

IN THE MISSOURI SUPREME COURT

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CAUSE NO. SC87513

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KIMBERLY HODGES,

Plaintiff-Respondent/Cross-Appellant,

v.

CITY OF ST. LOUIS,

Defendant-Appellant/Cross-Respondent

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Appeal from the Circuit Court of the City of St. Louis  
Twenty-Second Judicial Circuit  
Division No. 21  
The Honorable Evelyn M. Baker

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RESPONDENTS'S BRIEF AND CROSS-APPELLANT'S OPENING BRIEF OF  
PLAINTIFF-RESPONDENT/CROSS APPELLANT KIMBERLY HODGES

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**RESPONDENT’S BRIEF**

**JURISDICTIONAL STATEMENT**

Respondent Cross-Appellant Kimberly Hodges (“Hodges” or “Plaintiff”)<sup>1</sup> accepts and adopts the jurisdictional statement set forth in the Brief of the City of St. Louis (“City”).

**STATEMENT OF FACTS**

The City’s Statement of Facts is not a complete and fair statement of all of the facts relevant to the questions presented by the City’s appeal. Additional relevant facts and clarifications will be set forth at the appropriate point in the Argument. References to the Legal File will be shown as (LF \_\_\_\_). References to the trial transcript will be shown as (T \_\_\_\_).

**POINTS RELIED ON**

**I. The Trial Court Properly Denied the City’s Motions for Directed Verdict and For Judgment Notwithstanding the Verdict Because Section 84.330, RSMo., Specifically Provides That Members of the City’s Police Force Are “Officers” of the City “Under the Charter and Ordinances Thereof.” The General Assembly Thus Created An**

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<sup>1</sup> The injured person and the original plaintiff in this case was Ann Martin. She died during the course of this litigation and her daughter, the current plaintiff Kimberly Hodges, was then made the party plaintiff in the Third Amended Petition (LF 65).

**Agency Relationship Between the City and Its Police Officers As A Matter of State Statutory Law. The City May Therefore Properly Be Held Liable for the Negligent Acts of City Police Officers When Operating Motor Vehicles While On Duty, and the Jury Could Properly Find The City Liable in This Case.**

Section 84.330, RSMo

*Carrington v. City of St. Louis*, 89 Mo. 208, 1 S.W. 240, 241 (1886)

*State ex inf. Gentry v. Meeker*, 317 Mo. 719, 296 S.W. 411 (banc 1927)

*State ex rel. Wander v. Kimmel*, 256 Mo. 611, 165 S.W. 1067 (1914)

*State ex rel. Steed v. Nolte*, 345 Mo. 1103, 1107-1108, 138 S.W.2d 1016, 1019 (banc 1940)

Laws, 1899, p 51-61

**II. In the Alternative, The Trial Court Also Properly Denied the City's Motions for Directed Verdict and For Judgment Notwithstanding the Verdict Because Plaintiff Presented A Submissible Case As To The Vicarious Liability of the City for The Officer's Negligent Acts Under Common Law Tests of Vicarious *Respondeat Superior* Liability.**

*Bargfrede v. American Income Life Insurance Co.*, 21 S.W.3d 157, 161 (Mo.App.W.D. 2000)

*Smoot v. Marks*, 564 S.W.2d 231, 236 (Mo.App. banc 1978)

*Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo.App.E.D. 2002)

*Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998)

Section 84.090, RSMo

Section 84.010, RSMo

Section 84.330, RSMo

**III. The City's Point Relied On That This Action Is Barred By Sovereign Immunity Is Without Merit and Should Be Denied. The Scope Of The Absolute Waiver Of Sovereign Immunity Under Section 537.600 (1) For Injuries Resulting From The Negligence Of Public Employees In The Operation Of Motor Vehicles Is Coextensive With The Vicarious *Respondeat Superior* Liability Of Governmental Entities For The Negligent Operation Of Motor Vehicles. There Was A Submissible Case As To the Vicarious *Respondeat Superior* Liability of the City and The Jury Returned a Verdict Finding the City Liable for the Officer's Negligent Acts. This Case Falls Within the Plain Language of the Waiver of Sovereign Immunity In Section 537.600 (1).**

Section 537.600.1 (1), RSMo

*Bowman v. State of Missouri*, 763 S.W.2d 161, 163 (Mo.App.W.D. 1989)

*Bachmann v. Welby*, 860 S.W.2d 31 (Mo.App.E.D. 1993)

## **ARGUMENT**

### **Preliminary Statement**

In order to clearly present her argument on the issues raised by the City in its appeal, it is necessary to change the order in which the issues are discussed from that adopted in the City's Brief.

In its Point II, the City argues that it cannot be liable for the negligent actions of Officer Walker (the "Officer") because, under the provisions of state statutory law relating to the police department in the City of St. Louis, Sections 84.010 to 84.340, RSMo., the Officer was solely and exclusively an employee of the Board of Police Commissioners (the "Police Board"), and therefore was not and could not be an agent of the City as a matter of law. This point is without merit because, as will be shown below, the provisions of Section 84.330, as previously construed by this Court, instead establish as a matter of law that the Officer was an agent of the City of St. Louis and that the City is thus vicariously liable for his actions as a matter of state statutory law, completely separate and apart from common law tests of master-servant or agency relationships. These issues will be addressed in Point I of this Respondent's Brief. This issue is logically prior to the issues raised by the City as to the sufficiency of the evidence to show an agency relationship under common law rules of vicarious liability. If the Officer was thus the agent of the City as a matter of statutory law, the ruling of the trial court denying the City's motions for directed verdict and judgment

notwithstanding the verdict should be affirmed on that basis alone.<sup>2</sup> In that event, it will be unnecessary to reach the City's remaining arguments as to the sufficiency of the evidence under common law rules of vicarious liability. Those issues, if the Court reaches them, will then be addressed in Point II of this Brief.

Point III of this Respondent's Brief, like Point III of the City's Brief, will address the City's claim that this action does not come within the waiver of sovereign immunity under Section 537.600.1, RSMo, and that the City was therefore entitled to a directed verdict or judgment notwithstanding the verdict on that issue.

Thereafter, in her Cross-Appellant's Brief, Plaintiff will set forth the arguments in support of her cross appeal, related to the validity of the cap on liability in Section 537.610.2.

#### Standard of Review

All three of the City's Points Relied On contend the trial court erred in denying the City's motions for directed verdict at the close of all the evidence and for judgment notwithstanding the verdict. The legal standards applicable to a

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<sup>2</sup> As will be discussed below in Point III, if the City is otherwise vicariously liable under *respondeat superior* for the Officer's negligent operation of a motor vehicle while on duty, the waiver of sovereign immunity in Section 537.600.1 is also applicable.

motion for judgment notwithstanding the verdict are well established. The Court of Appeals, Eastern District, recently summarized those standards as follows:

The standard of review of the trial court's denial of a motion for JNOV and directed verdict is essentially the same.

*Maldonado v. Gateway Hotel Holdings, L.L.C.*, 154 S.W.3d 303, 307 (Mo.App. E.D.2003). Upon review, this Court must determine whether Plaintiff made a submissible case. *Id.*

"[T]his Court takes the evidence in the light most favorable to the verdict, giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence." *Nemani v. St. Louis University*, 33 S.W.3d 184, 185 (Mo. banc 2000). When reasonable minds can differ on the questions before the jury, we will not disturb the jury's verdict and JNOV is not appropriate. *Echard v. Barnes Jewish Hosp.*, 98 S.W.3d 558, 565 (Mo.App. E.D.2002). We "will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 818 (Mo. banc 2000); *LaRose v. Washington University*, 154 S.W.3d 365, 369 (Mo.App. E.D.2004).

*Steele v. Evenflo Company, Inc.*, 174 S.W.3d 715, 717-718 (Mo.App.E.D. 2005).

