

**IN THE MISSOURI SUPREME COURT**

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**CAUSE NO. SC87513**

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**KIMBERLY HODGES**

RESPONDENT/CROSS-APPELLANT,

v.

**CITY OF ST. LOUIS**

APPELLANT/CROSS-RESPONDENT.

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

**HONORABLE EVELYN M. BAKER**

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**SECOND BRIEF OF APPELLANT/CROSS-RESPONDENT**

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**REPLY BRIEF OF APPELLANT**

**POINTS RELIED ON**

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

*Johnson v. Bi-State Development Agency*, 793 S.W.2d 864 (Mo. banc 1990)

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

§ 84.010, RSMo. (2000)

§ 84.090, RSMo. (2000)

**II. THE TRIAL COURT ERRED IN DENYING THE CITY’S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE POLICE OFFICER WALKER WAS AN EMPLOYEE OF A SEPARATE STATE ADMINISTRATIVE AGENCY, THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, AND WAS NOT ACTING IN A DUAL AGENCY CAPACITY FOR THE CITY OF ST. LOUIS, SO AS TO MAKE THE CITY LIABLE FOR WALKER’S TORTIOUS ACTS.**

*State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524 (1899)

*American Fire Alarm Co. v. Board of Police Com’rs of Kansas City*, 285 Mo. 581, 227

S.W. 114 (1920)

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

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

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

§ 537.600, RSMo. (2000)

*McNeill Trucking Co. v. Missouri State Highway and Transp. Com’n*, 35 S.W.3d 846, 848 (Mo. banc 2001)

*Best v. Schoemehl*, 652 S.W.2d 740 (Mo. App. E.D. 1983)

## ARGUMENT

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

This point is directed to Point II of Respondent’s Brief, on the issue of whether there was sufficient evidence to make a submissible case that Police Officer Walker was an agent of the City of St. Louis.

The relationship of principal-agent is for the jury only “when, from the evidence adduced on the question, there may be a fair difference of opinion as to the existence of the relationship.” *Johnson v. Bi-State Development Agency*, 793 S.W.2d 864, 867 (Mo. banc 1990). The City submits that, given the evidence presented, there could be no fair difference of opinion on whether the relationship existed. The evidence presented showed no control or right to control by the City of St. Louis over police officers in the St. Louis Metropolitan Police Department (“SLMPD”), including Officer Walker.

Under principles of agency law, “the touchstone is whether the party sought to be held liable has the control or right to control the conduct of another in the performance of an act.” *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 764 (Mo. banc 1996). This “control or right to control must extend to the physical activities ... or to the details of the manner in

which the work is done ...” *Id.*, citing *Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128, 132 (Mo. banc 1993). “If there was no right to control there is no liability; for those rendering services but retaining control over their own movements are not servants.” *Wilson v. St. Louis Area Council*, 845 S.W.2d 568, 570 (Mo. App. E.D. 1992).

Plaintiff’s argument, Respondent’s Brief, at 21, that because state statute requires police officers to enforce laws passed by the Board of Aldermen, the Board of Aldermen thereby has the authority to direct activities and assign duties to police officers by the passage of ordinances, is a syllogism. First, it seems obvious that the statute, not City ordinances, are actually directing police activities. That the City can pass an ordinance for preserving public order, and the statute requires police officers to enforce it, does not mean the City is directing police activities. Second, since § 84.090, RSMo.<sup>1</sup> and its subsections give the Police Board plenary control over the operation of the Police Department and since § 84.010 prohibits any ordinance that would “in any manner, conflict or interfere with the powers or the exercise of the powers of the boards of police commissioners,” the City can never exercise the kind of control over police officers so as to make them agents of the City.

Plaintiff’s argument, Respondent’s Brief, at 25-26, that police officers are agents of the City because the City pays the police officers, misconstrues the obligations of Chapter 84. Under Chapter 84, the City is responsible for funding the Police Department based on a certified estimate of expenses from the Police Board, and the Board of

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<sup>1</sup> All references are to RSMo. (2000).

Aldermen is “hereby required to set apart and appropriate the amount so certified, payable out of the revenue” of the City. § 84.210, RSMo. But the City has no control over *how* the Police Board spends the money. The decisions on how much to pay any officer, what kinds of police vehicles to buy, what kind of insurance to purchase, to the extent they are not specified under Chapter 84, are decided by the Police Board. Moreover, citing the requirement that the City fund the Police Department does not address the fundamental hurdle for Plaintiff, showing that the City controls, or has the right to control, police officers. If merely providing funding established agency, then that would mean the Police Department, as well as the Police Board that runs it, was an agency of the City. This concept has been repudiated by the courts of this State, most recently (and definitively) in *Smith v. State*, 152 S.W.3d 275, 278 (Mo. banc 2005), holding that the Police Board is a “state agency.”

That the City does not control SLMPD officers is manifest from the testimony of the officers called in Plaintiff’s case. Not one SLMPD officer testified that any City official or any City policy ever told or provided instruction, written or otherwise, to the officers as to how to do their job.

Plaintiff has suggested that some cases in Missouri analyzing the principal-agent relationship have looked to the Restatement (Second) of Agency, § 220 for guidance. *See, e.g., Bargfrede v. American Income Life Ins. Co.*, 21 S.W.3d 157 (Mo. App. W.D. 2000). If such an analysis were engaged, it would show a majority of factors indicating that this police officer was not the City’s agent:

- (a) The City did not exercise any control over the details of the officer’s work;

- (b) Police officer is clearly a distinct occupation or business;
- (c) The work of police officers in the City of St. Louis is not usually (actually, is not ever) done under the direction of any official of the City;
- (d) Police officers have unique skill and training in their occupation;
- (e) The City does not supply the instrumentalities and tools for police officers; the instrumentalities and tools are either supplied by the Police Department with City funds, or by the officers themselves;
- (f) Police officers generally have long-term employment, in years, for the Board of Police Commissioners;
- (g) Police officers are salaried employees pursuant to state statute;
- (h) Law enforcement is not part of the regular business of the City of St. Louis, which by law is prevented from forming its own police force;
- (i) There was no evidence to show that the City, through any City official, believed it created the relationship of master and servant with the police officer;
- (j) The City is in “business,” albeit a business separate and apart from the police officer’s.

Taken together, these facts confirm that the City did not have control or right of control over SLMPD officers, so as to make them agents.

