IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED106387

NIESHA TURNER, as mother and next friend
Of CHANZE DESEAN JONES,

Appellant,

v.

CITY OF HAZELWOOD, C. NATHAN HAASE, MATTHEW MANKUS, and JOSEPH KOHNEN

Respondents.

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to RSMo. Section 512.020 as the appeal is taken from a final judgment of the St. Louis County Circuit Court disposing of all issues and parties entered on January 30, 2018. Appellant filed a timely Notice of Appeal on February 13, 2018.

STATEMENT OF FACTS

Appellant Niesha Turner is the natural mother of Chanze DeSean Jones. At the time of the incident, Chanze Jones was an eleven (11) month old infant with a tracheostomy tube. L.F. 4 at 2. On April 19, 2014, Chanze experienced difficulty breathing. Id. Sometime before 9 p.m. Niesha Turner suctioned his tracheostomy tube and provided a breathing treatment to relieve his breathing difficulties. Id. At approximately 10:24 p.m. Niesha contacted 911 and reported her child had breathing problems and was in respiratory distress. L.F. 4; L.F. 17 at 13-14. At approximately 10:31 p.m., City of Hazelwood firefighter/paramedics Haase, Mankus and Kohnen ("individual Respondents") arrived at the residence. L.F. 21 at 78-79.

Upon arrival Ms. Turner advised the individual Respondents Chanze's tracheostomy tube was obstructed, she had attempted to suction the tube but got nothing and his oxygen level was dropping. L.F. 21 at 96, 127-128, L.F. 4. Ms. Turner tried to change Chanze's tracheostomy tube as she had been trained to do but the individual Respondents prevented her from doing so and threatened her if she tried to change it. L.F. 21 at 127:22-128:3. The individual Respondents told Appellant there was not enough time to change the tracheostomy tube or remove the obstruction and they would bring Chanze to DePaul Hospital. L.F. 21 at 94:15-16. The Respondents would not use Appellant's LTV ventilator, did not try to clear any obstruction in the tracheostomy tube, or use the oxygen Appellant had for travel. L.F. 21 at 94, 127-128.

Respondents Haase, Mankus, and Kohnen removed Chanze from his heart rate monitor, O2 saturation meter and ventilator and put him into their ambulance. L.F. 21 at 128:22-24. Individual Respondents admitted they heard "Rhonchi-Low Wheeze" when

listening to Chanze breathe during their initial assessment. L.F. 4. Respondent Haase listened to Chanze's lung sounds and found he was "slightly wheezing," and in respiratory distress. L.F. 17 at 27:4 – 27:10; 28:19 – 28:22. Wheezing, rhonchi, and stridor sounds are all indicative of an airway obstruction. L.F. 18 at 30:7-30:20. The individual Respondents placed Chanze in a sniffing position whereby he was positioned with his neck and head extended in an attempt to open his airway. L.F. 17 at 49:16 – 50:1. Chanze's oxygen saturation levels continued to drop. L.F. 17 at 55:18 – 55:21.

During transport, Respondents Haase, Mankus, and Kohnen did not remove, replace or clear the obstruction in Chanze's tracheostomy tube. L.F. at 21. Furthermore, the individual Respondents did not attempt to ventilate Chanze through his nose or mouth and did not connect Chanze's tracheostomy tube to an oxygen source. L.F. at 21. During transport Chanze's heart rate, oxygenation levels and vital signs continued to drop. L.F. 17 at 27:14 – 27:17; L.F. 17 at 55:18 – 55:21. Respondent Haase had prepared a suction device to "have it on standby" but did not use it. L.F. 33 at 16:12. Suctioning is to check for or solve airway obstruction in a tracheostomy patient. L.F. 17 at 53:11-12.

Near the end of the transport, Appellant noticed Chanze's oxygen tube was not attached to an oxygen supply and told Respondents. L.F. 21 at 108:16 -108:19. While in Respondents' care, Chanze's heart, brain and body were deprived of oxygen for over ten minutes. L.F. 21 at 133. After he arrived at the hospital, Chanze's upper airway obstruction was immediately addressed by a nurse – his "trach was removed upon arrival and was mucous plugged." L.F. 23 at 25. He was immediately intubated, started breathing and had "spontaneous circulation." L.F. 33, 12m.

Respondents had established regulations, standards and protocols they were required to follow during the course and scope of Chanze' treatment. L.F. 24 at 12:25. Respondent Hazelwood adopted these SSM EMS Medical Directives as required. L.F. 24 at 12:16-18. The protocols are written by DePaul Hospital and provided to Respondents as medical direction. L.F. 24 at 19-24. The State of Missouri Bureau of EMS mandates Respondents operate under and follow hospital protocols. L.F.24 at 14:7-8. Respondents consider the protocols their "bible." L.F. 24 at 11:24 – 14:8, 32:18 – 32:21, 83:6 – 83:16.

The first protocol at issue stated if a person's oxygen level falls below 90% they are to be intubated. L.F. 17 at 69:6 – 69:12, 69:19 – 70:5, 254:23. Chanze's oxygen level was at 86% from the beginning of Respondents' encounter with him and continued to drop thereafter. L.F. 4: 21 at 84:14 - 84: 19; L.F. 20 at 49:5 – 49:10. The individual Respondents did not intubate Chanze. L.F. 4 at 84:14 - 84: 19. Appellant's expert testified Respondents' failure to follow their protocols caused Chanze to be without oxygen for at least 10 minutes. L.F. 18 at 182:6 – 182:20.

The second protocol said if Respondents are faced with a situation in which they are inexperienced or unsure what to do they are required to call medical control. L.F. 18 at 30, 31:18-31:25. The individual Respondents had never encountered a pediatric patient with an obstructed tracheostomy tube. L.F. 20 at 30:16 – 31:7; L.F. 17 at 11:4 – 12:1; L.F. 22 at 12:18 – 12:22. Respondents Haase and Kohnen had not ever received training on treating a tracheostomy patient. L.F. 17 at 7:12 – 7:21, 11:4 – 12:1; L.F. 22 at 7:17 – 8:4, 12:18 – 12:22. Had Respondents called medical control, they would have been told to replace the tracheostomy tube, allow the parent who has been trained to change the tube, or to intubate Chanze. L.F. 18 at 201, 202:6 – 202:25, 243:12 – 243:23, 210, 211:17

– 211:25. Appellant's expert testified that Respondents violated mandatory protocol by not contacting medical control. L.F. 18 at 204:10 – 204:13. Calling medical control and following their instructions would have prevented the injury to Chanze. L.F. 18 at 186:17 – 186:25.

