

SC88176

IN THE
SUPREME COURT OF MISSOURI

DOUGLAS A. HENSLEY, JR.
Respondent

vs.

JACKSON COUNTY, MISSOURI
Appellant

APPEAL FROM THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This action is one involving the question of whether the Respondent made a submissible case establishing Appellant waived its entitlement to sovereign immunity under the dangerous condition exception of § 537.600, RSMo (2004). The Circuit Court entered judgment for Respondent, holding that Appellant waived its entitlement to sovereign immunity pursuant to § 537.600.1 and that Respondent made a submissible case to the jury. This appeal does not involve any of the categories of cases reserved for the exclusive jurisdiction of the Supreme Court of Missouri and was, therefore, initially heard and decided by the Missouri Court of Appeals, Western District pursuant to Article V, Section 3, of the Missouri Constitution; and Section 512.020, RSMo., as amended. Following the decision of the Court of Appeals affirming the judgment of the Circuit Court, this Court sustained Jackson County's Application for Transfer. This Court has jurisdiction to order this case transferred from the Court of Appeals and to consider this appeal pursuant to Article V, Section 10, of the Missouri Constitution.

STATEMENT OF FACTS

On September 1, 2002, at approximately 9:45 p.m., Respondent, Douglas Hensley, Jr., a passenger in an automobile driven by Justin Strait, was involved in an automobile accident at the intersection of R.D. Mize Road and Stillhouse Road in Oak Grove, Missouri. (LF 2, 29-39; TR 522-24, 589, 667-69) The accident occurred when Justin Strait, who was driving northbound on Stillhouse Road, entered the intersection of R.D. Mize Road and struck an automobile driven by Andrew Westphal. (LF 2, 29-39; TR 522-24, 589, 667-69) Andrew Westphal was traveling westbound on R.D. Mize Road. (TR 451) Respondent alleged that the accident occurred because of a downed stop sign at the southeast corner of the intersection of R.D. Mize Road and Stillhouse Road which controlled northbound traffic on Stillhouse Road. (LF 4-5, 64) As a result of the accident Respondent suffered a broken neck which was successfully repaired during surgery. (TR 287-88, 297) Immediately after the accident, Deputy Winston Pearson, while investigating the scene, noticed that the stop sign on the southeast corner of the intersection (the one directing northbound Stillhouse Road traffic) was down and he immediately communicated the downed stop sign to his dispatcher who contacted the on call Public Works employee. (TR 552, 566) Public Works employees Sam Davis and John Merkle arrived at the accident scene within thirty minutes of being called. (TR 352, 745-47) They attempted to put the original sign and post back in an upright position but were unable. Instead, they replaced the original stop sign and post with a temporary sign and post. (TR 376-77, 746)

Prior to the accident on September 1, 2002, no one contacted Public Works about the downed stop sign. (TR 223, 258, 441, 564, 754)

The Jackson County Department of Public Works (“Public Works”) was closed for the Labor Day holiday weekend from about 4:30 p.m., Friday, August 28, 2002, through 7:00 a.m., Tuesday, September 3, 2002. (TR 397, 399) However, someone from Public Works was on call twenty-four hours a day to respond to emergency calls and dispatches. (TR 738, 747)

Public Works maintains approximately 870 total miles of roads in the unincorporated areas of Jackson County, Missouri. (TR 409) This amounts to approximately 432 lane miles of road. (TR 409) Public Works is responsible for maintaining approximately 7,900 traffic signs in that unincorporated area. (TR 410) There is a crew of four individuals who are responsible for the upkeep of those signs, one foreman and three workers. (TR 410) Of those signs, in the interest of public safety, Public Works considers stop signs and yield signs as the utmost importance and of the highest priority. (TR 353-54, 429, 743) Public Works has a policy that if they are notified of a downed or damaged stop sign they will attempt to repair or replace the damaged sign within five hours after it is reported. (TR 356-57) Public Works attempts to check all traffic signs at least twice per year. (TR 431-32) As to notice about damaged or downed signs, Public Works relies on three sources for notification: employees, the sheriff department and the general public. (TR 432, 738)

During the week of August 26, 2002, Public Works performed its annual inspection of the traffic signs for the district which included Oak Grove, Missouri. (LF 40, TR 358-360) This included stop sign No. 50, located at the southeast corner of the intersection of Stillhouse Road and R.D. Mize Road. (LF 40; TR 360, 699, 707-08) Larry Van Dyke, a Public Works sign shop foreman, specifically inspected the northbound stop sign at the intersection of Stillhouse Road and R.D. Mize Road on Wednesday, August 28, 2002. (LF 40; TR 358-61, 368-70, 699-700) During his inspection of the stop sign at the southeast corner of the R.D. Mize Road and Stillhouse Road intersection, Larry Van Dyke noted that sign was standing and in good condition. He found no problems with the stop sign or its post other than the stop sign needed to be changed to a bigger sign. (TR 368-70, 708-11) Had the sign or the post been damaged or in need of repair, Mr. Van Dyke would have noted on the inspection sheet that the sign needed to be replaced or reset. (TR 709)

The Jackson County Sheriff's Department regularly patrols the roads in district three, zone two which includes the intersection of R.D. Mize Road and Stillhouse Road. (TR 520) In fact, the R.D. Mize and Stillhouse Roads are the more important roads in that district because of their location in the district and because of heavy traffic they are good radar roads in the district. (TR 539-40) It is the policy and practice of the Jackson County Sheriff Department for its officers to be on the lookout for damaged or downed traffic signs while patrolling their beat. (TR 536, 560, 565) Should they notice a sign that needs to be repaired or

replaced it is their policy and practice to have the patrolling officer immediately dispatch the location of the damaged or downed sign and have the dispatcher immediately notify a Public Works employee who is on call to have the sign repaired or replaced. (TR 446-47, 566).

It is also the practice of Public Works to regularly patrol county roads while on shift and report damaged or downed traffic signs. (TR 46-67, 718-19, 739) Many Public Works employees pass through the R.D. Mize and Stillhouse Road intersection on a daily basis. Not one employee reported the stop sign on the southeast corner of the intersection down or leaning during the week of August 26, 2002. (TR 396, 741-43, 754-55) Public Works employees are not able to repair or replace damaged or downed signs if they are not made aware that those signs are down or damaged. (TR 457, 718-19, 748)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT (JNOV) OR NEW TRIAL BECAUSE APPELLANT ENJOYED THE PROTECTION OF SOVEREIGN IMMUNITY AGAINST RESPONDENT'S CLAIM IN THAT RESPONDENT FAILED TO ESTABLISH THAT THERE WAS A DANGEROUS CONDITION OF PROPERTY AT THE TIME OF INJURY, OR THAT APPELLANT HAD CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION IN SUFFICIENT TIME PRIOR TO THE INJURY TO HAVE TAKEN MEASURES TO PROTECT AGAINST THE DANGEROUS CONSITION.

State ex rel. Mo. Highway & Transp. Comm'n, 961 S.W.2d 58, 60 (Mo. 1998);

Donahue v. City of St. Louis, 758 S.W.2d 50, 54 (Mo. banc 1988);

Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988);

Kenney v. Wal-Mart Stores, 100 S.W. 3d 809, 814 (Mo. banc 2003);

Mo. Rev. Stat. § 537.600.1, (2004);

Mo. Rev. Stat. § 304.351, (2004).

II. THE PLAINTIFF DID NOT SUFFICIENTLY PLEAD A COMPENSABLE CLAIM IN THAT HE FAILED TO ALLEGE IN HIS PETITION FOR DAMAGES THAT HE WAS DAMAGED BY THE NEGLIGENT, DEFECTIVE OR DANGEROUS DESIGN OF A HIGHWAY OR ROAD PURSUANT TO DONAHUE V. CITY OF ST. LOUIS, 758 S.W.2d 50 (Mo. banc 1988).