Plaintiff’s citation, Respondent’s Brief, at 27, to *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. E.D. 2002) is not remotely analogous to the situation *sub judice*. First, *Scott* is an agency case in the context of healthcare and it has been suggested that agency analysis in the field of healthcare is distinct to the point of

constituting “a substantial body of special law.” *Keller v. Missouri Baptist Hosp.*, 800 S.W.2d 35, 37 (Mo. App. E.D. 1990). In *Scott*, the appellate court found that a hospital was vicariously liable for the negligence of a radiologist. In so finding, the opinion listed fifteen (15) separate evidentiary items that showed the hospital controlled or had the right to control the radiologist’s actions, including: setting the qualifications for the radiologist to provide services at the hospital; requiring the radiologist to submit reports regarding services rendered to the hospital; setting the prices for the radiologist’s services; having the right to terminate the radiologist; deciding what types of supplies the radiologist used; and having an exclusive agreement with the radiologist’s corporate employer to supply all of the hospital’s radiologists. All of these factors are indicia of control by the hospital over the physical activities of the radiologist.

By contrast, Plaintiff’s references in the case at bar fail to show the City’s control or right to control the physical activities of SLMPD officers: that officers by state statute have authority to enforce City ordinances; that the form of the Uniform Citation (prescribed by Rules 37.33 and 37.42 and Form 37.A) indicates it is issued on behalf of the City; that the officers do police work only for the City; that their compensation, equipment, and insurance are funded by the City; that their uniforms and vehicles show some form of the words “City of St. Louis” on them. Not one of these references indicates that the City controls or has the right to control the physical conduct of the officers. Even giving Plaintiff the benefit of every reasonable inference, Plaintiff’s evidence showed that the Police Department and its officers rendered services to the City, but retained their own control over how those services were performed. This does not

make them agents of the City. *Wilson, supra*, at 570.

Moreover, Plaintiff's reference to *Scott's* verbiage that simply because a hospital does not have the right to "stand over a doctor's shoulder" would not preclude a finding of agency, illustrates how dissimilar a healthcare context is from the current situation. As contrasted with the situation of a physician, whose treatment of a patient is based on his own independent decision as to manner and method, the evidence in the case at bar established that the manner and method of a police officer's pursuit was based on policy established by the Chief of Police, by authority of the Police Board. *Testimony of Major Paul Nocchiero, Tr.*, p. 211, l. 5 - 16. Thus in the current context, the police officer has an employer setting policy, instructing him how to respond to situations within his employment, and with the authority to terminate his employment if he does not act appropriately. The City has no such authority. Therefore, the officer cannot qualify as the agent of the City.

Based on the foregoing, there was insufficient evidence presented in Plaintiff's case that established a submissible issue on the City controlling, or having the right to control, the Police Department or its officers, including Officer Walker. The City's Motion for Judgment Notwithstanding Verdict should have been granted.

**II. THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE POLICE OFFICER WALKER WAS AN EMPLOYEE OF A SEPARATE STATE ADMINISTRATIVE AGENCY, THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, AND WAS NOT ACTING IN**

**A DUAL AGENCY CAPACITY FOR THE CITY OF ST. LOUIS, SO AS TO MAKE THE CITY LIABLE FOR WALKER'S TORTIOUS ACTS.**

This point is directed to Point I of Respondent's Brief, on the issue of whether Police Officer Walker was the dual agent of both the City of St. Louis and the Board of Police Commissioners of the City of St. Louis.

Plaintiff claims that the negligent conduct of a police officer operating a motor vehicle generally states a claim for *respondeat superior* liability against the city the officer serves, but that the cities of St. Louis and Kansas City attempt to avoid such liability on grounds that the boards of police commissioners are the actual employers. Respondent's Brief, at 7. Plaintiff contends an SLMPD officer such as Officer Walker has a "dual agency" relationship with both the Police Board and the City of St. Louis, which Plaintiff submits should subject both entities to vicarious liability.

Initially, while Plaintiff cites *Brickner v. Normandy Osteopathic Hospital, Inc.*, 746 S.W.2d 108, 113 (Mo. App. E.D. 1988) for the proposition that a person may be the servant of "two masters simultaneously," the relationship of the servant to the master in *Brickner* is significantly different from the one involved here. *Brickner* held that a hospital which was the general employer of a surgical resident could be held vicariously liable for the resident's negligence, even though an attending doctor had supervisory authority over the resident, because the evidence established the hospital never completely abandoned control over the resident. But in *Brickner*, the hospital was acknowledged as the "general employer" of the resident, and attempted to utilize the "borrowed servant doctrine" as an affirmative defense, claiming that the resident was the

borrowed servant of the attending doctor. *Id.* at 112. Then, and only then, was there a discussion of a servant serving two masters simultaneously. In contrast, in the case *sub judice*, the City was never the general employer of Officer Walker; the Board of Police Commissioners was his general employer. § 84.100, RSMo. The language of *Brickner* states that a non-general employer would be liable only in circumstances where the servant “was solely under the control and serving only the interest of” the non-general employer. *Id.* at 115.

On the issue of control over SLMPD officers, in *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524 (en banc 1899), this Court discussed the legislation creating the Board of Police Commissioners:

Since the year 1861 a metropolitan police system has been established in the city of St. Louis. The original act will be found in the Laws of Missouri, 1860-61, p. 446. ... As indicative of the purpose of the Legislature it may be noted that section 14 of the Act of 1861 provided for the organization of the board and notification of the city authorities and continued: “From and after the first meeting aforesaid, the whole of the then existing police force in the city of St. Louis, both officers and men, shall pass under the exclusive management and control of the said board, and be subject to no other control, and entitled to receive neither orders or pay (except arrearages then due) from any other authority” ...

(Emphasis added.) 54 S.W. at 525. Thus, the predecessor of the current Chapter 84 showed that the City of St. Louis had no control over SLMPD officers.

Plaintiff alternatively seeks to establish the principal-agent relationship by citing language within § 84.330, RSMo. that police officers in St. Louis “are hereby declared to be officers of the said cities.” Respondent’s Brief, at 8-9. The City showed in its opening Brief that “officer” is not synonymous with “agent,” as shown by the language of § 84.010 that uses both terms, not interchangeably, but rather, as *alternatives*: “... the boards of police or any officer, *or* agent or servant thereof or thereunder ...”

Furthermore, by taking selected words out of the entire statutory verbiage of § 84.330, Plaintiff has missed the legislative intent behind the provision. The entirety of § 84.330 reads:

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

(Emphasis added.) When reading the entirety of the statute, it seems apparent that the legislative intent was not to determine whether police officers were agents of one entity or another; rather, from reading the remainder of the statute, it becomes clear that the intent was to show that police officers had the authority to exercise police powers for offenses against state law as well as against city ordinances. *See American Fire Alarm Co. v. Board of Police Com’rs of Kansas City*, 285 Mo. 581, 227 S.W. 114, 116-117

(1920) (predecessor to § 84.330 “constitute[d] a part of the measures adopted by the State to preserve peace, and protect the legal rights of persons.”).