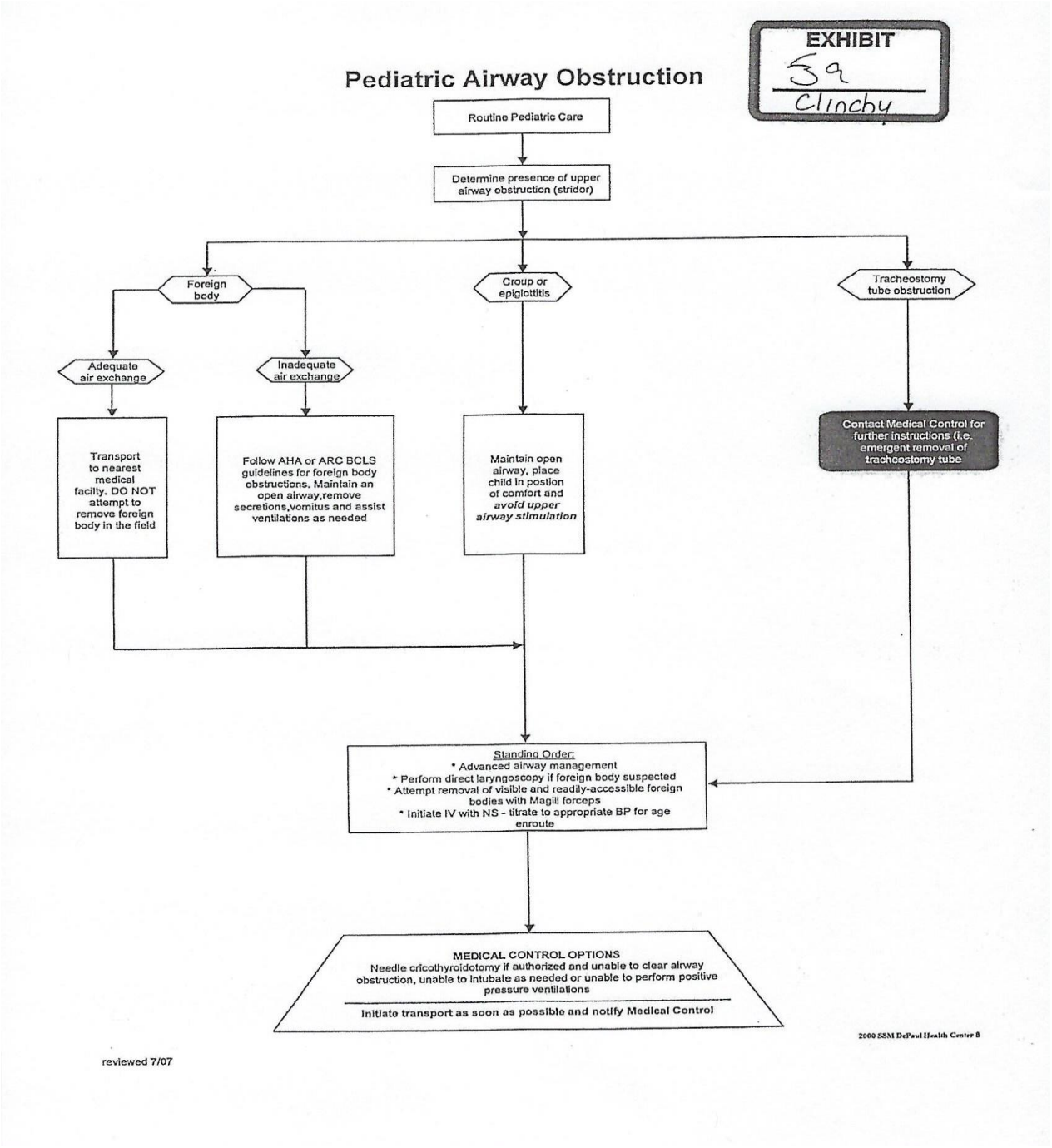
The third protocol at issue was that Respondents were required to know what protocols apply in order to follow them. L.F. 20 at 33:21 – 33:25, 34:1 – 34:5; L.F. 17 at 55:1 - 55:13; L.F. 18 at 245:18. None of the individual Respondents discussed what to do and no one discussed calling medical control about what to do. L.F. 17 at 55:5 – 55: 13; L.F. 18 at 245:18-254:23. Haase, Mankus, and Kohnen failed to check, think of, look at or use their mandatory protocols. L.F. 33, 5a; 10; L.F. 20 at 33:21 – 33:25. They did not discuss the proper required treatments despite not knowing what to do. L.F. 20 at 34:1 – 34:5; L.F. 17 at 55:1 – 55: 13; L.F. 18 at 245:18-254:23. Respondent Mankus said he did not use any flow chart or protocol when treating Chanze Jones and the proper treatment protocol was not even discussed among individual Respondents. L.F. 20 at 34:1 – 34:5; L.F. 17 at 55:1 – 55: 4; L.F. 17 at 55:5 – 55:13; L.F. 18 at 245:18-254:23.

Fourth, mandatory protocol required Respondents to continually reassess Chanze for an airway obstruction and change in condition. L.F. 17 at 84:3 – 85:10. Respondents failed to do that reassessment even though Chanze's oxygen saturation continuously dropped. L.F. 17 at 55:18 – 55:21, L.F. 17 at 84:3 – 85:10. Respondent Haase admitted Chanze's condition drastically changed. L.F. 17 at 84:6 – 84:9.