Donahue v. City of St. Louis, 758 S.W.2d 50, 54 (Mo. banc 1988);

Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988);

Mo. Rev. Stat. § 537.600.1, (2004).

III. THE SUPREME COURT SHOULD CHOOSE TO EXERCISE ITS DISCRETION TO PROVIDE A PLAIN ERROR REVIEW OF APPELLANT'S ISSUE INVOLVING JURY INSTRUCTIONS EVEN THOUGH APPELLANT FAILED TO OBJECT TO THE INSTRUCTIONS AT TRIAL PURSUANT TO RULE 70.03 BECAUSE IT IS EVIDENT, OBVIOUS AND CLEAR THAT THE TRIAL COURT ERRED IN ISSUING TO THE JURY ITS INSTRUCTION NUMBER FIVE AND THE VERDICT DIRECTOR ON COUNT OF RESPONDENT'S PETITION, BECAUSE THOSE INSTRUCTIONS MISSTATE MISSOURI LAW IN CONTRADICTION OF THE MISSOURI APPROVED INSTRUCTIONS, IN THAT THEY PERMITTED THE JURY TO BECOME CONFUSED WHICH RESULTED IN MANIFEST INJUSTICE OR A MISCARRIAGE OF JUSTICE, PREJUDICING APPELLANT.

State v. January, 176 S.W.3d 187, 193 (Mo. App. 2005);

Cohen v. Express Financial Services, Inc., 145 S.W.3d 857, 864 (Mo. App. 2004);

Hein v. Oriental Gardens, Inc., 988 S.W.2d 632, 634 (Mo. App. 1999);

Carlson v. K-Mart Corp., 979 S.W.2d 145, 147-48 (Mo. banc 1998);

MAI 31.16;

Rule 84.13(c);

Rule 70.03.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT (JNOV) OR NEW TRIAL BECAUSE APPELLANT ENJOYED THE PROTECTION OF SOVEREIGN IMMUNITY AGAINST RESPONDENT'S CLAIM IN THAT RESPONDENT FAILED TO ESTABLISH THAT THERE WAS A DANGEROUS CONDITION OF PROPERTY AT THE TIME OF INJURY, OR THAT APPELLANT HAD CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION IN SUFFICIENT TIME PRIOR TO THE INJURY TO HAVE TAKEN MEASURES TO PROTECT AGAINST THE DANGEROUS CONSITION.

Standard of Review

Appellate review of civil court-tried cases is governed by Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. In considering challenges to the sufficiency of the evidence the appellate court is to accept as true all inferences and evidence in the light most favorable to the judgment, and is to reject all contrary inferences and

evidence. In re Fabius River Drainage Dist., 35 S.W.3d 473, 480 (Mo. App. 2000). In determining whether a submissible case is made, the Court is to review the evidence in the light most favorable to the plaintiff, “giving the plaintiff the benefit of all reasonable favorable inferences, and, disregarding defendant’s evidence except insofar as it may aid the plaintiff’s case.” Klugesherz v. American Honda Motor Co., Inc., 929 S.W.2d 811, 813 (Mo. App. 1996). “However, we do not supply missing evidence or give plaintiff the benefit of unreasonable, speculative, or forced inferences. The evidence and inferences must establish every element and *not leave any issue to speculation.*” Klugesherz, 929 S.W.2d at 813 (emphasis added) (citation omitted).

A. Sovereign immunity

The Trial Court erred when it allowed the case to be submitted to the jury when Respondent failed to sufficiently prove that Appellant waived its sovereign immunity under Mo. Rev. Stat. § 537.600.1, (2004). In order for a Respondent to make a submissible case, each and every element essential to establish Appellant’s liability must be supported by substantial evidence. Wilkerson v. Williams, 141 S.W.3d 530, 533 (Mo. App. 2004), citing, Mathis v. Jones Store Co., 952 S.W.2d 360, 366 (Mo. App. 1997); Spring v. Kansas City Area Transp. Auth., 873 S.W.2d 224, 225 (Mo. banc 1994); Butts v. Express Pers. Servs., 73 S.W.3d 825, 836 (Mo. App. 2002), (emphasis added). Substantial evidence is competent evidence from which the trier of fact can reasonably decide the case. Mathis v. Jones Store Co., 952 S.W.2d 360, 366 (Mo. App. 1997). “If one or more of the

elements of a cause of action are not supported by substantial evidence, a directed verdict is proper.” *Id.* at 366, (emphasis added). To prove a claim of negligence against Appellant Jackson County, Missouri, Respondent had to establish that Jackson County waived its entitlement to sovereign immunity under the dangerous condition exception of Mo. Rev. Stat. § 537.600.1, (2004). To do this, Respondent had to establish:

- (1) a dangerous condition of public property;
- (2) that the injury directly resulted from the dangerous condition;
- (3) that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred; and
- (4) that a public employee negligently created the condition, or the public entity had actual or constructive notice of the condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

State ex rel. Mo. Highway & Transp. Comm’n, 961 S.W.2d 58, 60 (Mo. 1998), see also, Mo. Rev. Stat. § 537.600.1(2), (2004) (emphasis added). Additionally, Section 537.600.1(2) states in its second sentence, “in any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective or dangerous design of a highway or road. . . the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged

negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.”

Respondent failed to make a submissible case of negligence against Jackson County in that Respondent did not establish that there was a dangerous condition of public property prior to his injuries, that his injuries were a ‘direct result’ of the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred or that Jackson County had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the condition.

Respondent failed to establish any of the four requirements stated above, and therefore Respondent failed to make a submissible case against Jackson County. Additionally, Respondent failed to plead and does not allege in his Petition for Damages that he was damaged by the negligent, defective or dangerous design of a highway or road. A JNOV or new trial is appropriate when the Respondent did not produce any specific facts to demonstrate that Jackson County waived its sovereign immunity. Koppel v. The Metro. St. Louis Sewer Dist., 848 S.W.2d 519, 520 (Mo. App. 1993). The Trial Court should have granted Appellant its motion for JNOV and/or new trial because Respondent failed to demonstrate that Appellant waived its sovereign immunity.

1. Dangerous Condition of Public Property .

To be a dangerous condition, the public property must be dangerous because of its existence without intervention by a third party; otherwise, sovereign immunity is not waived. The test for a dangerous condition of property rests in the determination “that the condition was ‘dangerous because its existence, without intervention by third parties, posed a physical threat to Plaintiff.’” Marston v. Mann, 921 S.W.2d 100, 103 (Mo. App.1996) (citing Alexander v. State, 756 S.W.2d 539, 542 (Mo. banc 1988)). Furthermore, courts of this state affirm that if the property is not itself physically defective, but is instead the site of injuries as a result of misuse or other intervening act, the property is not considered a “dangerous condition” and sovereign immunity is not waived. *See* Marston, 921 S.W.2d at 103 (Affirming “[w]hen the injury is the direct result of the intentional conduct of another person and not the direct result of the physical condition of the property, sovereign immunity is not waived.”). Respondent failed to establish that there was a dangerous condition of public property at the time of his injuries. Even if Respondent provided enough information to establish that the stop sign was down prior to his accident, Respondent failed to prove that the downed stop sign was a dangerous condition of public property. Evidence which substantiated that Respondent failed to meet this burden includes: (1) Respondent’s witness Justin Strait; (TR 474-519) (2) Respondent/Appellant’s witness Deputy Winston Pearson; (TR 519-577) and (3) Mo. Rev. Stat. § 304.351 (2004), (TR 572) which state that the driver of the vehicle on the left, approaching an intersection where

there is no form of traffic control, shall yield the right-of-way to the driver of the vehicle on the right. (Appellant is not limiting the Court to just this evidence).

