

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. CITY
OF GRANDVIEW, MISSOURI,

Relator,

v.

THE HONORABLE JACK R. GRATE,
Judge for the Sixteenth Judicial Circuit
of Missouri,

Respondent.

Case No.: **SC95283**

BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

Upon application by Relator City of Grandview, Missouri, this Court issued a Preliminary Writ of Prohibition on November 25, 2015. (APPENDIX A000002) This Court has jurisdiction to adjudicate this matter pursuant to Article V, § 4 of the Missouri Constitution. Relator seeks a Permanent Order of Prohibition to prevent the Honorable Jack Grate from taking any further action other than granting Relator's Motion for Summary Judgment based on the application of Sovereign Immunity under Missouri Revised Statute § 537.600 and Missouri case law.

STATEMENT OF FACTS¹

The Parties.

The Relator, The City of Grandview, Missouri (hereinafter referred to as "the City" or "the Relator"), is a defendant in the underlying case of *Michael Green, Sr., Stephanie M. Green, Stephanie N. Green, Michael Green, Jr. v. Megan Y. Spears, Jonathan M. Nicholas, Michael Spano, Cody R. Allen and City of Grandview, Missouri*, docket number 1416-CV26128 (hereinafter referred to as "the underlying case"), now pending in the Circuit Court of Jackson County, Missouri at Independence. (Petition for Damages, **Exhibit A**, INDEX 000002)

¹ For ease of the Court and Respondent and as allowed by Court procedure, Relator refers to its exhibits and index to its Petition for Writ of Prohibition filed October 15, 2015. Documents not included in the Index and referred to here are included in the Appendix filed herewith pursuant to Rule 84.04(h).

The Respondent, the Honorable Jack R. Grate, is the judge sitting in Division 17 of the Circuit Court of Jackson County, Missouri, to whom the underlying case is assigned.

Megan Spears, Cody Allen, Jonathan Nicholas and Michael Spano are employed by the City as police officers for the Grandview Police Department and are also defendants in the underlying case. (Petition for Damages, **Exhibit A**, generally, INDEX 000001-21) Defendants Spears, Allen, Nicholas and Spano do not join in this Petition for Writ of Prohibition, because the sole issue is whether the City is entitled to sovereign immunity in the underlying case.

Michael Green, Jr., Michael Green, Sr., Stephanie M. Green and Stephanie N. Green (herein referred to as “the Greens” or “the Plaintiffs”) are the Plaintiffs in the underlying case. Their attorneys are John Turner, Christopher Sweeney and Marty Seaton of Turner & Sweeney. (Petition for Damages, **Exhibit A**, generally INDEX 000001-22)

Procedural Background Facts.

The Plaintiffs have asserted a claim against the City for vicarious liability for the actions of Defendants Spears, Allen, Nicholas and Spano related to their detention and arrest of Plaintiffs during a traffic stop on November 21, 2012. (See Petition, **Exhibit A**, at INDEX 0000021.)

The Plaintiffs’ Petition does not assert that their alleged injury resulted from the negligent operation of a motor vehicle or as a result of the condition of the City’s property. Likewise the Plaintiffs’ Petition does not assert that their alleged injury resulted from a proprietary undertaking by the City. Rather, the only allegation against the City is for vicarious liability for the alleged actions of Defendants Spears, Allen, Nicholas and Spano.

(Petition for Damages, **Exhibit A**, INDEX 000001-22.) (Respondent's Answer to Relator's Petition for Writ of Prohibition, (APPENDIX A0000003 at ¶ 6.)

Plaintiffs allege the City has a liability policy that would apply to a recovery in this case and the purchase of insurance waives the City's sovereign immunity under Sections 537.610 and 71.185 of the Revised Statutes of Missouri. (Petition for Damages, **Exhibit A**, INDEX 000004-5.)

