

IN THE SUPREME COURT OF MISSOURI

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CASE NO. SC 88176

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DOUGLAS A. HENSLEY, JR.,  
Plaintiff/Respondent

vs.

JACKSON COUNTY, MISSOURI  
Defendant/Appellant.

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RESPONDENT'S SUBSTITUTE BRIEF

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Appeal from a Judgment entered by the Honorable Michael W. Manners,  
Judge of the Circuit Court of Jackson County, Missouri  
Sixteen Judicial Circuit, Division 2

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## **JURISDICTIONAL STATEMENT**

Respondent adopts the jurisdictional statement of Appellant Jackson County, Missouri.

## **SUPPLEMENTAL STATEMENT OF FACTS**

Plaintiff/Respondent read the following admissions into the record:

Admission No. 1 is that all times referred to throughout the situation here the defendant, Jackson County, Missouri, was a duly authorized governmental public entity under the laws of the State of Missouri with offices in Jackson County, Missouri. (TR 197, 12-17)

Admission No. 2 made by the defendant is that on September 1 of 2002, said defendant, Jackson County, Missouri, was responsible for the maintenance of Stillhouse Road and R.D. Mize Road located within Jackson County, Missouri, and further was responsible for the posting and maintenance of stop signs and traffic control signs at the intersection of the Stillhouse Road and R.D. Mize Road in Jackson County, Missouri. (TR 197, 18-25; TR 198, 1-2)

The third admission I would like to read into the record, Judge, is that both Stillhouse Road and R.D. Mize Road are open and public roadways within Jackson County, Missouri. (TR 198, 3-6)

Witness Scott Grubb who lived at 6522 South Stillhouse Road in Oak Grove, Missouri (TR 199, 19-23) observed that the stop sign on the southeast corner of R.D. Mize Road and Stillhouse Road was not upright on the morning of August 30, 2002.

(TR 204, 10-21) Mr. Grubb went on to testify it was between 6:00 and 7:00 in the morning and that there was no doubt in his mind that the stop sign was down and not visible on Friday morning (August 30, 2002). (TR 208, 9-12) Mr. Grubb further testified that the stop sign was still down on Saturday August 31, 2002 and Sunday September 1, 2002 in the afternoon or early evening. (TR 209, 10-25; TR 21, 1-25)

Witness Joyce Guillemot lived at 6416 South Stillhouse Road in Oak Grove (TR 234, 3-4) and lived in the second house from the corner of R.D. Mize and Stillhouse Road on the west side. (TR 236, 9-12) Ms. Guillemot testified there was no stop sign on the southeast corner of Stillhouse Road and R.D. Mize Road on Friday August 30, 2002. (TR 237, 12-25; TR 238, 1-11)

Witness Guillemot further testified that it (the stop sign) was down that Friday and it was down all weekend (TR 239, 8-9) including Sunday, September 1, 2002, about 1:00 p.m. (TR 240, 20-25; TR 241, 1-8)

Ms. Guillemot also testified that she had observed the stop sign was leaning towards the east at probably a 45 degree angle for about a month prior to September 1, 2002 and it looked like it would fall into the ditch. (TR 245, 6-13; TR 246, 17-25)

Witness John Merkle (maintenance supervisor for Jackson County Public Works) an employee for Jackson County for twenty-three years was the road maintenance foreman during the month of August of 2002 and September 1, 2002. (TR 324, 8-22)

The primary office location for the maintenance Division of the Public Works Department of Jackson County in August and September of 2002 was 34900 East Old U.S. 40 Highway, Oak Grove, (TR 324, 19-25) between one and two miles from the intersection of R.D. Mize Road and Stillhouse Road. (TR 327, 6-10)

During their scheduled duty hours during the week, employees working out of the maintenance division would have traveled that intersection. (TR 327, 18-25)

Witness Merkle acknowledged that one of the responsibilities of the Maintenance Division of Jackson County Public Works Department of Jackson County is to inspect, repair and replace stop signs for the county. (TR 329, 10-15)

Witness Merkle also acknowledged that the maintenance and repair of a stop sign has a very high priority of the county as opposed to other signs ... Top priority... (TR 354, 1-6) because of public safety. (TR 353, 20-25)

Another reason for the highest priority is to prevent accidents and injuries from occurring if a stop sign is down. (TR 354, 1-6) Mr. Merkle further acknowledged that it was foreseeable that an accident could occur and that somebody could sustain injury. (TR 354, 7-23)

The policy procedure or practice of the Public Works Department was to respond immediately and erect a sign or at least within five hours. (TR 356, 6-19)