Justin Strait testified that he was vaguely familiar with the intersection of R.D. Mize and Stillhouse Road. (TR 483) He stated that at the time he entered the intersection of R.D. Mize and Stillhouse Road there was no stop sign standing at the southeast corner of the intersection. (TR 484) He testified that he thought the speed limit on Stillhouse Road was 45 mph instead of 35 mph. (TR. 482) He testified that he was traveling at a speed between 30 and 40 mph. (TR 497) However, Andrew Westphal, the other motorist involved in the accident, testified that he estimated Mr. Strait to be traveling at a high rate of speed between 60 and 70 mph. (TR 663, 667) Justin Strait also testified that he was aware of the traffic rules of Missouri which dictate that he was to yield to the right-of-way traffic coming on his right when there were no traffic control devices on the road. (TR 493, 503) The Trial Court took judicial notice of Mo. Rev. Stat. § 304.351, (2004) which states in pertinent part: “1. The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway, provided, however, there is no form of traffic control at such intersection.

2. When two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the driver of the vehicle on the right.” (TR 572) Given the fact that laws of Missouri dictated what a driver was to do when there was no traffic

control sign directing an intersection, Respondent failed to sufficiently prove that there was a dangerous condition of public property, the first step in proving that Appellant waived its sovereign immunity. Justice Robertson, in his dissent opinion of the Missouri Supreme Court case, Donahue v. City of St. Louis, 758 S.W.2d 50, 54 (Mo. 1988), correctly stated, in a case where one of the allegations was that a downed stop sign was the direct cause of Respondent's injuries,

“I cannot conclude that a fallen stop sign is a *direct* cause of this accident. Direct cause contemplates that Respondent's damage is ‘directly traceable’ to the fallen stop sign. . . .In this case, factors aside from the fallen stop sign caused the accident. Here the Respondent failed to operate his vehicle in a careful and prudent manner as required by Mo. Rev. Stat. § 304.010, (1986), and failed to yield the right-of-way at the intersection as required by Mo. Rev. Stat. § 304.351, (1986). It was Respondent's breach of this duty, his failure to follow the rules of traffic safety, which was the direct cause of his injury.” Id. at 54.

This is precisely what happened in this case. Respondent injuries were the direct result of Justin Strait's negligent operation of his motor vehicle, not the fallen stop sign. Justin Strait himself testified that he knew he was supposed to yield to the traffic which had the right-of-way (traffic on his right) when there was no traffic control device controlling the intersection. However, he failed to do so. Andrew Westphal was traveling westbound on R.D. Mize Road and therefore had the right-of-way. Justin Strait failed to operate his vehicle in a careful and prudent manner

as required by Missouri law. It was that breach of duty which was the ‘direct cause’ of Respondent’s injuries/damages not the downed stop sign. Therefore, Respondent did not show that there was a dangerous condition of public property, even if he sufficiently proved that the stop sign was down prior to the accident. Because Respondent did not sufficiently prove that there was a dangerous condition of public property he did not show that Appellant waived its sovereign immunity and therefore, the case should not have been submitted to the jury. The Trial Court should have granted Appellant’s motion for a new trial or JNOV.

2. The Injury Directly Resulted From The Dangerous Condition.

The next element which a Respondent must prove before he has sufficiently submitted a waiver of sovereign immunity is that the alleged dangerous public condition was the direct cause of his injuries. This means that the injuries were the proximate cause of the dangerous condition. Simply put, in order for a claim of negligence to be actionable, there must be a causal connection between the alleged negligence and the injury. Oldaker v. Peters, 869 S.W.2d 94, 100 (Mo. App. 1993). Stated another way, the waiver of sovereign immunity provided in §537.600 requires that the injury complained of must directly result from the dangerous condition of the public entity’s property. §537.600.1(2) *RSMo*, (1994). “The sovereign immunity statute must be strictly construed.” State ex rel. Missouri Highway and Transp. Com’n. v. Dierker, 961 S.W.2d 58, 60 (Mo. 1998). The causation requirement is an element of the “dangerous condition” exception to the sovereign immunity waiver and, if a plaintiff fails to show causation, he has

not met the conditions of the sovereign immunity waiver and his claim is barred. *See Dierker*, 916 S.W.2d at 61.

Additionally, courts recognize that “[t]he mere fact that injury follows negligence does not necessarily create liability. The plaintiff has the burden of showing a causal connection between the submitted negligence and the injury.” *Oldaker*, 869 S.W.2d at 100. Although such causal connection does not have to be proven by direct evidence, “if the evidence leaves the element of causal connection in the nebulous twilight of speculation, conjecture and surmise, plaintiff’s burden is not met.” *Oldaker*, 869 S.W.2d at 100. *See also Thompson v. City of West Plains*, 935 S.W.2d 334, 338 (Mo. App. 1996). This Court has determined that the language “directly resulting from” in this statute corresponds to “proximate cause.” *Stanley v. City of Independence*, 995 S.W.2d 485, 488 (Mo. 1999); *Dierker*, 961 S.W.2d 58, 60 (Mo. 1998). Accordingly, for plaintiff to recover damages, the negligence he alleges must be the actual proximate cause of his injuries - - i.e. the natural and probable consequence of the alleged negligence. *Stanley*, 995 S.W.2d at 488; *Dierker*, 961 S.W.2d at 60; *M.C. v. Yeargin*, 11 S.W.3d 604, 613 (Mo. App. 1999); *Stroot v. Taco Bell Corp.*, 972 S.W.2d 447, 449 (Mo. App. 1998). Though the alleged negligence need not be the only cause of the injury, it must be a cause *without which* the injury would not have occurred. *Yeargin*, 11 S.W.3d at 613.

“Proximate cause cannot be based on pure speculation and conjecture.” *Stanley*, 995 S.W.2d at 488. “To the extent that the damages are surprising,

unexpected, or freakish, they may not be the natural and probable consequences of a defendant's actions." Dierker, 961 S.W.2d at 60. *See also* Stroot, 972 S.W.2d at 449. To establish causal connection, it must be shown that in the absence of the negligence charged the injury would not have been sustained. James v. Sunshine Biscuits, Inc., 402 S.W.2d 364, 375 (Mo. 1966); Gottman v Norris Const. Co., 515 S.W.2d 861, 864 (Mo. App. 1974). *See also* Bauman v. Conrad, 342 S.W.2d 284, 287 (Mo. App. 1961). The burden to prove causation rests with the plaintiff. Gottman, 515 S.W.2d at 864. "The burden is not met if resort must be made to speculation." James, 402 S.W.2d at 375. *See also* Gottman, 515 S.W.2d at 864. Furthermore, "where evidence amounts to mere speculation and conjecture...a contention that the evidence did not make a surmisable case should be sustained." Gottman, 515 S.W.2d at 864. Where a plaintiff fails to prove that element and meet the burden he has failed to show causation and a judgment in his favor cannot stand. Pringle v. State Highway Com., 831 S.W.2d 732, 737 (Mo. App. 1992). Additionally, "[t]he causal connection must exist without intervention from a superseding or independent cause." Patterson v. Meramec Valley R-III School Dist., 864 S.W.2d 14, 16 (Mo. App. 1993); *See also* Dale by and through Dale v. Edmonds, 819 S.W.2d 388 (Mo. App. 1991).