Plaintiff cites to *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S.W. 240 (1886) as precedent that police officers are agents of the City. A careful reading of *Carrington* reveals that the analysis on this point was *obiter dictum* and furthermore, to the extent it had any precedential value, it has been *sub silentio* overruled. First, as the opinion itself noted, whether or not the officer was an agent of the City, “it is the unquestioned duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon ...” 1 S.W. at 242. Therefore, analysis of the officer’s status was irrelevant to the existence of this duty. Second, the opinion plainly proceeds on the underlying premise “that the police force constitutes a department of the city government.” *Id.* at 241. That concept has since been discredited and overruled many times, this Court having now held on multiple occasions that the Board of Police Commissioners, employer of the police officers, is a state agency. *See, e.g., Smith v. State, supra; State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982); *State ex rel. Sanders v. Cervantes*, 480 S.W.2d 888, 891 (Mo. banc 1972). The *Smith* decision stated, “[t]he conclusion that the Police Board is a state agency is further supported by more than a century of case law.” 152 S.W.3d at 278. That century of case law has occurred since *Carrington* was decided.

*State ex rel. Wander v. Kimmel*, 256 Mo. 611, 165 S.W. 1067 (en banc 1914), cited by Plaintiff, is inapposite. The issue there was not whether police officers were agents of the City, but whether a provision which excepted witness fees for “city

officers” applied to police officers in the St. Louis Metropolitan Police Department. The court held that since a statute (the predecessor of § 84.330) stated that police officers were “officers of the said cities,” that they were “city officers.” This was simply based on the plain language of the statute. The case provides no authority for the quantum leap in reasoning that “city officer” also means “city agent.”

In conclusion, Plaintiff’s contention, Respondent’s Brief, at 17, that “the outcome of this case is not governed by common law tests of ‘control’ or ‘payment’ but is instead ‘dictated by the express language of the statute’ — Section 84.330 — as set forth above,” is completely illogical, because nothing in the express language of 84.330 states that SLMPD officers are City agents. The trial court should have granted the City’s Motion for Judgment Notwithstanding Verdict.

**III. THE TRIAL COURT ERRED IN DENYING THE CITY’S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE EVEN IF PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT OFFICER WALKER WAS AN AGENT OF THE CITY, THE MISSOURI SOVEREIGN IMMUNITY STATUTES, §§ 537.600 - .620, RSMO., PROVIDED IMMUNITY TO THE CITY FOR TORT ACTIONS, AND THE EXPRESS WAIVER OF THAT IMMUNITY APPLIES ONLY TO INJURIES RESULTING FROM “THE NEGLIGENT ACTS OR OMISSIONS BY PUBLIC EMPLOYEES ARISING OUT OF THE OPERATION OF MOTOR VEHICLES ... WITHIN THE COURSE OF THEIR EMPLOYMENT,” AND THE EVIDENCE ESTABLISHED THAT OFFICER WALKER WAS AN EMPLOYEE**

**OF THE BOARD OF POLICE COMMISSIONERS, NOT THE CITY, AND THE OPERATION OF THE MOTOR VEHICLE DID NOT ARISE WITHIN THE COURSE OF EMPLOYMENT WITH THE CITY.**

This point is directed to Point III of Respondent’s Brief, concerning whether Police Officer Walker, if he could be deemed the “agent” of the City of St. Louis, was within the description of the express waiver of sovereign immunity in § 537.600.1(1), RSMo. as a “public employee” of the City, “within the course of employment” for the City.

The City has sovereign immunity from tort actions except for those within the express waivers of § 537.600, RSMo. Section 537.600.1(1) provides a waiver for:

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

“The liability of a public entity for torts is the exception to the general rule of immunity for tort and it is incumbent upon a plaintiff who seeks to state a claim for relief to specifically allege facts establishing that an exception applies.” *Best v. Schoemehl*, 652 S.W.2d 740, 743 (Mo. App. E.D. 1983), citing *Burke v. City of St. Louis*, 349 S.W.2d 930 (Mo. 1961). *Best* also stated:

The St. Louis Board of Police Commissioners was created by the Missouri Legislature (Act of March 27, 1861, 1861 Mo. Laws 446) and presently governs the St. Louis police force under sections 84.010 to 84.340, RSMo.

1978. *State of Missouri ex rel. Homer E. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982). The St. Louis Board of Police Commissioners is a public entity for purposes of § 537.600 and, as such, it may be liable under the doctrine of respondeat superior for the negligent acts of its employees arising out of the operation of a motor vehicle.

*Id.* at 742.

Thus, precedent has established that police officers are employees of a separate public entity, the Police Board. They cannot be characterized as “employees” of the City for purposes of the sovereign immunity waiver, nor can they be characterized as “acting within the course of their employment” for the City.

Plaintiff contends that “the City’s argument the Officer was not a ‘public employee’ within the meaning of § 537.600.1(1), and that this express waiver of immunity does not apply in this case, is contrary to the intent of the statute and the case law interpreting the statute.” Respondent’s Brief, at 33. This statement contains several errors. First, the City has not claimed Officer Walker was not a “public employee”; the City acknowledges Walker was a public employee — of his public employer, the Police Board. Second, while intent of the legislature is normally of paramount concern in statutory interpretation, because this concerns the waiver of sovereign immunity, the statute must be strictly construed. *McNeill Trucking Co. v. Missouri State Highway and Transp. Com’n*, 35 S.W.3d 846, 848 (Mo. banc 2001). Third, to the extent legislative intent comes into consideration, the City submits that intent would not favor interpreting

a waiver of sovereign immunity for the torts of employees of another governmental entity. Plaintiff has focused on the words “public employees,” almost to the exclusion of the remainder of the verbiage in the waiver: “acting within the course of their employment.”