**I. The Trial Court Properly Denied the City’s Motions for Directed Verdict and For Judgment Notwithstanding the Verdict Because Section 84.330, RSMo., Specifically Provides That Members of the City’s Police Force Are “Officers” of the City “Under the Charter and Ordinances Thereof.” The General Assembly Thus Created An Agency Relationship Between the City and Its Police Officers As A Matter of State Statutory Law. The City May Therefore Properly Be Held Liable for the Negligent Acts of City Police Officers When Operating Motor Vehicles While On Duty, and the Jury Could Properly Find The City Liable in This Case.**

As a general rule in the State of Missouri, the negligent conduct of a police officer in the operation of motor vehicle while on duty states a claim for *respondeat superior* vicarious liability against the city the officer serves. *E.g.*, *Oberkramer v. City of Ellisville*, 650 S.W.2d 286 (Mo.App.1983). In this case, the true heart of the argument for a different result, advanced by the City and amicus, City of Kansas City, is their claim that under the statutory provisions applicable to the police department in the City of St. Louis, Section 84.010 to Section 84.340, RSMo., the Officer was an solely an employee of the Board of Police Commissioners (the “Police Board”), and was subject solely to the control of the Police Board, and that the Officer therefore could not as a matter of law be an agent of the City for purposes of vicarious liability for his negligence in the operation of a motor vehicle. The exact reverse is instead true – that under Section

84.330 the officer *is* the agent of the City of St. Louis as a matter of statutory law, and that the City is therefore vicariously liable for his negligent acts in the operation of a motor vehicle as a police officer. For that reason, both Point I and Point II the City's Points Relied On, arguing that plaintiff failed to make a submissible case as to the vicarious liability of the City, are without merit and should be rejected. The rulings of the trial court denying the City's motions for directed verdict at the close of all the evidence and for judgment notwithstanding the verdict should be affirmed.

It has previously been recognized under Missouri law that a person may be the servant of "two masters simultaneously, provided the interest of the masters are not so adverse and antagonistic that the intent to serve one necessarily excludes and intent to serve the other." *Brickner v. Normandy Osteopathic Hospital, Inc.*, 746 S.W.2d 108, 113 (Mo.App.E.D. 1988). In this case, such a dual agency relationship, whereby the officer was the agent of *both* the Police Board and the *City*, has been created by statute by the General Assembly.

Section 84.330, RSMo, a part of the very same set of statutory provisions the City cited and relied upon by the City,<sup>3</sup> indicates that City of St. Louis police

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<sup>3</sup> The trial court took judicial notice of Section 84.330 during Plaintiff's case, and Plaintiff's counsel without objection then advised the jury of the language declaring City police officers to be officers of the City of St. Louis, as well as of the State (T. 149). The trial court also took judicial notice of Sections 84.010

officers have two masters, the Police Board and the City of St. Louis, and that they are the agents of *both*. Section 84.330 states as follows (emphasis supplied):

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 supplied).

The same issue now before this Court was decided in *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S.W. 240, 241 (1886).<sup>4</sup> In *Carrington*, a premises liability case against the City, this Court construed this statutory language, which then stated that the members of the police force organized by the police

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through 84.340, constituting the current text of the act relating to the police force of the City of St. Louis, including Section 84.330, during the City's case (T. 232).

<sup>4</sup> It is of interest to note that the City's Brief does not even mention or acknowledge *Carrington*, even though it was cited on relied on heavily by Plaintiff in the trial court. The amicus brief of the City of Kansas City does not mention or discuss *Carrington* either.

commissioners “are hereby declared to be officers of the City of St. Louis, under the charter and ordinances thereof, . . . “<sup>5</sup> *Carrington* held that under this statutory language, “we must conclude” that the police officer “was an agent of the city, . . . “ 1 S.W. at 242. In *Carrington*, the dangerous condition of the property was created by the act of the police officer himself. This Court stated:

We conclude that as to the act in question Balte [the city police officer] was the officer and agent of the city and that his

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<sup>5</sup> The statute as it existed when *Carrington* was decided stated:

The members of the police force of the city of St. Louis, organized and appointed by the police commissioners of said city, are hereby declared to be officers of the city of St. Louis, 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 court have jurisdiction of offenses against the laws of this state, or the ordinances of said city.

*Carrington*, 1 S.W. at 241. The operative language of this statute was substantially the same as that in the current statute. The only differences are that the present version refers to said “cities” rather than the City of St. Louis by name, and that it specifically refers to the numbers assigned to the various sections in current codification of the statute.

knowledge of the condition of the trapdoors was notice to and knowledge thereof on the part of the city.

*Carrington*, 1 S.W. at 242 (bracketed material supplied).

It is evident that the City in *Carrington* made exactly the same argument the City makes in this case: that the City police officer could not possibly be the agent of the City because City police officers had been placed under the control of the commissioners by the statute creating the Police Board, and were not subject to the to the orders of or interference of the City or its municipal assembly. It is equally evident that this Court rejected this argument. This much is shown by this Court's explanation of its holding that the City police officer was an agent of the City:

It is plain, from these provisions of the law, that the police force constitutes a department of the city government. *While these officers are state officers for some purposes, they are also city officers. They are none the less city officers because, for reasons deemed best by the legislature, they are under the control of the commissioners, and not the assembly. We see that by express law they are made city officers.* No such declarations seem to have been made in the statute with respect to the board of police commissioners of Baltimore, under which the case of *Altvater v. Mayor, etc.*, 31 Md. 462, was decided. There it was held the city was not liable for a failure

to remove a nuisance from a public street, because the power to remove the nuisance was lodged in the police, and not the city, and the police officers were held not to be city officers. The difference between the statute there and here is material.

*Carrington*, 1 S.W. at 241-242 (emphasis supplied). Based upon the foregoing statutory language and reasoning, this Court concluded that the City was liable for the negligent acts of the City police officer, subject only to the sovereign immunity of municipal corporations for governmental functions. *Carrington*, 1 S.W. at 242. On the facts of *Carrington*, the function at issue was instead in effect deemed proprietary and there was therefore no sovereign immunity defense.<sup>6</sup> The holding of this Court in *Pearson v. Kansas City*, 55 S.W.2d 485 (Mo. 1932), cited by Kansas City in its Amicus Brief at p. 17-18, was based on sovereign immunity,

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<sup>6</sup> The waivers of sovereign immunity that currently exist in Section 537.600.1 (1), relating to the negligent operation of motor vehicles by public employees, and in Section 537.600.1 (2), relating to conditions of property, do not depend upon this distinction between governmental and proprietary functions, but “are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort” Section 537.600.2. RSMo.

and the statements in the opinion cited by Kansas City were dicta and not necessary to the decision in that case.<sup>7</sup>

*Carrington* thus holds that the statute expressly created an agency relationship between the City of St. Louis and its police officers, regardless of whether the common law test of control was or was not satisfied. The General Assembly has the power to impose this relationship by legislative enactment, even when the relationship would not otherwise exist under common law rules. *E.g.*, *Rider v. Julian*, 365 Mo. 313, 333, 282 S.W.2d 484, 492 (en banc 1955); *Rucker v. Blanke Baer Extract & Preserving Co.*, 162 S.W.2d 345, 346-347 (Mo.App. 1942).

