

**IN THE MISSOURI SUPREME COURT**

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**NO. SC87513**

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**KIMBERLY HODGES**

**RESPONDENT/CROSS-APPELLANT,**

**v.**

**CITY OF ST. LOUIS**

**APPELLANT/CROSS-RESPONDENT.**

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

**HONORABLE EVELYN M. BAKER**

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**BRIEF OF AMICI CURIAE**

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**CITY OF KANSAS CITY,  
MISSOURI**

**Galen P. Beaufort #26498**

**City Attorney**

**William D. Geary #24710**

**Assistant City Attorney**

**28th Floor City Hall**

**414 East 12th Street**

**Kansas City, Mo 64106**

**(816) 513-3118**

**(816) 513-3133 (Facsimile)**

**ATTORNEYS FOR  
AMICUS CURIAE CITY OF  
KANSAS CITY, MISSOURI**

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## **JURISDICTIONAL STATEMENT**

Amicus Curiae City of Kansas City adopts the jurisdictional statement contained in the brief of Appellant / Cross-Respondent, City of St. Louis.

## INTEREST OF AMICUS CURIAE

This case involves the unique question of whether a police officer employed by the Board of Police Commissioners of the City of St. Louis is an agent of the City of St. Louis for purposes of municipal responsibility for the torts of the police officer. The City of St. Louis and the City of Kansas City are the only Missouri municipalities who are prohibited by statute, Chapter 84, Revised Statutes of Missouri, from organizing and operating a municipal police department. It has been noted that interpretations of the provisions of Chapter 84 that apply only to St. Louis, §84.010 - §84.340, RSMo., and those that apply only to Kansas City, §84.350 - §84.860, RSMo., are persuasive when discerning the meaning of each group of statutes. *State ex rel. McGull v. St. Louis Board of Police Commissioners*, 178 S.W.3d 719, 723 (Mo.App.E.D. 2005).

The issue of agency – is a police officer employed by a state agency, the St. Louis Board of Police Commissioners, under the control of the City of St. Louis (and by extension is an employee of the Kansas City Board of Police Commissioners under the control of the City of Kansas City) is of critical importance. The actions of the trial court have permitted recovery from a municipality for the damages caused by an employee of a state agency, and also from the State of Missouri. This was permitted, even though the municipality has no lawful means to control the actions of the police officer or the police officer's employer, the Board of Police Commissioners.

Although the City of Kansas City supports the position of the City of St. Louis that it should not be responsible for the torts of police officers employed by the Board of

Police Commissioners, the City of Kansas City, as amicus curiae, respectfully offer these additional comments and argument.

## **CONSENT AND REFUSAL OF PARTIES**

Pursuant to Missouri Supreme Court Rule 84.05(f)(2) counsel for the City of Kansas City contacted counsel for the Appellant / Cross-Respondent, City of St. Louis, and the Respondent / Cross-Appellant, Kimberly Hodges, requesting their consent to file this amicus curiae brief for the City of Kansas City. Counsel for Appellant / Cross-Respondent, City of St. Louis, granted his consent to the filing of this amicus curiae brief. Counsel for Respondent / Cross-Appellant, Kimberly Hodges, denied consent.

Pursuant to Missouri Supreme Court Rule 84.05(f)(3) the City of Kansas City filed its “Motion of City of Kansas City, Missouri, with Supporting Suggestions, for Leave to File an Amicus Curiae Brief” contemporaneously with this amicus curiae brief.

## **STATEMENT OF FACTS**

Amicus Curiae City of Kansas City, Missouri, adopts the statement of facts contained in the brief of Appellant / Cross-Respondent City of St. Louis, Missouri.