The term "direct cause" is synonymous with "proximate cause," or a "cause which directly, or with no mediate agency, produces an effect." Ielouch v. Warsaw R-IX Schools, 908 S.W.2d 769, 771 (Mo. App. 1995). To establish a causal connection between the alleged negligent act and injury, the plaintiff must

show both causation in fact and proximate cause. Payne v. City of St. Joseph, Missouri, 135 S.W.3d 444, 450, (Mo. App. 2004). The test for causation in fact is the “but for” test. Id., citing, Bond v. Cal. Comp. & Fire, 963 S.W.2d 692, 697 (Mo. App. 1998). The “but for” test for causation provides that the defendant’s conduct is a cause of the event if the event would not have occurred “but for” that conduct. Id. In contrast, “the practical test of proximate cause is whether the negligence is an efficient cause which sets in motion the chain of circumstances leading to the plaintiff’s injuries or damages.” Payne,135 S.W.3d at 450-51. Causation in fact is an issue for the jury if sufficient evidence is presented from which the jury could reasonably find that the plaintiff's injury was a direct result of the defendant's negligence. *See* Paragraph Fourth, MAI 31.16 [1995 Revision]. In contrast, "the practical test of proximate cause is whether the negligence is an efficient cause which sets in motion the chain of circumstances leading to the plaintiff's injuries or damages." Simonian v. Gevers Heating & Air Conditioning, Inc., 957 S.W.2d 472, 475 (Mo. App. 1997). "The test is not whether a reasonably prudent person would have foreseen the particular injury, but whether, after the occurrences, the injury appears to be the reasonable and probable consequence of the act or omission of the Appellant." Id. Proximate cause is a question of law for the trial court. “Evidence of causation must be based on probative facts not on mere speculation or conjecture.” Payne,135 S.W.3d at 450-51.

Evidence was adduced that Justin Strait, the driver of the vehicle in which Respondent was traveling, was negligent in his driving of his vehicle. Evidence

was adduced which demonstrated that Mr. Strait failed to operate his vehicle in a careful and prudent manner and obey the rules of the road as required by Missouri law. As stated above, Justin Strait failed to follow state law in yielding to Andrew Westphal's vehicle. (TR 493, 503, 516, 572) There was also evidence that Mr. Strait was speeding. (TR 482, 497, 663, 667) Respondent only showed that his injuries were the direct result of Justin Strait's per se negligence, failing to yield the right-of-way of Andrew Westphal's vehicle and speeding.

There was testimony from Andrew Westphal, the other driver involved in the accident that Justin Strait was driving between 60 and 70 mph on a road that had a speed limit of 35 mph. (TR 663, 667) Respondent even testified that he believed Mr. Strait was driving in excess of the posted speed limit. (TR 619-20) There also was testimony presented that Justin Strait was going to enter the intersection without stopping whether the stop sign was up or not. Justin Strait testified that he thought he was at another point on Stillhouse Road. He stated that directly prior to the accident and entering the Stillhouse and R.D. Mize Road intersection, he thought he was at the Stillhouse Road and Church Road intersection which had no stop sign for him on Stillhouse Road. (TR 502-03, 515-16) He would not have stopped for the stop sign prior to the accident because he did not want to stop and had no intention of stopping at the mistaken intersection. Id. He testified that he told this to Deputy Pearson immediately prior to his testimony at court. (TR 502-03)

The downed stop sign, when looking at it against Justin Strait's testimony, was merely an indirect cause of Respondent's injury. Even if the downed stop sign could be considered a contributing factor for the accident, which Appellant denies, it was not the proximate or direct cause of the accident. The proximate cause of the accident and Respondent's injuries was Justin Strait's negligent and careless driving and his disobedience of Missouri Laws. The evidence demonstrates that the accident would have happened whether there was a stop sign there or not. Justin Strait's negligence and failure to abide by the traffic laws of Missouri was the direct cause of the accident and Respondent's injuries not the downed stop sign. It was this intervention by Justin Strait which caused the condition to be "dangerous" and posed the physical threat to Respondent. Additionally, Dr. Gregory Walker testified that Respondent's chance of serious injury, like the broken neck he received, was substantially increased because he was not wearing a seatbelt. Because Respondent was not wearing a seatbelt he was thrown from the vehicle upon impact. (TR 319)

Respondent failed to present any evidence that his injuries were the direct or proximate cause of the downed stop sign. As such, Respondent's injuries were not the direct result of the alleged dangerous condition. Instead, his injuries are a direct result of Justin Strait's negligence per se. Respondent cannot show "but for" Appellant's conduct he would not have sustained injury or damages. The fact is Justin Strait's negligence would have caused Respondent's injuries regardless of whether the stop sign was up or down. Justin Strait negligently assumed he had

the right-of-way, not because of a downed stop sign, but because he failed to yield the right-of-way of oncoming traffic and because he wrongfully thought he was at a different location on Stillhouse Road. Based upon his conduct, he would have proceeded through the intersection regardless of whether there was a traffic sign or not. Evidence states the same. Evidence was presented that plaintiff was careless and negligent as he approached the intersection; there were no skid marks from Justin Strait's vehicle prior to or after he entered the intersection (LF 29-39; TR 551), there was testimony that he was traveling in excess of sixty miles per hour, and that he thought he was at another intersection on Stillhouse Road. Respondent failed to meet his burden of proof for the second component of the sovereign immunity statute. As stated in the sovereign immunity statute and case law, indirect or intervening causation is not enough a waiver of sovereign immunity. To establish a waiver, Respondent had the obligation of proving Appellant's dangerous condition was the direct or proximate cause of his injuries. He did not do this. This case should have never been submitted to the jury and at the very least the Trial Court should have granted Appellant's motion for a new trial or JNOV.

3. The Dangerous Condition Created a Reasonably Foreseeable Risk of Harm of The Kind of Injury Which Was Incurred.

Respondent failed to provide substantial evidence that the downed stop sign created a reasonably foreseeable risk of harm of the kind of injury which was incurred. As stated above, Respondent failed to prove that the down stop sign was

a dangerous condition. The reason the downed stop sign was not a dangerous condition is because Missouri law states what a driver must do if an intersection is not governed by traffic signals or signs. Mo. Rev. Stat. § 304.351, (2004) specifically provides if an intersection does not have any form of traffic controls, the vehicle on the left is to yield the right-of-way to traffic approaching on the right. Because of this rule there is no way Respondent could establish that the downed stop sign created a reasonably foreseeable risk of harm. There is no reasonably foreseeable risk of harm for a downed stop sign because laws like § 304.351 come into effect directing the conduct of Missouri drivers on roadways. The type of harm Respondent suffered was as a result of Justin Strait's violation of those laws. This created negligence per se violations of the law by Justin Strait. Respondent incurred the type of injuries reasonably foreseeable to Justin Strait's negligence, not a perceived indirect dangerous condition of Appellant. Respondent's burden of proof for the third tier of the dangerous condition exception also fails.

4. A Public Employee Negligently Created the Condition, or the Public Entity Had Actual or Constructive Notice of the Condition in Sufficient Time Prior to the Injury to Have Taken Measures to Protect Against the Dangerous Condition.

Respondent failed to prove that an employee of Jackson County negligently created the alleged dangerous public condition or that Jackson County had actual or constructive notice of the alleged dangerous condition prior to the injury to have taken measures to protect against the dangerous condition. Actual notice is

given directly to a public entity by the claimant or any other person. See Koppel v. Metro. St. Louis Sewer Dist., 848 S.W.2d at 519. However, a public entity can have constructive knowledge of a dangerous condition if the condition has existed for an extended period of time, which would be “a length of time that the [public entity] in the exercise of ordinary care could and should have discovered and remedied it.” Lockwood v. Jackson County, Mo., 951 S.W.2d 354, 357 (Mo. App. 1997).

Evidence demonstrated that the stop sign directing northbound traffic on Stillhouse Road at the intersection of Stillhouse Road and R.D. Mize Road was reported to be standing, visible to motorist, and in good condition during a routine inspection by the Jackson County Public Works Department on August 28, 2002, less than four days prior to the injury. (LF 25-27, 40; TR 699-700, 710-11) Larry Van Dyke testified that he specifically inspected the subject stop sign on Wednesday, August 28, 2002. (TR 699-700) He testified that the sign was in good condition and was standing upright. (TR 710-11) The only comment he had about the sign, which was documented on the inspection sheet, was that it needed to be replaced with a bigger sign because smaller 30” x 30” signs were being replaced by 36” x 36” signs. (TR 708-11) Mr. Van Dyke, along with his supervisor John Merkle, testified that had the sign been severely damaged, leaning or down during the inspection, it would have immediately been fixed, reported and/or replaced. (TR 425, 704, 710, 715, 718-19)

There was absolutely no evidence presented at trial that a Jackson County employee created the alleged dangerous condition. In fact, all evidence at trial indicated that no one knew exactly when the sign fell down. (TR 386, 570) It could have been one minute before the accident or up to a possible two days before the accident. As a result, Respondent cannot claim that the downed stop sign was the result of negligence created from a Jackson County employee.