There was no evidence of any breakage of the post and it was in good condition (TR 381, 8) In looking at the post which was laying in the southeast corner of the road

off of the side of the road, (TR 378, 4-6) that the post would not have been knocked down as a result of the accident. (TR 381, 13-19)

Witness Justin Strait, driver of the vehicle in which Plaintiff was a passenger (TR 474, 5-20) testified there was no stop sign at the intersection of Stillhouse Road and R.D. Mize Road on September 1, 2002. (TR 486, 1-9)

Justin Strait testified he was going between 30 and 40 miles an hour when he was driving north on Stillhouse Road on the night of September 1, 2002. (TR 496, 23-25; TR 496, 1) The speed limit on Stillhouse Road is 35 miles per hour. (TR 541, 7-8)

At 9:45 p.m. on September 1, 2002, it was dark, there was no illumination for the intersection, there were no lights of any sort that would have helped anyone see the intersection as you began to approach it from the south going north on Stillhouse Road. (TR 478, 2-13)

Immediately to the east on the southeast corner, there was an embankment that was pretty overgrown. (TR 478, 14-22) There were trees as well. (TR 479, 3-5)

Justin Strait testified he was unaware he was approaching or even close to the intersection before he got up to or in the middle of the intersection. (TR 484, 6-10)

Justin Strait did not see any kind of headlight or any other kind of illumination coming from the east going west prior to getting to the actual intersection itself. (TR 484, 19-24)

Justin Strait also testified that he could not recall any occasion when he actually saw a stop sign that he didn't slow down and stop at the stop sign. (TR 486, 1-4)

Deputy Sheriff Winston Pearson of the Jackson County Sheriff's Department worked August 30, 31, September 1, 2 and 3 of 2002 and worked the same shift 1500 hours until 1:00 a.m. the following morning on each of those dates. (TR 536, 12-19)

Deputy Pearson also stated he would patrol the intersection of R.D. Mize and Stillhouse Road at least two times during his shift each day. (TR 542, 19-25)

R.D. Mize and Stillhouse Roads are two important roads in the Sheriff Department's district because they are heavily traveled roads from Oak Grove to Grain Valley (R.D. Mize) and from one end of a district to the other end (Stillhouse Road). (TR 539, 2-25)

Deputy Pearson determined that the stop sign had not been knocked down as a result of the accident. (TR 548, 8-14)

Deputy Pearson could not recall seeing the stop sign at issue up at any time August 30, 31 or September 1, 2002, prior to his arrival to investigate the accident. (TR 545, 7-25)

The officer simply stated that if he would have seen a stop sign down, he would have reported it. (TR 538, 22-25)

Witness Larry Van Dyke has been the sign shop foreman at Jackson County Public works for thirty-nine years. (TR 695, 18-23) Mr. Van Dyke acknowledged that when a stop sign is down, it's an issue of highest priority and needs immediate attention, because an accident could happen and people could get injured. (TR 724, 3-11)

Witness Samuel D. Davis has worked for Jackson County Public Works for over thirty-four years (TR 728, 15-25; TR 729, 1) and was the highway maintenance supervisor in August – September of 2002. (TR 730, 2-4) Witness Davis acknowledged that a downed stop sign is a very serious, potentially dangerous condition and the county recognizes that! (TR 749, 6-12)

Witness Davis further acknowledged that there wasn't any reason why the public employees of Jackson County could not have seen the sign down (TR 753, 6-9) and could not have responded within five hours. (TR 563, L 12-17)

#### **POINTS RELIED ON**

##### **I**

**THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL AS IT RELATED TO DEFENDANT'S CLAIM OF SOVEREIGN IMMUNITY BECAUSE PLAINTIFF SUBMITTED SUBSTANTIAL EVIDENCE ESTABLISHING THAT DEFENDANT JACKSON COUNTY WAIVED ITS SOVEREIGN IMMUNITY UNDER §537-600.1(2) R.S.MO IN THAT THE EVIDENCE WAS UNDISPUTED THAT THE STOP SIGN WAS DOWN AT THE TIME OF THE ACCIDENT, THAT DEFENDANT'S OWN WITNESSES ACKNOWLEDGED THAT A DOWNED STOP SIGN CREATED A DANGEROUS CONDITION, THAT JUSTIN STRAIT TESTIFIED THAT HAD HE REALIZED WHERE HE WAS ON STILLHOUSE ROAD AND IF THERE WOULD HAVE**

