

IN THE SUPREME COURT OF MISSOURI

SC90699

**KATE GOERLITZ,
Appellant,**

vs.

**CITY OF MARYVILLE, MISSOURI,
A Municipal Corporation
Respondent.**

**Appeal from the Circuit Court of Gentry County, Missouri
The Honorable Brad J. Funk, Judge**

**SUBSTITUTE BRIEF OF RESPONDENT
CITY OF MARYVILLE, MISSOURI**

ORAL ARGUMENT REQUESTED

**NIKKI CANNEZZARO #49630
BRADLEY C. NIELSEN #39725
FRANKE, SCHULTZ & MULLEN, P.C.
8900 Ward Parkway
Kansas City, Missouri 64114
Telephone: (816) 421-7100
Facsimile: (816) 421-7915**

**Attorneys for Respondent
City of Maryville, Missouri**

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 6

POINTS RELIED ON 8

ARGUMENT 11

 POINT I 11

 POINT II 17

 POINT III 22

CONCLUSION 30

CERTIFICATE OF SERVICE 31

CERTIFICATION 31

APPENDIX 32

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

<u>A. CASES</u>	<u>PAGE</u>
<u>American Family Mut. Ins. Co. v. Lacy</u> , 825 S.W.2d 306 (Mo. App. 1991)	21, 28
<u>Bartley v. Special Sch. Dist. of St. Louis County</u> , 649 S.W.2d 864 (Mo. banc 1983)	24
<u>Brennan v. Curators of the Univ. of Missouri</u> , 942 S.W.2d 432 (Mo. App. 1997)	19
<u>Buschweiser v. Estate of Laverer</u> , 695 S.W.2d 125 (Mo. banc 1985)	4
<u>Callahan v. Cardinal Glennon Hosp.</u> , 863 S.W.2d 852 (Mo. banc 1993)	27
<u>Dale v. Edmonds</u> , 819 S.W.2d 388 (Mo. App. 1991)	27
<u>Hensley v. Jackson County</u> , 227 S.W.3d 491 (Mo. banc 2007)	24, 26
<u>ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp.</u> , 854 S.W.2d 371 (Mo. banc 1993)	11, 17
<u>James v. Sunshine Biscuits, Inc.</u> , 402 S.W.2d 364 (Mo. 1966)	27
<u>Kabir v. Missouri Department of Social Services</u> , 845 S.W.2d 102-103 (Mo. App. 1993)	23
<u>Keefhaver v. Kimbrell</u> , 58 S.W.3d 54 (Mo. App. 2001)	23
<u>Kersey v. Harbin</u> , 591 S.W.2d 745 (Mo. App. 1979)	21, 28
<u>Krause v. U.S. Truck Co., Inc.</u> , 787 S.W.2d 708 (Mo. banc 1990)	27

Landlot v. Glendale Shooting Club, Inc., 18 S.W.3d 101
(Mo. App. 2006) 14, 15, 16

Peters v. ContiGroup, 292 S.W.3d 380 (Mo. App. 2009) 13

Richardson v. State Hwy. & Transp. Comm’n, 863 S.W.2d 876
(Mo. banc 1993) 24

Rychhovsky v. Cole, 119 S.W.3d 204 (Mo. App. 2003) 14

State ex rel. Bd. of Trustees of City of North Kansas City Mem. Hosp.
v. Russell, 843 S.W.2d 353 (Mo. banc 1992) 20

State ex rel. Cass Med. Ctr. v. Mason, 796 S.W.2d 621 (Mo. banc 1990) 20

State ex rel. Missouri Hwy. & Transp. Comm’n v. Dierker, 961 S.W.2d 58
(Mo. banc 1998) 28

Townsend v. Eastern Chem. Waste Systems, 23 S.W.3d 452 (Mo. App. 2007) 24, 26

Viacom, Inc. v. Ingram Enter., Inc., 141 F.3d 886 (8th Cir. 1998) 14, 15

B. STATUTES AND OTHER RULES

§537.294 Mo. Rev. Stat. (2005) 5

§537.294 Mo. Rev. Stat. (2008) 6, 11, 12, 13, 14, 15, 16, 22, 23, 28, 29

§537.600 Mo. Rev. Stat. (2006) 19, 24, 26, 27

§ 537.610 Mo. Rev. Stat. (2006) 19, 20, 21

Missouri Constitution Article V, Section 10 4

Missouri Supreme Court Rule 74.04 11, 17

JURISDICTIONAL STATEMENT

This is an appeal from Summary Judgment entered by the Circuit Court of Gentry County, Missouri on or about January 5, 2009 with written Judgment being filed February 19, 2009. Appellant filed her Notice of Appeal to the Missouri Court of Appeals, Western District on or about February 2, 2009. The Missouri Court of Appeals, Western District issued its opinion with respect to appellant's appeal on December 8, 2009, affirming the trial court's Summary Judgment. Following the opinion of the Western District, appellant filed an Application for Transfer with this Court. On or about March 23, 2010, this Court accepted transfer. This Court has jurisdiction over the appeal pursuant to Article V, Section 10 of the Missouri Constitution, in that the Court transferred the case after opinion in the Court of Appeals. The Court now decides the case as though on original appeal. Buchweiser v. Estate of Laverer, 695 S.W.2d 125, 127 (Mo. banc 1985).