The last mandatory protocol at issue was called "Pediatric Airway Obstruction" which states if the presence of an upper airway obstruction exists, and if the child has a tracheostomy tube, EMTs must call medical control for further instruction. L.F. 17 at

74:24 – 75:15; L.F. 20 at 86:7 – 86:14; L.F. 10; L.F. 20 at 10:10 – 10:25; L.F. 22 at 6:8 – 6:14; L.F. 17 at 8:11-8:13; L.F. 10; L.F. 18 at 40:16 – 41:20, 47:14-47:23, 48:11-48:12, 50:25 – 51:7, 51:17 – 51:24, 151:7-151:9, 203:14 – 203:17, 244:17-245:1); L.F. 20 at 17:2 -18:1; L.F. 17 at 12:14 – 12:17; L.F. 20 at 86:7 – 86:14. Respondent City of Hazelwood's "Pediatric Airway Obstruction" protocol is in the form of a chart. L.F. 27. Respondents' Battalion Chief, a 29-year Hazelwood employee and chosen corporate representative, stated the individual Respondents were supposed to call medical control for further instructions such as emergency removal of the tracheostomy tube L.F. 24 at 26:7 – 28:15. They did not do so Id. Note that as stated supra p. 8, there is no evidence individual Respondents knew of, checked for, used or discussed this protocol.

Respondents performed the step in this protocol after the call medical control step – "initiating an IV with NS." L.F. 4; 10; 17 at 87:11 – 87:23. The individual Respondents would only get to the "initiating an IV with NS" step if they determined an upper airway obstruction or stridor was present. Id. This protocol is set forth in a flow chart:



Appellant's expert testified that the individual Respondents violated all five protocols, including the Pediatric Airway Obstruction protocol by not contacting medical control for further instructions. L.F. 33, 12f.

Appellant's expert testified that the finding of a pediatric airway obstruction such as the one in the present case is not a matter of judgment or discretion. L.F. 18 at 194:24 – 195:5; 260:24 – 261:5. He testified that Respondents did not have discretion in performing these types of duties. L.F. 17 at 74:24 – 75:15. When asked if determining whether there is an airway obstruction was "discretionary" or "automatic," Appellant's expert in EMT standards stated, "The symptoms that were represented and their findings, it's automatic." L.F. 18 at 194:24 – 195:5; 260:24 – 261:5. Appellant's expert testified that the individual Respondent's failures to follow their protocols caused Chanze to be without oxygen for at least 10 minutes and cause his severe brain injury. L.F. 18 at 182:6 – 182:20; accord medical records L.F. 23 at 25; L.F. 33, 12m; L.F. 21 at 133. Respondent presented no contrary expert testimony. *See* L.F. generally.

Respondent City of Hazelwood has an insurance policy that covers the negligence at issue thus waiving sovereign immunity. L.F. 13. Endorsement "M" to the policy, titled Emergency Medical Treatment Coverage, amends the policy definition of bodily injury to include "injury arising out of the rendering of or failure to render emergency medical treatment by any person..." L.F. 13. Endorsement "E" to the policy waives sovereign immunity. L.F. 13. Titled "Waiver of Governmental Immunity," the provision states the carrier will waive sovereign immunity "unless the insured requests in writing that [the carrier] not do so." L.F. 13. The endorsement states:

> 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.

POINTS RELIED ON

Respondents filed a motion for summary judgment claiming that the City of Hazelwood was protected from Appellant's claims by sovereign immunity and Haase, Mankus and Kohnen by official immunity. The trial court erred in granting Respondents' Motion.

I. The trial court erred in finding that the individual Respondents were protected by official immunity from Appellant's claims because Respondents violated protocols while treating Chanze which were ministerial and not discretionary, as required for official immunity and there were material disputes of fact on this issue, making summary judgment inappropriate.

II. The trial court erred in finding that Respondent City of Hazelwood was entitled to sovereign immunity because the City of Hazelwood waived its sovereign immunity by purchasing liability to cover the actions at issue in this case.

This Court should reverse the trial court's January 30, 2018 Order granting summary judgment for Respondents against Appellant's claims, find that all Respondents do not have sovereign immunity from all of Appellant's claims, and remand for further proceedings.

STANDARD OF REVIEW

Appellate review of summary judgment is *de novo.* ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (internal citations omitted). Courts review the record in the light most favorable to the party against whom judgment was entered. Southers v. City of Farmington, 263 S.W.3d 603, 608 (Mo.banc 2008). The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact. Id. A 'genuine issue' that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts and the 'genuine issue' is real, not merely argumentative, imaginary, or frivolous. Id.

ARGUMENT

The trial court entered summary Judgment for Respondents on all Appellant's four counts of negligence against Respondents on January 30, 2018. Appendix 1-11. The trial court decided Respondent City had sovereign immunity from Appellant's claims and Respondents C. Nathan Haase, Matthew Mankus and Joseph Kohnen had official immunity under the public duty doctrine. Appendix at 5 - 10. As set forth in section I, Respondents C. Nathan Haase, Matthew Mankus and Joseph Kohnen ("individual Respondents") are not entitled to official immunity as their actions and breaches of duties in injuring Chanze were ministerial. Those actions were in response to a fixed and designated set of facts requiring no professional judgment on their part. Moreover, Respondents' choice to use discretion while doing a ministerial duty does make the duty discretionary. Furthermore, the trial court erred in only considering one of the 5 protocols at issue in granting summary judgment. Summary judgment is improper where it is based on one-sided testimony, where facts are in conflict. As set forth in section II below, Respondent City of Hazelwood waived sovereign immunity by purchasing liability insurance to cover the specific negligence at issue. Appellants respectfully requests this Court reverse the trial court's summary judgment order and remand this case for further proceedings and trial.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE INDIVIDUAL RESPONDENTS ARE NOT ENTITLED TO OFFICIAL IMMUNITY FOR PERFORMING MINESTERIAL DUTIES.

Public officials are not protected by official immunity for "torts committed when acting in a ministerial capacity," and immunity only applies to discretionary acts. Southers v. City of Farmington, 263 S.W.3d 603, 610 (Mo. Banc 2008). The Missouri

Supreme Court has explained that "a discretionary act requires 'the exercise of reason in determining how or whether an act should be done or course pursued.'" Kanagawa v. State, 685 S.W.2d 831, 836 (Mo. banc 1985). A ministerial act is performed "in a prescribed manner, in obedience to the mandate of legal authority, without regard to [the public official's] own judgment or opinion concerning the propriety of the act to be performed." Richardson v. City of St. Louis, 293 S.W.3d 133, 139 (Mo. App. E.D. 2009).

EMS workers are protected by immunity only in situations where they are exercising discretion and not simply following protocol. Richardson, 293 S.W.3d at 142. When "presented with fixed and designated facts giving rise to a duty," EMS workers are not immune. Richardson v. Burrow, 366 S.W.3d 552, 556 (Mo. App. E.D. 2012) ("Richardson II"). Whether an act is discretionary 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 judgment; and (3) the consequences of not applying official immunity." Southers, 263 S.W.3d at 610.