On or about January 16, 2015, the City, in lieu of an Answer, filed its Motion for Summary Judgment based on the application of Sovereign Immunity. (Defendant City of Grandview, Missouri's Motion for Summary Judgment, **Exhibit B**, INDEX 000023-25; Statement of Uncontroverted Material Facts, **Exhibit C**, INDEX 000026-27; Suggestions in Support of Defendant City of Grandview Missouri's Motion for Summary Judgment, **Exhibit E**, INDEX 000373-380; and, Reply Suggestions in Support of Defendant City of Grandview, Missouri's Motion for Summary Judgment, **Exhibit F**, INDEX 000381-386.)²

On September 23, 2015, over eight months after the summary judgment motion was filed, the Honorable Jack R. Grate issued the court's order overruling the Motion for Summary Judgment. In particular, the Respondent ruled as follows:

² As required by Western District Rule XX, legal memoranda which advocate a position contrary to the relief requested in the petition are included in the index. **Exhibits H** (INDEX 000388-397), **I** (INDEX 000398-400), **J** (INDEX 000401-406) **and K** (INDEX 000407-409.)

The Court has reviewed the Motion for Summary Judgment and related documents filed by the City of Grandview and the Summary Judgment responses filed by the Plaintiffs. After giving due consideration to the pleadings, the Court requested that the attorneys appear in court for purposes of oral argument. After listening to the arguments of the parties and giving further consideration to the pleadings, the Court hereby denies the Defendant City's Motion for Summary Judgment.

(Order dated September 23, 2015, **Exhibit G**, INDEX 000387.) (APPENDIX A000001).

On September 30, 2015, Relator filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Western District, which was denied on October 1, 2015. (Order dated October 1, 2015, **Exhibit M**, INDEX 000423). Relator then filed a Petition for Writ of Prohibition in the Missouri Supreme Court, and this Court granted a Preliminary Writ of Prohibition (APPENDIX A000002) and ordered Respondent to file his Answer to the Petition for Writ of Prohibition. Respondent filed the Answer on November 25, 2015 (APPENDIX A000003-15)

Undisputed Facts Related to Summary Judgment on Sovereign Immunity.

The City is a municipality organized and existing under the laws of the State of Missouri. (Petition for Damages, **Exhibit A**, INDEX 000002.)

The Plaintiffs allege wrongful arrest, battery, malicious prosecution and negligence against Defendants Megan Spears, Cody Allen, Jonathan Nicholas and Michael Spano. (Plaintiffs' Petition for Damages, **Exhibit A**, generally, INDEX 000001-21.)

The Plaintiffs allege the City is vicariously liable for the alleged acts of Defendants Megan Spears, Cody Allen, Jonathan Nicholas and Mike Spano related to the traffic stop and arrest of Plaintiffs on November 21, 2012. (See Plaintiffs’ Petition for Damages, **Exhibit A**, INDEX 000021.)

At the time of the Plaintiffs alleged injury, the City had in place a Policy of Insurance issued by Atlantic Specialty Insurance Company/One Beacon Insurance Group, LLC. (Statement of Uncontroverted Material Facts, **Exhibit C**, INDEX 000026; see Amended Statement of Uncontroverted Material Facts, **Exhibit D**, INDEX 000028-30, and attached certified policy, **Exhibits D1, D2, D3, and D4**, INDEX 000031-372; Admitted at Plaintiffs’ Sur-Reply/Supplemental Suggestions in Opposition to Defendant City of Grandview’s Motion for Summary Judgment, **Exhibit L**, INDEX 000410-411.)

In pertinent part, the Policy of Insurance Law Enforcement Liability Coverage form provides as follows:

SECTION 1—COVERAGES

A. Insuring Agreement—Liability for Law Enforcement Wrongful Acts

- 1. We will pay those sums that the insured becomes legally obligated to pay as “damages” resulting from a “law enforcement wrongful act” to which this insurance applies.**

- 3. This insurance applies to “damages” resulting from a “law enforcement wrongful act” only if the “law enforcement wrongful act” was first committed;**

- a. **By an insured in the course and scope of their “law enforcement activities” for you and**

SECTION IV—WHO IS AN INSURED

If you are designated in the declarations as a governmental unit, you are an insured. Each of the following is also an insured but only with respect to your “law enforcement activity”;

- 2. **Your “employee” or “volunteer workers” but only for acts within the course and scope of their employment or volunteer activities by or for you;**

(Amended Statement of Uncontroverted Material Facts, **Exhibit D**, INDEX 000028-29.)(The Law Enforcement Liability Coverage Form attached thereto at GRANDVIEW 357-364, **EXHIBIT D3**, INDEX 000320-327.) (Admitted at Plaintiffs’ Sur-Reply/Supplemental Suggestions in Opposition to Defendant City of Grandview’s Motion for Summary Judgment, **Exhibit L**, INDEX 000410-411.)