STATEMENT OF FACTS

Respondent has no reason to object to Appellant's Statement of Fact, and therefore accepts Appellant's Statement. Notwithstanding the foregoing, Respondent City of Maryville, provides the following additional facts for the Court's consideration:

This case arises from the City of Maryville's ownership and operation of a firearm range. (L.F. 17). Not one of the allegations of plaintiff's petition involves the operation of a motor vehicle or a dangerous property condition which constitutes a physical defect in the property. (L.F. 17).

Plaintiff's Petition was based on an older version §537.294 Mo. Rev. Stat. (2005). The older version stated, in pertinent part, as follows:

All owners of firearm ranges in existence on August 13, 1988, shall be immune from any criminal liability arising out of or as a consequence of noise or sound emission resulting from the normal use of any such firearm range. Owners of such firearm ranges shall not be subject to any action for public or private nuisance or trespass and no court in this state shall enjoin the use or operation of such firearm ranges on the basis of noise or sound emission resulting from the normal use of any such firearm range. The term "**normal use**" of a firearm range, as used in this subsection, means the average level of use of the firearm range during the twelve months preceding August 13, 1988.

All owners of firearm ranges placed in operation after August 13, 1988, shall be immune from any criminal liability and shall not be subject to any action for public or private nuisance or trespass arising out of or as a consequence of noise or sound

emission resulting from the normal use of any such firearm range, if such range conforms to any one of the following requirements:

- (1) Any area from which any firearm may be properly discharged is at least one thousand yards from any occupied permanent dwelling on adjacent property;
- (2) Any area from which any rifle or pistol may be properly discharged is enclosed by a permanent building or structure that absorbs or contains the sound energy escaping from the muzzle of firearms in use; or
- (3) If the firearm range is situated on land otherwise subject to land use zoning, the firearm range is in compliance with the requirements of the zoning authority regarding the sound deflection or absorbent baffles, barriers, or other sound emission control requirements.

A new version of §537.294 Mo. Rev. Stat. (2008) was passed by the Missouri General Assembly and delivered to Governor Blunt for approval on May 29, 2008. (Supplemental Legal File “S.L.F” 15). Governor Blunt approved the Bill on June 26, 2008. (S.L.F. 15).

The effective date of the new statute was August 28, 2008. (S.L.F. 15)¹ The newer, applicable version states in pertinent part, as follows:

All owners and authorized users of firearm ranges shall be immune from any criminal and civil liability arising out of or as a consequence of noise or sound emission resulting from the use of any such firearm range. Owners and users of such firearm ranges shall not be subject to any civil action in tort or subject to any action for public or private nuisance or trespass and no court in this state shall enjoin the user or operation of such firearm ranges on the basis of noise or sound emission resulting from the use of any such firearm range. Any actions by a court in this state to enjoin the use or operation of such firearm ranges and any damages awarded or imposed by a court, or assessed by a jury, in this state against any owner or user of such firearm ranges for nuisance or trespass are null and void.

1 In preparing this Respondent's Brief, Respondent notes that Page 18 of the Legal File submitted by Appellant was missing from Respondent's copy of that Legal File. Page 18 was simply missing and the page order skipped from 17 to 19. As such, the second page of Respondent's Motion for Summary Judgment, filed June 11, 2008, with the Circuit Court of Nodaway County, Missouri, was missing. Attached at the end of this Respondent's Brief as Exhibit A-2 in the Appendix is page 2 of Respondent's Motion for Summary Judgment, which should have been page 18 in Appellant's Legal File.

POINTS RELIED ON

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE CITY OF MARYVILLE ON PLAINTIFF'S EQUITABLE CLAIM FOR AN INJUNCTION ASSERTED IN COUNT I OF PLAINTIFF'S PETITION BECAUSE THE CITY OF MARYVILLE'S OPERATION OF A FIREARM RANGE IS NOT SUBJECT TO AN INJUNCTION FOR ANY REASON IN THAT MO. REV. STAT. §537.294 PROVIDES THAT "ANY ACTION BY A COURT IN THIS STATE TO ENJOIN THE USE OR OPERATION OF SUCH FIREARM RANGES ... ARE NULL AND VOID." (Reply to Appellant's Points I and II)

Landlot v. Glendale Shooting Club, Inc., 18 S.W.3d 101 (Mo. App. 2006)

Peters v. ContiGroup, 292 S.W.3d 380 (Mo. App. 2009)

Rychhovsky v. Cole, 119 S.W.3d 204 (Mo. App. 2003)

Vicacom, Inc. v. Ingram Enter., Inc., 141 F.3d 886 (8th Cir. 1998)

Mo. Rev. Stat. §537.294

POINT II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT CITY OF MARYVILLE BASED ON SOVEREIGN IMMUNITY BECAUSE PLAINTIFF FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF LIABILITY INSURANCE IN THAT PLAINTIFF FAILED TO ALLEGE ANY FACTS IN HER PETITION THAT THE CITY WAIVED SOVEREIGN IMMUNITY BY CARRYING SUCH INSURANCE AND EVEN MORE IMPORTANTLY THE UNCONTROVERTED EVIDENCE BY THE CITY ESTABLISHED THAT ITS POLICY OF INSURANCE INCLUDED A PROVISION STATING THAT THE POLICY IS NOT MEANT TO CONSTITUTE A WAIVER OF SOVEREIGN IMMUNITY. (Reply to Appellant's Point III).

