

**IN THE MISSOURI SUPREME COURT**

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**CAUSE NO. SC87513**

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**KIMBERLY HODGES**

RESPONDENT/CROSS-APPELLANT,

v.

**CITY OF ST. LOUIS**

APPELLANT/CROSS-RESPONDENT.

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**APPEAL FROM THE CIRCUIT COURT,  
TWENTY-SECOND JUDICIAL CIRCUIT  
DIVISION NO. 21**

**HONORABLE EVELYN M. BAKER**

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**BRIEF OF APPELLANT/CROSS-RESPONDENT**

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**OFFICE OF THE CITY COUNSELOR**

Mark Lawson #33337

Associate City Counselor

Room 314, City Hall

St. Louis, MO 63103

Phone: (314) 622-3361

Fax: (314) 622-4956

**ATTORNEY FOR APPELLANT/  
CROSS-RESPONDENT**

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## **JURISDICTIONAL STATEMENT**

This case consists of an appeal by the City of St. Louis (“City”) and a cross-appeal by the Plaintiff, Kimberly Hodges. The cross-appeal involves the question of whether a portion of the Missouri Sovereign Immunity Statute, §§ 537.600, *et seq.*, RSMo., imposing a “cap” on recoverable damages, violates certain provisions of the Missouri Constitution. Hence, this action involves the validity of a statute of this State, within the exclusive jurisdiction of the Missouri Supreme Court pursuant to Mo. Const. Art. V, § 3.

## STATEMENT OF FACTS

This appeal stems from a motor vehicle accident which occurred on March 4, 2003, at the intersection of Annie Malone and Aldine in the City of St. Louis. *Petition*, ¶ 1, L.F., 14. At that time, a marked police vehicle owned by the St. Louis Metropolitan Police Department (“SLMPD”), *Testimony of P.O. Joseph Gooch*, Tr., Vol. III<sup>1</sup>, p. 52, l. 1 - 3, driven by Officer Willie Walker, *Gooch*, p. 51, l. 12 - 17, collided with a vehicle driven by Ann Starks Martin, *Gooch*, p. 52, l. 4 - 6. The Martin vehicle was southbound on Annie Malone, *Gooch*, p. 65, l. 1 - 5. The police vehicle was westbound on Aldine, *Gooch*, p. 58, l. 13 - 15; at that location, Aldine was a one-way eastbound street. *Gooch*, p. 56, l. 25 - p. 57, l. 2. Several police vehicles, including the vehicle operated by Officer Walker, were responding to a police radio broadcast for an “officer in need of aid,” *Gooch*, p. 53, l. 11 - p. 54, l. 9. Two witnesses testified that the police vehicle did not have its lights and sirens operating at the time of the accident. *Testimony of Jules Summerville*, Tr., p. 120, l. 22 - p. 121, l. 7; *Testimony of Vanessa Johnson*, Tr., p. 169, l. 23 - p. 170, l. 7.

Following the accident, Martin was taken by ambulance to Barnes Hospital. *Gooch*, p. 78, l. 10 - 12. Her injuries included fractures to the left side of her rib cage, pelvic fracture, fracture to the left femur, three lumbar fractures, fracture to the right arm, laceration to the forehead, and injuries of two fingers on her right hand. *Gooch*, p. 78, l.

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<sup>1</sup>All citations to the trial transcript (“Tr.”) hereinafter referenced, are located in Volume III of the transcript.

13 - p. 79, l. 5.

On May 28, 2003, Martin filed suit in the Circuit Court of the City of St. Louis, naming as defendants the City of St. Louis (“City”) and Officer Walker, alleging that Walker was the City’s agent, and pleading negligence. L.F., 14 - 15. The City filed a Motion to Dismiss. L.F., 16 - 17. On October 2, 2003, a First Amended Petition was filed, adding as defendants the Board of Police Commissioners of the City of St. Louis (“Board of Police Commissioners” or “Board”) and the individual Board members. L.F., 18 - 21. A Motion to Dismiss was filed on behalf of the City, L.F., 22, which was denied by the trial court, L.F., 23. The City then filed an Answer to the First Amended Petition, generally denying the allegations and asserting affirmative defenses, including the sovereign immunity statutes, § 537.600, *et seq.*, RSMo. L.F., 26 - 27. Martin filed a Reply to the affirmative defense, alleging the sovereign immunity statutes violated provisions of the Missouri Constitution. L.F., 28 - 29.

On September 21, 2004, Martin filed a Second Amended Petition, alleging joint liability for negligence of the City, the Board, and Officer Walker. L.F., 30 - 32. The City then filed a Motion for Summary Judgment, contending that Walker was neither an employee or agent of the City. L.F., 39 - 46. Martin filed a Response to the Motion for Summary Judgment, acknowledging that Walker was employed by the Board, but contending he was an agent of the City, and that there were “highly disputed facts about defendant Walker’s agency for the City of St. Louis on March 4, 2003.” L.F., 47 - 59.

On January 5, 2005, while the Motion for Summary Judgment was under submission to the trial court, Martin died, and a Motion to Substitute as Party Plaintiff

Kimberly Hodges, daughter of decedent Martin, was made for purposes of pursuing a wrongful death action. L.F., 60 - 61. Hodges then filed a Third Amended Petition, for wrongful death, against the same defendants, alleging, *inter alia*, that Walker, “as a member of the Police Force of the City of St. Louis appointed by the defendants Board of Police Commissioners, is an officer of the City of St. Louis, for whom the defendant City of St. Louis has passed ordinances protecting him by controlling interference with its officers such as defendant Willie James Walker, and that defendant City of St. Louis pays Willie James Walker for the services and benefits that he confers upon the defendant City of St. Louis while operating as a Police Officer in the City of St. Louis.” L.F., 65 - 68. Separate Answers to the Third Amended Petition were filed on behalf of the Board of Police Commissioners, L.F., 69 - 73; Walker, L.F., 74; and the City, which again denied generally the allegations of the Third Amended Petition and asserted affirmative defenses, including the sovereign immunity statutes and the right of the City to set-off for any sums paid by any party or non-party for liability for the claim. L.F., 75 - 77. No reply was filed to the affirmative defenses.

On July 18, 2005, the trial court ruled on the Motion for Summary Judgment, which had been filed in response to the Second Amended Petition, denying said Motion. L.F., 78 - 83.

On October 31, 2005, Hodges filed a Stipulation for Dismissal as to Walker and the Board and its members. L.F., 108.

On October 31, 2005, the case proceeded to trial on the allegations of the Third Amended Petition, against the City as the only remaining defendant. Testimony relevant

to the issues on appeal included the following:

Plaintiff called as a witness Police Officer Joseph Gooch of SLMPD, who was dispatched to the motor vehicle accident on March 4, 2003. *Gooch*, p. 54, l. 6 - 9. On direct examination, Gooch testified that his uniform had a badge that said City of St. Louis, *Gooch*, p. 45, l. 9 - 12; and that there was a shoulder patch that said St. Louis Police, Missouri, *Gooch*, p. 45, l. 13 - 16. Gooch testified that he received his paycheck from the City of St. Louis, *Gooch*, p. 45, l. 21 - 23; and that he was provided with information for the City of St. Louis at the end of the year for tax purposes, *Gooch*, p. 46, l. 1 - 4. He testified that he issues citations in the City of St. Louis and that the City has passed ordinances giving him the authority to issue those citations. *Gooch*, p. 46, l. 17 - 20. Gooch also testified that the citations are issued on forms that say “Twenty-Second Judicial Circuit, City of St. Louis, Missouri” and “City Court,” *Gooch*, p. 47, l. 4 - 13; and the forms direct payment for fines to the City Traffic Violation Bureau, p. 47, l. 17 - p. 48, l. 12. He testified that the fines go to the City of St. Louis, *Gooch*, p. 48, l. 13 - 15. Gooch further testified that he personally considered his services to be of benefit to the City of St. Louis. *Gooch*, p. 49, l. 3 - 9.