Respondent presented no evidence or testimony showing how or when Jackson County received actual or constructive notice of the downed stop sign prior to the accident. In fact, evidence was overwhelming that Jackson County was never notified of the downed stop sign prior to the accident on September 1, 2002. Respondent presented two individuals, Scott Grubb and Joyce Guillemot, who lived near the intersection, to testify that the stop sign was down from Friday, August 30, 2002 to Sunday, September 1, 2002, the day of the accident. (TR 204, 255) Both of the witnesses testified that they remembered the sign being down on that exact weekend. Id. However, both witnesses testified that neither of them called anyone at Jackson County to inform them of the downed stop sign even though they thought it was a very dangerous situation. (TR 223, 258) They both testified that they did not believe it was their responsibility to notify Jackson County about the downed stop sign. (223-24, 258-59) It should be noted that these witnesses, at times, had very inconsistent testimonies. Joyce Guillemot testified that the sign and post was leaning at a forty-five degree angle for the whole month of August, 2002, before it fell on the weekend of August 30th. (TR 246) She also

testified that she notified no one from Jackson County that the post was leaning. (TR 261) Scott Grubb, who lived just a couple of houses away from Joyce Guillemot, never testified that he saw the sign leaning at a forty-five degree angle the month prior to the accident. (TR 199-231) To the contrary, he testified that on Wednesday, August 28, 2002, and Thursday, August 29, 2002, the sign was up and standing. (TR 218) Both witnesses testified that they traveled the intersection several times per day. (TR 202, 235) Both witnesses testified that when they approached the intersection that weekend, without the stop sign, they stopped and looked both ways before entering the intersection because they were familiar with the intersection and knew that persons traveling on R.D. Mize Road had the right-of-way. (TR 224-25, 262) Both witnesses also testified that public work and sheriff department vehicles frequently travel through that intersection. (TR 224, 258-59)

Andrew Westphal, who also lived in Oak Grove and traveled through the intersection on a daily basis, testified that he was very familiar with the intersection. (TR 647) He testified that he did not remember the stop sign on the southeast point of the intersection ever leaning during the month of August 2002 and he did not remember the sign being down prior to the accident. (TR 672-73) Mr. Westphal testified that he traveled through the intersection several times during that Labor Day weekend because he had a friend who lived near the intersection and they were planning a hunting trip. He testified that on Friday and Saturday, August 30 & 31, he specifically remembered the stop sign being up and

not at a forty-five degree angle. (TR 674-76, 689-90) On Sunday, September 1, 2002, at approximately 2145 hours, it was Mr. Westphal who was involved in the accident with Justin Strait. Andrew Westphal was traveling westbound on R.D. Mize Road and collided with Mr. Strait's vehicle when he failed to yield to oncoming traffic. (TR 451) It should be noted that both Respondent and Justin Strait testified they lived near the intersection or in the nearby town of Oak Grove, Missouri, and both had driven through the intersection on several occasions prior to the accident on September 1, 2002. (TR 483, 493, 584, 614-15)

There was also testimony from other witnesses who stated had they seen the stop sign down anytime from Friday to Sunday they would have immediately notified Public Works to have the sign replaced or repaired. (TR. 448-49, 538, 546, 561, 562-64, 576, 718-19, 740-41) Specifically, Deputy Winston Pearson testified that he was working the evening shift from Friday, August 30, 2002 until Sunday, September 1, 2002. (TR 530-31) His shift started at 15:00 hours and ended at 01:00 hours. (TR 530, 557) He stated that it was required of him, as a deputy sheriff, to report a downed stop sign and he specifically looks for downed or damaged signs during his beat or shift. (TR 536, 560, 565) In fact, Deputy Winston Pearson testified that all deputies are trained to report downed stop signs immediately to the dispatcher and the dispatcher immediately notifies an on call person at Public Works if it is after hours. (TR 565-66) He also testified that he would have driven through the Stillhouse and R.D. Mize Road intersection on at least two occasions during a shift. (TR 542) He stated that it was a very familiar

and important intersection for Oak Grove residents and sheriff deputies. (TR 539-40) He stated that up until the night of the subject accident, he did not see a downed or damaged stop sign at the intersection during Friday, Saturday or Sunday and if he had he would have reported the downed or damaged sign. (TR 538, 546, 559, 560, 561, 562-64, 569, 576) He stated that his job was to protect the citizens of Missouri and he would have noticed and reported a downed stop sign had he seen it while on his shift. Id. He stated he would have purposely looked for down stop signs as it was a part of his duties when patrolling in his vehicle. (TR 536) He testified that he did not notice or report a downed stop sign until after the accident. (TR 545) He noticed it down while investigating the accident scene. (LF 29-39; TR 552) He further testified it was the first time he noticed the stop sign down and he then immediately contacted the dispatcher who notified the “on call” Public Works employee. (TR 566) Deputy Pearson testified that he definitely would have noticed a downed stop sign at that intersection and that he would have reported it had it been down. He continued by stating that during the three day weekend he did not see nor report the sign downed until the accident on September 1, 2002. (TR 563-64) He also testified that there were no other accidents at that intersection prior to the subject accident and that the downed stop sign was immediately replaced after the accident. (TR 566) Lastly, Deputy Pearson testified that there were two officers on his beat from 8:00 p.m. to 1:00 a.m. and no other officer reported a downed stop sign to the dispatcher during the holiday weekend prior to the accident. (TR 564, 565, 575)

Public Works personnel also testified that they had no knowledge of the downed stop sign until after the accident. (TR 352, 386, 441, 718-19, 754) Public Works would have been closed down for the Labor Day holiday weekend from Friday, August 30, 2002, at 16:30 hours through Tuesday, September 3, 2002. (TR 397, 716, 747) John Merkle testified that he specifically remembered driving past the intersection after work on Friday, August 30, 2002, and the stop sign was up and standing. (TR 458) He stated that he would have gone through the intersection around 16:45 hours Friday evening. (TR 459) Given the fact that no Public Works employee would have patrolled the area during the holiday weekend and given the fact that sheriff deputy Pearson testified he did not see a downed stop sign during any of his shifts until after the accident, the evidence presented substantiates that Jackson County received no actual or constructive notice of the downed stop sign prior to the accident. Respondent cannot point to one piece of evidence which substantiates that Appellant was ever notified, either actually or constructively, of the downed stop sign prior to the accident. Respondent's own witnesses specifically stated that they did not notify anyone in Jackson County that the sign was damaged or down. Jackson County employees specifically stated that they did not know of the downed stop sign until after the accident. Evidence was even presented that immediately after the downed stop sign was reported to Public Works, within a very short time, they had a temporary sign back in place. The weight of the evidence presented by both parties is that Appellant did not receive actual or constructive notice of the downed stop sign prior to the accident. All the

evidence presented at trial did nothing to demonstrate how and when Jackson County was notified of the downed stop sign prior to Respondent's injury.