Brennan v. Curators of the Univ. of Missouri, 942 S.W.2d 432 (Mo. App. 1997)

Kersey v. Harbin, 591 S.W.2d 745 (Mo. App. 1979)

State ex rel. Bd. of Trustees of City of North Kansas City Mem. Hosp. v. Russell, 843 S.W.2d 353 (Mo. banc 1992)

POINT III

PLAINTIFF HAS ABANDONED AND WAIVED ANY CLAIM OF ERROR RELATING TO THE APPLICABILITY OF §537.294 OR THE “NEGLIGENT DRIVING” OR “DANGEROUS CONDITION” EXCEPTIONS TO THE DOCTRINE OF SOVEREIGN IMMUNITY TO PLAINTIFF’S CLAIMS FOR DAMAGES ASSERTED IN COUNTS II, III AND IV BECAUSE A PARTY IS DEEMED TO HAVE ABANDONED AND WAIVED ANY CLAIM OF TRIAL COURT ERROR NOT ASSERTED IN THEIR BRIEF AND RAISED IN THE POINT RELIED ON IN THAT THE CLAIMS OF ERROR IN PLAINTIFF’S BRIEF RELATE ONLY TO (1) THE PROPRIETY OF THE COURT’S SUMMARY JUDGMENT WITH RESPECT TO THE CLAIM FOR INJUNCTIVE RELIEF IN COUNT I AS STATED IN PLAINTIFF’S FIRST AND SECOND POINTS RELIED ON; AND (2) A WAIVER OF SOVEREIGN IMMUNITY AS TO ALL COUNTS BASED SOLELY UPON THE ALLEGED PURCHASE OR MAINTENANCE OF LIABILITY INSURANCE.

Hensley v. Jackson County, 227 S.W.3d 491 (Mo. banc 2007)

Keefhaver v. Kimbrell, 58 S.W.3d 54 (Mo. App. 2001)

State ex rel. Missouri Hwy. & Transp. Comm’n. v. Dierker, 961 S.W.2d 58 (Mo. banc 1998)

Townsend v. Eastern Chem. Waste Systems, 23S.W.3d 452 (Mo. App. 2007)

§537.294 Mo. Rev. Stat. (2008)

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE CITY OF MARYVILLE ON PLAINTIFF'S EQUITABLE CLAIM FOR AN INJUNCTION ASSERTED IN COUNT I OF PLAINTIFF'S PETITION BECAUSE THE CITY OF MARYVILLE'S OPERATION OF A FIREARM RANGE IS NOT SUBJECT TO AN INJUNCTION FOR ANY REASON IN THAT MO. REV. STAT. §537.294 PROVIDES THAT "ANY ACTION BY A COURT IN THIS STATE TO ENJOIN THE USE OR OPERATION OF SUCH FIREARM RANGES . . . ARE NULL AND VOID." (Reply to Appellant's Points I and II)

A. Standard of Review

Plaintiff appeals the order of the trial court granting summary judgment in favor of defendant, the City of Maryville, Missouri. Summary judgment is designed to permit the trial court to enter judgment, based on the law, when the moving party shows undisputed facts. ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993); Missouri Supreme Court Rule 74.04. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. Id. Only genuine disputes as to material facts preclude summary judgment. Id. A material fact in the context of summary judgment is one from which the right to judgment flows. Id.

A defending party, such as the City, can establish a right to summary judgment by demonstrating any of the following: (1) facts that negate any one of the elements necessary to establish plaintiff's claim; (2) that the non-movant, after an adequate period of discovery,

has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the necessary elements to plaintiff's claim; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. Id. Each of the above numbered methods individually establishes the right to judgment as a matter of law. Id. at 381. Thus, where the facts underlying the right to judgment as a matter of law are beyond dispute, summary judgment is proper. Id.

An appellate court generally reviews the grant of summary judgment *de novo*. Id. at 376. Under a *de novo* review, the record from an appeal of summary judgment is viewed in the light most favorable to the party against whom judgment was entered, and the non-moving party is entitled to the benefit of all reasonable inferences from the record. Id. at 376. Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of fact exist. Id. at 377. Additionally, if as a matter of law, the judgment of the trial court is sustainable on any theory, it should be sustained on appeal. Id. at 387-388.

B. Argument and Analysis.

Section 537.294 of the Missouri Revised Statutes bars plaintiff's claim asserted in Count I of her Petition. Count I of Plaintiff's Petition seeks an injunction. The basis for the injunction, plaintiff claims, is that the use of the shooting range owned and operated by the City of Maryville, Missouri subjects plaintiff and others to (1) loud noise emissions that disturb the peace; (2) to danger from bullets which invade the air space of plaintiff and others; and, (3) to a nuisance. Section 537.294, however, prohibits a person from obtaining

an injunction against the use or operation of the firearm range based on the allegations in plaintiff's Petition. Specifically, §537.294 provides as follows:

Any actions by a court in this state to enjoin the use or operation of such firearm ranges and any damages awarded or imposed by a court, or assessed by a jury, in this state against any owner or user of such firearm ranges for nuisance or trespass are null and void.