In *State ex rel. Wander v. Kimmel*, 256 Mo. 611, 165 S.W. 1067 (1914), this Court relied on *Carrington* and held the statute was so clear with respect to this dual agency and capacity that it required no construction. This Court stated:

It is argued for relators that a St. Louis policeman is a state but not a city officer, and that, with such distinction once fixed, then, by that token, the ordinances of the city (to be presently considered) are not pertinent. Let us look to that. Section 9825, supra, R. S. 1909, prescribes that "members of the police

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<sup>7</sup> Later decisions of this Court cite *Pearson* as a sovereign immunity case. *E.g.*, *Watson v. Kansas City*, 499 S.W.2d 515, 517 (Mo. banc 1973); *Hilton v. Kansas City*, 293 S.W.2d 422, 425 (Mo. 1956).

force \*\*\* 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 ordinances of said cities." *For a court to construe when there is no call for it, where the language and meaning are plain and unequivocal, is to unjustifiably meddle with a statute. There is no room for construction in that statute. It construes itself. Its meaning is unmistakable, nor need we seek and exploit the reason of the law. It is one of those statutes where the will of the people stands for the reason of the law. "Stat pro ratione voluntas populi."* In that view of it, it is idle (on the question up) to stress those cases dealing with the metropolitan police force from the standpoint of a state instrumentality for preserving the public peace and safety, the latter being one of the sovereign functions of the city's overlord, the state. There are such cases, *but a member of such police force (like other agents) may be called on to act in a dual capacity and in a dual relation; and that is made his precise standing in the quoted statute which makes him both an officer of the city and the state. It says so in so many words, and there can be no two ways about it.* Those cases, then, dealing with him from the angle of his state

capacity and relation, militate not at all against his having a city relation and being a city officer also. *Moreover, the city pays him for his services, and this case no little illustrates the truth of the authenticated and venerable saying: "The ox knoweth his master's crib."*

We must hold that a St. Louis policeman is a city officer.

It is on that theory, and none other, that notice to him of a defect in a street or sidewalk is held notice to the city.

*State ex rel. Wander*, 165 S.W. at 1072-1073 (emphasis supplied).

This Court has held that a court's construction of statutory language becomes a part of the statute as if it had been so amended by the legislature. *State v. Crawford*, 478 S.W.2d 314, 317 (Mo. 1972).

Moreover, following the 1886 decision of this Court *Carrington*, construing the statute, the Missouri General Assembly in 1899 adopted legislation to repeal and reenact this same provision in substantially the same language considered in *Carrington*. Laws, 1899, p 51-61 in Section 25 at p. 60-61.<sup>8</sup>

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<sup>8</sup> The General Assembly repealed the provisions regarding the police department in the City of St. Louis as set forth in Article XXIX of the special appendix to Vol. II of the Revised Statutes of 1889 that had contained the statutory law applicable only to the City of St. Louis. The provisions related to the police department in the City of St. Louis were then reenacted in the same act as part of the statutory

When this Court construes a statute and the General Assembly thereafter repeals and reenacts the statute in substantially the same language, the General Assembly is presumed to have been aware of and to have adopted this Court's construction of the language as part of the statute as reenacted. See, e.g., *State ex inf. Gentry v. Meeker*, 317 Mo. 719, 723, 296 S.W. 411, 412-413 (banc 1927); *State ex rel. Steed v. Nolte*, 345 Mo. 1103, 1107-1108, 138 S.W.2d 1016, 1019 (banc 1940). Accordingly, the construction adopted by this Court in *Carrington* has become a part of the statute itself.

As in *Smith v. State*, 152 S.W.3d 275, 279 (Mo. banc 2005) (applying Section 84.330), the outcome of this case is not governed by common law tests of

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law applicable to cities with 300,000 inhabitants or over. See Laws, 1899, at p. 51-61. This particular provision as reenacted in 1899 was codified as Article X, Section 6232 of the Revised Statutes of 1899, and provided:

The members of the police force of the cities covered by this article, 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.

“control” or “payment” but is instead “dictated by the express language of the statute” – Section 84.330 – as set forth above. *Smith*, 152 S.W.3d at 279.

For these reasons, the Officer in this case was the agent of both the Police Board and the City of St. Louis as a matter of statutory law under Section 84.330,<sup>9</sup> and the City was vicariously liable for his negligent acts in the operation of a motor vehicle while on duty. The City’s recourse, if it deems the provisions of Section 84.330 as set forth above to be objectionable, is to ask the General Assembly to amend the statute accordingly for future cases. It is not to ask this Court to disregard or rewrite the statute in this case. The City’s Points Relied On I and II should accordingly both be denied, and the rulings of the trial court denying the City’s motions for directed verdict at the close of all the evidence and for judgment notwithstanding the verdict should be affirmed.

**II. In the Alternative, The Trial Court Also Properly**  
**Denied the City’s Motions for Directed Verdict and For**  
**Judgment Notwithstanding the Verdict Because Plaintiff**  
**Presented A Submissible Case As To The Vicarious**  
**Liability of the City for The Officer’s Negligent Acts Under**

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<sup>9</sup> Because the agency relationship here is expressly created by the statute, the argument advanced by the City of Kansas City (Brief of Amicus City of Kansas City, at p. 21-22) that a written agreement is required to create an express agency relationship under Section 432.070, RSMo., is not well taken.

## Common Law Tests of Vicarious *Respondeat Superior*

### Liability.

As discussed above, Section 84.330 establishes as a matter of statutory law that the Officer was the agent of the City, and that the City was therefore vicariously liable for his negligent operation of a motor vehicle on duty. However, there was also other evidence presented at trial that was sufficient for the jury to find that the Officer was the agent of the City under common law rules of vicarious liability.

The question is whether the trial court erred in denying the City's motions for directed verdict and for judgment notwithstanding the verdict. There are several aspects of the applicable standard of review that are particularly important in this case.

This Court has held that:

This Court reviews the evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict, disregarding evidence to the contrary. This Court will reverse the jury's verdict for insufficient evidence only where there is a "complete absence of probative fact" to support the jury's conclusion.

*Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998) (footnotes omitted). Accordingly, this Court does "not weight the evidence in jury-tried cases. It is only when there is a complete absence of probative facts in

such cases to support the verdict that appellate courts are authorized to interfere.” *Siegel v. Ellis*, 288 S.W.2d 932, 934 (Mo. 1956). “A directed verdict is a drastic action to be taken sparingly and only where reasonable persons in an honest and impartial exercise in their duty could not differ on a correct disposition of the case.” *Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 783 (Mo. banc 1999).

“Generally, the relationship of principal-agent or employer-employee is a question of fact to be determined by the jury when, from the evidence adduced on the question, there may be a fair difference of opinion as to the existence of the relationship.” *Johnson v. Bi-State Development Agency*, 793 S.W.2d 864, 867 (Mo. banc 1990), *citing Smoot v. Marks*, 564 S.W.2d 231, 236 (Mo.App. banc 1978). *See also Bargfrede v. American Income Life Insurance Co.*, 21 S.W.3d 157, 161 (Mo.App.W.D. 2000). Direct evidence is not required to establish the relationship; it may be established by circumstantial as well as direct evidence. *Johnson*, 793 S.W.2d at 867, *citing Smoot*, 564 S.W.2d at 236. If reasonable persons could draw different conclusions as to the existence of the relationship, the question is one for the jury. *Smoot*, 564 S.W.2d at 236; *Bargfrede*, 21S.W.3d at 162.

Some Missouri decisions have looked to Section 220 of the Restatement (Second) of Agency, which sets forth a series of factors to assist in determining whether one is a servant for purposes of vicarious liability or an independent contractor. E.g., *Bargfrede*, 21S.W.3d at 162; *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo.App.E.D. 2002). These factors include:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

It has also been held that:

None of these elements alone is conclusive, and all must be viewed to see whether control, or the right to control, has been retained over the alleged servant's physical conduct and the

details of the work. [Citation omitted.] "[T]he determining factor is not whether respondent actually exercised control over the work ... [but] whether respondent had the right to exercise that control."

*Bargfrede*, 21 S.W.3d at 162 (citations omitted).

