact with the hospital or some sort of collusion on behalf of Defendants attorneys. The exhibits submitted indicated that contact was made with the hospital during transit.

Defendants also raise the defense of the public duty doctrine. The public duty doctrine states that a public employee is not civilly liable--even for the breach of a ministerial duty--if that duty is owed to the general public rather than to a particular individual. *Southers*, 263 S.W.3d 603. In the present case, it is undisputed that the Defendants are public employees who were acting within the course and scope of their employment by Hazelwood at the time of the alleged acts. It is also undisputed that they were providing emergency medical assistance to residents of the Fire Protection District at the time of the alleged acts. Furthermore, as discussed above, the alleged acts by Defendants were discretionary in nature. Therefore, the exception to the public duty doctrine for ministerial duties owed to a particular individual does not apply. Thus, firefighter/paramedics CH, MM and JK are entitled to summary judgment in their favor based on the public duty doctrine.

CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Defendants, City of Hazelwood, and firefighter/paramedics CH, MM and JK.

Each party to bear its own costs.

SO ORDERED:



DATED: 1/30/2018

DEAN P. WALDEMER
CIRCUIT JUDGE
DIVISION 8
ST. LOUIS COUNTY CIRCUIT COURT
CC: Attorneys of record ✓