The language of §537.294 is clear and unequivocal. Section 537.294 divests the courts of this State of authority to enter an injunction against the owner of a firearm range based upon allegations of trespass and nuisance. Section 537.294 R.S.Mo. (2008). Further, the statute renders any action by a court to enjoin the use or operation of a firearm range null and void. Section 537.294 R.S.Mo.

A. Nuisance.

Undoubtedly, plaintiff's claims that "loud noise emission" that "disturbs the peace" of plaintiff and "a nuisance" sound in "nuisance." A "nuisance" is the unreasonable, unusual or unnatural use of one's property so that it substantially impairs the rights of another to peacefully enjoy his property. Peters v. ContiGroup, 292 S.W.3d 380 (Mo. App. 2009). Plaintiff's allegations parallel the very definition of a nuisance. Therefore, under §537.294, such nuisance allegations cannot provide a basis for injunction, thereby entitling the City to judgment as a matter of law.

B. Trespass.

Similarly, plaintiff's claim that bullets are invading the air space of plaintiff is nothing more than a claim of trespass. A "trespass" under Missouri law, is the unauthorized entry upon the land of another by a person or an object as a result of a person's action, regardless of the amount of force used or the amount of damage done. Rychkovsky v. Cole, 119 S.W.3d 204, 211 (Mo. App. 2003). Plaintiff's claim that bullets are coming onto her property without authorization falls squarely within the definition of a trespass. Accordingly §537.294 prohibits plaintiff from obtaining an injunction on the basis that bullets are invading her air space. The City is, therefore, entitled to judgment as a matter of law.

The City anticipates that plaintiff will claim that the current version of §537.294 does not apply to her claims. Such claim, however, is without merit. Section 537.294 went into effect on August 28, 2008. Although the effective date of the new statute was after plaintiff's lawsuit against the City was filed, under Missouri law, its effect is retroactive so as to preclude the requested injunction against the City because there is no retroactivity bar to applying a new statute after the initial issuance of an injunction. Landlot v. Glendale Shooting Club, Inc., 18 S.W.3d 101, 105 (Mo. App. 2006) (citing Vicacom, Inc. v. Ingram Enterp., Inc., 141 F.3d 886, 890 (8th Cir. 1998)). Therefore, the new statute renders any existing – and future – injunctions against the use of and operation of firearm ranges null and void.

Landlot illustrates the retroactive applicability of the new §537.294. In Landlot, a shooting club filed a motion to dissolve an injunction which had been issued in 1983 at the request of adjacent land owners. That injunction curtailed its permitted uses. Landlot, 18

S.W.3d at 103. In 1988, the Missouri legislature enacted §537.294, a statute that essentially granted immunity from nuisance actions to shooting ranges in existence as of the date of enactment.² The shooting range moved to dissolve the injunction in 1998, claiming that the injunction had been rendered “absurd and unjust due to the enactment of §537.294 and material modifications to the shooting range for noise abatement purposes.” *Id.* at 103. The trial court denied the shooting club’s motion to dissolve, holding that §537.294 was inapplicable as it was enacted after the injunction was issued. *Id.* at 104.

The appellate court, disagreed with the trial court, holding that the new statute applied to the injunction issued prior to the effective date of the statute. In so holding, the Court explained:

Because a permanent injunction acts in futuro and gives Plaintiff no vested right in the judgment of the trial court, there is no retroactivity bar to applying a new statute, after the initial issuance of an injunction. Viacom, Inc. v. Ingram Enter., Inc., 141 F.3d 886, 890 (8th Cir. 1998). Even if an injunction has matured into a final judgment,

² The statute at issue in Landlot was the old version of §537.294. Unlike the new version, the version of §537.294 at issue in Landlot prohibited injunctions against shooting ranges under limited circumstances, those in existence on August 13, 1988. The new version of §537.294 does not limit its protection against injunctions; all shooting ranges are free from injunctions.

when the legislature amends the substantive law on which an injunction is based, the injunction may be enforced only insofar as it conforms to the changed law.

Id. at 105 (emphasis supplied). As such, the court remanded the case and ordered the trial court to determine whether the shooting club was operating within the range of “normal use,” as required by the amended statute.³ Id. at 105.

As in Landlot, there is no retroactivity bar to applying the new version of §537.294, which now precludes the availability of the injunctive relief requested by the plaintiff. Unlike the version of §537.294 at issue in Landlot, the new version does not condition immunity on “normal use” of firearm ranges; it clearly protects ranges from any civil tort actions, nuisance actions, trespass actions and injunctions, irrespective of the range’s date of inception and regardless of whether the range is operated within the range of “normal use.”