## **POINTS ON APPEAL**

### **I.**

**THE TRIAL COURT ERRED DENYING THE CITY OF ST. LOUIS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE, DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND DENYING THE CITY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AND AGAINST THE CITY BECAUSE EVIDENCE SUFFICIENT TO MAKE A CASE SUBMISSIBLE TO THE JURY THAT POLICE OFFICER WALKER WAS AN AGENT OF THE CITY AND, THEREFORE, THE CITY COULD BE LIABLE FOR OFFICER WALKER'S TORTIOUS ACTS, WAS NOT PRESENTED.**

**A. BECAUSE THE CITY OF ST. LOUIS HAS NO LAWFUL RIGHT OR ABILITY TO CONTROL THE ACTIONS OF ANY ST. LOUIS POLICE OFFICER, THE CITY OF ST. LOUIS CANNOT BE IN A PRINCIPAL – AGENT RELATIONSHIP WITH A POLICE OFFICER OR THE BOARD OF POLICE COMMISSIONERS.**

*State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002).

*Smith v. State*, 152 S.W.3d 275, 278 (Mo. 2005).

*Pearson v. Kansas City*, 55 S.W.2d 485, 491 (Mo. 1932)

**B. BECAUSE THE PLAINTIFF DID NOT ESTABLISH ANY WRITTEN AGREEMENT TO WHICH THE CITY OF ST. LOUIS WAS A PARTY ESTABLISHING AN AGENCY RELATIONSHIP, THE PROVISIONS OF §432.070, RSMO., BAR ANY FINDING THAT OFFICER WALKER WAS AN AGENT OF THE CITY.**

*Gill Construction, Inc. v. 18th & Vine Authority*, 157 S.W.3d 699, 709 (Mo.App. 2004)

*Langlois v. Pemiscot Memorial Hospital*, 185 S.W.3d 711, 713 (Mo.App.S.D. 2006).

*Fantasma v. Kansas City Board of Police Commissioners*, 913 S.W.2d 388, 391

(Mo.App.W.D. 1996).

*Riley v. City of Kansas*, 31 Mo.App. 439 (1888).

**C. BECAUSE THE PLAINTIFF DID NOT ESTABLISH THAT THE CITY OF ST. LOUIS TOOK ANY AFFIRMATIVE STEPS TO MAKE OFFICER WALKER AN AGENT OF THE CITY, PLAINTIFF CANNOT ESTABLISH AN AGENCY RELATIONSHIP BETWEEN THE CITY AND OFFICER WALKER.**

*Settle v. State*, 679 S.W.2d 310, 317 (Mo.App.W.D. 1984).

*Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo.App.W.D. 1995).

*Jefferson-Gravois Bank v. Cunningham*, 674 S.W.2d 561, 563 (Mo.App.E.D. 1984).

*Kennon v. Citizens Mutual Insurance Co.*, 666 S.W.2d 782, 786 (Mo.App.E.D. 1983).

**ARGUMENT**

**I.**

**THE TRIAL COURT ERRED DENYING THE CITY OF ST. LOUIS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF’S EVIDENCE, DENYING THE CITY’S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE AND DENYING THE CITY’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOLLOWING JUDGMENT FOR PLAINTIFF AND AGAINST THE CITY BECAUSE EVIDENCE SUFFICIENT TO MAKE A CASE SUBMISSIBLE TO THE JURY THAT POLICE OFFICER WALKER WAS AN AGENT OF THE CITY AND, THEREFORE, THE CITY COULD BE LIABLE FOR OFFICER WALKER’S TORTIOUS ACTS, WAS NOT PRESENTED.**

The amicus curiae City of Kansas City, Missouri, adopts the standard of review set forth by the Appellant / Cross-Respondent, City of St. Louis, Missouri.

**A. BECAUSE THE CITY OF ST. LOUIS HAS NO LAWFUL RIGHT OR ABILITY TO CONTROL THE ACTIONS OF ANY ST. LOUIS POLICE OFFICER, THE CITY OF ST. LOUIS CANNOT BE IN A PRINCIPAL – AGENT RELATIONSHIP WITH A POLICE OFFICER OR THE BOARD OF POLICE COMMISSIONERS.**

The principal – agent relationship is the lynchpin of Respondent / Cross-Appellant’s, Ms. Hodges’, action against the City of St. Louis. For it is the assertion that Officer Walker, and by extension the St. Louis Board of Police Commissioners, are agents of the City of St. Louis. The Restatement (Second) of Agency §12 - §14 (1958), adopted by the Supreme Court, requires three things for a principal – agent relationship:

- (1) An agent holds a power to alter legal relations between the principal and a third party;
- (2) An agent is a fiduciary with respect to matters within the scope of the agency;
- (3) A principal has the right to control the conduct of the agent with respect to matters entrusted to the agent.