Evidence was presented which demonstrated Jackson County Public Works takes downed stop signs as their highest priority. (TR 353-54, 429, 743) They attempt to repair or replace a downed stop sign as soon as possible but by all means within five hours after it is reported. (TR 356-57) The fact that evidence was presented showing a Public Works employee responded to the call within one hour of being called to the accident, substantiated their claim. There was no evidence establishing Jackson County could have known (constructive knowledge) about the downed stop sign prior to the accident because as stated above, Public Work employees were not working and the sheriff deputies working during the weekend did not see a downed sign, until after the accident. All Jackson County personnel testified that had they seen the downed stop sign they would have reported and/or repaired the stop sign. (TR 448-49, 457, 538, 546, 561, 562-64, 565, 576, 718-19, 740-41) Even if you believe Respondent's evidence that the sign fell down on the Friday before the accident, it is impossible to imply that Appellant had constructive notice of the alleged dangerous condition in sufficient time to have corrected the problem. Respondent wants this Court to believe that two days on a holiday weekend, when no Public Work employee was working, was sufficient constructive notice to Appellant for them to have corrected the problem. Constructive notice of a dangerous condition only exists when the condition has existed for an extended period of time, which would be "a length of

time that the [public entity] in the exercise of ordinary care could and should have discovered and remedied it. Lockwood v. Jackson County, Mo., 951 S.W.2d 354, 357 (Mo. App. 1997). (emphasis added). In Donahue v. City of St. Louis, 758 S.W.2d 50 (Mo. banc 1988), the stop sign in that case was down for several months. In Fox v. City of St. Louis, 823 S.W.2d 22 (Mo. App. 1991), the stop sign was also down for several months. Appellant cannot find one Missouri case which establishes two days over a holiday weekend during a time when the entity responsible for maintenance of the sign was closed for the weekend, is sufficient time to have been constructively notified of a dangerous condition.

Respondent failed to meet his burden of proof that Jackson County, Missouri was notified, either actually or constructively, of the downed stop sign in sufficient time prior to Respondent's injury to have taken measures to protect against the alleged dangerous condition. Failure to have either type of notice dictates that the Trial Court should have never permitted the case to go to the jury. The only evidence presented by both parties was that the stop sign was down sometime between Friday, August 30, 2002 and 21:45 on September 1, 2002. No one testified that they specifically knew when the stop sign came down. It could have been a couple of days prior to Respondent's injuries or within minutes of Respondent's injuries. No one knows. No one contacted Jackson County of the alleged dangerous condition and because Public Works was closed for the holiday weekend, they could not have known about the sign until someone reported it. Therefore, Respondent failed to meet his burden of proof that Jackson County

knew or could have known of the downed stop sign in time to have taken measures to protect against Respondent's injuries. The weight of the evidence presented by both parties dictates that the Trial Court should have sustained Appellant's Motion for JNOV or in the alternative a New Trial to correct a monumental error of the law.

Missouri has no definite rule on how long a condition needs exist for there to be a presumption of constructive notice. Dorlon v. City of Springfield, 843 S.W.2d 934, 943 (Mo. App. 1992). However, as stated in Lockwood, the condition has to exist long enough for an Appellant like Jackson County to discover it while exercising ordinary care. 951 S.W.2d at 357. The evidence at trial was that Jackson County attempted to inspect over 8,000 signs twice a year. The stop sign in this case was inspected four days prior to Respondent's accident. During the four days between the time of inspection by Jackson County on August 28, 2002 and the time of the collision on September 1, 2002, there were no reports or calls directed to the Appellant concerning a downed stop sign. Jackson County had exercised ordinary care in regards to the stop sign directing northbound traffic on Stillhouse Road at the intersection of Stillhouse Road and R.D. Mize Road and had not received actual or constructive notice.

Thus, no statutory exception applies to deprive Jackson County of sovereign immunity in this case. "A case should not be submitted to the jury 'unless each and every fact essential to liability is predicated upon legal and substantial evidence.'" Kenney v. Wal-Mart Stores, 100 S.W. 3d 809, 814 (Mo

banc 2003) “Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case.” Id. Respondent failed to submit a submissible case as it related to Appellant’s waiver of sovereign immunity. Respondent failed to meet any of the four elements of proving waiver. There is especially no evidence what-so-ever that Appellant was notified of the downed stop sign in sufficient time to repair it prior to the accident. As such, Jackson County is entitled to sovereign immunity and the verdict of the jury must be over-turned and/or the case remanded for a new trial.

II. THE PLAINTIFF DID NOT SUFFICIENTLY PLEAD A COMPENSABLE CLAIM IN THAT HE FAILED TO ALLEGE IN HIS PETITION FOR DAMAGES THAT HE WAS DAMAGED BY THE NEGLIGENT, DEFECTIVE OR DANGEROUS DESIGN OF A HIGHWAY OR ROAD PURSUANT TO DONAHUE V. CITY OF ST. LOUIS, 758 S.W.2d 50 (Mo. banc 1988).

This Court in its 1988 Donahue v. City of St. Louis decision, a case wherein the plaintiff alleged he was damaged as a result of a dangerous condition when he was involved in an automobile accident at an intersection where a stop sign had fallen, held that the plaintiff sufficiently pled a cause of action under § 537.600.1 by pleading, although not in exact words, that the fallen stop sign was the negligent, defective, or dangerous design of the road or highway. Donahue v. City of St. Louis, 758 S.W.2d 50, 52 (Mo. banc 1988). This Court, relying on Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. banc 1977), and the

1985 amendment to § 537.600.1, RSMo 1986, held that cases dealing with the design and maintenance of a state highway encompasses the added language of § 537.600.1 which state that plaintiff must allege that he was damaged by the negligent, defective or dangerous design of a highway or road. Donahue at 51-52. This Court additionally held that public entities could be liable for the negligent design of roads and highways, and that failure to maintain or have traffic control devices could be construed as dangerous conditions of property in that they are an element of design. Although the result in that case was arguably correct (that traffic control devices could be encompassed in the negligent, defective, or dangerous design of roads and highways), the reasoning of the majority opinion was perplexing. The case involved a fallen stop sign, which the Eastern District had held constituted a defect in the physical condition of public property, thereby meeting the strict test for dangerous condition under Kanagawa v. State By and Through Freeman, 685 S.W.2d 831 (Mo. banc 1985). The claim was clearly for negligent maintenance of the stop sign rather than improper design. Neither the City of St Louis, nor the *amicus curiae*, argued that claims for negligent design did not fall within the limited waiver of sovereign immunity. Yet, the majority still chose to rule the case as though design had been the contested issue.

The majority opinion in Donahue observed that the 1978 enactment of Section 537.600, RSMo., “restored total immunity to all governmental entities relating to defects in roads and highways.” *Id.* at 52. That was clearly incorrect, as the statute only reinstated “such sovereign or governmental tort immunity as

existed at common law”, and at common law a municipality could be held liable for failure to keep its streets in a reasonably safe condition for travel. Watson v. Kansas City, *supra*. Further, nothing in the language of the original statute suggested that highway defects were excluded from the “dangerous condition” exception.

The majority also found that one of the purposes of the 1985 amendment to Section 537.600 was to permit such suits for highway defects, including claims for negligent design. The opinion cited Aylward v. Baer, 745 S.W.2d 692 (Mo. App. 1987), and State ex rel. Missouri Highway and Transportation Commission v. Ryan, 741 S.W.2d 828 (Mo. App. 1987), as two cases where it could be “inferred” that the appellate courts would have reached the same interpretation of the statute, had they been permitted to do so. Donahue, *supra*, at 52. Neither of those cases discussed whether a cause of action existed for negligent design. To the contrary, both were decided on the fact the respective public entities had not purchased liability insurance, pursuant to Bartley v. Special Road District, 649 S.W.2d 864 (Mo. banc 1983). Consequently, the more logical view is that claims for highway defects and negligent design were cognizable under the 1978 version of the statute, if a dangerous condition was created and the public entity had liability insurance, and that the 1985 amendment merely recognized a “state-of-the-art” defense for highways designed prior to September 12, 1977.

After Donahue, the courts of this state have held public entities to be potentially liable or affirmed judgments in two types of traffic control cases. The

first have involved claims for failure to maintain existing devices. Examples of this include Fox v. City of St. Louis, 823 S.W.2d 22 (Mo. App. 1991) – failure of the city to reinstall a stop sign at an intersection; and Williams v. Missouri Highway and Transportation Commission, 16 S.W.3d 605 (Mo. App. 2000) – failure to maintain power to a traffic signal.