While the statutes give the Police Board a substantial degree of control over the activities of City police officers, that control is not exclusive. The existence of the right of the City to exercise control over the work of City police officers is illustrated by Section 84.090, RSMo. This section sets forth the various duties of the police department and its officers. In addition to general duties to preserve public peace and order, prevent crime, arrest offenders, preserve rights of persons and property, guard public health, preserve public order, prevent and remove nuisances, protect firefighters, these duties include:

(9) They shall also enforce all laws and ordinances passed or which may be passed by the common council or municipal assembly of said cities not inconsistent with the provisions of sections 84.010 to 84.240, or any other law of the state, which may be properly enforceable by a police force

The City's Board of Aldermen thus has the authority to direct the activities of and assign duties to city police officers by the passage of ordinances, which the police officers then have the duty to enforce. The City is given the explicit authority to adopt ordinances for preserving order, securing property and persons

from violence, danger or destruction, protecting public and private property, and for promoting the interests and insuring the good government” of the City.

Section 84.010.<sup>10</sup> The statutes relating to the police department in the City of St. Louis do not by their terms purport to deprive the City of all right to exercise control over or direct the activities of police officers; the City is forbidden only from passing ordinances that conflict or interfere with the powers and the exercise of the powers of the police board or from taking actions that “impede, obstruct, hinder, or interfere with the Police Board or the police officers.” Section 84.010.<sup>11</sup>

Several City ordinances were introduced into evidence as examples (Section 17.02.410, Section 17.06.010, Section 17.06.020, Section 17.16.350, Section 17.20.140, Section 17.40.020, and Section 17.20.100; T. 146-154, 200; Pl. Ex. 20). They included ordinances assigning the duty to enforce traffic ordinances to the police department, making it offense to fail or refuse to comply with the reasonable orders of a police officer, making it offense to flee or attempt to evade

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<sup>10</sup> These matters relate to factor (a) as mentioned in Section 220 of the Restatement (Second) of Agency, the extent of control the master may exercise over the details of the work, and supports the sufficiency of the evidence in this case.

<sup>11</sup> In fact, the statute gives the mayor of the City the explicit authority to direct the chief of police in emergencies. Section 84.010. The statutes relating to the Kansas City police department do not contain any similar provision.

a police officer, relating to investigation of accidents by police officers, etc. A general penalty provision, providing for fines of not more than \$500 and/or imprisonment for not more than 90 days for violations of city ordinances, was also introduced into evidence (Section 17.40.020; T. 154).

The form of the Uniform Citation and summons issued by City police officers for ordinance violations clearly indicates that when an ordinance violation is charged it is issued on behalf of the City of St. Louis, and directs defendants to appear in the City's municipal court. (T. 46-48, 107; Pl.Ex. 19). It includes the street mailing address, phone number, and Internet web page address, for the City Court and the City Traffic Violations Bureau for payment of fines for City violations by mail or in person prior to the assigned court date. (T. 46-48; Pl. Ex. 19) Fines paid as a result of such ordinance violation proceedings initiated by City police officers, wherein the City itself is the party plaintiff, are paid to the City (T. 48).

The duty and authority to enforce ordinances also satisfies one of the other elements of agency referred to in the City's Brief. Because a City police officer has the authority to issue a summons for an ordinance violation, and thus initiate a prosecution of a citizen on behalf of the City in the City's municipal court, which may result in a fine and/or confinement in a City institution and a record of conviction, City police officers clearly possess a very broad authority to alter the legal relationship between third parties and the City.

The officers who testified at trial indicated that they did police work only for the City of St. Louis, and not in or for any other city. They testified that their services as police officers were of benefit to the City of St. Louis (T. 49). The City's witness, Major Nocchiero,<sup>12</sup> agreed that the services of City police officers confer a benefit on the City and its citizens, and that they do not work for any other city (T. 216-217). One officer, a shift supervisor, testified that he considered himself employed by the City of St. Louis (T. 112). Major Nocchiero also agreed that City police officers "do work for the City of St. Louis under the authority" of Section 84.330 (T. 221).<sup>13</sup>

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<sup>12</sup> The City's discussion of the facts in its Brief disregards the applicable standard of review, in that it emphasizes the evidence, and in particular the parts of the testimony of Major Noccheiro, that the City believes is contrary to the result reached by the jury. In this, the City is asking this Court to weigh the evidence, contrary to the proper standard of review. As set forth above, under the proper standard of review, the evidence and the inferences therefrom are to be viewed in the light most favorable to the jury verdict, *disregarding* evidence to the contrary.

<sup>13</sup> This evidence relates to factor (i) as mentioned in Section 220 of the Restatement (Second) of Agency, whether the parties believe they are creating the relation of master and servant, and supports the sufficiency of the evidence in this case.

The compensation of City police officers is by paid by the City. Their paychecks come from the Treasurer's Office of the City of St. Louis (T. 228). The City provides their end of year information for tax purposes (T. 46). They are paid in part to enforce the ordinances of the City (T. 229-230). They work on a long term basis and not just by the job. A number of the officers who testified had worked as police officers for more than 20 years (T. 34, 86, 112-113, 205). There is no indication that they are paid by the job.<sup>14</sup> The fact that the City pays the compensation of the City police officers is an indicator of an agency relationship. *State ex rel. Wander v. Kimmel*, 256 Mo. 611, 165 S.W. 1067 (1914); *Leidy v Taliferro*, 260 S.W.2d 504, 507 (Mo. 1953).

It is undisputed, in fact, that the City funds the entire police department pursuant to Section 84.210, including personnel, supplies, maintenance, and repairs. See T. 208, 230. The police car in question was a department vehicle (T. 51-52, 113, 210, 230) and it is a fair inference from the evidence that the City thus

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<sup>14</sup> This evidence relates to factors (f) and (g) as mentioned in Section 220 of the Restatement, the length of time for which the person is employed, and the method of payment, whether by time or by the job, and supports the sufficiency of the evidence in this case.

funds the purchase of the police cars, and other equipment and facilities used by City officers in the discharge of their duties.<sup>15</sup>

There was evidence the insurance for the police car in this collision was furnished by the City of St. Louis (Pl.Ex. 11; T. 50-53; 219-220). This is reflected in the police report prepared concerning the collision, which reports are to be as accurate as the reporting officer can make them and are subject to correction of inaccuracies by supplemental report (Pl.Ex. 11; T. 50-53, 219-220). Furnishing liability insurance is relevant to the issues of the existence of the agency relationship and of right to control for purposes of vicarious liability, and tends to show the existence of the relationship. *State ex rel. Cummings v. Witthaus*, 358 Mo. 1088, 1096-97, 219 S.W.2d 383, 389 (banc 1949); *Muckenthaler v. Ehinger*, 409 S.W.2d 625, 627-28 (Mo. 1966). *See also Nuchols v. Andrews Investment Co.*, 364 S.W.2d 128, 138 (Mo.App. 1962).<sup>16</sup> Major Nocchiero conceded that the City did not thereby interfere with the Police Board (T. 220-221).

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<sup>15</sup> This evidence relates to factor (e) as mentioned in Section 220 of the Restatement, whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work, and supports the sufficiency of the evidence in this case.

<sup>16</sup> Plaintiff also asked the trial court to take judicial notice from the court file that when this action was first filed the City Counselor's Office entered its appearance for the Officer and was furnishing his defense. The trial court sustained a

The badge worn along with the uniform of City police officers bears the words “City of St. Louis” (T. 45, 124, 22). The shoulder patch of the uniform refers to “St. Louis Police, Missouri” (T. 45, 124). The emblem on the side of City police cars states “City of St. Louis” under the Arch (T. 228-229; Pl. Ex. 11 and 13). The sides of police cars and their license plates refer to the “Metropolitan St. Louis Police” (T. 67-68, 125, 228-229). These references also constitute evidence that tends to show the requisite agency relationship between the City and its officers. See, e.g., *Smoot v. Marks*, 564 S.W.2d 231(Mo.App. banc 1978).