On cross-examination, Gooch testified that when he responded to the accident scene, he used his own judgment and decision as to how to get to the accident scene. *Gooch*, p. 83, l. 18 - 21. He testified that no one from the City told him how to respond to the accident scene. *Gooch*, p. 83, l. 22 - 24.

Plaintiff read into the record portions of the deposition testimony of Police Officer Thophilus Buford, who identified himself as an SLMPD officer, *Excerpted Deposition*

*Testimony of P.O. Theophilus Buford, Tr.*, p. 94, l. 13 - 18. Officer Buford testified on March 4, 2003, he was driving a marked police vehicle when he observed two suspects at the corner of Billups and Aldine, an area known for drug transactions, *Buford*, p. 97, l. 16 - 24. After asking one of the suspects to produce identification, the suspect pushed Buford and began running, *Buford*, p. 99, l. 10 - 24, at which time Buford began a foot pursuit, *Buford*, p. 100, l. 25 - p. 101, l. 11. After apprehending the suspect, Buford testified the suspect became combative, *Buford*, p. 102, l. 6 - 22, which caused Buford to activate the emergency button on his miniature radio for an officer in need of aid, *Buford*, p. 102, l. 23 - p. 103, l. 2. After a Sgt. Fleming came to supervise the scene, Sgt. Fleming was called away to the scene of the accident involving the vehicles driven by Martin and Officer Walker, *Buford*, p. 104, l. 16 - p. 105, l. 9.

Plaintiff read into the record portions of the deposition testimony of several SLMPD Police Officers, including P.O. John Clobes, who was assigned to the Communications Division, *Excerpted Deposition Testimony of P.O. John Clobes, Tr.*, p. 86, l. 8 - 18; P.O. John Vogan, who identified himself as manager of the Identification Division, *Excerpted Deposition Testimony of P.O. John Vogan, Tr.*, p. 92, l. 3 - 6.; and P.O. Doug Thompson, who was a shift supervisor, *Excerpted Deposition Testimony of P.O. Doug Thompson, Tr.*, p. 112, l. 12 - 14. Plaintiff also read in portions of the deposition testimony of Belinda Jackson, a civilian employee (dispatcher) of SLMPD, *Excerpted Deposition Testimony of Belinda Jackson, Tr.*, p. 108, l. 7 - 20. Each testified he or she received a City paycheck. *Clobes*, p. 86, l. 20 - 22; *Vogan*, p. 91, l. 17 - 19; *Thompson*, p. 112, l. 15 - 17; *Jackson*, p. 108, l. 4 - 6.

Plaintiff also read into the record portions of the deposition testimony of Police Officer Willie Walker of SLMPD. Walker testified that his uniform has a St. Louis Police badge, *Excerpted Deposition Testimony of P.O. Willie Walker*, Tr., p. 124, l. 13 - 18; that it has a St. Louis City Police Department emblem on the shoulder, *Walker*, p. 124, l. 19 - 21; and that when he issues a citation, it has City of St. Louis on it, *Walker*, p. 125, l. 11 - 14. Walker also testified that he received a City paycheck, *Walker*, p. 124, l. 22 - 24.

Plaintiff also read certain portions of the Revised Code of the City of St. Louis into the record, specifically under Title 17, Vehicles and Traffic. Tr., p. 150. Specific provisions read included § 17.06.010, Authority of Police and Fire Department and School Crossing Guards; § 17.06.020, Obedience to Police Officers; § 17.16.350, Duty to Give Information and Render Aid; § 17.20.140, concerning pedestrians paying fines of the municipal courts to the traffic violation bureau; and § 17.40.020, providing for punishment of fines of not more than \$500 or imprisonment for not more than ninety (90) days. Tr., pp. 150 - 153.

Following Plaintiff's resting, the City filed a Motion for a Directed Verdict, which was denied. Tr., pp. 200 - 204.

As part of the City's case, the City called Major Paul Nocchiero, who identified himself as Secretary to the Board of Police Commissioners. *Testimony of Major Paul Nocchiero*, Tr., p. 205, l. 1 - 4. Major Nocchiero testified that he was an employee of the Board of Police Commissioners and not the City of St. Louis. *Nocchiero*, p. 206, l. 2 - 7. He testified that all police officers of SLMPD were employees of the Board of Police

Commissioners. *Nocchiero*, p. 206, l. 18 - 22. He testified that members of the Board of Police Commissioners are appointed by the Governor of Missouri, *Nocchiero*, p. 207, l. 3 - 8; that they are not elected by the City, nor appointed by any City official, *Nocchiero*, p. 207, l. 9 - 15.

Major Nocchiero testified about who has authority over the SLMPD. He testified that the Board sets the policies and runs the police department. *Nocchiero*, p. 207, l. 19 - 22. This is done under the authority of Missouri state statute, Chapter 84. *Nocchiero*, p. 207, l. 25 - p. 208, l. 1. The City is required to fund SLMPD, by state statute. *Nocchiero*, p. 208, l. 2 - 9. The number of police districts in the City is not set by the City, but rather by statute. *Nocchiero*, p. 208, l. 10 - 21. The City does not have the authority to tell the Board how many officers should be assigned to each district; rather, that is the Board's decision. *Nocchiero*, p. 208, l. 22 - p. 209, l. 2. The Board has the authority: to run the Police Academy, *Nocchiero*, p. 209, l. 9 - 11; to determine any specialized police units, *Nocchiero*, p. 209, l. 12 - 14; to make the assignments to police units, *Nocchiero*, p. 209, l. 15 - 25.

Major Nocchiero further testified that neither the City, nor any City official, has authority over any disciplinary matters involving police officers. *Nocchiero*, p. 210, l. 3 - 11. A provision in Chapter 84 specifically prohibits a City official from interfering with the Board running the Police Department, *Nocchiero*, p. 210, l. 12 - 16; the penalty for interference is removal from office, *Nocchiero*, p. 210, l. 17 - 20.

As to the facts pertinent specifically to this motor vehicle accident, Major Nocchiero testified. He testified that the Board, not the City, owns SLMPD police cars,

including the one operated by Officer Walker involved in the accident. *Nocchiero*, p. 210, l. 21 - p. 211, l. 4. The pursuit policy for police vehicles is set by the Chief of Police, under authority of the Board's making of policy, *Nocchiero*, p. 211, l. 5 - 16; no City official controls that decision, *Nocchiero*, p. 211, l. 17 - 18. The policy on using lights and sirens is set by the Chief, not the City. *Nocchiero*, p. 211, l. 19 - p. 212, l. 1. The policy for responding to an officer in need of aid is set by the Chief, not the City. *Nocchiero*, p. 212, l. 2 - 7. Police officers in the City have the authority to enforce all state statutes and City ordinances. *Nocchiero*, p. 212, l. 8 - 11. As for Officer Walker, the City did not train him, did not own the police car he operated, did not give him his assignment on the day in question, did not instruct him in the manner of responding to the officer in need of aid call, and did not instruct him on when to use lights and sirens. *Nocchiero*, p. 213, l. 1 - p. 214, l. 5.