Plaintiff’s citation to *Bowman v. State of Missouri*, 763 S.W.2d 161 (Mo. App. W.D. 1988), fails to note the very important differences between that case and this one. In *Bowman*, the juvenile in custody of the Division of Youth Services was not shown to be the employee of another entity, as was Police Officer Walker. Likewise, the *Bowman* court’s statement that the statutory waiver must be construed in light of the statute’s purpose to compensate those injured by the negligent operation of motor vehicles by governmental employees, is weakened by the evidence here, showing Plaintiff has already been compensated for injury. In fact, Plaintiff has been compensated twice for the same injury, as two separate amounts, each representing the cap of sovereign immunity liability, have already been paid: once on behalf of the officer himself, and once on behalf of his employer, the Police Board. At some point, the *Bowman* opinion’s interpretation of legislative intent must recognize other legislative intent behind § 537.600:

The conclusion reached is that the legislative intent was not to carve out legislative exceptions to what under *Jones* became a judicial abrogation of sovereign immunity, but was, rather, to overrule *Jones* and to carve out limited exceptions to a general rule of immunity.

*State ex rel. Cass Medical Ctr. v. Mason*, 796 S.W.2d 621 (Mo. banc 1990), quoting *Bartley v. Special School District of St. Louis Cty.*, 649 S.W.2d 864, 868 (Mo. banc 1983).

On the basis of the foregoing, Police Officer Walker would not fit within that “limited exception” to the general rule of sovereign immunity, in that, with respect to the subject matter of the lawsuit, he was not a “public employee” of the City, nor was he “acting with the course of employment” for the City. The City’s Motion for Judgment Notwithstanding Verdict should have been granted.

### **SUMMARY OF REPLY BRIEF**

Plaintiff did not present sufficient evidence that SLMPD police officers, and particularly Officer Walker, were agents of the City, to have that issue submitted to a jury. To have made a submissible case, Plaintiff had the burden to prove that the City controlled, or had the right to control, this police officer’s physical conduct. Plaintiff never proved this. Plaintiff’s alternative basis for agency, based on § 84.330, RSMo., also fails; the statute never says that SLMPD officers are agents of the City, and the clear purpose of the statute is to recognize that SLMPD officers have the power to arrest under City ordinances, as well as State statutes. Even if this Court were to overturn well-established precedent by determining that this SLMPD officer was the City’s agent, as an “agent,” rather than employee, the officer does not fit within the waiver of sovereign immunity, because vis-a-vis the City, the officer was not an “employee” of the City, and was not “within the course of employment” for the City. On any of the bases offered, the

trial court should have granted the City's Motion for Judgment Notwithstanding Verdict. The decision of the trial court must be reversed and remanded, with instructions to enter judgment for the City.

**CROSS-RESPONDENT’S BRIEF RESPONDING TO CROSS-APPEAL**

**STATEMENT OF FACTS**

The City supplements the Statement of Facts submitted by Plaintiff Kimberly Hodges with the following.

The City first asserted the applicability of the Sovereign Immunity Statutes in its Answer to Plaintiff’s First Amended Petition, Affirmative Defenses ¶ 2 (L.F., 26-27). Plaintiff’s Reply to the Answer stated *in toto* as follows:

Comes now Plaintiff and for her Reply to Defendants’ Answers to Plaintiff’s First Amended Petition states:

1. Defendants have invoked the provisions of Sections 537.600, 537.610, and 537.615, **R.S. Mo., et seq.**, all of which are invalid because these provisions violate plaintiff’s fundamental Constitutional rights guaranteed by Article I, Section 2, Constitution of Missouri, 1945, and further violates Article I, Section 14, Constitution of Missouri, 1945, Article I, Section 1, Constitution of Missouri, 1945, Article II, Section 4, Constitution of Missouri, 1945, and Article IV, Section 30(b), Constitution of Missouri, 1945, and by reason thereof should be stricken and held for naught in the trial of this case.

Wherefore, Plaintiff prays the Court to declare the aforesaid Sections 537.600, 537.610, and 537.615, R.S. Mo., et seq., unconstitutional and to have no force and effect in the trial of this case, and further prays judgment

pursuant to her prayer in her First Amended Petition.

(L.F., 28).

Plaintiff subsequently sought and was granted leave to file a Second Amended Petition<sup>2</sup>, and then a Third Amended Petition (L.F., 65-68). The Third Amended Petition, which substituted Hodges as Plaintiff and initiated an action for wrongful death, was the pleading upon which the case was tried. In the City's Answer to the Third Amended Petition (L.F., 75-77), the City again pled the Sovereign Immunity Statutes and §§ 537.600-.620, RSMo., as Affirmative Defenses, ¶¶ 2 and 3 (L.F., 76). Plaintiff did not file a Reply to these Affirmative Defenses. Plaintiff filed no further pleadings claiming the cap was unconstitutional until the post-trial Objections to Imposition of Statutory Cap (L.F., 112-114) and Motion to Set Aside Judgment and Enter New Judgment and Alternative Motion for Additur (L.F., 115-116).

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<sup>2</sup>Plaintiff's Second Amended Petition (L.F., 30-32) was responded to with a Motion to Dismiss and/or for More Definite Statement (L.F., 33-34), which was subsequently denied, thereafter followed by City's Motion for Summary Judgment (L.F., 39-43). After the Motion for Summary Judgment had been submitted, but before it was ruled on, Plaintiff filed a Third Amended Petition.

**POINTS RELIED ON**

**I. THIS COURT SHOULD NOT REVIEW PLAINTIFF’S CLAIM THAT THE STATUTORY CAP AND LIMITATION OF RECOVERY IN THE SOVEREIGN IMMUNITY STATUTES, §§ 537.600 *et seq.*, RSMO., IS UNCONSTITUTIONAL BECAUSE PLAINTIFF FAILED TO PRESERVE SUCH ISSUE FOR REVIEW, IN ONE OR MORE OF THE FOLLOWING RESPECTS: 1. IN THE TRIAL COURT PLAINTIFF FAILED TO STATE FACTS SHOWING THE ALLEGED VIOLATION; 2. PLAINTIFF FAILED TO PRESERVE THE ISSUE THROUGHOUT THE COURSE OF THE PROCEEDINGS IN THE TRIAL COURT.**

*United C.O.D. v. State of Missouri*, 150 S.W.3d 311 (Mo. banc 2004)

*State ex rel. Tompras v. Board of Election Com’rs*, 135 S.W.3d 65 (Mo. banc 2004)

*Callier v. Director of Revenue*, 780 S.W.2d 639 (Mo. banc 1989)

*Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996)

**II. IN THE ALTERNATIVE, EVEN IF THE CONSTITUTIONAL ISSUE WAS PRESERVED FOR REVIEW, THE TRIAL COURT DID NOT ERR IN REDUCING THE JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST THE CITY TO THE STATUTORY CAP AND LIMITATION ON RECOVERY OF § 537.610.2, RSMO., AND IN DENYING PLAINTIFF’S MOTION TO SET ASIDE JUDGMENT AND ALTERNATIVE MOTION FOR ADDITUR BECAUSE THE STATUTORY CAP DOES NOT VIOLATE THE EQUAL PROTECTION**