There is little in Missouri case law by way of direct analogy to the legal relationship between the City of St. Louis and its police officers in this context. One interesting decision that has many similarities to, as well as some differences from, the instant case is *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo.App.E.D. 2002). *Scott* involved the conduct a radiologist (Dr. Koch) who was not formally an employee of the hospital but was instead a partner and employee of RIC, a company that contracted to furnish radiological services for the hospital. He was paid by RIC and not by the hospital. The hospital did not set his hours at the hospital, and the hospital did not bill patients for his services.

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relevancy objection to this evidence (T. 5, 188-192). This evidence, however, was relevant to the issue of agency. It should not have been excluded and may properly be considered by this Court. Furnishing a defense is clearly analogous to furnishing insurance as it bears on the issue of agency.

The plaintiff in *Scott* was injured due to the negligence of the radiologist in reading a CT scan, as well as that of a hospital ER physician. Plaintiff sued the radiologist and his employer, RIC, as well as the hospital and others. The radiologist, Dr. Koch, and his employer, RIC, settled before trial, and the case was tried against the hospital, with plaintiff claiming that Dr. Koch was the agent of the hospital and that the hospital was thereby vicariously liable for his negligence. The parallels with the alignment and posture of the parties in this case, in which the Officer and the Police Board settled before trial, and the case was tried against the City on the theory the Officer was the agent of the City, and that the City was vicariously liable for the Officer's negligence, are thus apparent.

In *Scott*, the jury found that the radiologist, Dr. Koch, was the agent of the hospital, and found the hospital liable for his negligence. On appeal, the hospital argued, as does the City here, that the trial court erred in denying its motions for directed verdict or judgment notwithstanding the verdict. The hospital argued that nothing in the record showed that it controlled the acts of the radiologist in the performance of his duty in the reading of plaintiff's CT scan for the hospital. The court nevertheless determined there was an issue for the jury as to whether he was an agent of the hospital for purposes of vicarious liability, and affirmed the judgment against the hospital.

Among the facts relied upon the court in *Scott* were the following: Dr. Koch was required to maintain liability insurance or the hospital was authorized to obtain it at his expense; the hospital furnished all of the office space and radiology

equipment, films, supplies and fixtures used by Dr. Koch; the contract with Dr. Koch was of an indefinite duration; RIC, Dr. Koch's employer, had been the exclusive provider of radiology services to the hospital for 60 years, and was the exclusive provider of radiologists to the hospital; and one of RIC's radiologists testified that he consider himself and other RIC radiologists to be in effect "employees of the hospital." The similarities to the situation of City police officers are apparent. The hospital also set policies that related to Dr. Koch's activities; here the Board of Aldermen can adopt ordinances that relate to the activities of police officers, so long as they do not hinder or interfere with the police board.

The two cases also differ in that the hospital had the authority to terminate Dr. Koch's services if it was dissatisfied with him, and here the City does not have that authority with respect to police officers. However, it must be remembered that none of the relevant elements alone is conclusive in applying the Restatement test, and all must be viewed in considering the agency issue. *Bargfrede*, 21 S.W.3d at 162. The two cases also differ in a way that strongly supports the sufficiency of the evidence in this case. *Scott* did not involve a statute like Section 84.330 that addressed the issue of agency, whereas in this case, Section 84.330 expressly provides that city police officers are "officers" of the City of St. Louis.

One of the other interesting aspects of *Scott* is its acknowledgment that a hospital does not have the right to stand over a physician's shoulder to dictate how to diagnose and treat patients, and that such does not preclude finding an agency

relationship in an otherwise proper case. That holding was of course applied in *Scott* to a physician who was not employed by the hospital claimed to be liable for the physician's negligence but who was instead employed by a separate entity that contracted to furnish radiological services to the hospital. Similarly, a police officer inevitably retains considerable discretion in his activities. For instance, in this case, the collision occurred when the Officer selected a route to the location where another officer had requested assistance that took him the wrong direction down a one way street (T. 57, 126). One of the other officers who responded testified that he used his own judgment as to the route he used to get to the scene, and that police officers always used their own judgment and made their own decisions as to how to get to a call location (T. 83-84). Based upon this, it is a fair conclusion from the evidence that the City had no less control of the Officer's activities in this respect than did the Police Board. As in the case of a physician, it is not possible or necessary to stand over a police officer's shoulder to dictate his activities in such matters. And, as in *Scott*, that fact should not, in an otherwise proper case, preclude a finding of agency. That reasoning has relevance to the case before the Court.

*Scott* obviously falls short of a perfect analogy to the instant case, but it has similarities and is of interest as an illustration of the manner in which the issues in this case may be analyzed.

When all of the foregoing evidence, and the inferences from that evidence, are considered in the light most favorable to the verdict, disregarding all contrary

evidence, reasonable persons could differ as to the conclusions to be drawn on the issue of agency. Accordingly, the issue was properly submitted to the jury.

But there was of course more than that before the jury. In addition to the evidence reviewed above, the evidence also included the provisions of Section 84.330, whereby the statute expressly declares City police officers to be officers of the City of St. Louis. It has been shown above that this statute creates an agency relationship for purposes of vicarious liability as a matter of law. At a minimum, it was certainly yet another piece of the evidence that strongly supports and would permit a reasonable juror to reach the conclusion that such an agency relationship existed in this case. No comparable statutory declaration of agency exists in the cases cited by the City in which the evidence was held insufficient to submit the issue to the jury, and they are for that reason therefore completely distinguishable from this case.

The question in the end is whether reasonable persons could differ on the agency issue, based upon the evidence presented to the jury, taken in the light most favorable to the verdict, and disregarding all contrary evidence. Based upon that standard, plaintiff Hodges presented a submissible case on the issue of the City's vicarious liability for the actions of the Officer. The trial court properly denied the City's motions for directed verdict and judgment notwithstanding the verdict, and her rulings on this point should be affirmed. For these further reasons, in addition to those set out in Point I of this Brief, the City's Point I and II should be denied by this Court.

**III. The City's Point Relied On That This Action Is Barred By Sovereign Immunity Is Without Merit and Should Be Denied. The Scope Of The Absolute Waiver Of Sovereign Immunity Under Section 537.600.1 (1) For Injuries Resulting From The Negligence Of Public Employees In The Operation Of Motor Vehicles Is Coextensive With The Vicarious *Respondeat Superior* Liability Of Governmental Entities For The Negligent Operation Of Motor Vehicles. There Was A Submissible Case As To the Vicarious Respondeat Superior Liability of the City and The Jury Returned a Verdict Finding the City Liable for the Officer's Negligent Acts. This Case Falls Within the Plain Language of the Waiver of Sovereign Immunity In Section 537.600.1 (1).**

Because, as shown above, the jury in this case could properly find that the City was vicariously liable for the acts of Officer as the agent of the City, the City's claim that it is entitled to judgment as a matter of law based upon sovereign immunity is also without merit. That is because the scope of the absolute waiver of sovereign immunity under Section 537.600.1 (1) for injuries resulting from the negligence of public employees in the operation of motor vehicles is coextensive with the vicarious *respondeat superior* liability of governmental entities for the negligent operation of motor vehicles. If the case is one in which the City is thus

vicariously liable, then it is also one that falls within the express waiver of immunity under Section 537.600.1 (1). The Plaintiff in this case has consistently maintained since the outset of this litigation that the City is vicariously liable for the Officer's negligent acts. The jury in this case returned a verdict finding the City vicariously liable.

The City admits that Section 537.600.1 (1) contains an express waiver of sovereign immunity for compensatory damages actions against public entities with respect to:

- (1) 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 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. The leading decision on this point is *Bowman v. State of Missouri*, 763 S.W.2d 161, 163 (Mo.App.W.D. 1989). *Bowman* makes it clear that the term "public employees" as used in Section 537.600.1 (1), is not narrowly limited to employees in the conventional sense of the word. In *Bowman*, for instance, the "public employee" was a juvenile in the custody of the Division of Youth Services who pulled the lever on a trash compactor on a truck while collecting trash on Division of Youth Services property, thereby crushing the arm of another similarly

situated juvenile. Her status was clearly not that of a conventional employee. Indeed, the court in the same case held that neither of these two juveniles was an “employee” for purposes of workers compensation coverage. *Bowman*, 763 S.W.2d at 165. They were instead being held in the custody of the juvenile corrections system and were in essence prisoners. 763 S.W.2d at 166.