**BEEN A STOP SIGN AT THAT INTERSECTION HE WOULD HAVE STOPPED,  
THAT DEFENDANT'S OWN CORPORATE REPRESENTATIVE  
ACKNOWLEDGED THAT A REASONABLE FORESEEABLE RISK OF  
HARM OF THE TYPE PLAINTIFF SUFFERED WAS CREATED BY A  
DANGEROUS CONDITION, AND THAT THERE WAS CONSTRUCTIVE  
NOTICE TO JACKSON COUNTY OF THE DOWNED STOP SIGN FROM  
FRIDAY MORNING AT 6:00 A.M. TO SUNDAY EVENING AT 9:45 P.M., IN  
THAT THE JACKSON COUNTY SHERIFF DEPARTMENT PATROLLED THE  
INTERSECTION AT LEAST TWO TIMES PER DAY AND THAT JACKSON  
COUNTY MAINTENANCE PERSONNEL DROVE BY THE INTERSECTION ON  
A DAILY BASIS AND COULD HAVE AND SHOULD HAVE SEEN A DOWNED  
STOP SIGN IN SUFFICIENT TIME TO HAVE CORRECTED THE PROBLEM.**

*Benoit v. MO Highway and Transportation Commission*, 33 S.W. 3<sup>rd</sup> 663 (Mo. App. S.D. 2000)

*Beyerbach v. Girardeau Contractors, Inc., et al*, 868 S.W. 2d (Mo. App. E.D. 1994)

*Cole v. MO Highway and Transportation Commission*, 770 S.W. 2d 296 (Mo. App. W.D. 1989)

*Donahue v. City of St. Louis*, 758 S.W. 2d 50 (Mo banc 1988)

*Dorlon v. City of Springfield*, 843 S.W. 2d 934 (Mo. App. S.D. 1992)

*Fox v. City of St. Louis*, 823 S.W. 2d 22 (Mo. App. 1991)

*Freely v. City of St. Louis*, 898 S.W. 2d 708, 709 (Mo. App. E.D. 1995)

*Hale ex. rel. Hale v. City of Jefferson*, 6 S.W. 3<sup>rd</sup> 187 (Mo. App. W.D. 1999)

*Jones v. St. Charles County*, 181 S.W. 3<sup>rd</sup> 197 (Mo. App. E.D. 2005)

*Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo banc 1976)

*Smith v. Coffey*, 37 S.W. 3<sup>rd</sup> 797 (Mo banc 2001)

*United MO Bank, N.A. v. City of Grandview*, 105 S.W. 3<sup>rd</sup> 880 (Mo. App. W.D. 2003)

*Webb v. Fox*, 978 S.W. 2d 16, 19 (Mo. App. W.D. 1998)

*Williams v. MO Highway and Transportation Commission*, 16 S.W. 3<sup>rd</sup> 605, 612 (Mo. App. W.D. 2000)

Mo. Rev. Stat. §537.600.1(2)

## II

**PLAINTIFF SUFFICIENTLY PLED A COMPENSABLE CLAIM  
BECAUSE HE ALLEGED ALL OF THE ESSENTIAL ELEMENTS REQUIRED  
BY R.S.MO 537.600, (EVEN THOUGH NOT PLEADING IN THE EXACT  
WORDS OF THE STATUTE) IN THAT HE ALLEGED FACTS SUPPORTING  
THAT DEFENDANT JACKSON COUNTY, MISSOURI WAS RESPONSIBLE  
FOR THE MAINTENANCE OF STILLHOUSE ROAD AND R.D. MIZE ROAD  
AND FURTHER THAT DEFENDANT WAS RESPONSIBLE FOR THE  
POSTING AND MAINTENANCE OF STOP SIGNS AND TRAFFIC CONTROL  
SIGNS AT SAID INTERSECTION, THAT ON SEPTEMBER 1, 2002, THERE  
WAS NO STOP SIGN IN PLAIN SITE OR POSTED FOR NORTH BOUND  
TRAFFIC ON STILLHOUSE ROAD, THAT THERE HAD BEEN NO STOP  
SIGN AT SAID LOCATION FOR AT LEAST 2 – 3 DAYS PRIOR TO 11:00 P.M.**