*State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002). It is the third requirement – the right of the principal to control the agent – that can never be established because it is unlawful for the City of St. Louis to exercise any control over the police function protecting the people of St. Louis.

The police force protecting St. Louis since 1861 has been a state agency. *State v. Smith*, 152 S.W.3d 275, 278 (Mo. 2005). This was recognized shortly after the State of Missouri denied St. Louis the authority to organize and maintain its own police force when the Supreme Court wrote:

[T]he Police Commissioners are an agency of the State Government, and required to perform within a specified locality some of the most important duties of the government.

*State ex rel. Police Commissioners of St. Louis v. County of St. Louis*, 34 Mo. 546, 571 (1864).<sup>1</sup> It has continued to be so recognized.

What has sometimes been called the St. Louis Police Act, §84.010 - §84.340 RSMo 2000, is explicit in its prohibition against the City of St. Louis operating a police force. After noting that the applicable cities, of which only St. Louis qualifies or has qualified, may enact ordinances for the protection of the public, the statute states:

[N]o ordinances heretofore passed, or that may hereafter be passed, by the common council or municipal assembly of the cities, shall, in any manner, conflict or interfere with the powers or the exercise of the powers of the boards of police commissioners of the cities as created by section 84.020, nor shall the cities or any officer or agent of the corporation of the cities, or the mayor thereof, *in any manner impede*, obstruct, hinder or interfere with the boards of police or any officer, or agent or servant thereof or thereunder.

§84.010, RSMo 2000.<sup>2</sup>

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<sup>1</sup> At this time the police function for St. Louis County and the City of St. Louis was provided by a single police force. The County funded 25% of the cost and the City funded the remainder. Later the City of St. Louis became the only responsibility of the Board of Police Commissioners.

This prohibition and the similar prohibition applicable to the City of Kansas City<sup>3</sup> have been reviewed over the course of the last 145 years and the nature of the relationship between the cities and the Boards of Police Commissioners has not changed. The Boards are state agencies and the City of St. Louis and the City of Kansas City have no authority or right to operate a police department.

It should be noted that in one instance the statutes controlling the two cities vary. St. Louis must provide funding to the St. Louis but consideration is given to specific municipal expenditures. §84.210.1 RSMo 2000. At one time Kansas City was required to pay over to its Board of Police Commissioners whatever sum demanded. This was found to be an unconstitutional tax levied by the State through the state Police Board against a local government. Kansas City was free to operate its own police, and did so from 1932 until 1939. *State ex rel. Field v. Smith*, 49 S.W.2d 74 (Mo. 1932). But following seven years of politicization of the municipal police force and general municipal corruption, the State once again took over the police function for Kansas City without running afoul of

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<sup>2</sup> The statute includes one exception, when the Mayor declares an emergency and the Board of Police Commissioners does not take control. This exception is not germane to Ms. Hodges' claims against the City of St. Louis.

<sup>3</sup> Because the provisions applicable to St. Louis are in no real substance different from the provisions applicable to Kansas City, cases interpreting the various provisions of Chapter 84 RSMo 2000, are instructive. *State ex rel. McGull v. St. Louis Board of Police Commissioners*, 178 S.W.3d 719, 723 (Mo.App.E.D. 2005).

the taxation prohibition of the prior statute. *See Pollard v. Board of Police Commissioners*, 665 S.W.2d 333, 336 (Mo. 1984).