The court nevertheless rejected the state’s argument that the waiver of immunity in Section 537.600.1(1) did not apply because the state did not employ the juvenile. The court acknowledged the rule of strict construction of provisions for waivers of sovereign immunity, but also held that the statute must be construed in light of the legislature’s purpose in enacting it: recognition of the need to compensate those injured by the negligent operation of motor vehicles by governmental employees. “No construction of the statute may legitimately ignore that purpose.” *Bowman*, 763 S.W.2d at 164. The court held that by enactment of Section 537.600, the state agreed to accept vicarious liability as an employer of persons operating motor vehicles. In particular the court further held that the meaning of the “public employee” under § 537.600.1 (1) was governed by the common law doctrine of vicarious liability and concepts of master and servant. The central holding of *Bowman* is that if a relationship exists between a public entity and an individual sufficient to impose vicarious *respondeat superior* liability on the public entity for that person’s negligent acts, then that person is a “public employee” for purposes of § 537.600.1 (1), and that the label of a formal

or conventional employer-employee relationship is not required.<sup>17</sup> This statutory waiver of sovereign immunity was intended to be coextensive with those cases involving the negligent operation of a motor vehicle in which the public entity would be vicariously liable under *respondeat superior*.

As set forth above, Section 84.330 by statutory law creates an agency relationship between the City and its police officers that imposes *respondeat superior* vicarious liability on the City for their negligent acts. In the alternative, it has also been shown above that there was sufficient evidence in this case for the jury to find an agency relationship and vicarious liability under common law rules.

This case therefore falls within the scope of the waiver of immunity in Section 537.600.1 (1), as explained in *Bowman*. It is respectfully submitted that *Bowman* properly carries out the legislative purpose of the statute and should be followed by this Court.

Completely apart from construction of the waiver in Section 537.600.1 (1) in *Bowman*, it should also be noted that the Court of Appeals, Eastern District, has expressed the view that City police officers are “public employees” for purposes

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<sup>17</sup> It should also be noted that: “Fundamentally, there is no distinction to be drawn between the liability of a principal for the tortious acts of his agent, and the liability of an employer (“master”) for the tortious acts of his employee (“servant”).” *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 n. 8 (Mo.App. E.D. 2002).

of § 537.600.1 (1) in actions against the City. In *Bachmann v. Welby*, 860 S.W.2d 31 (Mo.App.E.D. 1993), the court concluded that a suit against a City police officer based upon a traffic collision should have been dismissed on official immunity grounds. The Court, however, then went on to state:

We note, however, that the official immunity doctrine is a different legal concept than the sovereign immunity doctrine. *Jackson v. Wilson*, 581 S.W.2d 39, 42 (Mo.App.W.D. 1979). The general assembly has waived sovereign immunity for injuries resulting from the negligent acts of public employees arising out of the operation of motorized vehicles. § 537.600.1 (1), RSMo 1986. Thus, plaintiff may have an action against the City of St. Louis.

860 S.W.2d at 34. Although the court did not more fully explain the basis of this conclusion, it is supported by the plain language of the statute, as well as by the decision in *Bowman*.

It is worthwhile to keep in mind the actual language of the waiver set forth in Section 537.600.1 (1). It includes:

(1) 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.

It is admitted by the City that the Officer was a “public employee” although the City asserts that he was an employee of the Police Board only and not of the City. Under the plain language of the statute, however, there is no requirement that the Officer have been an employee of the City, so long as he was a “public employee.” There can be no doubt that the Officer’s negligent act occurred while he was on duty. Thus this case directly comes within the plain language of the waiver provided for by the statute. Regardless of whether the Officer is deemed to have been employed solely by the Police Board, or the City, or both, he is still by the admission of both parties, a “public employee”. Assuming the jury could properly find the City vicariously liable for the actions of the Officer based upon the arguments set forth above, there is nothing in the language of Section 537.600.1 (1) that requires the Officer to have been the employee of the City for the waiver of the City’s immunity as to that vicarious liability to be effective, so long as he was a “public employee,” and the negligent operation of a motor vehicle for which the City is liable occurred within the course of his employment as a “public employee.” Both of those conditions are satisfied here.

For all of these reasons, the case comes within the scope of the waiver of sovereign immunity in Section 537.600.1(1). The City’s argument to the contrary is without merit. The City’s Point Relied On III should be denied.

### **CONCLUSION**

For all of the foregoing reasons, the trial court properly denied the City’s motions for directed verdict and for judgment notwithstanding the verdict. The

trial court's rulings denying the City's motions for directed verdict and for judgment notwithstanding the verdict should therefore be affirmed. The City's Points Relied On I, II, and III should all be denied by this Honorable Court.

**CROSS APPELLANT'S BRIEF**

**JURISDICTIONAL STATEMENT**

Plaintiff-Respondent/Cross-Appellant Hodges accepts and adopts the jurisdictional statement set forth in the Brief of the City.

**STATEMENT OF FACTS RELATING TO CROSS-APPEAL**

The sole Point Relied On in this cross-appeal challenges the validity of the cap on damages set forth in Section 537.610, R.S.Mo. The City first mentioned Section 537.610 in its Separate Answer of the City of St. Louis to First Amended Petition, filed on July 9, 2004 (LF 27). Plaintiff immediately asserted the invalidity of Section 537.610 in Plaintiff's Reply to Defendant's Answer to Plaintiff's First Amended Petition, filed on August 19, 2004 (LF 28). Plaintiff stated that Section 537.610 (and Section 537.600 and Section 537.615) were invalid on constitutional grounds, specifically citing Article I, Section 2, Constitution of Missouri, 1945; 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.

It is undisputed that prior to trial, Plaintiff settled her claim against the Officer and the Police Board for the sum of \$670,236 (T. 277; LF 115, 123), and a

Stipulation of Prejudicial Dismissal was filed as to those two defendants only on October 31, 2005 (L.F. 108). The case was tried to a verdict with the City as the sole remaining defendant. At the very beginning of the trial, on October 31, 2005, Plaintiff again raised her claim that the cap contained in Section 537.610 was invalid on the same constitutional grounds set forth in her Reply of August 19, 2004 (T. 2-4). On November 3, 2005, the jury returned its verdict in favor of Plaintiff and against the City in the sum of \$1,200,000 (LF. 149-150). Adjustment of the verdict to reflect the amount of the settlement would have resulted in a net verdict and judgment against the City of \$529,764 (T. 277).

The evidence at trial as to economic, as opposed to non-economic loss, was that there were medical bills from Barnes Jewish Hospital in the sum of \$411,733.35, Rehab Institute of St. Louis in the sum of \$74,643.96, and City of St. Louis EMS in the sum of \$311, for a total of \$486,816.31 (T. 167-168; Pl. Ex. 16). This evidence came in without objection by the City (T. 167). There was also testimony that Ann Martin was unable to work for 14 or 15 months following this collision (T. 166).

After the jury returned its verdict in favor of Plaintiff and against the City in the sum of \$1,200,000, the City made an oral motion to the trial court to apply the cap on damages contained in Section 537.610, and reduce the verdict and judgment against the City to the amount permitted under the cap, \$335,118 (T. 276). Plaintiff immediately objected, again asserting that the cap contained in Section 537.610 was unconstitutional for the same reasons set forth in its Reply

filed on August 19, 2004 (T. 276-277). The trial court applied the cap contained in Section 537.610 (T. 277) and entered a judgment in favor of Plaintiff and against the City, reciting the jury verdict of \$1,200,000, but specifically stating that “Plaintiff Kim Hodges recovery shall be limited to the City of St. Louis cap of \$335,118.” (LF 145-146).