**ON SEPTEMBER 1, 2002, THAT THE LACK OF A STOP SIGN OR OTHER TRAFFIC CONTROL FOR NORTH BOUND TRAFFIC AT SAID INTERSECTION CREATED A DANGEROUS CONDITION ON SAID PUBLIC PROPERTY, THAT THE COLLISION BETWEEN THE TWO VEHICLES WAS CAUSED BY THE NEGLIGENCE OF DEFENDANT JACKSON COUNTY IN FAILING TO MAINTAIN A TRAFFIC CONTROL SIGN AT THE LOCATION AND AS SUCH, SAID PROPERTY AT SAID LOCATION WAS IN A DANGEROUS CONDITION AT THE TIME OF PLAINTIFF'S INJURY, THAT THE DANGEROUS CONDITION CREATED A REASONABLY FORESEEABLE RISK OF HARM OF THE KIND WHICH PLAINTIFF INCURRED AND THAT DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION IN SUFFICIENT TIME PRIOR TO THE INJURY TO HAVE TAKEN MEASURES TO PROTECT AGAINST THE DANGEROUS CONDITION. FURTHER THAT PLAINTIFF'S PETITION IS CONSIDERED AMENDED TO CONFORM TO THE EVIDENCE AFTER A JURY VERDICT IS RENDERED.**

*Anderson v. Kraft*, 129 S.W. 2d 85 (Mo. App. 1939)

*Eckhardt v. Bock*, 159 S.W. 2d 395 (Mo. App. 1942)

*Green v. MO Department of Transportation*, 151 S.W. 3<sup>rd</sup> 877 (Mo. App. S.D. 2004)

*Kemper v. Gluck*, 39 S.W. 2d 330 (Mo. S. Ct 1931)

### III

**THE TRIAL COURT DID NOT ERR BY ALLOWING PLAINTIFF TO MODIFY ITS VERDICT DIRECTING INSTRUCTION (FOURTH PARAGRAPH OF MAI 31.16) TO STATE “SUCH FAILURE DIRECTLY CAUSED OR DIRECTLY CONTRIBUTED TO CAUSE PLAINTIFF TO SUSTAIN DAMAGE” AND TO SUBMIT THE DAMAGE INSTRUCTION (MAI 4.01) WITHOUT MODIFICATION BECAUSE DEFENDANT WAS ALLOWED TO PRESENT EVIDENCE ATTEMPTING TO CONVINCING THE JURY THAT JUSTIN STRAIT WAS THE SOLE CAUSE OF THE ACCIDENT EVEN THOUGH DEFENDANT HAD NO CROSS-CLAIM OR THIRD-PARTY CLAIM FILED AGAINST JUSTIN STRAIT AND FURTHER BECAUSE DEFENDANT MADE NO OBJECTION TO SAID INSTRUCTION NOR DID DEFENDANT OFFER ANY OTHER INSTRUCTION TO BE CONSIDERED BY THE COURT IN THAT UNDER THE PLEADINGS AND THE LAW OF THE CASE, DEFENDANT WAS LIABLE FOR ALL OR NONE OF THE DAMAGES SUSTAINED BY PLAINTIFF AND WAIVER OF SOVEREIGN IMMUNITY IS NOT LIMITED TO ONLY INJURY THAT IS SOLELY OR EXCLUSIVELY ATTRIBUTABLE TO A PUBLIC ENTITY AND THE WORDS “DIRECTLY RESULTED FROM” IN §537.600.1(d) R.S.MO ARE SYNONYMOUS WITH “PROXIMATE CAUSE.”**

*Gill Construction, Inc. v. 18<sup>th</sup> & Vine Authority*, 157 S.W. 3<sup>rd</sup> 699 (Mo. App. W.D. 2004)

Mo. Sup. Ct. R. 70.03

## **ARGUMENT**

### **Point I**

**THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL AS IT RELATED TO DEFENDANT'S CLAIM OF SOVEREIGN IMMUNITY BECAUSE PLAINTIFF SUBMITTED SUBSTANTIAL EVIDENCE ESTABLISHING THAT DEFENDANT JACKSON COUNTY WAIVED ITS SOVEREIGN IMMUNITY UNDER § 537-600.1(2) R.S.MO IN THAT THE EVIDENCE WAS UNDISPUTED THAT THE STOP SIGN WAS DOWN AT THE TIME OF THE ACCIDENT, THAT DEFENDANT'S OWN WITNESSES ACKNOWLEDGED THAT A DOWNED STOP SIGN CREATED A DANGEROUS CONDITION, THAT JUSTIN STRAIT TESTIFIED THAT HAD HE REALIZED WHERE HE WAS ON STILLHOUSE ROAD AND IF THERE WOULD HAVE BEEN A STOP SIGN AT THAT INTERSECTION HE WOULD HAVE STOPPED, THAT DEFENDANT'S OWN CORPORATE REPRESENTATIVE ACKNOWLEDGED THAT A REASONABLE FORESEEABLE RISK OF HARM OF THE TYPE PLAINTIFF SUFFERED WAS CREATED BY A DANGEROUS CONDITION, AND THAT THERE WAS CONSTRUCTIVE NOTICE TO JACKSON COUNTY OF THE DOWNED STOP SIGN FROM FRIDAY MORNING AT 6:00 A.M. TO SUNDAY EVENING AT 9:45 P.M., IN THAT THE JACKSON COUNTY SHERIFF DEPARTMENT PATROLLED THE INTERSECTION AT**