On cross-examination, Nocchiero testified that when he formerly served as a patrol officer, he conferred a benefit on the City. *Nocchiero*, p. 216, l. 20 - 22. He testified that as a patrol officer, he had arrested individuals and charged them with City ordinance violations, acting for the Board of Police Commissioners. *Nocchiero*, p. 217, l. 13 - 19. He acknowledged that the City got the fine money, *Nocchiero*, p. 218, l. 6 - 10, but testified the Board received some money from the fine violations for certain charges placed by SLMPD officers on citizens, *Nocchiero*, p. 218, l. 11 - 19. He testified that the vehicles, owned by the Board, were insured by the City. *Nocchiero*, p. 220, l. 18 - p. 221, l. 1. He also testified that § 84.330 of state statutes declares that police officers are officers of the City. *Nocchiero*, p. 221, l. 2 - 21. He further testified that under § 84.110

of state statutes, the City can pass ordinances so long as it doesn't interfere with the conduct or actions of the Board. *Nocchiero*, p. 221, l. 22 - p. 222, l. 1. He acknowledged that the City has passed ordinances which are at least in part for the protection of a police officer. *Nocchiero*, p. 222, l. 5 - p. 223, l. 16. He acknowledged that if the City wanted to insure itself for police vehicles while on patrol, that would not interfere with the Board, although that is not currently done. *Nocchiero*, p. 224, l. 15 - p. 225, l. 17.

Major Nocchiero also testified on cross-examination that there are City ordinances giving officers the power and authority to direct traffic, *Nocchiero*, p. 226, l. 3 - 6, and that would be for the benefit of citizens and residents of the City, *Nocchiero*, p. 226, l. 8 - 10. He testified that a traffic ticket (summons) contains a reference to City Court, *Nocchiero*, p. 226, l. 25 - p. 227, l. 8, and that this is a court for City ordinance violations, which could be issued by SLMPD officers, *Nocchiero*, p. 227, l. 9 - 22.

Major Nocchiero also testified that officers receive a paycheck from the Treasurer's Office of the City. *Nocchiero*, p. 228, l. 14 - 19. He testified that police cars have the name on the side, St. Louis Metropolitan Police, *Nocchiero*, p. 228, l. 20 - 23; that they have an emblem on the side, under the arch, that says City of St. Louis, *Nocchiero*, p. 228, l. 24 - p. 229, l. 1; that the license plates on the cars indicate Metropolitan St. Louis Police, *Nocchiero*, p. 229, l. 2 - 4; and that the badge of SLMPD officers indicates City of St. Louis, *Nocchiero*, p. 229, l. 5 - 8. He acknowledged that these things do not interfere with the Board of Police Commissioners, *Nocchiero*, p. 229, l. 9 - 11.

The City, as part of its case, also asked the trial court to take judicial notice of §§

84.010-.340, Missouri Revised Statutes. Tr., p. 232.

At the close of Defendant's evidence, the City again moved for a directed verdict, which again was denied by the trial court. Tr., p. 232.

On November 3, 2005, the jury returned a verdict in favor of Plaintiff, awarding damages of \$1,200,000. L.F., 110 - 111. The trial court entered judgment against the City, reducing the amount of judgment to \$335,118 to reflect the limit of liability available under the sovereign immunity statutory "cap."<sup>2</sup>

On November 15, 2005, Plaintiff filed Objections to Imposition of Statutory Cap of Section 537.610, RSMo. L.F., 112 - 114. On November 15, 2005, Plaintiff also filed a Motion to Set Aside Judgment and Enter New Judgment and Alternative Motion for Additur Pursuant to § 537.068, RSMo. L.F., 115 - 116.

On November 18, 2005, Defendant City filed its Motion for Judgment Notwithstanding Verdict (JNOV). L.F., 117 - 120.

On December 19, 2005, the trial court entered an Order and Partial Judgment as to Plaintiff's claims against Defendants Walker and the Board and its members, in order to

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<sup>2</sup>Although not reflected in any pleadings of record prior to the entry of judgment, the trial transcript after the verdict reflects that Plaintiff had reached settlements with both Officer Walker and the Board and its members, receiving separate sums of \$335,118 on behalf of each. Tr., p. 277. This total of \$670,236 would have been applied to offset damages against the City. Hodges' attorney calculated that, applying the offset, but for the statutory cap, the Plaintiff was entitled to \$549,764 from the City. Tr., p. 277.

comply with § 537.095, RSMo. L.F., 121 - 123.

On January 30, 2006, a hearing was held on the post-trial motions of the parties. Following argument, the Court denied all post-trial motions. L.F., 142.

On February 6, 2006, City filed its Notice of Appeal in the Missouri Court of Appeals, Eastern District. L.F., 143 - 146. Also on February 6, 2006, Hodges filed a Notice of Appeal in the Missouri Supreme Court, invoking the exclusive appellate jurisdiction of the Missouri Supreme Court, presumably based on the claim that the case involves “the validity ... of a statute or provision of the constitution of this state.” Mo. Const., Art. V, § 3. Because of Hodges’ Notice of Appeal filed in the Missouri Supreme Court, the City filed a Motion in the Missouri Court of Appeals, requesting that Court to transfer the City’s appeal to the Missouri Supreme Court. By agreement of the parties, the City has been designated the Appellant, and Hodges the Cross-Appellant.

**POINTS RELIED ON**

**I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE, DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND DENYING THE CITY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AGAINST THE CITY BECAUSE PLAINTIFF FAILED TO PRESENT EVIDENCE SUFFICIENT TO MAKE A SUBMISSIBLE CASE THAT POLICE OFFICER WALKER WAS AN AGENT OF THE CITY SO AS TO MAKE THE CITY LIABLE FOR WALKER'S TORTIOUS ACTS.**

*State ex rel. Bunting v. Koehr*, 865 S.W.2d 351 (Mo. banc 1993)

*State ex rel. Elson v. Koehr*, 856 S.W.2d 57 (Mo. banc 1993)

*Wilson v. St. Louis Area Council*, 845 S.W.2d 568 (Mo. App. E.D. 1992)

**II. THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND DENYING THE CITY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AGAINST THE CITY BECAUSE AS A MATTER OF LAW, POLICE OFFICER WALKER, AS AN EMPLOYEE OF A SEPARATE STATE ADMINISTRATIVE AGENCY, THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, WAS NOT AN AGENT OF THE CITY SO AS TO MAKE THE CITY LIABLE FOR**

**WALKER'S TORTIOUS ACTS.**

*Smith v. State*, 152 S.W.3d 275 (Mo. banc 2005)

*State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982)

§ 84.010, RSMo. (2000)