The meaning of this State decision to retain the power to provide police services to its two largest cities has been clear throughout attempts to reduce the State's authority or attempts to force St. Louis or Kansas City to pay the obligations of the two state agencies, the Boards of Police Commissioners. Possibly the most direct assessment of the relationship between the cities and the Boards of Police Commissioners is found in *State ex rel. Reynolds v. Jost*, 175 S.W. 591, 593 (Mo. 1915), where the Supreme Court noted:

That the State can establish in a municipality a metropolitan police force, and require such municipality to pay for the same, has been thoroughly and well settled by the lamented Judge Gantt in a very able opinion in the case of *State ex rel. v. Mason*, 153 Mo. 23, 54 S.W. 524. The doctrine announced is a trite one, i.e., the creature is not greater than its creator.

It is the City of St. Louis that is controlled by the State of Missouri. The State of Missouri, even acting through an independent agency like the St. Louis Board of Police Commissioners, is *not* controlled by the City of St. Louis.

That the City of St. Louis is the created and it is the State of Missouri that is the creator is even more plain when it is noted that the payment of the costs of the police services for the City provided by the State renders the City the agent *of the State* – exactly opposite from that relationship urged by Ms. Hodges. *American Fire Alarm Co. v. Board of Police Commissioners*, 227 S.W. 114, 117 (Mo. 1920). It is for this reason that attempts by Kansas City to redefine the basis upon which it was required to pay the

Board of Police Commissioners were rejected out of hand by the Supreme Court in *State ex rel. Spink v. Kemp*, 283 S.W.2d 502 (Mo. 1955), where it was said:

Obviously, if the city, by its charter or by ordinance, may devote a substantial portion of what ordinarily would be considered general revenue to a special use by a process of "earmarking" its use for a special purpose and thereby take such portion so "earmarked" out of the category of general revenue, then the city may starve its state operated and controlled police department into utter ineffectiveness and create a situation which heretofore the state assiduously has undertaken to prevent by statutes such as §84.730 and its forerunners.

Of course, Ms. Hodges is not the first to seek to open up a city to liability for the acts of an employee of the state agency, Board of Police Commissioners. But such efforts cannot navigate the lack of control statutorily denied St. Louis and Kansas City. A similar situation to the general facts before the Court now happened almost 75 years ago when a person was injured at property controlled and owned by the Board of Police Commissioners of Kansas City. Although not involving the tortious operation of a motor vehicle owned and controlled by the Board of Police Commissioners as is the case in the present matter, the similarities are important. Property and people that could not be controlled by the City were the cause of injuries. The injured party attempted to recover damages from the City. But this is not permissible:

There is also another feature of this case which distinguishes it from any of the other cases referred to herein. That is: The police station and the

elevator therein was entirely under the control of the police board, which was a state agency. A municipal corporation has no inherent police power but derives it solely from delegation by the State. The protection of life, liberty and property and the preservation of public peace and order in every part, division and subdivision of the State is a governmental duty which devolves upon the State and not upon its municipalities any farther than the State in its sovereignty may see fit to impose or delegate it to the municipalities. In this State, the Legislature had not seen fit to delegate completely to Kansas City the function of maintaining a police department but had retained control thereof in the State by placing upon the Governor of the State the duty of appointing the police board which would have charge of such functions there. *While the police board was in charge of the station, there was nothing the city could do about it.*

*Pearson v. Kansas City*, 55 S.W.2d 485, 491 (Mo. 1932) (emphasis added). Because the City of St. Louis had no way to control Officer Walker and how he drove his police car, there can be no agency relationship involving the City of St. Louis. There can be no liability against the City.

It matters not what Ms. Hodges identifies on a police officer's uniform or on the cars used by the Board of Police Commissioners as it operates the St. Louis Metropolitan Police Department. It matters not what type of ordinances the City of St. Louis adopts to assist the Board and its employees in performing their duties. There can be no control

over the Board of Police Commissioners or over any employee of the Board, such as Officer Walker.