**LEAST TWO TIMES PER DAY AND THAT JACKSON COUNTY MAINTENANCE PERSONNEL DROVE BY THE INTERSECTION ON A DAILY BASIS AND COULD HAVE AND SHOULD HAVE SEEN A DOWNED STOP SIGN IN SUFFICIENT TIME TO HAVE CORRECTED THE PROBLEM.**

### **Standard of Review**

The standard of review of a trial court's denial of a motion for Judgment notwithstanding the verdict is whether the plaintiff made a submissible case. *Benoit v. MO Highway and Transportation Commission*, 33 S.W. 3<sup>rd</sup> 663, 667 (Mo. App. S.D. 2000) Evidence is viewed in the light most favorable to the party who obtained the verdict. *Id.* In deciding whether a submissible case is made, a plaintiff is entitled to all reasonable favorable inferences from the evidence and the defendant's evidence is disregarded. *Id.* Only the Jury may judge the credibility of witnesses and the weight and value of their testimony. *Id.* The Jury is free to believe or disbelieve any part of a witness's testimony. *Id.* Where reasonable minds can differ on the question before the Jury, the court may not disturb the Jury's verdict. *Freely v. City of St. Louis*, 898 S.W. 2d 708, 709 (Mo. App. E.D. 1995)

### **Discussion**

The waiver of sovereign immunity contained in §537.600 is not limited to only injury that is solely or exclusively attributable to a public entity; rather normal tort rules of liability and causation are applicable. *Smith v. Coffey*, 37 S.W. 3<sup>rd</sup> 797, 801 (Mo banc 2001). The government is subject to joint and several liability. *Id.* Thus, a public entity may be sued, under a waiver of sovereign immunity, concurrently with

another party at fault. Williams v. MO Highway and Transportation Commission, 16 S.W. 3<sup>rd</sup> 605, 612 (Mo. App. W.D. 2000)

Joint and several liability is a generally applicable principle that furthers Missouri’s policy of placing financial burden of injuries on the parties at fault in causing injuries. It does not create a new theory of recovery for which sovereign immunity must be waived anew. The common law doctrine of joint and several liability was firmly imbedded in tort law long before the legislature resolved to subject the government to tort liability. The Court must presume that the legislature was aware of the state of the law at the time of enactment of §537.600. Smith v. Coffey, Id.

The words “directly resulted from” in §537.600.1(d) are synonymous with “proximate cause”. The General Assembly expressed no intent to create a new set of tort rules applicable only to state agencies by its use of the words “directly resulted” in the statute granting the limited waiver of tort immunity. Again, it intended that to the extent of waiver, normal tort rules of liability and causation would be applicable. Smith v. Coffey, Id.

Causation is generally an issue for the trier of fact.

Our Supreme Court has held that traffic controls such as stop signs are encompassed in the waiver of sovereign immunity under §537.600 Donahue v. City of St. Louis, 758 S.W. 2d 50 (Mo banc 1988).

Appellate Courts have also held that proof of other negligence occurring with that of a city to cause an accident does not defeat a plaintiff's claim, but would only permit apportionment of fault. *Fox v. City of St. Louis*, 823 S.W. 2d 22 (Mo. App. 1991) *Cole v. Missouri Highway and Transportation Commission*, 770 S.W. 2d 296 (Mo. App. W.D.1989), *Beyerbach v. Girardeau Contractors, Inc. et al*, 868 S.W. 2d 163 (Mo. App. E.D. 1994).

To circumvent sovereign immunity of Jackson County, Plaintiff had to prove four elements:

1. A dangerous condition of property;
2. Plaintiff's injury was a direct result of the dangerous condition;
3. Reasonable foreseeable risk of harm of type Plaintiff suffered was created by dangerous condition;
4. Public entity had actual or constructive notice.