**III. THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AGAINST THE CITY BECAUSE, EVEN IF PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT POLICE OFFICER WALKER WAS AN AGENT OF THE CITY, THE MISSOURI SOVEREIGN IMMUNITY STATUTE, §§ 537.600-.620, RSMO., PROVIDED IMMUNITY TO THE CITY FOR TORT ACTIONS, AND THE EXPRESS WAIVER OF THAT IMMUNITY, BY THE LANGUAGE OF § 537.600(1), APPLIES ONLY TO INJURIES RESULTING FROM "THE NEGLIGENT ACTS OR OMISSIONS BY PUBLIC EMPLOYEES ARISING OUT OF THE OPERATION OF MOTOR VEHICLES ... WITHIN THE COURSE OF THEIR EMPLOYMENT;" AND THE EVIDENCE ESTABLISHED THAT POLICE OFFICER WALKER WAS AN EMPLOYEE OF THE BOARD OF POLICE COMMISSIONERS, NOT THE CITY, AND THE OPERATION OF THE MOTOR VEHICLE DID NOT ARISE WITHIN THE COURSE OF ANY EMPLOYMENT WITH THE CITY.**

§ 537.600, RSMo. (2000)

*McNeill Trucking Co. v. Missouri State Highway and Transp. Com'n*, 35 S.W.3d 846

(Mo. banc 2001)

§ 84.100, RSMo. (2000)

## ARGUMENT

**I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE, DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND DENYING THE CITY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AGAINST THE CITY BECAUSE PLAINTIFF FAILED TO PRESENT EVIDENCE SUFFICIENT TO MAKE A SUBMISSIBLE CASE THAT POLICE OFFICER WALKER WAS AN AGENT OF THE CITY SO AS TO MAKE THE CITY LIABLE FOR WALKER'S TORTIOUS ACTS.**

### **Standard of Review**

This appeal follows the trial court's denial of the City's Motion for Directed Verdict at the close of Plaintiff's evidence, Motion for Directed Verdict at the close of all evidence and Motion for Judgment Notwithstanding the Verdict (JNOV). The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 818 (Mo. banc 2000). A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that

verdict. *Id.* The Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. *Id.*

Since the filing of this litigation, the City has denied that Police Officer Willie Walker was the City's agent or employee. See City's Motion to Dismiss (original Petition), L.F., 16 - 17; City's Reply to First Amended Petition, L.F., 22 - 23; City's Answer to First Amended Petition, L.F., 26 - 27; Defendants' Joint Motion to Dismiss and/or for More Definite Statement, L.F., 33 - 34; City's Motion for Summary Judgment, L.F., 39-43, and Affidavit of Jane Berman Shaw, L.F., 44 - 45; City's Answer to Third Amended Petition, L.F., 75 - 77; City's Motion to Dismiss Third Amended Petition, L.F., 85 - 88. The City preserved this contention throughout trial, including it as a basis of a Motion for Directed Verdict at the close of Plaintiff's evidence and a Motion for Directed Verdict at the close of all evidence; and after trial, including it as a basis in the City's Motion for Judgment Notwithstanding Verdict, L.F., 117 - 120. As hereinafter shown, there was insufficient evidence to make a submissible case that Officer Walker was the City's agent.

### **The Elements of Agency and Vicarious Liability for the Acts of an Agent**

Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 353 (Mo. banc 1993), quoting Restatement (Second) of Agency, § 1. Recent cases from this Court analyzing agency have mostly come in the context of whether one party can be

considered the agent of another party for purposes of venue statutes.<sup>1</sup> See *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. banc 2002); *Bunting*; *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 60 (Mo. banc 1993). In this context, the agency relationship requires three essential elements:

- 1) that an agent holds a power to alter legal relations between the principal and a third party; Restatement (Second) of Agency, § 12;
- 2) that an agent is a fiduciary with respect to matters within the scope of the agency; Restatement (Second) of Agency, § 13;
- 3) that a principal has the right to control the conduct of the agent; Restatement (Second) of Agency, § 14.

*Elson*, *supra*, at 60. The absence of any one of these three characteristics defeats the purported agency relationship. *Bunting*, *supra*, at 353. This Court apparently has not analyzed the elements for the imposition of vicarious liability based on an agency relationship since prior to its opinion in *Elson*.<sup>2</sup>

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<sup>1</sup>Most recently, however, in *Netco, Inc. v. Dunn*, \_\_\_\_ S.W.3d \_\_\_\_, 2006 Mo. LEXIS 72, *Slip op.*, at 8 (Mo. banc 2006), a case concerning an arbitration agreement, this Court cited *Bunting* for the proposition that “the principal can control the conduct of the agent, which is the essence of the agency relationship.”

<sup>2</sup>In *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 764 (Mo. banc 1996), this Court stated: “Many factors are included in the calculus for determining if one person is the servant of another for purposes of establishing vicarious liability,” but did not identify those factors

In the interim, the Courts of Appeals have continued to analyze vicarious liability based on an agency relationship. These holdings have stated an agency relationship sufficient to establish vicarious liability rests on two elements: (1) the principal must consent, expressly or impliedly, to the agent's acting on the principal's behalf; and, (2) the agent must be subject to the principal's control. *See, e.g., Ritter v. BJC*, 987 S.W.2d 377, 385 (Mo. App. E.D. 1999); *Bost v. Clark*, 116 S.W.3d 667, 676 (Mo. App. W.D. 2003). Under this analysis, "[t]he touchstone is whether the party sought to be held liable has the control or right to control the conduct of another in the performance of an act." *Ritter*, at 385, citing *J.M., supra*, 922 S.W.2d at 764.

Whether the elements for establishing agency so as to impose vicarious liability are now premised on the three-part test of *Elson* and its progeny, or the two-part test used by the Courts of Appeals, Plaintiff failed to present sufficient evidence to make a submissible case under either standard because each test requires a showing of control by the putative principal over the alleged agent. As a precursor to this discussion, there must be a recitation of the evidence offered by Plaintiff on the agency issue.

### **Plaintiff's Evidence Relevant to Agency and Vicarious Liability**

Viewing the evidence in the light most favorable to the jury verdict and giving

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other than control or right to control. In *State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995) and *Gibson v. Brewer*, 952 S.W.2d 239, 245-246 (Mo. banc 1997), this Court discussed *respondeat superior*, but not in the context of determining what elements are necessary for vicarious liability of a principal for an agent's acts.

Plaintiff the benefit of all inferences, the evidence relevant to Police Officer Walker's status was as follows: that SLMPD officers' uniforms included a badge that said "City of St. Louis" on it; that the uniforms included a shoulder patch that said "City of St. Louis" on it; that SLMPD officers get a paycheck from the City; that the City provides SLMPD officers with tax information at the end of the year; that SLMPD officers issue citations in the City and the City has passed ordinances giving the authority to issue those citations; that the citations are issued on forms that say "Twenty-Second Judicial Circuit, City of St. Louis, Missouri" and "City Court"; that the forms on which the citations are issued direct payment for fines to the City Traffic Violation Bureau; that the fines go to the City; that some officers personally considered their services to be of benefit to the City; and that there are ordinances which are part of the Revised Code of the City of St. Louis which provide for the authority of police officers to direct traffic, which require obedience to the directions of a police officer, and which make it a duty for drivers to give name, address and vehicle registration number and to show their driver's license to a police officer.