Plaintiff then filed her Motion to Set Aside Judgment entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068, R.S.Mo. Plaintiff again set forth her objection that the cap in Section 537.610 was invalid on constitutional grounds and requested the trial court to enter a new judgment without imposition of the cap in the sum of \$529,764, or in the alternative to grant an additur (LF 115-116). She specifically cited Article I, Section 1; Article 1, Section 2; Article I, Section 14; Article I, Section 22(a); and Article 4, Section 30 (b) of the Missouri Constitution. She further set forth that the application of the Section 537.610.2 cap deprived her of the sum of \$194,646.00 – the difference between the net verdict (after credit for the settlement with the Officer and the Police Board) of \$529,764.00, and the actual judgment entered by the trial court after application of the cap of \$335,118.00 (LF 115-116). Plaintiff further presented her position to the trial court at the motion hearing on January 30, 2006 (T. 293-296). After that hearing, the trial court denied the Motion to Set Aside Judgment entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068, R.S.Mo.(L.F. 151).

Plaintiff has carried her position as to the validity of Section 537.610 forward in her appeal to this Honorable Court.<sup>18</sup>

**POINT RELIED ON**

**The Trial Court Erred In Denying Plaintiff's Objections to the City's Request to Apply the Cap and Limitation on Recovery Contained in Section 537.610.2, In Thereby Reducing the Amount of the Judgment Against the City to The Amount of the Cap, and In Denying Plaintiff's Motion to Set Aside Judgment Entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068. Section 537.610.2 Is Contrary to Article I, Section 2 of the Missouri Constitution, Providing for Equal Protection, Because Section 537.610.2 Caps and Limits the Recovery of Economic Damages By Persons Injured Due to the Negligence of Public Employees, Unlike Provisions Such As**

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<sup>18</sup> The foregoing procedural history also demonstrates that Plaintiff's constitutional claims were properly asserted in the trial court at the earliest possible time, and were properly preserved throughout the proceedings in the trial court for review by this Court. *E.g., United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

**Section 538.210, Which Place Limits Only On Noneconomic Damages But Do Not Limit Recovery For Economic Losses.**

Missouri Constitution, Article I, Section 2

*Adams By and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992)

*Flyler v. Doe*, 457 U.S. 202, 201 S.Ct. 2382 (1982)

*Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978)

Section 538.210, RSMo

Section 537.610.2, RSMo

**ARGUMENT**

**The Trial Court Erred In Denying Plaintiff's Objections to the City's Request to Apply the Cap and Limitation on Recovery Contained in Section 537.610.2, In Thereby Reducing the Amount of the Judgment Against the City to The Amount of the Cap, and In Denying Plaintiff's Motion to Set Aside Judgment Entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068. Section 537.610.2 Is Contrary to Article I, Section 2 of the Missouri Constitution, Providing for Equal Protection, Because Section 537.610.2 Caps and Limits the Recovery of Economic Damages By Persons Injured Due to the**

**Negligence of Public Employees, Unlike Provisions Such As  
Section 538.210, Which Place Limits Only On Noneconomic  
Damages But Do Not Limit Recovery For Economic Losses.**

The trial court erred in denying Plaintiff's objections to the City's request to apply the cap and limitation on recovery contained in section 537.610.2, in thereby reducing the judgment against the City to the amount of the cap, \$335,118, and in denying Plaintiff's Motion to Set Aside Judgment Entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068, R.S.Mo. ("Motion to Set Aside Judgment"). Section 537.610.2 is contrary to Article I, Section 2 of the Missouri Constitution, providing for equal protection.

Article I, Section 2, of the Missouri Constitution of 1945 provides:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Section 537.610.2, RSMo, contains a cap or limit on the amount of any judgment that may be entered against a public entity for any one person for a single act or occurrence and provides as follows (emphasis supplied):

2. The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650, shall not exceed two million dollars for all claims arising out of a single accident or occurrence and *shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence*, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo.

Section 537.610.5 further provides for an annual adjustment of the \$300,000 limit as set forth in §537.610.2, based upon data supplied by the United States Department of Commerce. There is no dispute in this case that the applicable limit at the time of trial in this case was \$335,118.

Section 537.610.2 was the basis of the trial court's action in providing in the judgment entered in favor of Plaintiff and against the City that "Plaintiff Kim Hodges recovery shall be limited to the City of St. Louis cap of \$335,118", thereby reducing the jury verdict and judgment to that amount. (LF 145-146).

On its face, Section 537.610.2 is a limit or cap on the recovery all damages, economic as well as non-economic. In this Section 537.610.2 is significantly different than the other cap or limit on damages that has been established by the

General Assembly, which provides that no more than \$350,000 may be recovered for non-economic damages in actions against health care providers, irrespective of the number of defendants: Section 538.210.<sup>19</sup> Section 538.210.1 provides:

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover

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<sup>19</sup> In this discussion, Plaintiff adopts the definitions of “economic damages” (which includes “medical damages”) and “noneconomic damages” set forth in Section 538.205 (1), (6) and (7):

(1) “Economic damages”, damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages or lost earning capacity;

. . . . (6) “Medical damages”, damages arising from reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitation services;

(7) “Noneconomic damages”, damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages;

more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants.

Unlike Section 537.610.2, Section 538.210 does not place any limit or cap on the amount of *economic* damages that may be recovered in such an action. In this case, the evidence at trial demonstrated a minimum of \$486,816.31 in economic damages based upon medical damages alone (without any consideration of wage loss) (T. 167-168; Pl. Ex. 16). There is thus a shortfall of \$151,698.31 between the medical economic damages alone and the judgment of \$335,188 entered by the trial court.

When the validity of this limit on recovery of noneconomic damages in medical negligence cases was challenged on constitutional grounds in *Adams By and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), this Court specifically emphasized the fact that the statute placed no limit on the recovery of economic damages in rejecting an equal protection challenge to the statute. This Court thus held:

The legislature could rationally believe that the cap on noneconomic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers. Were this to result, the legislature could reason, physicians would be willing to continue "high risk" medical

practices in Missouri and provide quality medical services at a less expensive level than would otherwise be the case.

*The noneconomic damage cap does not take away from any economic or punitive damage award.* Moreover, the limit on noneconomic damages still allows \$430,000 per liable defendant in this case, in addition to the nearly \$5.9 million awarded in economic damages. As such, the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians.

*Adams*, 832 S.W.2d 898 at 904 (emphasis supplied). Thus, in *Adams* the fact that economic damages were *not* limited was an important factor in determining that the limit on noneconomic damages had a rational basis sufficient to survive an equal protection challenge.

This Court has considered the validity of Section 537.610.2 in two previous cases: *Richardson v. State Highway and Transportation Commission*, 863 S.W.876 (Mo. banc 1993), and *Fisher v. State Highway Commission*, 948 S.W.2d 607 (Mo. banc 1997). In those cases, this Court declined to find that Section 537.610.2 was unconstitutional based upon equal protection, due process, right to trial by jury or the open courts provision of the Missouri constitution. But the disparity between the limit on noneconomic damages in medical malpractice cases and the limit on economic damages under Section 537.610, and the significance of

that disparity for equal protection analysis, has not been yet been directly addressed by this Court.

A statute is presumed to be constitutional, and when the constitutionality of a statute is challenged, the burden of proof is on the party challenging the constitutionality of the statute. E.g., *Adams By and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 903 (Mo. banc 1992).