**PROVISION OF ART. I, § 2 OF THE MISSOURI CONSTITUTION, IN THAT THE CAP DOES NOT INFRINGE ON A FUNDAMENTAL RIGHT OF PLAINTIFF'S, THERE IS A RATIONAL RELATION BETWEEN THE CAP AND A LEGITIMATE GOVERNMENTAL INTEREST, AND THERE IS NO AUTHORITY FOR ANY LEVEL OF SCRUTINY OTHER THAN THE "RATIONAL RELATIONSHIP" TEST.**

§ 537.610, RSMo. (2000)

*Richardson v. State Highway and Transp. Comm'n*, 863 S.W.2d 876 (Mo. banc 1993)

*Fisher v. State Highway Comm'n*, 948 S.W.2d 607 (Mo. banc 1997)

*Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324 (Mo. banc 1982)

## ARGUMENT

**I. THIS COURT SHOULD NOT REVIEW PLAINTIFF’S CLAIM THAT THE STATUTORY CAP AND LIMITATION OF RECOVERY IN THE SOVEREIGN IMMUNITY STATUTES, §§ 537.600 *et seq.*, RSMO., IS UNCONSTITUTIONAL BECAUSE PLAINTIFF FAILED TO PRESERVE SUCH ISSUE FOR REVIEW, IN ONE OR MORE OF THE FOLLOWING RESPECTS: 1. IN THE TRIAL COURT PLAINTIFF FAILED TO STATE FACTS SHOWING THE ALLEGED VIOLATION; 2. PLAINTIFF FAILED TO PRESERVE THE ISSUE THROUGHOUT THE COURSE OF THE PROCEEDINGS IN THE TRIAL COURT.**

This Point is directed to Point I of Plaintiff’s Cross-Appeal. Plaintiff contends that the statutory cap and limitation of recovery in the Sovereign Immunity Statutes, §§ 537.600 *et seq.*, RSMo., is unconstitutional.

### **Standard of Review**

This Court’s standard of review for constitutional challenges to a statute is *de novo*. *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006). To properly raise a constitutional question, one must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. *United C.O.D. v. State of*

*Missouri*, 150 S.W.3d 311, 313 (Mo. banc 2004).

## **Introduction**

A reply should be filed when a plaintiff desires to avoid or affirmatively attack new and affirmative matter alleged in the answer. *Jaycox v. Brune*, 434 S.W.2d 539, 547 (Mo. 1968). In that reply he should distinctly allege his grounds of avoidance. *Id.* A reply is required to assert an avoidance, which is an affirmative defense to an affirmative defense. *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 845 (Mo. banc 1997). Rule 55.01 provides that “[a] defense constituting an affirmative avoidance to any matter alleged in a proceeding [*sic*] pleading must be pleaded.” *Id.* An affirmative defense is waived if the party raising it does not plead it. *Detling v. Edelbrock*, 671 S.W.2d 265, 271 (Mo. banc 1984). The City submits, for reasons hereafter set forth, that Plaintiff waived any claim purporting to assert that the statutory cap is unconstitutional.

### **1. In the trial court, Plaintiff failed to state facts supporting how the Sovereign Immunity Statute violated Constitutional provisions.**

“Ordinarily, a constitutional question must be raised at the first opportunity by specifically designating the provision claimed to be violated, identifying the facts showing such violation, and the question must be preserved at each stage of review.” *State ex rel. Tompras v. Board of Election Com’rs*, 136 S.W.3d 65, 66 (Mo. banc 2004). “The reason for this requirement is to prevent surprise to the opposing party and to permit the trial court to fairly identify and rule on the issues.” *Id.*

Plaintiff’s verbiage in the Reply to City’s Answer to the First Amended Petition

merely recited the article and section number of several constitutional provisions, without alleging any facts to show how the Sovereign Immunity Statutes violated any of these provisions. A review of the language in that Reply would not reasonably advise another person, whether litigant or judge, of the basis for Plaintiff's contention as to how the Sovereign Immunity Statutes were unconstitutional. It did not specify which portion or portions of the Sovereign Immunity Statutes were being challenged. It did not specify that it was the Equal Protection clause portion of Art. I, § 2 that was the basis of the challenge. And it certainly did not specify what the claimed "fundamental Constitutional right" of Plaintiff's was that was allegedly violated. Plaintiff never further clarified the factual basis for this allegation until after trial. But Plaintiff's Reply, which was the only pleading prior to trial ever contending the Sovereign Immunity Statutes were unconstitutional, does not meet the third requirement of the four-part prerequisite for preserving a constitutional challenge.

A litigant may not lodge review proceedings in this Court by simply anticipating an adverse judgment and inserting appropriate averments in the pleadings that the same would violate the due process or other constitutional provisions. *State ex rel. Heppe v. Zilafro*, 206 S.W.2d 496, 497 (Mo. 1947). "A party asserting the unconstitutionality of a statute or ordinance bears the burden of supporting that contention by at least relating his argument to the statute or ordinance and issue at hand." *Callier v. Director of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989), quoting *Atkins v. Department of Building Regulations*, 596 S.W.2d 426, 434 (Mo. 1980). The failure to point out wherein and why

the Constitution is violated fails to properly raise a constitutional question. *State ex rel. Allison v. Barton*, 355 Mo. 690, 197 S.W.2d 667, 669 (en banc 1946). In the instant case, Plaintiff failed to do this as required.

The instant case may be contrasted with the facts in *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324 (Mo. banc 1982), a case which also challenged the constitutionality of the Sovereign Immunity Statutes, to illustrate what is and is not an acceptable statement of facts for purposes of preserving the constitutional question. In *Winston*, the defendant filed a motion for summary judgment asserting the Sovereign Immunity Statutes as a defense. The plaintiff filed a “Reply to Defendant’s Answer and Motion for Summary Judgment,” which alleged the unconstitutionality of the statute in only the most general terms (“violative of Plaintiff’s rights to due process and equal protection”). While the sufficiency of this language to preserve the constitutional issue was questionable, the opinion stated that the plaintiff’s “Reply Memorandum,” “filed sometime after the reply, but well in advance of entry of judgment, referenced the specific constitutional sections *and in narrative form supplied the underlying facts with sufficient particularity to inform defendant and the trial court of plaintiff’s contentions.*” (Emphasis added.) *Id.* at 327. However, in the instant case, at no time prior to trial did Plaintiff plead any facts which would have informed the City or the trial court of those contentions.