A. Respondents Mankus, Haase, and Kohnen Are Not Entitled to Qualified Immunity Because Their Actions were controlled by Protocols That Did Not Leave Room For or Require Professional Judgment.

Where protocol dictates what a person should do, the person is performing a ministerial duty. Rush v. Senior Citizens Nursing Home District of Ray County, 212 S.W.3d 155 (Mo. App. W.D. 2006). Since protocol and standards in place dictate what actions should be done, no outside judgment is required for a ministerial act. Id. The inquiry is whether the protocol allows for discretion or if it mandates action given a specific set of facts. Id.

EMT personnel perform ministerial duties where there is no judgment required. Richardson II, 366 S.W.3d 552. In Richardson II, this Court ruled on a similar set of facts and circumstances and held that EMT personnel were performing ministerial duties under EMT protocol and were not entitled to official immunity. Id. Richardson II, was a wrongful death action against an EMT provider who mistakenly placed an endotracheal tube in the Plaintiff's husband's esophagus rather than his trachea. Id. The patient was deprived of oxygen causing an anoxic brain injury resulting in his death. Id. at 556. The EMTs in Richardson II were guided by protocol that mandated intubation if a patient's oxygen saturation levels dropped below 80%. This Court reversed the trial court's ruling and found the EMT was presented with a fixed set of facts, an oxygen level below 80%, that gave rise to a duty to intubate. Id. This Court found under the protocol, there was no room for any judgment on the part of the EMT. Therefore, the intubation with respect to the protocol was a ministerial act and the defendant was not entitled to qualified immunity. Id.

Where a policy leaves no room for discretion or professional judgment, the actions are ministerial. Rush. Mr. Rush was a diabetes patient at a nursing home operated by the county. Id. The nurse who treated him had a protocol requiring her to test Mr. Rush's blood sugar four times per day. Id at 158. The protocol further had a sliding scale showing the nurse how much insulin to provide to Mr. Rush based on his blood sugar readings. Id. The protocol required the nurse to provide two units of insulin if his blood sugar was between 201 and 250. Id. On a day when Mr. Rush's blood sugar reached 250, the nurse failed to administer any insulin. Id. The nurse failed to follow the protocol for insulin use and failed to give Mr. Rush required insulin multiple times until eventually,

he died as a result. Id. The Court in Rush, determined the nurse's actions were ministerial since she had strict protocols she was required to follow. Id. At 161. Even the doctor in the Rush case, who had policymaking duties in general, but did not have discretion with regard to following the protocol, did not have immunity for his acts in failing to follow the protocol. Id. Accordingly, neither the doctor nor the nurses were protected by official immunity because the acts did not require any professional judgment.

i. That Respondents Haase, Mankus and Kohnen Failed To Follow Four Required Protocols Was Not Contested By Respondents or Addressed By The Court.

Here, just like the nursing home nurse in Rush, and the EMTs in Richardson II, the individual Respondents had established regulations, standards and protocols they were required to follow during the course and scope of Chanze's treatment. L.F. 24 at 12:25. Respondent Hazelwood adopted these SSM EMS Medical Directives as required. L.F. 24 at 12:16-18. The protocols are written by DePaul Hospital and provided to Respondents as medical direction. L.F. 24 at 19-24. The State of Missouri Bureau of EMS mandates Respondents operate under and follow hospital protocols. L.F.24 at 14:7-8. Respondents consider the protocols their "bible." L.F. 24 at 11:24 – 14:8, 32:18 – 32:21, 83:6 – 83:16. The individual Respondents violated at least 5 ministerial protocols causing injury to Chanze. The four that were not seriously contested by Respondents or addressed by the trial court are addressed here, and the fifth in the next section. There is no sovereign immunity for such ministerial protocol violations. See Southers, Rush and Richardson II.

First, protocol mandated Respondent's action under a clear oxygen level standard with no room for professional judgment. The facts and protocol at issue are nearly identical to Richardson II. In that case, intubation was required if oxygen levels fells

below 90%. Here, protocol required Respondents to intubate Chanze if his oxygen level fell below 90%. L.F. 18; L.F. 17 at 69:6 – 69:12; 69:19 – 70:5. Chanze's oxygen level was at 86% from the beginning of Respondents encounter with him and continued to drop. L.F. 4; 21 at 84:14 - 84: 19; L.F. 20 at 49:5 – 49:10. Respondents did not intubate Chanze - causing crippling injuries. L.F. 4 at 84:14 -84: 19, 33, 5e, 14. The Court in Richardson II found EMTs had a strict protocol telling them what to do and found they were performing a ministerial duty with respect to this specific intubation protocol. Just like in Richardson II, the individual Respondents' duty under the protocol was clearly mandated based on the fixed fact of Chanze's oxygen level. L.F. 18; L.F. 17 at 69:6 – 69:12; 69:19 – 70:5. Appellant's expert testified that Respondent's failures to follow their protocols caused Chanze to be without oxygen for at least 10 minutes. L.F. 18 at 182:6 – 182:20. Consequently, the EMT Respondents are not entitled to official immunity where protocol does not leave any room for professional judgment.

The second protocol at issue required no professional judgment since it mandated Respondents call medical control if they encountered something in which they were inexperienced or were in a situation where they were unsure what to do. L.F. 18 at 30, 31:18-31:25. Thus, the only facts necessary to invoke the protocol was EMT inexperience. Id. The record is clear, Respondents were inexperienced -- none of the Respondents had ever encountered a pediatric patient with an obstructed tracheostomy tube. L.F. 20 at 30:16 – 31:7; L.F. 17 at :4 – 12:1; L.F. 22 at 12:18 – 12:22. Respondents Haase and Kohnen had never received training on treating a tracheostomy patient. L.F. 17 at 7:12 – 7:21, 11:4 – 12:1; L.F. 22 at 7:17 – 8:4, 12:18 – 12:22. Pursuant to both Richardson II and Rush, Respondents had no discretion whatsoever under the protocol.