This Court has employed a two-step analysis in approaching equal protection cases under Article I, Section 2, of the Missouri constitution. The first is to consider whether the classification at issue operates to the disadvantage of a suspect class or impinges on a fundamental constitutional right. If so, the classification is subject to strict scrutiny to determine whether the classification is necessary in order to accomplish a compelling state interest. If not, this Court's review is based upon whether it is rationally related to a legitimate state interest. E.g., *In re Marriage of Kohring*, 999 S.W.2d 228, 231-32 (Mo. banc 1999). In *Richardson and Fisher*, this Court reviewed the equal protection claims asserted in those cases as to the limit on damages contained in Section 537.610.2 under the rational basis test. This Court has stated that victims of government negligence are not a suspect class, and has declined to find that Section 537.610.2 infringes a fundamental right. *Fisher*, 948 S.W.2d at 610. However, in both *Richardson*, Judge Holtstein, and in *Fisher*, then Chief Justice Holstein, joined by Judge Price, persuasively argued that Section 537.610.2 does infringe on a fundamental right, and that "the plaintiff's right to recover their economic loss for a wrong

perpetrated by public officials in the course of their duties is a fundamental right found in the Missouri Constitution.” *Richardson*, 863 S.W.2d at 884 (Holstein, J., concurring in the result). It is evident from both opinions that Judge Holstein would not have questioned a limit on recovery of noneconomic damages in the same way. Based upon this reasoning, the Court is respectfully requested to apply strict scrutiny in this case.

In addition, there is a third level of scrutiny, sometimes referred to as intermediate level scrutiny, which has been applied by the United States Supreme Court in equal protection cases, even when no suspect classification or fundamental right is involved. This test considers whether the classification at issue serves an important governmental objective and whether it is substantially related to the achievement of that objective. *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 457 (1976). In the alternative, Plaintiff asks the Court to use intermediate level scrutiny in this case.

In this regard, the Court’s attention is invited to *Flyler v. Doe*, 457 U.S. 202, 201 S.Ct. 2382 (1982), in which the Court applied an intermediate scrutiny test. In that case, the statute denied children who could not document legal presence in the United States access to a free public education. These were children of illegal immigrants. The Court acknowledged that undocumented aliens did not constitute a suspect class, and that education was not a fundamental right. 457 U.S at 234, 102 S.Ct. at 2398. But the Court emphasized that these undocumented minor children were not responsible for their status. By denying

them access to public education, the statute “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status”, 457 U.S at 234, 102 S.Ct. at 2398, and for that reason could not be “considered rational unless it furthers some substantial goal of the state.”

Those who are seriously and permanently injured as a result of the negligence of public employees are also “not accountable” for their status. Further, to the extent Section 537.610.2 denies recovery of the full extent of economic damages of those who are seriously and permanently injured, including medical bills for past and future treatment, they too may well face a lifetime hardship as a result of inability to recover for those economic losses. The critical point in *Flyler* was the imposition of a hardship on a discrete class of children, and that the children *were not accountable for their disabling status*. As Chief Justice Holstein pointed out in his separate concurring and dissenting opinion in *Fisher*, a very similar situation exists here:

“ . . . . I believe the State's imposition of a disabling injury upon a plaintiff is a form of compulsory servitude from which the plaintiff cannot escape. Moreover, plaintiff will be deprived of previously acquired earnings and whatever meager income she may now be capable of producing by being forced to pay medical and rehabilitation expenses thrust upon her by the culpable conduct of the State's agents. She is thereby

deprived by the State of the right to enjoy the gains of her own industry.

It is possible the State may limit its liability. In this case, plaintiff seeks only economic damages in excess of that authorized by sec. 537.610. Just compensation and due process require at least the payment of plaintiff's actual economic loss attributable to the State or its agents.

*Fisher*, 948 S.W.2d at 614 (opinion of Holstein, C.J., concurring and dissenting).

For these reasons, the alternative test of intermediate level scrutiny is appropriate in this case.

With respect to the validity Section 537.610.2, the Court's attention is also invited to *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978), which applied an intermediate scrutiny test. In that case, the court held a statutory limit of the total damages recoverable in a medical negligence case of \$300,000, including both economic and noneconomic damages, violated equal protection. In *Arneson*, the stated purposes of the statute were "assurance of availability of competent medical and hospital services at reasonable cost, elimination of the expense involved in nonmeritorious malpractice claims, provision of adequate compensation to patients with meritorious claims, and the encouragement of physicians to enter into practice in North Dakota and remain in such practice so long as they are qualified to do so." 270 N.W.2d at 135. In holding the limit on economic

damages, as well as noneconomic damages, violated equal protection, the court held that:

Does the limitation of recovery of seriously damaged or injured victims of medical negligence promote these aims? We hold that it does not and that it violates the Equal Protection Clause of the State Constitution. Certainly the limitation of recovery does not provide adequate compensation to patients with meritorious claims; on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims. Restrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims.

*Arneson*, 270 N.W.2d at 135-136.

In contrast to *Arneson*, in *Adams* this Court sustained a limitation on *noneconomic* damages in medical negligence cases against an equal protection challenge, based upon similar legislative purposes, and explicitly based its conclusion that the limitation did not violate equal protection in part on the fact that the “noneconomic damage cap does not take away from any economic or punitive damage award.” *Adams*, 832 S.W.2d at 904.

In considering Section 537.610.2, this Court has pointed to concern on the part of the General Assembly that “full monetary responsibility for tort claims”

would create a risk of “insolvency or intolerable tax burdens” and that the limitation on damages would allow for orderly stewardship of public funds while “while permitting some victims to recover something.” *Richardson*, 863 S.W.2d at 879; *Fisher*, 948 S.W2d at 610-611. Recovery of the full amount of economic damage would not entail full responsibility for tort claims, nor would it present the same risk of insolvency or tax increases as would exposure to the full amount of economic and noneconomic damages.<sup>20</sup> As *Adams* illustrates, a limit on noneconomic damages rationally addresses such concerns, and does so without arbitrarily denying just compensation for economic damages. Arbitrarily denying just compensation for economic damages is in this way not rationally related to these legitimate state concerns. As illustrated by *Arneson*, it is certainly not substantially related to the achievement of an important governmental objective

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<sup>20</sup> It is of interest to note that at the post trial hearing, the trial court received in evidence Plaintiff’s Ex. A (LF 137-138; (T 293-295), a compilation from the Circuit Clerk’s office of all judgments against the City since and including 1994. Of some 28 tort cases listed, only four, including this case, exceeded the unadjusted cap amount of \$300,000. It is, of course, impossible to tell what portion of these judgments was attributable solely to economic loss, although one may be fairly certain a jury verdict in a personal injury case would typically have a substantial noneconomic component.

and it unquestionably is not necessary in order to accomplish a compelling state interest.

Regardless of the test used, strict scrutiny, intermediate scrutiny, or rational basis, the limit on all damages, including economic damages, contained in Section 537.610.2, violates equal protection. Article I, Section 2, Missouri Constitution. The trial court erred in denying Plaintiff's Motion to Set Aside Judgment entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068.

### **CONCLUSION**

For all of the foregoing reasons, the limit or cap on recovery contained in Section 537.610.2 violates equal protection under Article I, Section 2 of the Missouri Constitution. The trial court therefore erred in reducing the verdict against the City to the amount of the cap. Because there was no valid statutory cap or limitation on the damages as assessed by the jury in its verdict, the trial court should have entered a net judgment against the City in the amount of \$529,764, representing the jury verdict less the amount of the settlement with Officer and the Police Board. Plaintiff therefore respectfully prays this Honorable Court to reverse the trial court's action in applying the cap and remand to the trial court with directions to enter judgment in favor of plaintiff in the sum of \$529,764.

Respectfully submitted,

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**CERTIFICATE OF ATTORNEY**

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 11,714 words, as calculated by Microsoft Word, and is in 13 point Times New Roman font;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing Brief and a copy in electronic format on a 3 ½" disk were sent U.S. Mail, postage prepaid, to the following parties on this \_\_\_\_ day of September, 2006:

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