Ms. Hodges was obligated to prove that the City of St. Louis had the right to control the conduct of Officer Walker with respect to the performance of his job as an employee of a State agency. Restatement (Second) of Agency §14 (1958); *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002). This she cannot do because as a matter of law the City cannot control police activities within the City of St. Louis. For these reasons the trial court erred when it denied the City of St. Louis' motions for directed verdict at the close of plaintiff's evidence and again at the end of all evidence, and when it denied the City's motion for judgment notwithstanding the verdict. The judgment should be reversed and the matter remanded to the trial court for the entry of judgment in favor of the City of St. Louis.

**B. BECAUSE THE PLAINTIFF DID NOT ESTABLISH ANY WRITTEN AGREEMENT TO WHICH THE CITY OF ST. LOUIS WAS A PARTY ESTABLISHING AN AGENCY RELATIONSHIP, THE PROVISIONS OF §432.070, RSMO., BAR ANY FINDING THAT OFFICER WALKER WAS AN AGENT OF THE CITY.**

Ms. Hodges relies on a litany of things to bolster her assertion that the City of St. Louis was a principal and Officer Walker was its agent. These include:

**Appearance of Police Officers and Their Equipment**

- Uniforms include a badge and shoulder patch saying “City of St. Louis;” on it;
- Vehicles are marked “St. Louis Metropolitan Police;”

### **Financial Services**

- Officers receive their paycheck from the City;
- St. Louis provides officers with tax information at the end of the year;

### **Enforcement of Laws through Citations**

- Officers issue citations in the City
- Citations are issued on forms that say “Twenty-Second Judicial Circuit, City of St. Louis, Missouri” and “City Court”;
- Citation forms direct payment for fines to the City Traffic Violation Bureau;
- Fines are received by the City;

### **Perception of Some Officers**

- Some officers personally considered their services to be of benefit to the City;

### **Ordinances Enacted to Assist the Board and Its Employees in Enforcing the**

### **Laws**

- Ordinances grant authority to officers to direct traffic;
- Ordinances require obedience to the directions of an officer;

- Ordinances impose a duty on drivers to give their name, address and vehicle registration number and to show their driver's license to an officer.

[Tr. p. 44 ln. 1 – p. 48 ln. 17; p. 66 ln. 8 – p. 67 ln. 4]

Nowhere does Ms. Hodges identify any writing that reflects the establishment of a legal relationship between the City of St. Louis as principal and the Board of Police Commissioners or any of its officers, particularly Officer Walker, as an agent of the City. To establish this legal relationship there *must exist* such a writing. The absence of the writing defeats the establishment of a principal – agency relationship.

The requirement for a writing is found in §432.070 RSMo 2000, which reads in relevant part:

No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

The City of St. Louis and the St. Louis Board of Police Commissioners are separate entities. To effect a change in that fact and establish some relationship the General Assembly requires the City to enter into a contract. Ms. Hodges produced no contract.

The writing requirement is essential because it has long been held that the acts of the Board of Police Commissioners cannot be imputed to the City. Facing a claim by a discharged officer the Court of Appeals framed the question this way:

The single question presented by this appeal is, whether or not the defendant city is liable in this form of action for the imputed acts and defaults of the board of police commissioners?

*Riley v. City of Kansas*, 31 Mo.App. 439, 443 (1888). The Court of Appeals went on to summarize its emphatic “no” to the question:

It is clearly manifest . . . from the whole tenor and scope of the act creating the board of police commissioners, that it was the design of the legislature to make the board entirely independent, in their administrative capacity, of the control, interference, or authority of the city government.

*Supra* at 445.

The restrictions found in Chapter 84 RSMo 2000 have long had a clear meaning – St. Louis and Kansas City cannot control the police forces protecting their citizens, that has been reserved to itself by the State of Missouri. To alter that relationship there must be an agreement. The requirements of §432.070 are not discretionary; they are mandatory and are to be strictly construed. This is because the requirement protects “the public from needless and extravagant demands.” *Langlois v. Pemiscot Memorial Hospital*, 185 S.W.3d 711, 713 (Mo.App.S.D. 2006). Absent a writing, a party with no relationship to the City will fail to find the City liable for another’s misconduct.