#### Dangerous Condition of Property

The evidence was undisputed that the stop sign was down at the time of the accident, and had been down since at least 6:00 a.m. on August 30, 2002. (TR 204, 10-21; TR 208, 9-21; TR 209, 10-25; TR 210, 1-25; TR 237, 12-25; TR 238, 1-11; TR 239, 8-9; TR 240 20-25; TR 241, 1-8)

The two roads comprising the intersection are two important roads in the Sheriff Department's district because they are utilized by heavy traffic. (TR 539, 2-25)

The phrase “directly resulted from” in § 537.600.1(2) is synonymous with ‘proximate cause.’ United Missouri Bank, N.A. v. City of Grandview, 105 S. W. 3<sup>rd</sup> 880, 896 (Mo. App. W.D. 2003)

“The practical test for proximate cause is generally considered to be whether the negligence of the defendant is that cause or act of which the injury was the natural and probable consequence.” Hale ex. rel. Hale v. City of Jefferson, 6 S.W. 3<sup>rd</sup> 187, 194 (Mo. App. W.D. 1999)

“The test is not whether a reasonably prudent person would have foreseen the particular injury but whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the act or omission of the defendant.” United Missouri Bank, N.A. v. City of Grandview, 105 S.W. 3d 896.

More than the existence of a downed stop sign was presented in this case. The evidence also demonstrated that the stop sign was leaning towards the east at probably a 45 degree angle for about a month prior to September 1, 2002 and it looked like it would fall into the ditch. (TR 245, 6-13; TR 246, 17-25) Defendant’s own witnesses acknowledged that a downed stop sign created a dangerous condition (TR 353, 20-25; TR 354, 1-6; TR 749, 6-12) whether a defendant created a sufficiently dangerous condition is ordinarily a question of fact for the jury. Jones v. St. Charles County, 181 S. W. 3<sup>rd</sup> 197, 203 (Mo. App. E.D. 2005)

Plaintiff’s Injury was a Direct Result of the Dangerous Condition

Justin Strait, driver of the vehicle in which Plaintiff was a passenger testified there was no stop sign at the intersection of Stillhouse Road and R.D. Mize Road on September 1, 2002. (TR 474, 5-20; TR 486, 1-9) Justin Strait also testified that he could not recall any occasion when he actually saw a stop sign that he didn't slow down and stop at the stop sign. (TR 486, 1-4)

“The negligence of the defendant need not be the sole cause of the injury, as long as it is one of the efficient causes thereof, without which injury would not have resulted.” *Id.*

Mr. Strait testified that a stop sign was not posted at the intersection the night of the accident. He also testified that he was unaware that he was approaching an intersection, as no signs were posted that he was. The evening was dark at the time of the accident, and he did not see the other vehicle until immediately before the collision occurred. This, he said, is why he did not yield to the other vehicle. Mr. Strait also testified he was going between 30 and 40 miles an hour when he was driving north of Stillhouse Road. The jury was free to believe or disbelieve any part of a witness' testimony and certainly could have believed he was going 30 miles per hour prior to the accident and disbelieved any contrary testimony.

The evidence, in the light most favorable to the verdict demonstrates that, had the stop sign been properly posted, Mr. Strait would have known that he was approaching an intersection and would have stopped before entering it. Upon stopping, he would have seen the other vehicle and would not have collided with the

other vehicle. Without a collision, Plaintiff would not have sustained injury. The jury determined from all the evidence that the downed stop sign at this intersection constituted a dangerous condition and that Plaintiff's injuries were the reasonable and probable consequence of the downed stop sign. This was its prerogative.

Reasonable Foreseeable Risk of Harm of Type Plaintiff Suffered was Created by Dangerous Condition

This was admitted by numerous witnesses and by Defendant's own corporate representative. (TR 353, 20-25; TR 354, 1-6; TR 354, 7-23; TR 724, 3-11)

Witness John Merkle acknowledged that the maintenance and repair of a stop sign has a very high priority of the county as opposed to other signs ... Top priority... because of public safety. Witness Merkle stated another reason for the highest priority is to prevent accidents and injuries from occurring if a stop sign is down. Mr. Merkle further acknowledged that it was foreseeable that an accident could occur and that somebody could sustain injury.

Witness Larry VanDyke also acknowledged that when a stop sign is down, its an issue of highest priority and needs immediate attention, because an accident could happen and people could get injured.

Witness Samuel D. Davis acknowledged that a downed stop sign is a very serious, potentially dangerous condition and the county recognized that. Witness Davis further acknowledged that there wasn't any reason why the public employees of

Jackson County could not have seen the sign down and could not have responded within five hours.