Another type of traffic control case giving rise to liability has involved claims that roads were dangerous because of inadequate warning or guidance for motorists. In each such case, however, there were allegations or evidence of a hazard (something more than the possibility of another driver making a mistake) that could have arguably been made safer through additional signing. These include Cole v. Missouri Highway and Transportation Commission, 770 S.W. 2d 296 (Mo. App. 1989) – sudden curve that obscured a stop sign and intersection; Wilkes v. Missouri Highway and Transportation Commission, 762 S.W. 2d 27 (Mo. banc 1998) – icy bridge obscured by a curve; Smith v. Missouri Highway and Transportation Commission, 826 S.W. 2d 41 (Mo. App. 1992) – inadequate sight distance for intersection of a county road and state highway at a hillcrest; Ielouch v Missouri Highway and Transportation Commission, 972 S.W. 2d 563 (Mo. App. 1998) – inadequate sight distance for school driveway entrance to state highway at a hillcrest; and Nagy v. Missouri Highway and Transportation Commission, 829 S.W. 2d 648 (Mo. App. 1992) – improperly placed traffic signal and failure to warn of newly opened lanes of cross traffic. The courts have also distinguished such cases in Johnson v. City of Springfield, *Id.*

However, despite the fact that courts seem confused about the holding in Donahue, Donahue holds for the notion that a plaintiff, in a case involving a fallen stop sign, must plead that the stop sign was the result of a negligent, defective, or dangerous design of a road or highway. Respondent in this case did not allege anything about the negligent, defective or dangerous design of the intersection itself. He only alleged the failure to maintain or absence of a stop sign created a dangerous condition of the property. That does not state a claim for negligent highway design under Section 537.600. Seemingly, Donahue required him to have done so. Failing to do so requires this Court to reverse or remand this claim for plaintiff's failure to sufficiently plead a cause of action under § 537.600.

On the same day that this Court decided Donahue, it also decided Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988). In Alexander, this Court held that although prior caselaw indicated "dangerous condition" referred only to defects in the physical condition of the public property, it was holding that a dangerous condition not only included intrinsic defects in the property but also by the dangerous condition created by the positioning of various items of property without the intervention by third parties. This appeared to be a separate and distinct standard when analyzing "§ 537.600" cases. Essentially, when analyzing a case in which Alexander controls, it involves applying the four prong criteria under the first sentence of § 537.600.1(2). In defective design cases wherein Donahue controls, the analysis had been made under the second sentence of

§537.600.1(2). Because this case involves a fallen stop sign as in Donahue, it appears that Respondent should have pled facts under the second sentence of § 537.600.1(2), i.e. that there was a negligent, defective, or dangerous design of a road or highway. Respondent did not do this. As such, Respondent did not sufficiently plead a compensable case and the holding of the trial court must be reversed.

III. THE SUPREME COURT SHOULD CHOOSE TO EXERCISE ITS DISCRETION TO PROVIDE A PLAIN ERROR REVIEW OF APPELLANT'S ISSUE INVOLVING JURY INSTRUCTIONS EVEN THOUGH APPELLANT FAILED TO OBJECT TO THE INSTRUCTIONS AT TRIAL PURSUANT TO RULE 70.03 BECAUSE IT IS EVIDENT, OBVIOUS AND CLEAR THAT THE TRIAL COURT ERRED IN ISSUING TO THE JURY ITS INSTRUCTION NUMBER FIVE AND THE VERDICT DIRECTOR ON COUNT OF RESPONDENT'S PETITION, BECAUSE THOSE INSTRUCTIONS MISSTATE MISSOURI LAW IN CONTRADICTION OF THE MISSOURI APPROVED INSTRUCTIONS, IN THAT THEY PERMITTED THE JURY TO BECOME CONFUSED WHICH RESULTED IN MANIFEST INJUSTICE OR A MISCARRIAGE OF JUSTICE, PREJUDICING APPELLANT.

A. Plain Error

Appellant requests this Court to consider exercising its discretion to provide a plain error review of its issue regarding jury instructions pursuant to Rule 84.13(c). Appellant concedes that it did not properly preserve, for appellate review, its claim of instructional error with the Trial Court. Rule 70.03 states that objections to erroneous jury instructions shall be made by counsel before the jury retires to consider its verdict. In this case, although objections were made “off the record” during the instruction conference in chambers, they were not objected to “on the record” before the jury retired to consider its verdict. (TR 758-61) However, objections were made in Appellant’s Motion for a New Trial. (LF 72-97, 91-94) It should be noted that attorney for Appellant was of the belief that his arguments and objections concerning the jury instructions made before Respondent’s counsel and the trial court in chambers would be part of the record on appeal. Plaintiff only learned that the jury instruction conference made in chambers the evening before the instructions were submitted to the jury was not part of the record when it received the transcript on appeal. Appellant was never informed that the jury instruction conference made in chambers was not part of the record. Appellant’s attorney made his objections to the instructions in that conference. Respondent’s counsel was well aware that Appellant’s counsel was not in agreement to the proposed instructions. Appellant counsel did not object to the instructions “on record” the following morning because he thought his objections made in chambers, which were overruled by the trial court in chambers, would be part of the transcript for appeal. The trial court stated, in chambers, after

adding the conflicting instructions to Respondent's proposed instructions, that if Appellant's counsel did not cite a specific case stating that the proposed instructions were in error that it would sustain the Respondent's instructions. At that time, Appellant's counsel did not have a case to cite. This Court in State v. Baker, 103 S.W.3d 711, 717 (Mo. banc 2003), held that when both the trial court and opposing counsel understood that appellant did not intend to waive issue contained in the motion that the otherwise inadequate objection was sufficient to preserve the issue for appellate review. As in Baker, the trial court and opposing counsel were well aware that appellant was not waiving its objections to the proposed jury instructions.

“Plain error affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.” French v. Mo Highway & Transp. Comm'n, 908 S.W.2d 146, 150 (Mo. App. 1995). “In determining whether to exercise its discretion to provide plain error review, the appellate court looks to determine whether there facially appear substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice.” State v. January, 176 S.W.3d 187, 193 (Mo. App. 2005); Cohen v. Express Financial Services, Inc., 145 S.W.3d 857, 864 (Mo. App. 2004). Before an instructional error is reversible, the error found must have prejudiced the appellant. Id. To establish that an error involving a verdict director or a verdict form rises to the

level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury's verdict. Lewis v. State, 152 S.W.3d 325, 328 (Mo. App. 2004).

B. Instructional Error

When there is an applicable MAI instruction its use is mandatory. Karnes v. Ray, 809 S.W.2d 738, 740 (Mo. App. 1991). "A modification of an M.A.I. instruction constitutes error, its prejudicial effect to be judicially determined." Rule 70.02(c). "All deviations from the straight and narrow path prescribed in MAI will be presumed prejudicially erroneous unless it is made perfectly clear that no prejudice has resulted." Venable v. Lattner, 713, S.W.2d 37, 40 (Mo. App. 1986); citing, Murphy v. Land, 420 S.W.2d 505, 507 (Mo. 1967). An instructional error will result in reversal only when the error was prejudicial. Hein v. Oriental Gardens, Inc., 988 S.W.2d 632, 634 (Mo. App. 1999). An instructional error is prejudicial if it misdirects, misleads, or confuses the jury. Id.

MAI 31.16 states in whole:

Your verdict must be for Plaintiff if you believe:

First, (*here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded"*), and as a result the Defendant's (*describe property, such as "gymnasium floor" or "table saw"*) was not reasonably safe, and

Second, Defendant knew or by using ordinary care could have known of this condition in time to [remedy] [warn of] such condition, and

Third, Defendant failed to use ordinary care to [remedy] [warn of] such condition, and

Fourth, as a direct result of such failure, Plaintiff sustained damage.