The City of Kansas City established the 18th & Vine Authority, Inc. to manage the redevelopment of a Jazz District that includes a Jazz Hall of Fame, the Negro Leagues Museum, and other tourist and entertainment venues. The City helped fund the redevelopment. The Authority entered into a contract with the City that included payments by the City for work arranged by the Authority; payments would be made directly to the Authority's contractors or to the Authority for payment to its contractors. The Authority breached its contract with Gill Construction Co., which in turn sought damages from the Authority, but also from the City. The Court of Appeals summarized the import of §432.070 as Gill Construction attempted to transform the independent contractor relationship between the City and the Authority into a principal – agent relationship:

It is well established under Missouri law that all contracts with a municipal corporation must be in writing and all persons dealing with a municipal corporation are charged with notice of that law. The purpose of Section 432.070 is to protect municipalities. Section 432.070 does not protect parties who seek to impose obligations upon government entities. The provisions of Section 432.070 are mandatory, not directory. A contract made in violation of the statute is void rather than voidable. The fact that a municipality has received the benefit of a performance by the other party does not make the municipality liable either on the theory of ratification, estoppel or implied contract.

*Gill Construction, Inc. v. 18th & Vine Authority*, 157 S.W.3d 699, 708 (Mo.App.W.D. 2004). The City could not be made a principal of a wrongdoer without a contract, nor could the victim of the wrongdoer recover from the City without some relationship – in the *Gill* matter a contract – between the City and the victim. This was so even though the City passed numerous ordinances to help the Authority conduct its business – just as St. Louis has enacted ordinances to help the Board conduct its business. *Supra* at 709. Ms. Hodges has no relationship to the City of St. Louis for it was the employee of the Board that caused the tragic accident.

Even if the City takes actions that appear to affect the work or status of the Board, the actions do not change the Board’s legal relationship. Kansas City was faced with an allegation that it was responsible for damages to the survivors of a shooting victim at a festival permitted by the City to be held in one of the City’s parks but allegedly arising from the actions of an off-duty police officer because the City “provided” or “required” insurance for the event, including insurance for the actions of the off-duty police officer working as the security officer. Even if it was assumed that the City bought or provided insurance, that act could not change the sovereign immunity protecting the Board. The City could not alter the position of the Board by its unilateral acts. *Fantasma v. Kansas City Board of Police Commissioners*, 913 S.W.2d 388, 391 (Mo.App.W.D. 1996). [“However, even assuming that the City “purchased” liability insurance within the meaning of §537.610 does not establish that respondents purchased insurance because the City and respondents are separate entities.”]

A final observation must be made concerning the absence in the record of trial of any writing reflecting a principal – agency relationship between the City of St. Louis and the St. Louis Board of Police Commissioners. There is no writing because, first, St. Louis has not sought that relationship, but more importantly, such a writing would be unlawful. Any agreement between the City and the Board to allow the City to control any aspect of the police function in the City of St. Louis would violate the State framework found in §84.010 - §84.340 RSMo 2000. For these reasons the trial erred when it denied the City of St. Louis’ motions for directed verdict at the close of plaintiff’s evidence and again at the end of all evidence, and when it denied the City’s motion for judgment notwithstanding the verdict. The judgment should be reversed and the matter remanded to the trial court for the entry of judgment in favor of the City of St. Louis.

**C. BECAUSE THE PLAINTIFF DID NOT ESTABLISH THAT THE CITY OF ST. LOUIS TOOK ANY AFFIRMATIVE STEPS TO MAKE OFFICER WALKER AN AGENT OF THE CITY, PLAINTIFF CANNOT ESTABLISH AN AGENCY RELATIONSHIP BETWEEN THE CITY AND OFFICER WALKER.**

Even if the import of §432.070 RSMo 2000 is ignored there must still be some element of control over Officer Walker by the City of St. Louis. Simply funding the Board of Police Commissioners is not sufficient to establish responsibility with the City for the actions of the Board or its employees. The Court of Appeals found that type of reasoning “specious” and wrote:

The whole operation of the Police Department involves matters of great public interest financially and as affecting public health and safety. Every resident of Kansas City, as a taxpayer, has an interest in this area because his tax dollars are expended to maintain the Department. But that interest gives the City (beyond its budgetary function) and the taxpayers *no control* over the Department's operations or obligation (except financial) for its administrative acts.