While there appear to be no “bright-line” benchmarks for what facts must be alleged to properly preserve a constitutional challenge, there have been examples. In

*Massage Therapy Training v. Mo. State Bd.*, 65 S.W.3d 601 (Mo. App. S.D. 2002), plaintiffs purported to challenge administrative agency regulations promulgated by the State Board of Therapeutic Massage as unconstitutional. Their Petition apparently attempted to plead several paragraphs challenging various regulations.<sup>3</sup> In holding that the issue had not been preserved for appeal, the Court stated, “Here, the petition does not designate, with the requisite specificity, any constitutional provision or clause claimed to have been violated *nor does it plead facts showing a constitutional violation.*” (Emphasis added.) *Id.* at 609.

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<sup>3</sup>The opinion, in a footnote, quoted these pleadings in whole or in relevant part:

“(a) Regulations violate the United States Constitution and the Missouri Constitution in that said regulations constitute a taking of property without compensation by requiring Plaintiffs to remove current instructors and retain additional instructors or instructors at higher pay to comply with the before mentioned regulations;

“(b) The ... regulations violate the United States Constitution and the Missouri Constitution in that it denies Plaintiffs due process;

\* \* \*

“(e) The ... regulations violate the United States Constitution and the Missouri Constitution in that it does not ‘grandfather’ in current schools or current instructors.”

65 S.W.3d at 609, n. 6.

In *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52 (Mo. App. E.D. 1990), plaintiff was a former mayor who had been impeached in an administrative proceeding pursuant to a state statute that authorized cities to impeach officials “for cause.” Plaintiff attempted to challenge a portion of the Missouri Administrative Procedure Act, §§ 536.010 *et seq.*, RSMo., which prohibited certain methods of civil discovery in administrative proceedings. In plaintiff’s petition for administrative review filed in circuit court, plaintiff pled:

“[T]he actions and decisions of the Board of Impeachment and City Council were in violation of the Due Process and Equal Protection Clauses of the Constitution of the United States (U.S.C.A. Const. Amnd. 5, 14), in excess of the statutory authority and jurisdiction of said Boards, not supported by competent and substantial evidence upon the record as a whole, unauthorized by law, against the weight of the evidence, arbitrary, capricious, unreasonable, based upon unlawful procedure, made without a fair (sic) trial, involved an abuse of discretion, against the weight of the evidence and did not constitute grounds for impeachment ...”

The appellate court held this was inadequate to preserve the issue for review, stating “The petition did not specify which of these legal grounds was the basis for the Mayor’s claim that the Board of Impeachment’s refusal to compel the requested discovery was improper.” *Id.* at 58.

In order to properly preserve a challenge to a statute as unconstitutional, a pleader

must plead facts meaningful enough to explain to the trial court and the adversary how the statute operates unconstitutionally. Plaintiff failed to do this. Plaintiff's point on cross-appeal should not be reviewed by this Court.

**2. Plaintiff failed to preserve the issue for review throughout the trial court proceeding.**

The fourth requirement for obtaining appellate review of a constitutional issue has been to preserve the constitutional question throughout for appellate review. *United C.O.D., supra*. As previously stated, Plaintiff did not preserve the constitutional issue throughout in the trial court. A Third Amended Petition was filed, substituting not only the plaintiff, but also substituting a new claim, for wrongful death. The City properly filed its Answer, including its affirmative defenses, as required by Rule 55.08, including the applicability of the Sovereign Immunity Statutes. However, Plaintiff did not file a reply or, as the term is used in Rule 55.08, an avoidance, *i.e.*, “an affirmative defense to an affirmative defense.” *Warren, supra*, at 845. The case proceeded to trial on the theories and allegations of the Third Amended Petition and Answer thereto. Clearly, this did not include a contention that the statutory cap was unconstitutional.

By failing to raise the issue of the unconstitutionality of the statutory cap in connection with the most recent amendment of the petition, Plaintiff waived the right to assert this issue on appeal.<sup>4</sup> “A constitutional question must be directly raised at the first

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<sup>4</sup>There is even some authority suggesting that raising the constitutional question by way of reply, rather than in the petition, is not sufficient to preserve it, *see Rider v. Julian*, 365

opportunity that good pleading and orderly procedure will permit, and must be kept alive, otherwise it will be considered as abandoned.” *City of Frankford v. Davis*, 348 S.W.2d 553, 554 (Mo. App. St. L. 1961), citing *State v. Lofton*, 1 S.W.2d 830, 832 (Mo. 1927). Even if Plaintiff had stated sufficient facts concerning the claim of unconstitutionality, by failing to assert her claim consistently, Plaintiff waived the constitutional challenge.

It does not matter that application of the statutory cap to reduce the net amount of the judgment came after completion of the trial. “An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal.” *Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. banc 1996), quoting *Land Clearance for Redevelopment Authority v. Kansas University Endowment Ass’n*, 805 S.W.2d 173, 175 (Mo. banc 1991). In both *Land Clearance for Redevelopment Authority* and *Adams v. Children’s Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), appellants challenging the prejudgment interest statute argued their constitutional claims arose only after judgment, and that therefore the post-trial motion was their first opportunity to raise the constitutional claim. This Court rejected the argument in both cases because application of the prejudgment interest statute could hardly have been a surprise to appellants.

Based on the foregoing, Plaintiff failed to keep her constitutional claim alive long

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Mo. 313, 282 S.W.2d 484, 497 (en banc 1955), although *Winston, supra*, would suggest otherwise.

enough for this Court to issue its diagnosis. Plaintiff's claim cannot be revived, once its natural life has expired. And there are no Lazarus-like miracles by which it can now return from the dead.

**II. IN THE ALTERNATIVE, EVEN IF THE CONSTITUTIONAL ISSUE WAS PRESERVED FOR REVIEW, THE TRIAL COURT DID NOT ERR IN REDUCING THE JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST THE CITY TO THE STATUTORY CAP AND LIMITATION ON RECOVERY OF § 537.610.2, RSMO., AND IN DENYING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT AND ALTERNATIVE MOTION FOR ADDITUR BECAUSE THE STATUTORY CAP DOES NOT VIOLATE THE EQUAL PROTECTION PROVISION OF ART. I, § 2 OF THE MISSOURI CONSTITUTION, IN THAT THE CAP DOES NOT INFRINGE ON A FUNDAMENTAL RIGHT OF PLAINTIFF'S, THERE IS A RATIONAL RELATION BETWEEN THE CAP AND A LEGITIMATE GOVERNMENTAL INTEREST, AND THERE IS NO AUTHORITY FOR ANY LEVEL OF SCRUTINY OTHER THAN THE "RATIONAL RELATIONSHIP" TEST.**

This point is directed to Point I of Hodges' Cross-Appeal, contending that the statutory cap and limitation on recovery of the Sovereign Immunity Statutes, §§ 537.600 *et seq.*, RSMo., is unconstitutional.