### **Analysis of Plaintiff's Evidence on Issue of Agency**

#### **1. Principal's Express or Implied Consent**

An agent's authority to act on behalf of the principal is "the [] power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." *Bost, supra*, at 676, quoting *Nichols v. Prudential Ins. Co.*, 851 S.W.2d 657, 661 (Mo. App. E.D. 1993). Actual authority may be express or implied. *Bost*, at 676. Express authority is created when the principal

explicitly tells the agent what to do. *Id.* Implied authority consists of those powers incidental and necessary to carry out the express authority. *Id.*

Initially, there was no evidence presented in Plaintiff's case that the City gave express consent to Police Officer Walker to act on the City's behalf.<sup>3</sup> Express agency denotes the circumstance wherein principal and agent have actually agreed between themselves to the designation of an agent. *Stram v. Miller*, 663 S.W.2d 269, 274 (Mo. App. W.D. 1983). Evidence of a specific agreement is essential to prove express agency. *Id.* No such agreement was ever established by the evidence.

The alternative of implied consent can occur when the principal, "by implication from conduct for which *he is responsible*, appoint[s] the agent." *Id.* at 276 (emphasis added). In order to establish an implied agency, it must be shown that the purported principal held out the alleged agent as his agent or permitted him to act in such capacity with his knowledge and acquiescence. *Kennon v. Citizens Mut. Ins. Co.*, 666 S.W.2d 782, 786 (Mo. App. E.D. 1983).

From the trial record, there is no evidence that the City ever held out Officer Walker or any other SLMPD officer, as its agent. The record is devoid of any testimony from any City official or employee at all on any fact, let alone that Officer Walker was held out as the City's agent. That leaves the only other alternative for establishing implied consent to be that the City permitted Officer Walker to act as the City's agent

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<sup>3</sup>In fact, as discussed *infra*, state statute prohibits any City official from interfering with any of the operations of the Police Department.

with its knowledge and acquiescence. *Kennon*, at 786. Since the only way that the City could be deemed to acquiesce in Officer Walker's alleged agency would be based on Officer Walker's dealings with third parties, there must, at a minimum, have been evidence in the record that Officer Walker represented to third parties that he was an agent of the City, with knowledge and acquiescence by the City. There was no such evidence in the record. Whether this was the intent behind Plaintiff's counsel's questioning of some of the SLMPD officers about patches on their uniforms or emblems and license plates on their cars saying "City of St. Louis" is for Plaintiff to answer, but under any circumstance, this should be insufficient to show implied consent by the City.<sup>4</sup> The City has not established a proprietary claim on the words "City of St. Louis." That verbiage is a common description, and in fact, happens to be part of the identification for the Board of Police Commissioners which has been designated by state statute. See § 84.020, RSMo. See also § 84.095, RSMo.

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<sup>4</sup>*Johnson v. Bi-State Dev. Agency*, 793 S.W.2d 864 (Mo. banc 1990) does not aid Plaintiff. In that case, the Court allowed evidence from the plaintiff testifying that she saw a driver with a Bi-State uniform to infer that the driver of a bus was an employee of Bi-State. But that was based on the evidence that Bi-State employees wore uniforms, and the underlying presumption that those wearing Bi-State uniforms were Bi-State employees, of whom Bi-State had control or the right to control. Obviously, in the instant case, there is no such presumption because there is no evidence that City employees had uniforms that said "City of St. Louis" on them.

## **2. Principal's Control**

The test to determine if *respondeat superior* applies to a tort is whether the person sought to be charged as master had the right or power to control and direct the physical conduct of the other in the performance of the act. *Wilson v. St. Louis Area Council*, 845 S.W.2d 568, 570 (Mo. App. E.D. 1992). If there was no right to control there is no liability; for those rendering services but retaining control over their own movements are not servants. *Id.* Whether a party is liable under the doctrine of *respondeat superior* depends on the facts and circumstances in evidence in each particular case and no single test is conclusive on the issue of the party's interest in the activity and his right of control. *Id.*

A review of the record shows Plaintiff presented no evidence that the City controlled or had the right to control Officer Walker's movements. The only officer called live in Plaintiff's case, Officer Joseph Gooch, gave no testimony on direct examination that the City controlled or had the right to control his activities. Testimony that his uniform said "City of St. Louis" on the badge and shoulder patch has no relevance to control. Testimony that he received a City paycheck and tax information from the City likewise has no relevance to the issue of control. His testimony that he issues citations in the City and that the City has passed ordinances giving him the authority to issue citations does not show that the City controls his activities. Nor does the evidence that the citations may lead to fines which go to the City. His testimony that he personally considered his services to be of benefit to the City again has no relevance to the issue of control.

The only testimony relevant to the issue of control during Officer Gooch's testimony came during cross-examination:

Q: Officer, when you received your radio call that night to respond to the accident scene –

A: Yes, sir.

Q: – did you use your own judgment and make your own decision as to what route you would take to get to that accident scene?

A: Yes, sir.

Q: Okay. You would agree, sir, no one from the City told you how to respond to that accident scene?

A: That's correct, sir.

Q: And in your experience of 28 years on the police force, is it your understanding that when an officer receives a radio call and is advised to go to some incident at a certain location, that officer uses his own judgment and makes his own decision as to how to get there?

A: Yes, sir.

Tr., p. 83, l. 15 - p. 84, l. 6.

The four commissioned SLMPD officers other than Officer Walker (Buford, Clobes, Vogan and Thompson) whose deposition testimony was read into the record in Plaintiff's case, likewise offered nothing relevant on the element of City control. The same can be said for the SLMPD civilian employee, Belinda Jackson. All of the questioning as to their status relative to the City produced essentially the same

information as was produced by Officer Gooch and, as with Officer Gooch, they did not produce any testimony relevant to the issue of control.

As to Officer Walker himself, herein is the only evidence from the portions of his deposition read into the record that even arguably relates to the issue of whether he could be considered an agent of the City:

Q: State your name.

A: Willie Walker.

Q: I notice you're in uniform today, correct?

A: Yes, I am.

Q: And you have a St. Louis police badge on.

A: That's correct.

Q: And you have a St. Louis City Police Department emblem on your left shoulder.

A: That's correct.

Q: And you receive your paycheck from the City of St. Louis?

A: Yes, I do.

Q: And do you have an assignment for your police work in the City of St. Louis?

A: Yes.

Q: Do you as a police officer now and on March the 4<sup>th</sup> of 2003 patrol any other city or municipality other than the City of St. Louis, Missouri?

A: Just St. Louis City.

Q: And on March 4<sup>th</sup>, 2003, were you driving an automobile that was marked with a City of St. Louis Police Department emblem on it?

A: Yes, I was.

Q: When you issue a citation or a ticket to somebody, does it have the City of St. Louis on it?

A: My traffic summons?

Q: Yes, sir.

A: Yes.

Tr., p. 124, l. 11 - p. 125, l. 16.

Plaintiff also read into the record the language of some City ordinances which provide for the authority of police officers to direct traffic, and impose duties on citizens to obey the directions of police officers and give pertinent information to police officers in the event of an accident. However, nothing in these ordinances shows a control or right to control the officers. The language of these ordinances puts duties on citizens, not the officers.

In contrast, the City's case presented direct evidence on the issue of control of SLMPD police officers. Major Paul Nocchiero, Secretary to the Board of Police Commissioners, was called to testify pursuant to subpoena. Without rehashing all of his testimony in this regard, which is recounted in the Statement of Facts, the following question-and-answer exchange succinctly summarizes the evidentiary record on the issue of control:

Q: I want to direct your attention to the night in question where this

accident happened on March 4<sup>th</sup> of 2003 in regards to Police Officer Willie Walker. The City of St. Louis did not hire him; correct?