The uncontroverted facts of the present matter establish that in Count I of her Petition,

³ The version of § 537.294 at issue in Landlot conditioned immunity on a finding that the shooting range was operating within the bound of “normal use.” The new version of §537.294 does away with the “normal use” requirement. As such, whether and to what extent the City’s Range operated within the range of “normal use” is irrelevant under the facts and circumstances in the present appeal.

plaintiff seeks to enjoin the City's operation of the firearm range based on allegations of trespass and nuisance. Section 537.294 expressly prohibits plaintiff from obtaining such an injunction and thereby entitles the City to judgment as a matter of law. This Court must, therefore, affirm the trial court's Summary Judgment.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT CITY OF MARYVILLE BASED UPON SOVEREIGN IMMUNITY BECAUSE PLAINTIFF FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF LIABILITY INSURANCE IN THAT PLAINTIFF FAILED TO ALLEGE ANY FACTS IN HER PETITION THAT THE CITY WAIVED SOVEREIGN IMMUNITY BY CARRYING SUCH INSURANCE AND EVEN MORE IMPORTANTLY THE UNCONTROVERTED EVIDENCE BY THE CITY ESTABLISHED THAT ITS POLICY OF INSURANCE INCLUDED A PROVISION STATING THAT THE POLICY IS NOT MEANT TO CONSTITUTE A WAIVER OF SOVEREIGN IMMUNITY. (Reply to Appellant's Point III).

A. Standard of Review.

Plaintiff appeals the order of the trial court granting summary judgment in favor of defendant, the City of Maryville, Missouri. Summary judgment is designed to permit the trial court to enter judgment, based on the law, when the moving party shows undisputed facts. ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993); Missouri Supreme Court Rule 74.04. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. Id. at 376. Only genuine disputes as to material facts preclude summary judgment. Id. A material fact in the context of summary judgment is one from which the right to judgment flows. Id.

A defending party, such as the City, can establish a right to summary judgment by demonstrating any of the following: (1) facts that negate any one of the elements necessary to establish appellant's claim; (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the necessary elements to appellant's claim; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. Id. Each of the above numbered methods individually establishes the right to judgment as a matter of law. Id. at 381. Thus, where the facts underlying the right to judgment as a matter of law are beyond dispute, summary judgment is proper. Id.

An appellate court generally reviews the grant of summary judgment *de novo*. Id. at 376. Under a *de novo* review, the record from an appeal of summary judgment is viewed in the light most favorable to the party against whom judgment was entered, and the non-moving party is entitled to the benefit of all reasonable inferences from the record. Id. at 376. Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of fact exist. Id. at 377. Additionally, if as a matter of law, the judgment of the trial court is sustainable on any theory, it should be sustained on appeal. Id. at 387-388.

B. Argument and Analysis.

Contrary to the plaintiff's contention, the City need not prove that it did not purchase liability insurance. In fact, the plaintiff's failure to allege a waiver of sovereign immunity by virtue of the City's maintenance of liability insurance is fatal to her argument and does not

affect the City's entitlement to judgment as a matter of law. In Missouri, the exceptions to the sovereign immunity doctrine are a part of plaintiff's *prima facie* case. Townsend v. Eastern Chem. Waste Systems, 234 S.W.3d 452, 470 (Mo. App. 2007). As such, the doctrine of sovereign immunity is not considered an affirmative defense. Id. In other words, the plaintiff must plead facts triggering an exception to the sovereign immunity doctrine.

A case upon which the plaintiff relies, Brennan v. The Curators of the Univ. of Missouri, 942 S.W.2d 432 (Mo. App. 1997), is dispositive on this issue. In Brennan, the mother of a child who was born at a state university hospital sued the university based on prenatal care, which had allegedly caused the child's premature birth and injuries. Brennan, 942 S.W.2d at 433. The trial court granted the university's motion to dismiss because the plaintiff did not allege that the university had waived sovereign immunity. Id. On appeal, the Western District affirmed the trial court's dismissal, holding that the plaintiff was obligated to plead facts sufficient to allege a waiver of sovereign immunity by virtue of the university's adoption of liability insurance. Id. at 437. The plaintiff's failure to plead facts alleging that the University carried the insurance rendered §537.610 inapplicable. Id.

As in Brennan, there are no allegations in the plaintiff's Petition that the City is covered by liability insurance, much less that the insurance covers torts other than those mentioned in the exceptions set forth in §537.600. Nor are there any facts in the record to create a genuine issue of material fact regarding the same. In short, there is no evidence that the City waived sovereign immunity by maintaining liability insurance.

Alternatively and irrespective of the absence of facts regarding liability insurance, the uncontroverted evidence establishes that the City's liability insurance expressly does not waive sovereign immunity. In this regard, the City participates in a self-insurance plan called Missouri Intergovernmental Risk Management Association ("MIRMA"). The Coverage Outline contains a clause titled "Sovereign Immunity," which specifically states:

G. SOVEREIGN IMMUNITY

The Coverage provided by this protected self insurance plan does not apply to any claim or "lawsuit" which is barred by the doctrines of sovereign immunity and/or official immunity although the defense of such actions shall be provided. No provision of this condition of coverage, or the coverage outline in which it is included, shall constitute a waiver of MIRMA's right or the right of any protected self insured to assert a defense based on the doctrines of sovereign immunity or official immunity. (S.L.F. 13-14, 26-27). The Missouri Supreme Court has determined that where a city's insurance policy includes a disclaimer concerning the waiver of sovereign immunity, it is not waived under §537.610. See State ex rel. Bd. of Trustees of City of North Kansas City Mem. Hosp. v. Russell, 843 S.W.2d 353, 360 (Mo. banc 1992) and State ex rel. Cass Medical Ctr. v. Mason, 796 S.W.2d 621 (Mo. banc 1990). The express disclaimer contained in the City's Coverage Outline leaves no doubt that the City's participation in a self insurance program does not constitute a waiver of sovereign immunity.