**Standard of Review**

This Court's standard of review for constitutional challenges to a statute is *de*

*novo. Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006). A statute is presumed constitutional and must not be held otherwise unless it clearly and undoubtedly contravenes the Constitution. *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980). A statute should be enforced by courts “as an expression of the people’s will unless it plainly and palpably affronts the fundamental law embodied in the Constitution.” *Winston, supra*, 636 S.W.2d at 327. It is not the Court’s province to question the wisdom, social desirability, or economic policy underlying a statute, as these are matters for the legislature’s determination. *Id.* For Equal Protection claims made under the United States Constitution, courts apply the rational basis test where the plaintiff is not a member of a suspect class or the statute does not impinge on a fundamental right. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991). The challenged statute will be upheld if it is “rationally related to a legitimate state interest.” *Id.*

## **Introduction**

Although the City submits that this Court should not reach the merits of the constitutional issue on the Cross-Appeal, it must nevertheless address this issue, since it has been fully briefed by Plaintiff. Plaintiff challenges the statutory cap as unconstitutional, on grounds that it violates the Equal Protection clause of the Missouri Constitution, Art. I, § 2, Mo. Const. (1945). With respect to the claim that a statute is violative of equal protection, a challenger must prove abuse of legislative discretion beyond a reasonable doubt and, short of that, the statute is valid. *Winston, supra*, at 327. As hereinafter shown, multiple reasons support a conclusion that this constitutional

challenge must be rejected: that on the basis of *stare decisis*, from two decisions of this Court within the last fifteen years, the cap is constitutional; that no basis exists for assessing the constitutionality of the cap under Equal Protection under any standard other than the “rational relation” standard; and that, as this Court has previously suggested, Plaintiff’s “remedy,” if one is to be had, is with the legislature, not the courts.

Since the General Assembly’s codification of the Sovereign Immunity Statutes, §§ 537.600, *et seq.*, RSMo. (2000) following abrogation of the common law doctrine of sovereign immunity in *Jones v. State Highway Commission*, 537 S.W.2d 225 (Mo. banc 1977), this Court has been repeatedly faced with challenges to the statutes. *See, e.g., Winston, supra*. On two occasions, constitutional challenges to the statutory cap limiting liability, § 537.610.2., have been made in this Court. *See Richardson v. State Highway and Transp. Comm’n*, 863 S.W.2d 876 (Mo. banc 1993); *Fisher v. State Highway Comm’n*, 948 S.W.2d 607 (Mo. banc 1997). In all of these cases, this Court has rejected these constitutional challenges.

The case *sub judice* is the third time a plaintiff has come to this Court challenging the statutory caps on the basis of the Equal Protection clause of the Missouri Constitution, Art. I, § 2, Mo. Const. (1945). In *Richardson*, the theory was that because the statutory caps applied only to the two classes of torts enumerated in § 537.610.2 — motor vehicle operations and conditions of public property — and to no others, equal protection was violated. This Court, noting that plaintiffs identified neither a fundamental right nor a suspect classification, proceeded under a “rational relationship”

test, stating “The General Assembly has a rational basis to fear that full monetary responsibility for tort claims entails the risk of insolvency or intolerable tax burdens.” 863 S.W.2d at 879. In *Fisher*, the plaintiffs’ theory, *inter alia*, was that the level of scrutiny should not be a “rational relation” standard because there was a fundamental right implicated — the right under the Missouri Constitution of all persons to “the enjoyment of the gains of their own industry,” Art. I, § 2, Mo. Const. (1945). If the contention were accepted, then presumably the statute would be reviewed under a “strict scrutiny” standard. *Blaske*, at 829. Noting that a similar type phrase was added to Missouri’s Constitution in 1865 as a reference to recently-freed slaves, the *Fisher* opinion stated “this constitutional provision applies only to conditions in the marketplace.” 948 S.W.2d at 610. It rejected application of this phrase to any other context.

This time, Plaintiff returns to equal protection, putting only a slight variation on an old theme: that the rational relation test should not be used in determining the constitutionality of the cap; rather, Plaintiff argues, the cap infringes on a fundamental right claimed to be different from the one offered in *Fisher*, namely, the plaintiff’s right to recover for economic loss for a wrong perpetrated by public officials in the course of their duties is a fundamental right found in the Missouri Constitution. This argument is grounded almost exclusively on the separate opinions issued in the *Richardson* and *Fisher* cases by the same author. See *Richardson*, at 882 (Holstein, J., concurring in result); *Fisher*, at 612 (Holstein, J., dissenting in part and concurring in part).

The argument that the cap violates equal protection has already been rejected

twice. While in *Richardson*, the challenge was based on the creation of two separate classes of torts to which the cap applied, the challenge in *Fisher* is almost identical to the challenge here. Just as in *Fisher*, Plaintiff claims that the right to recover for economic loss caused by a public entity is a fundamental right. The only difference is that Plaintiff no longer relies on the “enjoyment of the gains of their own industry” language of Art. I, § 2. The reason for this is obvious — *Fisher* flatly rejected it. Instead, Plaintiff relies on the verbiage of Judge Holstein’s two opinions as if they created some substantive constitutional right in and of itself. However, “fundamental rights” include such things as freedom of speech, freedom of the press, freedom of religion, the right to vote, and the right to procreate. *Blaske*, at 829. Furthermore, as Plaintiff’s counsel is aware, Judge Holstein’s opinion in *Richardson* already existed at the time that *Fisher* was submitted, and was argued in support of the plaintiff’s position in *Fisher*.<sup>5</sup> The *Fisher* opinion not only rejected the position that a fundamental right was involved, but implied that the matter had been definitively settled even before *Richardson* was decided:

Further, this Court implicitly rejected a fundamental rights argument in holding that the legislature’s readoption of sovereign immunity, and limited waiver of immunity, did not violate equal protection under either the United States or Missouri Constitutions. *See Winston v. Reorganized School*

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<sup>5</sup>As proof of this, the City has included in the Appendix to this Brief, at A1-A4, portions of the Appellants’ Brief, pp. 41-44, in *Fisher*, showing argument relying on Judge Holstein’s *Richardson* concurrence.