A: That's correct.

Q: The Board did?

A: They did.

Q: Okay. The City of St. Louis didn't train him; correct?

A: That's correct.

Q: The City of St. Louis did not own the car he was operating?

A: That's correct.

Q: The City of St. Louis or no official gave him assignments for his shift that evening?

A: No.

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Q: Did any city official instruct Police Officer Willie Walker in the manner in which he should respond to an officer in need of aid call?

A: No.

Q: Did any city official tell Officer Walker what route to take to the scene?

A: No.

Q: What streets to drive?

A: No.

Q: Did any city official instruct him on whether or not to use his lights

or sirens?

A: No.

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Q: Major, can you tell this jury or give this jury any example of where any city official instructs any police officer on the day-to-day activities of policing?

A: No.

Tr., p. 212, l. 19 - p. 213, l. 9; p. 213, l. 18 - p. 214, l. 5; p. 214, l. 15 - 19.

Moreover, Missouri state statutes expressly prohibit the City from exercising the kind of control necessary to support the finding of an agency relationship. Section 84.010, RSMo., of which the trial court took judicial notice, states in part:

[B]ut no ordinances heretofore passed, or that may hereafter be passed, by the common council or municipal assembly of the cities, shall, in any manner, conflict or interfere with the powers or the exercise of the powers of the boards of police commissioners of the cities as created by section 84.020, nor shall the cities or any officer or agent of the corporation of the cities, or the mayor thereof, in any manner impede, obstruct, hinder or interfere with the boards of police or any officer, or agent or servant thereof or thereunder ...

The record in this case is devoid of the indicia of control that prior cases have found to support the conclusion of a principal-agent relationship. A consistent line of cases from this Court has held that the requisite control to create an agency relationship

for purposes of vicarious liability extends to the manner and method of the alleged agent's movements being controlled by the principal.<sup>5</sup> This is particularly true in the context of torts occurring as a result of the use of an automobile.

In *Barnes v. Real Silk Hosiery Mills*, 341 Mo. 563, 108 S.W.2d 58 (1937), a corporation was sued for negligence as the result of an automobile accident involving a salesman who sold the corporation's products pursuant to a contract and was traveling to his sales territory at the time of the accident. The contract specified that the salesman was to deliver all orders to the corporation, on order blanks supplied by the corporation, and upon the terms and conditions specified by the corporation. All equipment and samples used by the salesman were the property of the corporation. After citing the definitions of "master," "servant," and "independent contractor" from Restatement (First) of the Law of Agency, the Court found there was no agency sufficient to impose liability, stating:

In the present case [defendant], so far as it appears, had no control or right

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<sup>5</sup> *Cates v. Webster*, 727 S.W.2d 901 (Mo. banc 1987), in which this court used a "payment" test to determine a master-servant relationship, is inapposite. As the *Cates* opinion noted, "We are not dealing in this case with a question of vicarious liability to a claimant of the State, county or municipality for the tortious acts of the individual police officers, in which event the factual and legal problems relating to borrowed employees and control might come into play." *Id.* at 906, quoting *Township of Edison v. Hyland*, 156 N.J. Super. 137, 383 A.2d 714, 717 (App. Div. 1978).

of control over [salesman] as to the *manner* by which he went to and from his territory or while working in the territory. Neither was there any evidence tending to show that [defendant] had any right of control over [salesman] as to his physical conduct in soliciting orders.

108 S.W.2d at 62 (Emphasis in original).

In *Hammonds v. Haven*, 280 S.W.2d 814 (Mo. 1955), again the corporate defendant was sued as the result of an automobile accident involving a salesman. However, in contrast to *Barnes*, there was evidence in this case that the corporation did control the salesman's movements, which led to a different result:

The statement in the brief that [salesman] "had freedom of choice as to the place of holding the meetings" is not supported by the evidence. [Salesman] testified that "within certain limits he had such choice." The only inference to be drawn from that statement is that the company had the right of control.

*Id.* at 818.

In *Dean v. Young*, 396 S.W.2d 549 (Mo. 1965), plaintiff sued Sears, Roebuck & Company for vicarious liability for an accident involving a motor vehicle driven by an appliance service repairman who had an oral agreement to do repair work for Sears on an occasional basis. Sears did not furnish the repairman's tools and he was not provided an office at the Sears store. He used his own car to respond to service calls and his repair work took place in the customer's residence or wherever the appliance was located. Citing *Barnes* for the proposition that Missouri followed the Restatement of Agency in

analyzing whether there was a master-servant relationship, *id.* at 553, the Court cited factors<sup>6</sup> in Restatement (Second) of Agency, § 220 for determining whether the repairman was in fact a servant. The opinion noted that “control or right to control, is the one [factor] most frequently referred to in our cases distinguishing a servant from an independent contractor.” *Id.* at 553. The opinion concluded that Sears exercised little control over the repairman, noting that he “came and went as he saw fit.” *Id.* at 553. The Court determined there was no master-servant relationship to make Sears vicariously liable, and affirmed a directed verdict in favor of Sears.

In sum, when this Court has been faced with the contention of vicarious liability to be imposed in the context of a vehicular tort, this Court, since electing to adopt the

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<sup>6</sup>These factors were: (a) The extent of control which, by the agreement, the master may exercise over the details of the work; (b) Whether or not the one employed is engaged in a distinct occupation or business; (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) The skill required in the particular occupation; (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) The length of time for which the person is employed; (g) The method of payment, whether by the time or by the job; (h) Whether or not the work is a part of the regular business of the employer; (i) Whether or not the parties believe they are creating the relation of master and servant. 396 S.W.2d at 553 - 556.

Restatement of Agency as the benchmark for determining an agency relationship, has invariably required a showing that the alleged principal controlled the physical movements of the alleged agent. No such showing was made by Plaintiff.

**II. THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND DENYING THE CITY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AGAINST THE CITY BECAUSE AS A MATTER OF LAW, POLICE OFFICER WALKER, AS AN EMPLOYEE OF A SEPARATE STATE ADMINISTRATIVE AGENCY, THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, WAS NOT AN AGENT OF THE CITY SO AS TO MAKE THE CITY LIABLE FOR WALKER'S TORTIOUS ACTS.**

**Standard of Review**

The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. *Giddens, supra*, at 818. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* A defendant is entitled to judgment notwithstanding the verdict if the plaintiff failed to present a submissible case. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996). Where the issue is a question of law, the reviewing court reviews the trial court's conclusions denying judgment notwithstanding the verdict *de novo*. *Id.*

Generally, the relationship of principal-agent or employer-employee is a question

of fact to be determined by the jury when, from the evidence adduced on the question, there may be a fair difference of opinion as to the existence of the relationship. *Johnson v. Bi-State Dev. Agency, supra*, at 867. However, the employment relation is a question of law for the court where material facts from which it is inferred are not in dispute and only one reasonable conclusion can be drawn from the material facts. *Id.*

The trial court took judicial notice of §§ 84.010 - .340, RSMo. Tr., p. 232. These statutes provide for the establishment of a police department in the City of St. Louis, establish a Board of Police Commissioners to operate the police department, and make specific provisions governing the authority of the Board and of individual officers employed by the Board. Having taken judicial notice of these statutes, the trial court should have concluded, as a matter of law, that Plaintiff did not make a submissible case against the City, and should have granted the City's Motion for Directed Verdict at the close of all evidence. Alternatively, the trial court should have granted the City's Motion for Judgment Notwithstanding Verdict, which included this same argument.