*Hasenyager v. Board of Police Commissioners of Kansas City*, 606 S.W.2d 468, 473 (Mo.App.W.D. 1980). There is no control by statute. There is no control by a written agreement. Ms. Hodges must seek to convince that control exists in some lawful alternative fashion.

Acts committed by the City and relied upon by Ms. Hodges to show an agency relationship between the City and the Board, and particularly Officer Walker, include providing payroll services to the Board and passing ordinances to assist the Board in performing its statutory duties. But nothing the City does can expand on the authority granted to police officers by the General Assembly. Any ordinance inconsistent with those statutes is unenforceable and unlawful. *Settle v. State*, 679 S.W.2d 310, 317 (Mo.App.W.D. 1984). Providing financial and payroll services to the Board might render the City the *agent* of the Board, but it certainly does not render the City the *principal* of the Board or Officer Walker. Passing ordinances to assist the Board in performing its duties does not control the Board or the officers. It controls the behavior of citizens.

Ms. Hodges must look to a theory of apparent authority or implied authority to try to establish a principal – agent relationship. By definition this cannot be done because no writings are involved. “Implied agency is a principal - agent relationship created by the parties without any express oral or written agreement.” *Jefferson-Gravois Bank v. Cunningham*, 674 S.W.2d 561, 563 (Mo.App.E.D. 1984). Oral contracts do not bind a city and there is no written contract before the Court.

To establish apparent authority Ms. Hodges was obligated to prove that the City of St. Louis, as principal, manifested its consent to the exercise of the Board’s authority. *Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo.App.W.D. 1995). This is an impossibility. St. Louis has no legal standing to approve or disapprove of the way the Board and the police officers it employs provide police services to the people of St. Louis. The State of Missouri retains that authority. Secondly, the Board cannot exercise any municipal authority in policing the City because St. Louis has no authority to delegate.

Finally, to establish an implied agency Ms. Hodges was obligated to show that the City of St. Louis held out the Board and Officer Walker as its agent or permitted them to act in such capacity with its knowledge and acquiescence. *Kennon v. Citizens Mutual Insurance Co.*, 666 S.W.2d 782, 786 (Mo.App.E.D. 1983). The name of the City on badges, patches and cars was not shown to be the act of St. Louis, even if those things had any weight. It is, after all, the City of St. Louis that the State of Missouri has decided to protect through its own agency, the St. Louis Board of Police Commissioners. Ms. Hodges failed to show any actions by the City of St. Louis indicating the City’s desire to establish an agency relationship with the Board or any of its employees. It is the

actions of the City that are important, not the feelings of police officers, not the nature of the uniforms or cars of the officers, not the ordinances regulating citizen behavior, not the City's role in providing services *to the Board*. An agency relationship cannot be established absent a writing. For these reasons the trial erred when it denied the City of St. Louis' motions for directed verdict at the close of plaintiff's evidence and again at the end of all evidence, and when it denied the City's motion for judgment notwithstanding the verdict. The judgment should be reversed and the matter remanded to the trial court for the entry of judgment in favor of the City of St. Louis.

## CONCLUSION

Mr. Hodges mother was the tragic victim of an automobile accident caused by Police Officer Walker. She has properly recovered damages from Officer Walker and from his employer, the St. Louis Board of Police Commissioners. [L.F. p. 110-111]

But she now seeks to recover *again*, but now from the City of St. Louis. This claim is not based on anything the City or any employee or official of the City did or did not do. She simply seeks to recover twice. The acts she seeks to impute to the City of St. Louis are the acts of Officer Walker, an employee of a state agency.