Also under this point, it should be noted that contained in the argument section of Plaintiff's Point Relied On number III is a boot strapped hearsay statement allegedly from the Mayor Pro Tem for the City of Maryville. A review of the legal file, however, plainly

reveals that the statement relied on in plaintiff's brief at page 16 is not a statement directly from the Mayor Pro Tem as alleged by plaintiff. Rather, it is merely a statement from a newspaper article and is double hearsay. Only evidentiary materials that would be admissible at trial can avoid summary judgment. American Family Mut. Ins. Co. v. Lacy, 825 S.W.2d 306, 311 (Mo. App. 1991). Hearsay may not really be relied upon to avoid summary judgment. Kersey v. Harbin, 591 S.W.2d 745, 750 (Mo. App. 1979). Plaintiff's have not satisfied any burden with regard to prevailing in this case on its argument about sovereign immunity and liability insurance. Plainly, the policy purchased by the City of Maryville does not waive sovereign immunity, and the Courts of Missouri, as set forth above, hold that the purchase of insurance policies containing the provision set forth above does not constitute a waiver of sovereign immunity pursuant to §537.610, Mo. Rev. Stat. (2008). The trial court therefore was correct in granting the City Summary Judgment. This Court must affirm such decision.

III. PLAINTIFF HAS ABANDONED AND WAIVED ANY CLAIM OF ERROR RELATING TO THE APPLICABILITY OF §537.294 OR THE “NEGLIGENT DRIVING” OR “DANGEROUS CONDITION” EXCEPTIONS TO THE DOCTRINE OF SOVEREIGN IMMUNITY TO PLAINTIFF’S CLAIMS FOR DAMAGES ASSERTED IN COUNTS II, III AND IV BECAUSE A PARTY IS DEEMED TO HAVE ABANDONED AND WAIVED ANY CLAIM OF TRIAL COURT ERROR NOT ASSERTED IN THEIR BRIEF AND RAISED IN THE POINT RELIED ON IN THAT THE CLAIMS OF ERROR IN PLAINTIFF’S BRIEF RELATE ONLY TO (1) THE PROPRIETY OF THE COURT’S SUMMARY JUDGMENT WITH RESPECT TO THE CLAIM FOR INJUNCTIVE RELIEF IN COUNT I AS STATED IN PLAINTIFF’S FIRST AND SECOND POINTS RELIED ON; AND (2) A WAIVER OF SOVEREIGN IMMUNITY AS TO ALL COUNTS BASED SOLELY UPON THE ALLEGED PURCHASE OR MAINTENANCE OF LIABILITY INSURANCE.

As addressed under Points I and II of this brief, plaintiff’s claims of error in the present appeal are twofold. First, under Points I and II of her brief, plaintiff claims the trial court erred in granting Summary Judgment with respect to the claim for injunctive relief asserted in Count I. Second, under Point III of her brief, plaintiff claims that the trial court erred in failing to find a question of fact or law regarding a waiver of sovereign immunity based upon the purchase of liability insurance to preclude summary judgment. The claims of error set forth in plaintiff’s brief are limited to those stated above. Plaintiff has not raised any claim of error with respect to the trial court’s application of §537.294 to plaintiff’s claims for damages asserted in Counts II, III and IV of her Petition. Similarly, plaintiff has also failed

to raise any claim of error with respect to the City's waiver of sovereign immunity based upon the "negligent driving" or "dangerous condition" exceptions to the sovereign immunity doctrine.

It is well settled under Missouri law that when an issue is presented and decided by the trial court, an appellant abandons any claim of error as to an issue not raised in its brief. Kabir v. Missouri Department of Social Services, 845 S.W.2d 102-103 (Mo. App. 1993); Keefhaver v. Kimbrell, 58 S.W.3d 54 (Mo. App. 2001). For instance, in Keefhaver, the plaintiff asserted claims of fraudulent and negligent misrepresentation and breach of contract. Id. On appeal, however, the plaintiff challenged only the trial court's entry of directed verdict on the fraudulent misrepresentation claim. Id. In addressing the appellant's claims of error on appeal, the appellate court specifically noted that while the plaintiff had brought claims under negligent misrepresentation and breach of contract, because she did not raise any points of error in her brief regarding the trial court's judgment against her on those claims, any error pertaining to those claims was deemed waived and abandoned. Id.