The Policy also contains the following Endorsement:

“MISSOURI CHANGES – PROTECTION OF IMMUNITY

This policy and any of the coverages associated therewith does not constitute, nor reflect an intent by you to waive or forego any defenses of sovereign immunity and governmental immunity available to any

insured, whether based upon statute(s), common law or otherwise, including Missouri Revised Statute Section 537.610 or any amendments; or Missouri Revised Statute Section 71.185 or any amendments.”

(Amended Statement of Uncontroverted Material Facts, **Exhibit D**, INDEX 00028-30)(Endorsement attached thereto at GRANDVIEW 00372, **EXHIBIT D4**, INDEX 000335.)(Admitted at Plaintiffs’ Sur-Reply/Supplemental Suggestions in Opposition to Defendant City of Grandview’s Motion for Summary Judgment, **Exhibit L**, INDEX 000410-411.)³

POINT RELIED ON

I. Relator is entitled to a permanent order prohibiting Respondent from taking any further action other than to grant Relator’s Motion for Summary Judgment based on the application of sovereign immunity under Missouri Revised Statute §537.600 and Missouri common law in that Plaintiff fails to allege a claim which would constitute an exception to immunity and Relator has not waived its sovereign immunity by the purchase of insurance because the Relator’s policy

³ The policy contains a Commercial General Liability Coverage form for Government Risks. (**EXHIBIT D3**, INDEX 000274-00296). That coverage form also contains another endorsement specifically “Missouri Changes-Protection of Immunity” preserving the City’s sovereign immunity, which contains identical language to the Endorsement for the Law Enforcement coverage. (See **EXHIBIT D3**, INDEX 000330).

contains an endorsement which explicitly preserves all sovereign immunity-type defenses as allowed by Missouri law.

Mo. Rev. Stat. § 537.600

Crouch v. City of Kansas City, 444 S.W.3d 517 (Mo. App. W.D. 204)

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

Hendricks v. Curators of Univ. of Missouri, 308 S.W.3d 740 (Mo. App. W.D. 2010)

ARGUMENT

STANDARD OF REVIEW APPLICABLE TO WRIT OF PROHIBITION

Appellate courts issue writs of prohibition in three circumstances: (1) where there is an usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; (2) where the trial court is acting in excess of its jurisdiction, such that it lacks the power to act as contemplated; and (3) where the circumstances are such that the party seeking the writ does not have an adequate remedy by appeal. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. banc 1986). The third category applies “where some absolute irreparable harm may come to the petitioner if some spirit of justifiable relief is not made available to respond to a trial court’s order.” *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994)(citation and internal quotation marks omitted).

It is well-settled that prohibition will lie when a trial court erroneously fails to grant a motion for summary judgment based on a defense such as Sovereign Immunity. *State ex*

rel. Police Ret. Sys. v. Mummert, 875 S.W.2d 553 (Mo. banc 1994); and *State ex rel. Howenstine v. Roper*, 155 S.W.3d 747 (Mo. banc 2005).

Prohibition is particularly appropriate when the trial court, in a case where the facts are uncontested, wrongly decides a matter of law thereby depriving a party of an absolute defense. Forcing upon a defendant the expense and burdens of trial when the claim is clearly barred is unjust and should be prevented.