#### Constructive Notice

There was evidence the stop sign was down from Friday morning at 6:00 a.m. all day Saturday and Sunday to the time of the accident on Sunday evening at 9:45 p.m. (TR 204, 10-21; TR 208, 9-20; TR 210, 1-25; TR 234, 3-4; TR 236, 9-12; TR 237, 12-25; TR 238, 1-11; TR 240, 20-25; TR 241. 1-8; TR 245, 6-13; TR 246, 17-25)

There was evidence that the Jackson County Sheriff Department patrolled the specific intersection at least two times per day. (TR 542, 19-25)

Deputy Sheriff Winston Pearson of the Jackson County Sheriff's Department worked August 30, 31, September 1, 2 and 3 of 2002 and worked the same shift 1500 hours until 1:00 a.m. the following morning on each of those dates. (TR 536, 12-19)

Deputy Pearson could not recall seeing the stop sign at issue up at anytime August 30, 31 or September 1, 2002, prior to his arrival to investigate the accident. (TR 545, 7-25) He simply stated that if he would have seen a stop sign down, he would have reported it. (TR 538, 22-25)

It's one thing not to see it down or not recall seeing the stop sign up and another to swear that it was up prior to the accident. The officer could not swear to that fact.

There was also ample testimony that the Jackson County Maintenance Department was located within two miles of the intersection at issue (TR 324, 19-25;

TR 327, 6-10) and that numerous employees drove by that intersection on a daily basis, including the Friday prior to the accident at issue and could have and should have seen a downed stop sign at the intersection where the accident happened and could have responded with in five hours. (TR 327, 18-25; TR 563, 12-17; TR 753, 6-9)

“There is no fixed rule as to the length of time necessary to justify a presumption of notice to a [sovereign] of a dangerous condition on a public street or sidewalk. Each case must depend upon the facts and circumstances shown therein.” *Dorlon v. City of Springfield*, 843 S.W. 2d 934, 943 (Mo. App. S.D. 1992).

“The question of whether a [sovereign], in exercise of ordinary care, would have discovered the condition in sufficient length of time prior to plaintiff’s injury to have removed it and thereby prevented the injury is to be determined by the jury.” *Id.*

All of the above was evidence of constructive notice to the County in sufficient time to have corrected the problem.

The Court properly overruled Defendant’s motion for Judgment notwithstanding the verdict (JNOV) or for a new trial.

## **ARGUMENT**

### **POINT II**

#### **STANDARD OF REVIEW**

A petition is not to be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief. Green v. Missouri Department of Transportation, 151 S.W. 3<sup>rd</sup> 877 (Mo. App. S.D. 2004)

If the allegations in a petition raise principles of substantive law that would entitle a plaintiff to relief, a petition should not be dismissed for failure to state a claim. V.A.M.R. 55.27(g).

Where a petition is amendable in that an omitted averment with respect to which evidence was received can be incorporated in the petition without changing the cause of action, any defect in said petition is waived and after verdict, the petition is taken as amended to conform to evidence coming in without objection. Anderson v. Kraft, 129 S.W. 2d 85 (Mo. App. 1939)

A challenge to a petition at the threshold stands on a better foot than a challenge after verdict or Judgment and after a verdict or decree, the grace of every allowable implication is permitted in aid of the verdict or decree. Eckhardt v. Bock, 159 S.W. 2d 395 (Mo. App. 1942)

Where petition does not affirmatively show want of jurisdiction, but merely fails to state fact which would give jurisdiction and might be alleged consistently with petition, defect, unless demurred to, is cured by verdict. V.A.M.S. § 507.050, 509.300, 509.340, 509.400 and 511.560 Kemper v. Gluck 39 S. W. 2d 330, 327 (Mo. S. Ct 1931)

## **Discussion**

Plaintiff simply states that the facts alleged in his amended Petition and further amended to conform to the evidence considered by the jury raised principles of substantive law which entitled him to relief.

## **ARGUMENT**

### **POINT III**

**THE TRIAL COURT DID NOT ERR BY ALLOWING PLAINTIFF TO MODIFY ITS VERDICT DIRECTING INSTRUCTION (FOURTH PARAGRAPH OF M.A.I. 31-16) TO STATE “SUCH FAILER DIRECTLY CAUSED OR DIRECTLY CONTRIBUTED TO CAUSE PLAINTIFF TO SUSTAIN DAMAGE” AND TO SUBMIT THE DAMAGE INSTRUCTION (M.A.I. 4.01) WITHOUT MODIFICATION BECAUSE DEFENDANT WAS ALLOWED TO PRESENT EVIDENCE ATTEMPTING TO CONVINCING THE JURY THAT JUSTIN STRAIT WAS THE SOLE CAUSE OF THE ACCIDENT EVEN THOUGH DEFENDANT HAD NO CROSS-CLAIM OR THIRD-PARTY CLAIM FILED AGAINST JUSTIN STRAIT AND FURTHER BECAUSE DEFENDANT MADE NO OBJECTION TO SAID INSTRUCTION NOR DID DEFENDANT OFFER ANY OTHER INSTRUCTION TO BE CONSIDERED BY THE COURT IN THAT UNDER THE PLEADINGS AND THE LAW OF THE CASE, DEFENDANT WAS LIABLE FOR ALL OR NONE OF THE DAMAGES SUSTAINED BY PLAINTIFF AND THE WAIVER OF SOVEREIGN IMMUNITY IS NOT LIMITED TO ONLY**