*** [unless you believe Respondent is not entitled to recover by reason on Instruction Number ____ (*here insert number of affirmative defense instruction*)].**

Instruction Number 5, which was submitted to the jury in this case as the verdict director, stated in whole:

Your verdict must be for Plaintiff if you believe:

First, there was no stop sign for northbound traffic on Stillhouse Road at the intersection of Stillhouse Road and R.D. Mize Road at approximately 9:45 p.m. on September 1, 2002 and as a result the intersection at said location was not reasonably safe, and

Second, Defendant knew or by using ordinary care could have known of this condition in time to remedy such condition, and

Third, Defendant failed to use ordinary care to remedy such condition, and

Fourth, such failure directly caused or directly contributed to cause Plaintiff to sustain damage.

The phrase “ordinary care” as used in this instruction means that degree of care that an ordinarily careful person would use under the same or similar circumstances. (Emphasis Added).

Additionally, Converse Instruction Number 6, which was submitted to the jury in this case stated in whole:

Your verdict must be for Defendant unless you believe that Plaintiff failed to use ordinary care as submitted in Instruction Number 5 and such failure directly caused or directly contributed to cause damage to Plaintiff. (Emphasis Added)

Instruction Number 7, which was submitted to the jury in this case as the damages instruction, stated in whole:

If you find in favor of Plaintiff, then you must award Plaintiff such sum as you believe will fairly and justly compensate Plaintiff for any damages you believe Plaintiff sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence. (Emphasis Added).

Appellant alleges it was reversible error to allow Respondent to modify the fourth paragraph in jury instruction number five in that it deviated from MAI 31.16. In the fourth paragraph of MAI 31.16, it specifically states that the standard of proof Respondent must show, in the dangerous condition of property claim, before he is entitled to damages is, “as a ‘direct result’ of such failure, Respondent sustained damage.” The Trial Court allowed the burden of proof for Respondent in the verdict director to be lessened by allowing, “such failure ‘directly caused or directly contributed to cause’ Respondent to sustain damage.” This clearly lessened Respondent’s burden of proof as established by MAI 31.16 and Mo. Rev. Stat. § 537.600, (2004). There are no laws or standards which allow Respondent to lessen his burden of proof when attempting to establish a Appellant waived its sovereign immunity. This error carried over to Appellant’s converse instruction in Instruction number six in that the Court mandated the same language. Additionally, this language differed from Instruction Number 7 which

used the language “direct result”. To allow such a deviation not only confused the jury but could only be prejudicial towards Appellant.

There can be no question that allowing such a deviation prejudiced Appellant in this matter. Although Respondent presented absolutely no evidence that there was a dangerous condition of property or that Appellant had actual or constructive notice of the condition in sufficient time prior to the injury to have taken measures to protect against the alleged dangerous condition and that Respondent’s injuries were the direct result of the alleged dangerous condition, the jury came back with a verdict in favor of Respondent. There can be no question that the Trial Court’s error was evident, obvious and clear but there is also no question that the error resulted in manifest injustice or a miscarriage of justice. It is obvious that the jury was confused as to what burden it was to consider. There is absolutely no question that there is an obvious distinction between “direct result” and “directly caused or directly contributed to cause”. The differences in the burden of proof language used in the verdict director, converse and damages instructions, (5, 6 & 7), no doubt confused the jury and prejudiced the Appellant. Based upon the evidence submitted at trial and the burden of proof put on Respondent, it should be clearly apparent to this Court that the instructional error affected the jury’s verdict. In Carlson v. K-Mart Corp., 979 S.W.2d 145, 147-48 (Mo. banc 1998), this Court reversed the trial court's judgment when conflicting causation standards were used in the verdict director and the damages instruction. This Court noted that "the phrase 'direct result' is sufficiently inconsistent with 'directly caused or contributed

to cause' to produce potentially inconsistent results where the phrases are used in different instructions." Id. at 148.

This case is directly on point with the Carlson case. "Direct result" and "Directly caused or directly contributed to cause" are not the same. One lessens Respondent's burden of proof. As stated earlier, Respondent had the burden of proving that the alleged defective condition directly caused or was the proximate cause of Respondent's injury. This is more than just contributing to cause. Additionally, when compared to the damages instruction the language contained therein implies that the jury was to only award Respondent damages if Appellant's actions were the "direct result" of the evidence. (It should be noted that the trial court judge in this case, Michael W. Manners, was the attorney representing Appellant in Carlson who successfully argued that the inconsistent jury instructions were improper. Therefore, there is no question that the trial court was fully aware that the instructions were improper.)

It appears that the court allowed language contained in a comparative fault instruction like MAI 37.01 or multiple causes of damage contained in MAI 19.01. The court in this case specifically would not allow Appellant to use a comparative fault instruction. Changing the fourth paragraph in the verdict director to reflect language in a comparative fault or multiple damages instruction is just plain error, especially when it was combined with the direct language of the damages instruction. As the Carlson Court stated,

“it is . . . confusing to instruct the jury that, on the one hand, a Appellant is liable if he ‘directly caused or contributed to cause damage’ to the Respondent, but that the measure of such damage is only that which ‘directly resulted’ from such conduct. If the ‘direct result’ language is confusing in the verdict director when there are multiple possible causes of injury, it is equally so in the damages instruction.”

Id. at 148. The trial court had no authority to allow Respondent to modify MAI 31.16 and have it conflict with its damages instruction. The confusion engendered by the conflict between the instructions prejudiced Jackson County, entitling it to a new trial.

Although the court in Cohen v. Express Financial Services, Inc., 145 S.W.3d at 865 (Mo. App. 2004), ruled that the plain error rule should be used sparingly and does not justify a review of every trial error that has not been properly preserved for appellate review, it also stated that plain error should be used when it is readily apparent to the appellate court that the instructional error affected the jury’s verdict. State v. January, 176 S.W.3d at 193-94. This is such a case. As this Court in Carlson v. K-Mart, 979 S.W.2d at 148 stated, when reviewing instructional error almost exactly like this case, “The damage instruction given here should have been modified to track the verdict directing instruction, and the confusion engendered by the conflict between the instructions prejudiced Ms. Carlson, entitling her to a new trial.” There is no doubt that Appellant Jackson County was prejudiced by the instructional error. Respondent

failed to prove that Jackson County waived its sovereign immunity. Had it not been for the prejudicial and confusing effect of the jury instructions, a Respondent's verdict would not be had. This Court should not allow the undersigned's inexperience and ignorance on preserving appellate review for jury instructions, especially when Respondent knew Appellant was not waiving its objections to the jury instructions, allow a miscarriage of justice or manifest injustice to occur. The plain error of the Trial Court justifies a reversal of the jury's verdict and a new trial should be granted.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the trial court and grant Appellant a judgment notwithstanding the jury's verdict and/or order a new trial.

IN THE SUPREME COURT OF MISSOURI

DOUGLAS A. HENSLEY, JR.,)
)
) Respondent,)
)
) vs.) SC88176
)
JACKSON COUNTY, MISSOURI,)
)
) Appellant.)

CERTIFICATE OF COMPLIANCE

COMES NOW the undersigned Randell G. Collins, counsel for Appellant Jackson County, Missouri, and hereby certifies to this Court, pursuant to Rule 84.06(c) of the Rules of Civil Procedure that this Brief complies with the limitations in Rule 84.06(b) and that said Brief is composed of 13,640 words, including the certifications attached.

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) Respondent,)
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) vs.) SC88176
)
) JACKSON COUNTY, MISSOURI,)
)
) Appellant.)

CERTIFICATE OF DISK

COMES NOW the undersigned Randell G. Collins, counsel for Appellant, Jackson County, Missouri, and hereby certifies to this Court, pursuant to Rule 84.06(g) of the Rules of Civil Procedure that the disk filed herewith has been scanned for viruses and is virus free.

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) vs.) SC88176
)
) JACKSON COUNTY, MISSOURI,)
)
) Appellant.)

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant’s Brief were hand-delivered,
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