Howenstine, 155 S.W.3d at 749. “Immunity connotes not only immunity from judgment but also immunity from suit.” *Missouri Dep’t of Agriculture v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). Accordingly, prohibition is appropriate when the plaintiff’s claim is barred by the doctrine of sovereign immunity. *Id.*; and *State ex rel. Nixon v. Westbrooke*, 143 S.W.3d 737 (Mo. App. W.D. 2004).

Where a defendant has the defense of sovereign immunity, “prohibition is the appropriate remedy to forbear patently unwarranted and expensive litigation, inconvenience and waste of time and talent.” Where a defendant is clearly entitled to immunity, it is not necessary to wait through a trial and appeal to enforce that protection.

State ex rel. Bd. of Trustees of City of N. Kansas City Mem’l Hosp. v. Russell, 843 S.W.2d 353, 355 (Mo. 1992)(citing *State ex rel. New Liberty Hospital District v. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985)).

In the underlying case, the circuit court has erroneously failed to grant the Relator’s Motion for Summary Judgment on the basis of sovereign immunity, and therefore, this

Court's Writ of Prohibition should issue. The Court applies a *de novo* standard of review regarding summary judgment. *White v. Zubres*, 222 S.W.3d 272, 274 (Mo. banc 2007).

SUMMARY JUDGMENT STANDARD

Rule 74.04(c) provides: "If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith." MO. R. CIV. P. 74.04(c). A defendant may establish its right to summary judgment by showing there is no genuine dispute, either as to facts that negate any of the elements to be proven by the plaintiff, or as to the absence of facts necessary to establish any of the elements to be proven by the plaintiff, or as to the existence of the facts necessary to support the defendant's affirmative defense. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). Since the liability for torts by a public entity is the exception to the general rule of sovereign immunity, the plaintiff carries the burden to plead and prove facts demonstrating that sovereign immunity does not apply. *Hummel v. St. Charles City R-3 School District*, 114 S.W.3d 282, 284 (Mo. App. E.D. 2003)(citing *Burke v. City of St. Louis*, 349 S.W.2d 930 (Mo. 1961) and *Brennan by and through Brennan v. Curators of the University of Missouri*, 942 S.W.2d 432, 436 (Mo. App. W.D. 1997)). The City of Grandview, Missouri is entitled to summary judgment, because the facts of this case do not fall within any exception to sovereign immunity.

THE PERMANENT WRIT SHOULD ISSUE BECAUSE THE RELATOR HAS SOVEREIGN IMMUNITY

The City has Statutory Sovereign Immunity.

Under Missouri law, public entities, such as the City of Grandview, Missouri, are protected from liability pursuant to the doctrine of sovereign immunity. § 537.600 RSMo.; *Crouch v. City of Kansas City*, 444 S.W.3d 517, 521 (Mo. App. W.D. 2014); *Hale v. City of Jefferson*, 6 S.W.3d 187, 192 (Mo. App. W.D. 1999); *see also Brennan v. Curators of the University of Missouri*, 942 S.W.2d 432, 434 (Mo. App. W.D. 1997) (a governmental body is immune from suit for liability in tort in the absence of an express statutory provision). "Sovereign immunity is expressly waived for torts arising out of: (1) the negligent operation of motor vehicles by public employees; and (2) the dangerous condition of a public entity's property." *Brennan*, 942 S.W.2d at 434 (citing § 537.600.1 R.S.Mo.). In addition, sovereign immunity is waived by municipalities for performance of a proprietary function, which, as set forth below, is not an issue nor applicable in this case. *See Davis v. City of St. Louis*, 612, S.W.2d 812,814 (Mo. App. 1981)(citing *Hiltner v. Kansas City*, 293 S.W.2d 422 (Mo. 1956)).

A waiver of sovereign immunity must be narrowly construed. *Brennan*, 942 S.W.2d at 434. Whether sovereign immunity applies to a defendant is a question of law. *Crouch*, 444 S.W.2d at 522. None of Plaintiffs' claims as set forth in their Petition for Damages states a claim to which an exception to The City's sovereign immunity applies. That is, there is no allegation of injury from negligent operation of a City automobile or a dangerous condition on City property. Likewise there is no claim of the City's performance of a proprietary function. Plaintiffs' only claim against The City is alleged vicarious liability for the claims against its officers for False Arrest, Battery, Malicious Prosecution, and Negligence. *See Petition for Damages, Count XX, Exhibit A, INDEX 000021.*

Therefore, sovereign immunity applies and the Petition for Damages against The City must be dismissed because it is immune from plaintiffs' claims as a matter of law.