The protocol dictated exact moves given a set of fixed facts and had Respondents called medical control, they would have been told to replace the tracheostomy tube, allow the parent to change the tube, or to intubate Chanze. L.F. 18 at 201, 202:6 – 202:25, 243:12 – 243:23, 210, 211:17 – 211:25. Appellant's expert testified that Respondents violated mandatory protocol by not contacting medical control. L.F. 18 at 204:10 – 204:13. The individual Respondents' failure to do so does not make their actions discretionary as the language of the protocol mandated specific action. As a result, Respondents' duty was ministerial with no immunity protections afforded. Calling medical control as required and following their instructions would have prevented the damages to Chanze. L.F. 18 at 186:17 – 186:25.

The third protocol did not involve any professional judgment as Respondents were required to know what airway protocols were in effect. Under the EMS protocols, the individual Respondents were required to check what the protocols were in order to know how to follow the protocols. L.F. 20 at 33:21 – 33:25, 34:1 – 34:5; L.F. 17 at 55:1 - 55: 13; L.F. 18 at 245:18-254:23. Like in Richardson II (with no room for discretion in a protocol), the individual Respondents had to check protocol in order to know how to proceed before rendering emergency services. Id. Appellant's protocol leaves no room for discretion. Haase, Mankus, and Kohnen failed to check their mandatory protocols L.F. 33, 5a; 10; L.F. 20 at 33:21 – 33:25. They did not discuss the proper required treatments despite not knowing what to do. L.F. 20 at 34:1 – 34:5; L.F. 17 at 55:1 – 55: 13; L.F. 18 at 245:18-254:23. Respondent Mankus said he did not use any flow chart or protocol when treating Chanze Jones and the proper treatment protocol was not even discussed among individual Respondents. L.F. 20 at 34:1 – 34:5; L.F. 17 at 55:1 – 55: 4;

L.F. 17 at 55:5 – 55:13; L.F. 18 at 245:18-254:23. Since the protocol dictated specific moves given a set of fixed facts, the protocol is ministerial and Respondents are not entitled to official immunity.

Fourth, where protocol mandates continual assessment of a patient, there is no room for professional discretion. Mandatory protocol required Respondents continually reassess Chanze for an airway obstruction and change in condition. L.F. 17 at 84:3 – 85:10. Respondents failed to do that reassessment. L.F. 17 at 84:3 – 85:10. This is despite the fact that Chanze's oxygen saturation continuously dropped and Appellant informed them Chanze's oxygen was not attached during the ambulance ride. L.F. 17 at 55:18 – 55:21; 21 at 108:16 -108:19. Pursuant to Richardson II, this protocol did not require any judgment and is a clear administrative duty mandating specific action. L.F. 17 at 84:3 – 85:10. Respondent Haase even admitted Chanze's condition drastically changed later. L.F. 17 at 84:6 – 84:9. Applying Richardson II, Respondents were given very clear facts under a specific protocol to continually reassess Chanze for an obstructed airway regardless of anything else. As a result, this protocol did not require even an ounce of judgment and Respondents duty was ministerial.

Since none of the four protocols left any room for professional judgment in theory or application, Respondents were performing ministerial duties and are not entitled to official immunity.

ii. Respondents Haase, Mankus and Kohnen Failed To Follow The Required Pediatric Airway Obstruction Protocol.

The Fifth protocol at issue is the Pediatric Airway Obstruction flow chart principally relied on by Respondents and the trial court for summary judgment. To rely

on this argument is belied by the uncontroverted facts. Note that as stated supra p. 8, the individual Respondents did not know of, check for, look at, think of, use, or discuss this protocol in treating Chanze. *Supra*. *A fortiori,* an argument that they applied discretion in applying the flow chart protocol is without foundation and fails factually. Moreover, the only person who was truly working the airway on Chanze, Respondent Kohnen, admits he does not remember anything about the events of that day. L.F. 33, 12d. Note that the only way that Respondents would get to the protocol chart is if there is an airway obstruction, so their argument fails on that ground as well. L.F. 27.

Assuming, *arguendo*, this protocol applies as grounds for immunity (and not just negligence), it too did not require any judgment call where an airway obstruction existed. Under protocol, if there was an upper airway obstruction or stridor and the child had a tracheostomy tube, the individual Respondents were to call medical control. L.F. 17 at 74:24 – 75:15; L.F. 20 at 86:7 – 86:14; L.F. 10; L.F. 20 at 10:10 – 10:25; L.F. 22 at 6:8 – 6:14; L.F. 17 at 8:11-8:13; L.F. 10; L.F. 18 at 40:16 – 41:20, 47:14-47:23, 48:11-48:12, 50:25 – 51:7, 51:17 – 51:24, 151:7-151:9, 203:14 – 203:17, 244:17-245:1; L.F. 20 at 17:2 -18:1; L.F. 17 at 12:14 – 12:17; L.F. 20 at 86:7 – 86:14. The trial court, focusing only on this protocol and none of the others (at Respondents' urging), said the individual Respondents' used judgment to determine whether an obstruction was present and Chanze and they thus are cloaked with official immunity. This was in error – finding such stridor or obstruction was automatic, the evidence is, at best, controverted about whether individual Respondents used this discretion, and it cannot be reasonably disputed Chanze had an airway obstruction.

Respondents own testimony indicates clear evidence of an airway obstruction: The Respondents' initial assessment of Chanze was "Rhonchi-Low Wheeze." L.F. 4. Respondent Haase listened to Chanze's lung sounds and found that he was "slightly wheezing," and was in respiratory distress. L.F. 17 at 27:4 – 27:10; 28:19 – 28:22. According to Appellant's expert wheezing, rhonchi, and stridor sounds mean an obstruction. L.F. 33, 12. According to the "pediatric airway obstruction" protocol, the presence of stridor sounds indicates an upper airway obstruction. L.F. 10. According to the National Institute of Health (NIH), stridor is a type of wheeze heard in patients with tracheal or laryngeal obstruction. https://www.ncbi.nlm.nih.gov/pubmed/3304813. SSM protocols mandated Respondents call medical control if there is a suspected airway obstruction. L.F. 17 at 74:24 – 75:15; L.F. 20 at 86:7 – 86:14; L.F. 10; L.F. 20 at 10:10 – 10:25; L.F. 22 at 6:8 – 6:14; L.F. 17 at 8:11-8:13; L.F. 10; L.F. 18 at 40:16 – 41:20, 47:14-47:23, 48:11-48:12, 50:25 – 51:7, 51:17 – 51:24, 151:7-151:9, 203:14 – 203:17, 244:17-245:1; L.F. 20 at 17:2 -18:1; L.F. 17 at 12:14 – 12:17; L.F. 20 at 86:7 – 86:14.