Last year, in *Smith v. State*, 152 S.W.3d 275 (Mo. banc 2005), this Court held that the Board of Police Commissioners was a state agency, and not a local or municipal agency. The opinion stated that “[t]he statutory framework governing the St. Louis Police Board, sec. 84.010 et seq., RSMo. 2000 leads this Court to [this] conclusion,” *id.* at 278, noting that the Board members, other than the mayor *ex-officio*, are appointed by the Governor, with advice and consent of the senate, § 84.030; that the Governor is authorized to remove any commissioner for misconduct in office, § 84.080; and that the general assembly has imposed many requirements pertaining to the Board's duty to

establish and employ a permanent police force, § 84.100, including those that establish the qualifications of police officers, § 84.120, the number of police officers of each rank that the Board may employ, § 84.150, and the maximum amount that officers of each rank can be paid, § 84.160.

The *Smith* opinion also noted, “the conclusion that the Police Board is a state agency is further supported by more than a century of case law.” *Id.* Included within the Court’s analysis was *State ex rel. The Police Commissioners of the City of St. Louis v. The County Court of St. Louis County*, 34 Mo. 546, 571 (1864), which stated “The Police Commissioners are an agency of the State Government”; and *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524, 529 (1899), which states in pertinent part: “It is almost universally conceded that police boards and metropolitan police forces are state officers, and fall clearly within legislative control.” More recent cases cited in *Smith* were: *State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982), holding the Police Board to be a “state agency,” for purposes of the Hancock Amendment, Mo. Const. Art. X, § 21; *State ex rel. Sanders v. Cervantes*, 480 S.W.2d 888, 891 (Mo. banc 1972), holding that certain decisions of the Police Board are subject to administrative review as “the acts of any public official or administrative agency of this state”; and *Slater v. City of St. Louis*, 548 S.W.2d 590, 592-593 (Mo. App. E.D. 1977), noting the distinction between the City-controlled security force at Lambert Airport, which was a matter of local concern, and the actual Police Department run by the Police Board, which was a matter of state concern.

Just as importantly for purposes of this appeal, in *Smith* this Court rejected the argument advanced by the State, based on *Cates v. Webster, supra*, that the officers were

not state employees because the City, rather than the State, paid the police officers. Although not stated in the *Smith* opinion, the reason that police officers receive City paychecks is because state statute requires the City to pay SLMPD officers. See § 84.160.4, RSMo.

Further to the proposition that the Police Board is a state agency and SLMPD officers are not City agents, this Court in *Smith* cited language of § 84.010, RSMo., which expressly prohibits the City from interfering in any way with the operations of the Police Board:

[B]ut no ordinances heretofore passed, or that may hereafter be passed, by the common council or municipal assembly of the cities, shall, in any manner, conflict or interfere with the powers or the exercise of the powers of the boards of police commissioners of the cities as created by section 84.020, nor shall the cities or any officer or agent of the corporation of the cities, or the mayor thereof, in any manner impede, obstruct, hinder or interfere with the boards of police or any officer, or agent or servant thereof or thereunder ...

*Smith*, and the line of cases it relies on, have unequivocally held the Board of Police Commissioners to be a state agency.<sup>7</sup> Evidence at trial established that police

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<sup>7</sup>Recently, in *Thomas v. St. Louis Bd. of Police Com'rs*, 447 F.3d 1082 (8<sup>th</sup> Cir. 2006), the U.S. Court of Appeals for the Eighth Circuit determined that the Board of Police Commissioners was not entitled to immunity under the Eleventh Amendment because it

officers are employees of the Board. *Nocchiero*, Tr., p. 206, l. 18 - p. 207, l. 2. In light of the previously cited testimony, *supra*, that the City does not control any movements of SLMPD officers, it should be determined as a matter of law that SLMPD officers are not agents of the City.

It is likely that Plaintiff would respond to the above and contend, as in the trial court, that police officers are agents of the City by citing the language of § 84.330, RSMo., which states:

The members of the police force of the cities covered by sections 84.010 to 84.340, organized and appointed by the police commissioners of said cities, are hereby declared to be officers of the said cities, under the charter and ordinances thereof, and also to be officers of the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said cities.

However, referring to police officers as “officers of the said cities” does not *a fortiori* translate to mean that they are “agents,” for purposes of vicarious liability. The

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could not be considered an “arm of the state,” based on a holding from the Supreme Court, *Auer v. Robbins*, 519 U.S. 452 (1997), which was decided before this Court’s decision in *Smith*. Besides the fact that *Thomas* itself is inapposite because it concerns a matter of federal law, the *Thomas* opinion makes clear that it reached this conclusion only because of *Auer*, and stated “the Supreme Court may wish to revisit the matter in the wake of the post-*Auer* developments in Missouri law.” 447 F.3d at 1087, n. 9.

language of these Chapter 84 statutes evinces a legislative intent that “officer” does not mean “agent.” This is shown by the language of § 84.010, which prohibits a city from interfering with the “boards of police or any officer, *or agent or servant thereof or thereunder ...*” If the legislature had intended “officer” to mean agent or servant, for purposes of this Chapter, it would not have been necessary to have separately stated that word, for “officer” would have been subsumed within the terms “agent” and/or “servant.” Every word, phrase and sentence in a statute must be given some meaning if that can be done. *Household Finance Corp. v. Robertson*, 364 S.W.2d 595, 602 (Mo. banc 1963). The disjunctive “or” in its ordinary sense marks an alternative which generally corresponds to the word “either.” *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969). Thus, the only rational construction which gives effect to every word in the statute, would connote that “officer,” as used in Chapter 84, means something other than “agent.”

Moreover, there is no legal basis to infer that in enacting Chapter 84 the legislature abandoned the traditional criteria for determining whether an agency relationship exists. Regardless of the terminology for personnel within the ranks of the police departments established by state statutes, no case has held that common law precepts have been superseded. Calling someone an “officer” of a city should not automatically convert that person into an agent of the city. As demonstrated in Point I of the Argument *supra*, the evidence presented in Plaintiff’s case failed to support the existence of an agency relationship between Officer Walker and the City.

Based on Chapter 84 and Missouri case law, the trial court should have granted the

City's Motion for Judgment Notwithstanding Verdict because as a matter of law, Officer Walker could not be the City's agent.

**III. THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AGAINST THE CITY BECAUSE, EVEN IF PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT POLICE OFFICER WALKER WAS AN AGENT OF THE CITY, THE MISSOURI SOVEREIGN IMMUNITY STATUTE, §§ 537.600-.620, RSMO., PROVIDED IMMUNITY TO THE CITY FOR TORT ACTIONS, AND THE EXPRESS WAIVER OF THAT IMMUNITY, BY THE LANGUAGE OF § 537.600(1), APPLIES ONLY TO INJURIES RESULTING FROM "THE NEGLIGENT ACTS OR OMISSIONS BY PUBLIC EMPLOYEES ARISING OUT OF THE OPERATION OF MOTOR VEHICLES ... WITHIN THE COURSE OF THEIR EMPLOYMENT," AND THE EVIDENCE ESTABLISHED THAT POLICE OFFICER WALKER WAS AN EMPLOYEE OF THE BOARD OF POLICE COMMISSIONERS, NOT THE CITY, AND THE OPERATION OF THE MOTOR VEHICLE DID NOT ARISE WITHIN THE COURSE OF ANY EMPLOYMENT WITH THE CITY.**

**Standard of Review**

The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. *Giddens, supra*, at 818. A case may not be

submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* A defendant is entitled to judgment notwithstanding the verdict if the plaintiff failed to present a submissible case. *Jungerman, supra*, at 204. Where the issue is a question of law, the reviewing court reviews the trial court's conclusions denying judgment notwithstanding the verdict *de novo*. *Id.*

The Missouri Sovereign Immunity statutes, §§ 537.600 *et seq.*, RSMo., provide generally for a public entity's immunity from tort liability, with two express categories of waiver, only one of which is relevant to the current lawsuit:

Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment.