The State of Missouri has denied the City of St. Louis (and the City of Kansas City) the ability to provide police services to its citizens. The State of Missouri has retained control of that important governmental function. These two cities, St. Louis and Kansas City, are prohibited by clear and strict law; they may not engage in policing their cities. Ms. Hodges' proposed rule would make a special category of victims. Those injured by employees of the state agency, the Board of Police Commissioners, may recover for their injuries twice. Those injured by employees of a municipal police department may recover once. There is no justification for this result.

When an unfair and nonsensical result flows from a proposed change in the long-held consistent interpretation given a statute, in this matter Chapter 84, RSMo. (2006), it must be closely considered. When the argument of Ms. Hodges is distilled, she seeks to write into the statutes through judicial rulemaking the establishment of St. Louis and Kansas City as principals and their respective Boards of Police Commissioners as agents. There is nothing in the record of the trial of this matter that establishes any intent or

actions by the City of St. Louis to establish a principal – agency relationship. There can be nothing in the record because Chapter 84, RSMo. (2006) renders any such attempt by St. Louis unlawful.

Identifying the City of St. Louis on badges, patches and vehicles was not shown to be done by St. Louis or at the insistence of St. Louis. Furthermore, the Board is assigned as a state agency to operate within St. Louis. It would be nonsensical to call itself anything other than the St. Louis Metropolitan Police Department. There is nothing presented by Ms. Hodges or otherwise in the record of trial that reflects any writing, which is required by §432.070, RSMo. (2006), to establish an agency relationship. Again, such a writing would be violative of Chapter 84, RSMo. (2006).

Lacking any evidence that establishes any act by the City of St. Louis to impose a principal – agent relationship on the Board of Police Commissioners, and further lacking any evidence that establishes any act by the Board of Police Commissioners accepting such subservient role to the City in violation of the statutes, Ms. Hodges' attempt to recover twice for the tragic accident involving her mother and Officer Walker must fail.

## CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06(c) counsel for the Amicus Curiae certify that:

1. As required by Missouri Supreme Court Rule 55.03, counsel for Amicus Curiae City of Kansas City, Missouri are: Galen P. Beaufort, City Attorney, and William D. Geary, Assistant City Attorney, 2800 City Hall, 414 East 12<sup>th</sup> Street, Kansas City, Missouri 64106, Voice 816-513-3118 Facsimile 816-513-3133.

2. The Brief to which this certificate is attached complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. The Brief contains 5,804 words in Microsoft Word 2003 format.

4. Also served and filed with this Brief of Amicus Curiae is a floppy disk containing the brief, which is double-sided, high density, IBM-PC compatible 1.44 MB, 3½” size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format of Microsoft Word 2003. The disk has been scanned for viruses and it is virus free.

Respectfully submitted,

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William D. Geary #24710  
Assistant City Attorney

28th Floor City Hall  
414 East 12th Street  
Kansas City, Mo 64106  
(816) 513-3118  
(816) 513-3133 (Facsimile)

## CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing Brief of Amicus Curiae and one disk containing the Brief, were mailed, postage prepaid, this 21st day of July, 2006, to the following:

Mr. Mark Lawson  
Associate City Counselor  
Room 314, City Hall  
St. Louis, MO 63103

and

Attorney for City of St. Louis, Missouri  
Appellant / Cross-Respondent

Mr. Donald L. Schlappizzi  
701 Market Street, Suite 1550  
St. Louis, Missouri 63101

Attorney for Kimberly Hodges  
Respondent / Cross-Appellant

Respectfully submitted,

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William D. Geary #24710  
Assistant City Attorney

28th Floor City Hall  
414 East 12th Street  
Kansas City, Mo 64106  
(816) 513-3118  
(816) 513-3133 (Facsimile)

ATTORNEY FOR AMICUS CURIAE  
CITY OF KANSAS CITY, MISSOURI