Further facts bolster the position Respondents knew there was an obstruction and the pediatric airway obstruction protocol dictated their next move. Appellant told the individual Respondents that Chanze's tracheostomy tube was obstructed from the very beginning. L.F. 33 at 5c, 12k-m. Appellant advised Chanze had respiratory complications, that he was suctioned and that his oxygen level was dropping. L.F. 33, 12. Appellant tried to change the obstructed tracheostomy tube as she had been trained but Respondents prevented her from doing so. L.F. 33, 12c. Respondents' diagnosis of Chanze was respiratory distress, which was why they were called to assist in the first place. L.F. 33, 12. The Respondents even placed Chanze in a sniffing position which is a

position where they extended his neck and head in an attempt to open his airway. Id.

Chanze had an 86% oxygen saturation rate on his home ventilator, then Respondents took over, his oxygen level declined throughout transport, and Respondents delivered Chanze to DePaul with "no air movement" through his tracheostomy tube. L.F. 23 at 3. Moreover, when he arrived at the hospital, Chanze clearly had an upper airway obstruction. In the emergency room, Chanze's "trach was removed upon arrival and was mucous plugged." L.F. 23 at 25. He was immediately intubated and started breathing and had "spontaneous circulation." L.F. 33, 12m. Note that the nature of the public employees' duties can always include discretionary functions generally, but the question is whether the instant actions were discretionary or ministerial. Rush, 212 S.W.3d 155 (2006). When asked if determining whether there is an airway obstruction was "discretionary" or "automatic," Appellant's expert in EMT standards stated, "The symptoms that were represented and their findings, it's automatic." L.F. 18 at 194:24 – 195:5; 260:24 – 261:5.

Because the symptoms that were present clearly indicated the presence of an airway obstruction, the pediatric airway protocol dictated Respondents next steps. L.F. 33, 12. Respondents should have continued down the "pediatric airway obstruction" flow chart and called medical control L.F. 27. Pursuant to Richardson II and Rush, the Respondents' decision not to follow the protocol is not discretionary since it violates the protocol. After determining the presence of an upper airway obstruction, the individual Respondents were mandated to call medical control for further instructions. L.F 27. They did not. However, the individual Respondents took the next step in that protocol which included "initiating an IV with NS." L.F. 4; 10; 17 at 87:11 – 87:23. Protocol shows

Respondents would only get to this step in this circumstance if they found an upper airway obstruction. Id.

As a result, since Chanze had stridor/an upper respiratory obstruction, strict protocol mandated the individual Respondents their next move leaving no room for discretion. Consequently, individual Respondents were performing a ministerial duty and no immunity attaches.

B. Respondents Improperly Try To Substitute The Alleged Use Of Their Discretion As A Permitted Deviation From Mandatory Ministerial Protocol

The individual Respondents' argument that they injected choice/discretion while performing a ministerial duty does not change the fact it is ministerial. Geiger v. Bowersox, 974 S.W. 2d 513, 517 (Mo. App. Ct. E.D. 1998); *See also* Boever v. Special Sch. Dist. of St. Louis Cty., 296 S.W.3d 487, 492 (Mo. Ct. App. 2009).[1] An employee who is to perform according to a policy is not performing a discretionary duty by violating the protocol. 974 S.W. 2d at 517. In Geiger, a prisoner ingested wax that medical personnel had put in his pill bottle. Id. The plaintiff sued the nurse who violated protocol by letting someone else fill his prescription and the Court found she was not

[1] [1]To any extent that Respondents rely on *Boever* (and now *Nguyen*) for the proposition that "[t]o be liable for official acts, a public official or employee must breach a ministerial duty imposed by *statute or regulation*" they are misguided. *Boever* quoted *Brummitt v. Springer*, 918 S.W.2d 909 (Mo. App. S.D. 1996) for this proposition. *Boever*, 296 S.W.3d at 492. *Brummitt*, in turn, relied upon *Norton v. Smith*, 782 S.W.2d 775, 777 (Mo. App. E.D. 1989), which stated, "To be liable in tort for his or her official acts, a public official or employee must breach a ministerial duty imposed by statute or by regulation." *Norton* does not cite to any authority or provide any rationale for that statement; moreover, *Norton* made that comment solely in the context of the public duty doctrine. *Id.* Given this weak pedigree, the Missouri Court of Appeals in *Nguyen v. Grain Valley R-5 School District*, 353 S.W.3d 725 (Mo. App. W.D. 2011) declined to rely on these cases, instead stating that *Boever*, *Brummitt*, and *Norton* "**inaccurately stated the standard adopted by our Supreme Court**" to the extent they "require 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." *Id.* at 730. Thus, under *Nguyen*, there is no requirement to plead a ministerial duty in order to survive a motion to dismiss. Further, this violation of a statute or regulation idea only applies as the second prong of official immunity if the defendant is a public official in the first place.

shielded by official immunity. The nurse was required to follow protocol and her failure did not make her actions discretionary. As a result, the nurse was performing a ministerial duty regardless of whether she followed the protocol since she was simply to perform whatever the protocol mandated.

Performing duties in an emergency situation does not automatically make EMT actions discretionary. Thomas v. Brandt, 325 S.W.3d 481 (Mo. App. E.D. 2010). In Thomas, EMT's encountered a man with chest pains and diagnosed him incorrectly. Id. This misdiagnosis ultimately lead to his death as his chest pains were a heart attack and the EMT's did not transport him to a hospital during their original encounter. Id. The Court stated this was a discretionary function because they were making decisions in an emergency situation with limited information. Id. But Thomas did not replace the discretionary act requirement with the requirement of a true emergency situation. The opinion in dicta stated emergency responders acting in true emergency situations about which they have limited information use discretion. Thomas at 485. Thomas defines a "true emergency" as a rapidly-evolving emergency situation where the actors have limited information available to them. Id. The Court distinguished Thomas later in Richardson II and said response to an emergency situation with limited information is different than assessing the act at issue as discretionary or ministerial: "it is undisputed that Burrow was responding to a true emergency situation. At issue though is whether Burrow's treatment of Decedent was a discretionary act." Richardson II at 4. Even in a true emergency, an act must still be discretionary for the actor to be immune. In Thomas, the decision to transport required a judgment call, thus the emergency situation evaluation was discretionary under the circumstances. Id.