§ 537.600.1, RSMo.

The general rule regarding sovereign immunity is that the sovereign cannot be sued without its consent. *McNeill Trucking Co. v. Missouri State Highway and Transp. Com'n*, 35 S.W.3d 846, 848 (Mo. banc 2001). Consequently, statutory provisions that waive sovereign immunity must be strictly construed. *Id.*

The express waiver for motor vehicle torts twice uses forms of the word "employee." Nowhere within the verbiage of the waiver does the word "agent" appear. Although the City has vehemently denied that Officer Walker was an agent of the City, even if this Court were to change established precedent by holding that he was the City's agent, he clearly was not the City's "public employee," nor could he have been operating his vehicle "within the course of employment" for the City. Hence, the tort alleged in

this lawsuit against the City does not fit within the express waiver of sovereign immunity per § 537.600.1.

The uncontroverted evidence adduced at trial established that Officer Walker was employed by the Board of Police Commissioners. *Nocchiero, Tr.*, p. 206, l. 18 - 22. This fact is confirmed by the state statute, § 84.100, RSMo., which states that the Board is “authorized and required to appoint, enroll and *employ* a permanent police force.” Moreover, § 84.150 provides:

The officers of the police force shall have commissions issued to them by the boards of police commissioners, and those heretofore and those hereafter commissioned shall serve so long as they shall faithfully perform their duties and possess the necessary mental and physical ability, and be subject to removal only for cause after a hearing by the board, who are hereby invested with exclusive jurisdiction in the premises.

There can be no dispute that SLMPD police officers, including Officer Walker, are employees of the Board of Police Commissioners.

The question of whether a person established by the evidence as being the employee of one legal entity can be considered a “public employee” acting “within the course of employment” of another public entity for purposes of § 537.600.1, appears to be an issue of first impression in this Court.<sup>8</sup> City submits that for purposes of this

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<sup>8</sup>*Woods v. Kelley*, 948 S.W.2d 634 (Mo. App. W.D. 1997) and *Bowman v. State*, 763 S.W.2d 161 (Mo. App. W.D. 1988), both Western District Court of Appeals cases, which

appeal, it is not necessary for this Court to define “public employee” or “within the course of employment.” The narrow issue which City submits as decisive is that because Officer Walker was shown, by the uncontroverted evidence, to be an employee of the Board of Police Commissioners, he cannot as a matter of law also be an employee of the City of St. Louis, for purposes of the sovereign immunity waiver found in § 537.600.1.

Moreover, Walker’s employer, the Board of Police Commissioners, had already paid Plaintiff for damages under a *respondeat superior* claim of liability. There is only one act of negligence that forms the basis of the plaintiff’s injuries. *Helms v. Wismar*, 820 S.W.2d 495, 497 (Mo. banc 1991). The employer is not separately liable because he is not separately negligent; instead the employer’s liability is imputed as a matter of law from the negligent acts of the employee. *Id.* In the instant case, Walker’s employer has already acknowledged liability for its employee’s negligence and paid for it. The City cannot be held liable for acts done “within the course of employment” by Officer Walker, when Walker’s employer has already paid its liability.

This Court has repeatedly held that waivers of sovereign immunity must be strictly construed. See *McNeill Trucking Co., supra*, at 848; *State ex rel. Mo. Highway & Transp. Comm’n v. Dierker*, 961 S.W.2d 58, 61 (Mo. banc 1998); *Richardson v. State*

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Plaintiff cited in opposition to the City’s Motion for Judgment Notwithstanding Verdict, are factually distinct from the instant action. In both of those cases, the evidence established that the alleged tortfeasors were not employees of another legal entity at the time the alleged tort took place.

*Highway & Transp. Comm'n*, 863 S.W.2d 876, 882 (Mo. banc 1993); *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 186 (Mo. banc 1985); *State ex rel. St. Louis Housing v. Gaertner*, 695 S.W.2d 460, 463 (Mo. banc 1985); *Kanagawa v. State by and through Freeman*, 685 S.W.2d 831, 834-835 (Mo. banc 1985); *Bartley v. Special School Dist.*, 649 S.W.2d 864, 868 (Mo. banc 1983); *Beiser v. Parkway School Dist.*, 589 S.W.2d 277, 280 (Mo. banc 1979). Given that the only evidence in the record was that Officer Walker was the employee of the Board of Police Commissioners, this Court should hold that there was no waiver of immunity by the City pursuant to § 537.600.1, because Officer Walker was not a “public employee” operating “within the course of employment” for the City.

Since Officer Walker was not a public employee of the City or acting within the course of employment for the City, as a matter of law there was no waiver of the City’s sovereign immunity. The City therefore was entitled to a directed verdict. The trial court should have granted the City’s Motion for Judgment Notwithstanding Verdict.

### **CONCLUSION**

In conclusion, police officers of the St. Louis Metropolitan Police Department are not agents of the City of St. Louis. The record in this case establishes that the City does not control the hiring, training, disciplining, decision-making or policy governing police officers. That function belongs solely to the Board of Police Commissioners. The Board of Police Commissioners is unquestionably the employer of all such police officers under Chapter 84. The Board of Police Commissioners has been recognized repeatedly by this Court as a state administrative agency. Plaintiff has received payments made on behalf

of both the individual officer and the Board of Police Commissioners in settlement of her claims. There is no basis for holding that the City has any liability for the actions of its co-defendants. Moreover, sovereign immunity for tort actions is the rule, and waivers of that sovereign immunity must be strictly construed. All of these factors show that the City should have been granted Judgment Notwithstanding the Verdict. The judgment of the trial court should be reversed.

Respectfully submitted,

OFFICE OF THE CITY COUNSELOR

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Mark Lawson #33337  
Associate City Counselor  
Attorney for Appellant/Cross-Respondent  
Room 314, City Hall  
St. Louis, MO 63103  
Phone: (314) 622-3361 Fax: (314) 622-4956

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The undersigned hereby certifies that this Brief of Appellant/Cross-Respondent was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 11,000 words of text. The accompanying diskette, containing a complete copy of Brief of Appellant/Cross-Respondent, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Appellant/Cross-Respondent are stated herein and the Brief has been signed by the attorney of record.

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Mark Lawson

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the Brief of Appellant/Cross-Respondent, along with a copy of the Brief on a diskette, scanned and determined to be virus-free, were served by U.S. Mail, first-class postage prepaid, on July 21, 2006, upon:

Donald L. Schlappizzi  
Attorney for Respondent/Cross-Appellant  
701 Market St.  
Suite 1550  
St. Louis, MO 63101

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Mark Lawson