**INJURY THAT IS SOLELY OR EXCLUSIVELY ATTRIBUTABLE TO A PUBLIC ENTITY AND THE WORDS “DIRECTLY RESULTED FROM” IN § 537.600.1(d) R.S.MO ARE SYNONYMOUS WITH “PROXIMATE CAUSE.”**

**Standard of Review**

**Objection to Instructions**

Missouri Supreme Court Rule 70.03

Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Counsel need not repeat objections already made on the record prior to delivery of the instructions. If an instruction is not objected to with specificity prior to submission of the case to the jury, a court is limited to reviewing the giving of an instruction for manifest injustice or a miscarriage of justice. *Gill Construction, Inc. v. 18<sup>th</sup> & Vine Authority*, 157 S.W. 3<sup>rd</sup> 699.723 (Mo. App. W.D. 2004)

**Discussion**

Under “the law of the case,” the facts and evidence submitted and the pleadings of the case, it was not error to instruct the jury as the Court did, especially where there was no objection by Defendant to the instructions submitted and no tender of any alternative instructions.

The verdict directing instruction (Instruction No. 5) was proper, especially in light of the fact that the Court allowed Defendant to introduce evidence and attempt to convince the jury in final argument that the only cause of the accident had nothing to do with the stop sign being down but rather completely the fault of a third-party driver Justin Strait, even though Defendant had no cross-claim or third-party claim filed against Justin Strait in the case. (TR 792, 2-16) It was certainly proper for the Plaintiff to modify the verdict director in accordance with applicable law and the evidence introduced at trial. Not to have done so would have been prejudicial to the Plaintiff, because of evidence offered by Defendant.

The damage instruction (Instruction No. 7) was proper in the present case because the Defendant, under the pleadings of the case, as between Plaintiff and Defendant, was liable for all or none of the damages sustained by Plaintiff. If any party was prejudiced by such an instruction, it would have been the Plaintiff. Defendant made no objection to said instruction, nor did Plaintiff.

The Court held its instruction conference on the record and inquired of both Counsel for Plaintiff and Counsel for Defendant if either party had any objection to the order of the instructions, or the form or substance of any of the instructions, or if either Plaintiff or Defendant wished to tender any instruction claiming the Court should have given that instruction instead of the ones being given.

To all such questions, both Counsel for Plaintiff and Counsel for Defendant answered in the negative. NO OBJECTION. (TR 758, 14-25; TR 759, 1-25; TR 760, 1-25; TR 761, 1-5)

Defendant claims the change in the words “as a direct result of such failure” were changed to “such failure directly caused or directly contributed to cause” lessened Plaintiff’s burden of proof. Defendant claims it was prejudiced by the change in wording because no evidence was presented that it had actual or constructive notice that the stop sign was down or that Plaintiff’s injuries resulted from the dangerous condition even though the jury returned a verdict in Plaintiff’s favor. There was no “manifest injustice” or “miscarriage of justice.”

### **Conclusion**

The Court committed no error and certainly no error prejudicial to Defendant. Defendant waived any objection to the instructions by not making any timely objection and agreeing to the instructions submitted by the Court.

For the reasons stated above, Defendant’s Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial should be overruled and the verdict and Judgment of the jury and Court should be sustained.

Respectfully submitted,

/s/John C. Bragg

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of Respondent's Substitute Brief and diskette were served via U.S. Mail, postage prepaid, this 6<sup>th</sup> day of March, 2007, addressed to:

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that Microsoft Word 2002 Office XP in Times New Roman 13 point font was used to prepare this Brief and that I have provided the Clerk of the Court and Appellant's counsel with a 3 ½ inch computer diskette containing the full text of this brief, labeled with case name and number. The floppy disk submitted with this Brief has been scanned for viruses with Norton Anti-Virus software and is virus-free.

/s/John C. Bragg  
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**RULE 84.06 CERTIFICATE**

**I hereby certify that the foregoing brief:**

- (1) includes the applicable information required by Rule 55.03;**
- (2) complies with the limitations contained in Rule 84.06(b);**
- (3) the number of words in the brief is 6,757;**
- (4) the number of lines in the brief is 675 lines.**

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