In an attempt to make Respondents' actions sound more discretionary, Respondents misstate the standard set forth in Thomas v. Brandt by alleging the acts were *per se* discretionary because they were performed during a "true emergency." This is an incorrect interpretation of Thomas. The heart of the official immunity analysis is still whether the conduct of the Respondent EMTs required any type of judgment call or discretion, regardless of whether the EMTs are responding to a true emergency situation. If Respondents' were correct, that the only thing a Defendant had to do to gain a shield of immunity and avoid liability was to claim that he used his discretion (despite the fact that he may have had a ministerial duty), then no claimant could ever get past immunity. Respondents' argument would render the ministerial duty distinction superfluous. Adopting such rational here would be even more absurd as there is no evidence this protocol was known, followed or contemplated by the individual Respondents. *Supra*.

This is supported by longstanding Missouri law which leans the other direction. Southers, 263 S.W.3d at 610 (Discussing breach of a ministerial duty); Clay v. Scott, 883 S.W.2d 573, 576 (Mo. Ct. App. 1994) ("However, a public official is liable if the law imposes on the officer ministerial duties … and breach of such duties causes injury to the individual.") Horneyer v. City of Springfield, 98 S.W.3d 637, 640 (Mo. Ct. App. 2003) ("Under longstanding Missouri law, a city is not immune for neglect or breach of a ministerial duty, whereas, it is generally immune from suit in its performance of governmental duties."). Suggesting EMT's are allowed to not use valuable protocol and make their own decisions under emergency situations and call it discretionary impacts the public's trust in protocols designed to mandate adequate medical care.

Respondents failure to follow a set protocol does not make their actions

discretionary. The individual Respondents had protocols they required to follow. L.F. 24 at 12:25. The protocols were written by DePaul Hospital and provided to Respondents as clear medical direction. L.F. 24 at 19-24. The State of Missouri Bureau of EMS mandated Respondents operate under hospital protocols and the protocols be followed. L.F. 24 at 11:24 – 14:8, 32:18 – 32:21, 83:6 – 83:16. The reason DePaul Hospital wrote the protocols was to provide needed guidance to these paramedics who were encountering medical situations they had never seen before. Id. Pursuant to Gieger, the fact Respondents failed to follow protocols is irrelevant to the assessment of whether the protocols are ministerial. Rather, using discretion in the face of a ministerial duty (as they admit) makes Respondents tortfeasors – not immune. L.F. 17 at 74:7-75:26.

Respondents are not entitled to official immunity because the question is whether the duty is ministerial, not whether Respondents chose to follow the protocol. As a result, this Court should overturn the trial court's grant of summary judgment.

C. Summary Judgment Is Improper On The Basis Of One Side's Testimony Where Facts Are In Conflict.

Under long standing Missouri law Respondents' one-sided testimony demonstrates a genuine dispute of material fact and cannot be used to establish their prima facie case. Dresser Industries, Inc. v. Lane, 878 S.W. 2d 869 (Mo. Ct. App. ED 1994). When any evidence submitted by the movant requires any inference to establish his right to summary judgment, and the evidence supports any other plausible inference, the movants prima facie case fails. Id; see also ITT Commercial Finance Corp., 854 S.W.2d 371, 382 (Mo. banc 1993); Lunn v. Anderson, 302 S.W.3d 180, 192 (Mo. App. ED 2009). In *Dresser*, the Court found that a party moving for summary judgment could not make a

prima facie case when they relied on their own testimony through affidavit, which conflicted with their opponent's evidence. Id. Simply – summary judgment is improper where facts are controverted making a factfinder's resolution of the controversy necessary for due process.

Respondents and the court below relied on Respondent's evidence contrary to Appellant's evidence, making summary judgment improper. Their testimony demonstrates a genuine dispute of material fact, which under Missouri law must be decided at trial. L.F. 3; L.F. 2. Summary judgment was granted based on Respondent's own testimony that they "used discretion" under one protocol. L.F. 17 at 74:7-75:26. Appellant disagrees as the law indicates Respondent's failure to follow protocol is irrelevant in deciding whether their duty was ministerial. L.F.15; L.F. 16; Supra. Moreover, all evidence points to the existence of an obstruction, despite the self-serving statements of Respondents that none was found by them. The individual Respondents' assertion they used discretion is not a basis for summary judgment but a defense at trial. Furthermore, there is evidence to the contrary of Respondents own argument. Respondents' Battalion Chief, a 29-year Hazelwood employee and chosen corporate representative, stated Respondents were supposed to call medical control for further instructions such as emergency removal of the tracheostomy tube L.F. 24 at 26:7 – 28:15. They did not do so. Id. A jury should weigh Respondents' argument it did not violate mandatory protocol by not calling medical control. L.F. 33, 12f.

Furthermore and as shown above, the trial court erred in granting summary judgment on the basis of just one protocol's potential discretionary reading since there are five protocol violations presented in the undisputed facts. L.F. 24 at 12:25.

This Court should reverse the trial court's granting of summary judgment in favor of Respondents because there exists a genuine dispute of material fact regarding immunity of the individual EMT Respondents. The Respondents acted in response to a fixed and designated set of facts requiring no professional judgment on their part rendering their duty ministerial. They violated five mandatory protocols established to regulate their care of Chanze.

Its application here turns immunity on its head. The individual Respondents' claim that they used discretion in application of one of the protocols is contrary to the instant record and usurps the factfinders role in resolving the above noted disputes of fact. The individual Respondents' discretion assertion does not and cannot turn their mandatory ministerial protocol into immunity or make the duty discretionary. With the overwhelming evidence of mere discretion here, this Court should not permit the mention of discretion in testimony by a public employee accused of negligence to automatically invoke immunity and escape liability. This is Respondents' position and the trial court's finding; and it is contrary to Missouri law, Southers and good public policy. When a municipality like Respondent Hazelwood has mandatory, robust policies and protocols for its paramedic and insurance for liability, those paramedics should be held responsible for those protocol violations. Appellant respectfully requests this Court reverse the trial court's summary judgment order.

D. The Above Analysis Also Shows the Trial Court's Alternative Reason for Granting Summary Judgment Under the Public duty Doctrine was Improper.