In the present case, plaintiff's failure to assert any claim of error relating to the applicability of §537.294 or the "negligent driving" or "dangerous condition" exceptions to the doctrine of sovereign immunity to plaintiff's claims for damages asserted in Counts II, III and IV must be deemed by this Court as plaintiff's abandonment and waiver of any such claims of error. However, in the event this Court addresses issues not raised in plaintiff's brief, the City asserts the following additional arguments supporting the trial court's decision:

A. Sovereign immunity.

Under Missouri law, specifically §537.600 of the Missouri Revised Statutes, the City of Maryville, Missouri, a public entity, is entitled to sovereign immunity. In relevant part, §537.600 provides as follows:

Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977 [when this court judicially abrogated common law sovereign immunity in tort] . . . shall remain in full force and effect.

Section 537.600.1 then sets out only two specific situations in which sovereign immunity for public entities is expressly waived. First, sovereign immunity is waived where a public employee negligently operates a motor vehicle during the course of employment and thereby causes injury. Section 537.600.1(1). This is commonly referred to as the “negligent driving” exception. Hensley v. Jackson County, 227 S.W.3d 491, 494 (Mo. banc 2007). The second instance is where the injury results from a dangerous condition of public property. Section 537.600.1(2). This latter exception is often referred to as the “dangerous condition” exception. Hensley, 227 S.W.3d 494.

The sovereign immunity statute must be strictly construed by the courts. Richardson v. State Highway & Transp. Comm’n, 863 S.W.2d 876, 882 (Mo. banc 1993); Bartley v. Special Sch. Dist. of St. Louis County, 649 S.W.2d 864, 868 (Mo. banc 1983). Additionally, in Missouri, the sovereign immunity doctrine is not an affirmative defense, but rather is part of plaintiff’s *prima facie* case. Townsend v. Eastern Chem. Waste Systems, 234 S.W.3d 452, 470 (Mo. App. 2007). In other words, the plaintiff must plead facts triggering an exception

to sovereign immunity in her Petition. In the present case, plaintiff failed to make a prima facie showing of the applicability of an exception to the doctrine of sovereign immunity.

1. Uncontroverted facts negate applicability of waiver based on “negligent driving” exception.

Plaintiff’s Petition contains absolutely no facts suggesting that she sustained injury as a result of a public employee’s negligent operation of a motor vehicle. Moreover, in response to the City’s Motion for Summary Judgment, plaintiff admitted “that her petition does not allege injuries that were caused by the negligent operation of a motor vehicle by a public employee within the course of his/her employment.” (L.F. 85). Accordingly, the uncontroverted facts of plaintiff’s own admission negate the applicability of sovereign immunity waiver based on the “negligent driving” exception.

2. Uncontroverted facts negate applicability of waiver based on “dangerous condition” exception.

In order for sovereign immunity to be waived by means of the “dangerous condition” exception, four elements must be established by plaintiff. Particularly, a plaintiff must prove the following:

- (1) that the property was in a dangerous condition at the time of the injury;
- (2) that the injury directly resulted from the dangerous condition, that is, that the dangerous condition was the proximate cause of the injury,
- (3) that the dangerous condition created a reasonably foreseeable risk of the harm of the kind of injury that was incurred; and

- (4) that a public entity had actual or constructive notice of the dangerous condition and sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Hensley, 227 S.W.3d at 496 (citations omitted). In the present case, plaintiff's Petition for Damages is simply insufficient as a matter of law in its attempt to state a claim under the "dangerous condition" exception against defendant City. While plaintiff's Petition purports to seek waiver of sovereign immunity by means of the "dangerous condition" exception contained in §537.600.1(2), plaintiff has failed to allege facts demonstrating that such dangerous exception to the doctrine of sovereign immunity is applicable. It is for this reason that the City is immune from plaintiff's claims.

In her attempt to establish application of the "dangerous condition" exception to sovereign immunity, plaintiff's Petition for Damages makes conclusory allegations that a dangerous condition existed in property owned or maintained by the City of Maryville, Missouri. Specifically, plaintiff's Petition merely alleges that the City "by owning and operating the firearm range created a dangerous condition." (L.F. 8). Plaintiff's Petition, however, fails to allege facts establishing the elements of the "dangerous condition" exception because plaintiff does not allege facts demonstrating the existence of a dangerous condition which caused plaintiff damage or injury.

Moreover, any alleged dangerous condition of a public entity's property which merely has some causal connection to the plaintiff's injury does not suffice to allow for the waiver of sovereign immunity. Instead, the alleged dangerous condition must be the direct or proximate cause of a plaintiff's injury, not just a "but for" cause. State ex rel. Missouri

Highway & Transp. Comm'n. v. Dierker, 961 S.W.2d 58, 60-61 (Mo. banc 1998). The Missouri courts have recognized that the phrase “directly resulted from” as used in §537.600.1(2) is synonymous with “proximate cause.” Id. at 60, (citing Dale v. Edmonds, 819 S.W.2d 388, 390 (Mo. App. 1991)). Proximate cause requires something in addition to a “but for” causation test, because the “but for” causation test serves only to exclude items that are not causal in fact; it will include items that are causal in fact but that would be unreasonable to base liability on because they are too far removed from the ultimate injury or damage. Id. 60, (citing Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 865 (Mo. banc 1993)). The practical test of proximate cause is generally considered to be whether the negligence of the defendant is the cause or act of which the injury is the natural and probable consequence. Id. (citing Krause v. U.S. Truck Co., Inc., 787 S.W.2d 708, 710 (Mo. banc 1990)).