*District R-2 ...*

948 S.W.2d at 610. There could hardly be a clearer statement from this Court, starting with *Winston* and continuing on with *Richardson* and *Fisher*, that the Sovereign Immunity Statutes collectively, and the statutory cap in particular, do not infringe on a fundamental right.

The next clearest proposition, based on these prior cases, is that the Sovereign Immunity Statutes, and the cap in particular, have met the “rational relation” test. In *Richardson*, this Court stated:

The General Assembly has a rational basis to fear that full monetary responsibility for tort claims entails the risk of insolvency or intolerable tax burdens. ... Restricting the amount recoverable — like limiting recovery to certain enumerated torts — allows for fiscal planning consonant with orderly stewardship of governmental funds, while permitting some victims to recover something.

863 S.W.2d at 879. That verbiage is repeated in *Fisher*, 948 S.W.2d at 610-611. There simply is no logical reason why this Court need revisit the issue again.<sup>6</sup>

Plaintiff’s argument for a distinction between a cap that caps only non-economic

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<sup>6</sup>If anything, the amendment of § 537.610 in 1999, after the decisions in *Richardson* and *Fisher*, increasing the cap to \$300,000, plus providing an annual adjustment for inflation, should reflect that the General Assembly has addressed the issue and provided an answer.

damages, such as was involved in *Adams v. Children’s Mercy Hosp.*, *supra*, and the one here, which caps all damages, has no basis in law or logic. First, it has no basis in law because this Court was already aware of its holding in *Adams*, which was decided one year before *Richardson*.<sup>7</sup> It seems apparent that however much Plaintiff attempts to read into *Adams*, this Court in *Richardson* and, later, *Fisher*, declined to accept the argument that a fundamental right was affected by having a statutory cap on all damages. Second, from a purely logical standpoint, capping only non-economic damages would not accomplish the legitimate state interest that this Court has already identified in *Richardson* and *Fisher* as being the purpose of the statutory cap — to allow for fiscal planning consonant with orderly stewardship of governmental funds, while permitting some victims to recover something.

Plaintiff also argues in the alternative, that if the strict scrutiny test is rejected, then this Court should turn to a third level of scrutiny — the so-called “intermediate level scrutiny.” Respondent’s Brief, at 49. This is described as considering “whether the classification at issue serves an important governmental objective and whether it is substantially related to the achievement of that objective.” Besides the fact that this argument was never presented to the trial court in any way, shape or form, it also assumes that the courts of this state have accepted and adopted intermediate scrutiny as a basis for

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<sup>7</sup>In fact, *Adams* is cited in *Richardson*, at 879, only for the proposition that “[i]f the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery.”

review of some, or any, equal protection claims. In fact this is not the case. Plaintiff points to no Missouri cases which have adopted the intermediate scrutiny standard for any equal protection analysis under the Missouri Constitution. Moreover, just as this Court announced in *Fisher* that it had implicitly determined that the Sovereign Immunity Statutes did not infringe on a fundamental right, so it must also be taken, based on *Richardson* and *Fisher*, that the Court has implicitly determined that the “rational relation” standard has been established as the appropriate standard of review for equal protection claims challenging the constitutionality of the sovereign immunity caps.

Plaintiff’s citation to *Plyler v. Doe*, 457 U.S. 202 (1982)<sup>8</sup> is inapposite to the circumstances involved here. First, *Plyler* analyzed an issue for which there was no existing precedent for the level of scrutiny to be employed in dealing with the children of illegal aliens, contrary to the rational relation standard established in the sovereign immunity challenges by *Richardson* and *Fisher*. Secondly, to equate persons who claim to have been injured by public employees or public entities, without consideration of circumstances, with the children of illegal immigrants, for purposes of an equal protection analysis, takes a quantum leap in logic. Missouri’s system of comparative fault means even plaintiffs who are at fault can recover damages. To say without qualification that those injured by public employees or public entities are “not accountable” for their status, paints with a very broad brush.

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<sup>8</sup>Cited in Respondent’s Brief as “*Flyler v. Doe*.”

Plaintiff also cites to a case from another jurisdiction<sup>9</sup> which reviewed a statutory cap on all damages in medical negligence claims under an intermediate level scrutiny to invalidate the statute. With all due respect to the decisions of other jurisdictions, this decision has no pertinence to a consideration of a statutory sovereign immunity cap. First, the scenario is not comparable, in that it deals with a medical negligence damages cap; it can have no greater relevance to the issues in this appeal than did *Adams*, and as noted *supra*, this Court made only a passing reference to *Adams* in the *Richardson* case. Second, the relevance of a case almost thirty years old from another jurisdiction seems tenuous, when there have been two decisions from the forum state in the last fifteen years that have utilized a different analysis.

Within constitutional limits, a sovereign may prescribe the terms and conditions under which it may be sued, and the decision to waive immunity, and to what extent it may be waived, lies within the legislature's purview. *Winston, supra*, at 328. The Missouri General Assembly, by enacting sovereign immunity caps on liability, and later increasing those caps, has clearly expressed its intent to "balance the need for protection of governmental funds against a desire to allow redress for claimants injured in limited classes of accidents." *Id.* The General Assembly has a rational basis to fear that full monetary responsibility for tort claims entails the risk of insolvency or intolerable tax burdens. *Richardson*, at 879. As this Court stated in *Richardson*, an argument as to whether or not the sovereign immunity cap is sufficient, "is more properly directed to the

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<sup>9</sup>*Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

General Assembly, which can balance the level of compensation of tort victims with the need to protect public funds.” *Id.*

### **CONCLUSION**

The statutory cap and limitation on recovery in the Sovereign Immunity Statutes has been repeatedly challenged and has repeatedly withstood those challenges in this Court. There is nothing in the current appeal to change that outcome. Preliminarily, the Cross-Appeal should not be considered because the constitutional issue was not preserved for review in the trial court. Even if it were deemed that the constitutional issue was preserved for review, the result should not change from the previous holdings, for it is clear that the cap bears a rational relation to the legitimate state interest in protecting governmental entities from the choice of insolvency or higher taxes. The trial court’s rulings upholding the validity of the statutory cap should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The undersigned hereby certifies that this Second Brief of Appellant/Cross-Respondent was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 10,291 words of text. The accompanying diskette, containing a complete copy of Second Brief of Appellant/Cross-Respondent, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Appellant/Cross-Respondent are stated herein and the Brief has been signed by the attorney of record.

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Mark Lawson

**CERTIFICATE OF SERVICE**

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

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