The trial court also addressed Respondents defense of the public duty doctrine.

The trial court believed the individual Respondents were also "entitled to summary judgment in their favor based on the public duty doctrine." Appendix at 10. Under Southers and other cases, no such immunity attaches if a public employee's conduct is ministerial and the analysis is the same as set forth above. As the individual Respondents acted ministerially and without discretion in violating five of their mandatory protocols, they ae not entitled to immunity under the public duty doctrine. The trial court's entry of summary judgment for the individual Respondents on this ground should be reversed by this Court.

II. SUMMARY JUDGMENT FOR RESPONDENT CITY OF HAZELWOOD IS IMPROPER BECAUSE THEY WAIVED SOVERIEN IMMUNITY WITH THE PURCHASE OF LIABILITY INSURANCE TO COVER THE SPECIFIC INSTANCE OF NEGLIGENCE AT ISSUE

Under Missouri statute, a public entity can purchase tort liability insurance, and in doing so statutorily waive sovereign immunity. R.S. Mo. §71.185 and § 537.610; Appendix 12 - 14. Courts have interpreted these statutes and have long held Municipalities waive sovereign immunity for governmental functions to the extent they are covered by liability insurance. Southers at 609. Where a party can show the existence of insurance and that it specifically covers the negligence at issue, immunity for public entities is waived. Brennan v. Curators of the Univ. of Mo., 942 S.W.2d 432, 434 (Mo. App. W.D. 1997); R.S. Mo. §71.185 and § 537.610. Respondent City of Hazelwood waived sovereign immunity by purchasing liability insurance to cover the specific negligence at issue. Thus, this Court should reverse the trial court's grant of summary judgment, enter an order finding Respondent Hazelwood waived its immunity and

remand for further proceedings.

Where a municipality purchases insurance that covers a specific claim, the municipality is liable for damages the policy covers. Id at 433. In Brennan, a mother sued a state hospital for negligence and the court dismissed the claim under sovereign immunity. Id. The Appellate Court in review looked at the insurance policy in depth since immunity is waived where the insurance covers specific instances. Id. at 435. The State hospital carried a General Liability Plan with a provision stating it did not waive their sovereign immunity. Id. at 436. While the Court ruled on different grounds, it said if Appellants had shown the existence of the plan and that it covered the claim at issue, this would constitute waiver. Id. As a result, where Plaintiffs can show an insurance plan exists and covers the specific instance at hand, sovereign immunity is waived. Id. Furthermore, despite differences in language of the two Missouri statutes that allow for waiver and the fact that §71.185 applies to municipalities and § 537.610 applies to political subdivisions of the State, the purchase of liability insurance functions as a waiver of sovereign immunity under either statute. Brennan, 942 S.W.2d at 435.

Respondent City of Hazelwood has an insurance policy that covers the negligence at issue thus waiving sovereign immunity. L.F. 13. Respondents' policy is more specific than the one in Brennan and expressly covers emergency medical treatment. Endorsement "M" to the policy, titled Emergency Medical Treatment Coverage, amends the policy definition of bodily injury to include "injury arising out of the rendering of or failure to render emergency medical treatment by any person..." L.F. 13. Endorsement "E" to the policy even waives sovereign immunity. L.F. 13. Titled "Waiver of Governmental Immunity," the provision states the carrier will waive sovereign immunity "unless the

insured requests in writing that [the carrier] not do so." L.F. 13. There is no such request in writing. So, Respondent Hazelwood, "shall be liable as in other cases of torts for … personal injuries … while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried." RSMo. §71.185.

While Respondents attempt to allege an endorsement at the end of the policy is sufficient to act as this request, it does not. The endorsement states:

> 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.

But the endorsement does not avoid sections 71.185 or 537.610 and reinstate Respondent Hazelwood's sovereign immunity. This endorsement does not address or repeal endorsement "E" at all. Instead, it says merely that in cases where there is liability, it only covers situations where there is no immunity under the laws of Missouri. In other words, if a case is one that is an exception to governmental immunity – for example – in cases involving the governmental operation of a motor vehicle, or a dangerous condition on government property, an official doing ministerial work, or where Missouri Law says they have waived immunity by purchasing insurance– then, the policy is in effect. It is a logical fallacy to say this sentence negates the waiver of immunity in Endorsement "E" where Missouri law says purchase of insurance waives governmental immunity. Further, that provision only states the obvious, that immunity must not attach for there to be exposure to insure. Accordingly, Since Plaintiff's identified an insurance policy that directly covers the issue at hand, Respondents have waived sovereign immunity, and summary judgment must fail.

Respondents cite Cunningham v. Hinrichs to support their claim that Endorsement O negates a waiver of sovereign immunity. Cunningham v. Hinrichs, No. 4:12-CV-785; 2013 WL 6068881 at 9-10 (E.D. Mo. Nov. 18, 2013). However, the opinion in Cunningham does not show the particular policy in that case had an Endorsement "E" or anything similar which explicitly waived sovereign immunity. Cunningham stated, Defendants had to specifically request in writing that sovereign immunity not be waived. Nothing in Cunningham addresses the fact that in this case, Respondents were required to request in writing that sovereign immunity not be waived and they failed to do so. Accordingly, Respondents have waived sovereign immunity with their insurance policy and summary judgment was improper.

Summary judgment was improper since Respondent City of Hazelwood waived sovereign immunity by purchasing liability insurance to cover the specific negligence at issue. As a result, Appellant requests this Court reverse the trial court's grant of summary judgment on this ground as well, find that Respondent Hazelwood has waived sovereign immunity to the extent of their insurance coverage and remand this matter to the trial court for further proceedings.

CONCLUSION

This Court should deny Respondents request for summary judgment in this case for all of the reasons above. This Court should reverse the trial court's January 30, 2018 Order granting summary judgment to all Respondents, find that all Respondents do not have sovereign immunity from all of Appellant's claims, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that the foregoing was sent via the Missouri e-filing system, on the 21th day of June 2018, to:

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The undersigned hereby further certifies that this brief includes the information required by rule 55.03 and complies with rule 84.06. Also, relying on the word count feature of Microsoft Word, the undersigned certifies that the total number of words in this brief is 8,017 words, excluding the cover page, table of contents, table of authorities, signature block, and this certificate.

/s/ Gary K. Burger
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