Additionally, proximate cause cannot be based on pure speculation and conjecture. James v. Sunshine Biscuits, Inc., 402 S.W.2d 364, 375 (Mo. 1966). Here, even assuming that plaintiff’s Petition for Damages alleges facts establishing the existence of a dangerous condition, such condition did not directly cause plaintiff’s alleged damage. Plaintiff’s alleged damages in the present matter were not the natural and probable consequence of any alleged condition of the property owned or maintained by the City. In short, plaintiff has failed to allege facts demonstrating a physical defect of property owned or maintained by the City which proximately caused plaintiff’s claimed damage. Given plaintiff’s failure to allege facts demonstrating that the “dangerous condition” exception to the doctrine of sovereign immunity is applicable, allowing for waiver of sovereign immunity, the trial court was

correct in granting Summary Judgment to the City. This Court must affirm the trial court's decision

Additionally, with respect to this issue (which again was not raised in any of plaintiff's points relied on), plaintiff sets forth some facts attempting to suggest that the City's fire arm range constitutes a dangerous condition, however, virtually all of the facts relied upon by plaintiff are inadmissible hearsay or legal conclusions. Only evidentiary materials that would be admissible at trial can avoid summary judgment. American Family Mut. Ins. Co. v. Lacy, 825 S.W.2d 306, 311 (Mo. App. 1991). Consequently, hearsay may not be relied on to avoid summary judgment. Kersey v. Harbin, 591 S.W.2d, 745, 750 (Mo. App. 1979). For instance, the plaintiff cites numerous pages of the legal file which are actually pages from an attachment in response to the City's Motion for Summary Judgment. All of the statements are inadmissible hearsay, and cannot be relied upon to survive the City's Motion for Summary Judgment or on appeal. Again, the "facts" plaintiff alleges in response to the City's motion are inadmissible hearsay, and are not competent to avoid summary judgment or to prevail on appeal.

B. Section 537.294

As stated *supra* (in the City's Point Relied On I at pages 11-16), §537.294 (2008) operates as a bar to plaintiff's claims in this case. Plaintiff has completely failed to set forth any competent, admissible facts in response to the City's motion for summary judgment to obviate the application of §537.294 (2008). Under this statute, the legislature has immunized owners of firearm ranges from civil liability in tort (negligence) or for nuisance or trespass. Specifically, §537.294 provides in relevant part as follows:

Owners and users of such firearm ranges shall not be subject to any civil action in tort or subject to any action for public or private nuisance or trespass . . . Any actions by a court in this state to enjoin the use or operation of such firearm ranges and any damages awarded or imposed by a court, or assessed by a jury, in this state against any owner or user of such firearm ranges for nuisance or trespass are null and void.

Counts II, III, and IV of Plaintiff's Petition sound in tort, nuisance and trespass and thus are barred by the statute. Plaintiff has presented no facts or allegations through competent, admissible evidence, which would prevent the application of §537.294 Mo. Rev. Stat. (2008). Accordingly, this Court must affirm the trial court's Summary Judgment.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent City of Maryville, Missouri prays for an order of this Court affirming the decision of the trial court granting Summary Judgment in favor of the City of Maryville, Missouri and against plaintiff Kate Goerlitz, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

FRANKE SCHULTZ & MULLEN, P.C.

NIKKI CANNEZZARO #49630
BRADLEY C. NIELSEN #39725
8900 Ward Parkway
Kansas City, Missouri 64114
Telephone: 816-421-7100
Facsimile: 816-421-7915

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Brief of Respondent were mailed this 3rd day of May, 2010 to:

Jarold L. Drake
STEPHENS, DRAKE & LARISON
9 West 3rd
P.O. Box 400
Grant City, Missouri 64456
(660) 564-2321
(660) 564-2267 - Fax
Attorneys for Plaintiff

Attorney for Defendant/Respondent

RULE 84.06(c) CERTIFICATION

Undersigned counsel for Respondent hereby certifies that this Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 6,747 words counted using Microsoft Office Word 2007. Furthermore, this Reply Brief complies with Rule 84.06(g) in that the computer disk provided to the Court containing this Reply Brief has been scanned for viruses and that it is virus-free and has been formatted in Microsoft Office Word 2007.

Respectfully submitted,

FRANKE, SCHULTZ & MULLEN, P.C.

Nikki Cannezzaro #49630
Bradley C. Nielsen #39725
8900 Ward Parkway
Kansas City, Missouri 64114
Telephone: (816) 421-7100
Facsimile: (816) 421-7915
Attorneys for Respondent

APPENDIX

1 Judgment A-1

2. Page 2 of Respondent’s Motion for Summary Judgment A-2

3. Section 537.294, Mo. Rev. Stat. (2007) A-3

4. Section 537.294, Mo. Rev. Stat. (2008) A-5

5. Section 537.600, Mo. Rev. Stat. (2008) A-5

6. Section 537.610, Mo. Rev. Stat. (2008) A-7