Sovereign immunity bars claims for the governmental function of the operation and maintenance of a police department by the City of Grandview.

The City has sovereign immunity for the operation of its police department. *See Crouch v. City of Kansas City*, 444 S.W.3d 517, 523 n. 8 (Mo. App. W.D. 2014)(maintenance of a police force is a governmental function entitling City to sovereign immunity)(citing *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 296 (Mo. App. E.D. 1983)); *See also Gregg v. City of Kansas City*, 272 S.W.3d 353, 361 (Mo. App. W.D. 2008)(operation and supervision of a police department is a governmental function); *See Carmelo v. Miller*, 569 S.W.2d 365, 367-368 (Mo. App. E.D. 1978) (Board of Police Commissioners, whether a municipal or state agency, is vested with sovereign immunity from claims of failure to "adequately train, supervise command and control" police officers, because those are governmental functions); *See Bittner v. City of St. Louis Bd. Of Com'rs*, 925 S.W.2d 495, 498-499 (Mo. App. E.D. 1996)(police board entitled to sovereign immunity from allegations of failure to train and supervise police officers); *See Best v. Schoemehl*, 652 S.W.2d 740, 742 (Mo. App. E.D. 1983) ("[S]overeign immunity attaches to the operation and maintenance of a police force[.]") (citing *Carmelo*); *See also Plummer v. Dace*, 818 S.W.2d 317, 319 (Mo. App. E.D. 1991)(School district has sovereign immunity from failure to train claim); *See Aiello v. St. Louis Community College Dist.*, 830 S.W.2d 556, 559 (Mo. App. E.D. 1992) ("As to the claim of negligent supervision, sovereign immunity also applies.").

In addition, the City is immune from Plaintiffs' claims for intentional tort. "Intentional torts have consistently been found to fall within the shield of sovereign immunity." *Mitchell v. Village of Edmundson*, 891 S.W.2d 848, 850 (Mo. Ct. App. E.D. 1995)(sovereign immunity from conversion claims); *Conrod v. Missouri State Highway Patrol*, 810 S.W.2d 614, 617-618 (Mo. App. S.D. 1991)(sovereign immunity from conversion claims); *See also Pickens v. Wasson-Hunt*, 2006 WL 2265402, 7 (W.D. Mo. 2006)(sovereign immunity for alleged conversion of firearms); *See also Missouri Public Entity Risk Management Fund v. Investors Ins. Co. of America*, 338 F.Supp.2d 1046, 1051 (W.D. Mo. 2004)("Under Missouri law, public entities enjoy sovereign immunity, even where the cause of action against the entity is pleaded as an intentional tort."); *See also Duncan v. Creve Coeur Fire Protection Dist.*, 802 S.W.2d 205, 207 (Mo. Ct. App. E.D. 1991)("The tort involved here [intentional infliction of emotional distress] does not arise from an exception to sovereign immunity."); *See also Fischer v. Steward*, 2010 WL 147865, 12 (E.D. Mo. 2010)("the Court concludes that sovereign immunity bars Plaintiffs' tort claims against [defendant and the municipality] for malicious prosecution, intentional infliction of emotional distress, and civil conspiracy.").

Simply put, plaintiffs' claims against The City fail. The City is immune as a matter of law from these claims of vicarious liability for alleged negligence and intentional tort relating to the governmental function of the operation of its Police Department and supervision of the Defendant Police Officers Megan Spears, Cody Allen, Jonathan Nicholas, and Michael Spano. The Court should issue its permanent Writ of Prohibition

because summary judgment for the City of Grandview is warranted and it was error for the Respondent to deny the City's motion.

The City has not waived its sovereign immunity by its purchase of insurance.

Aside from the substantive law applicable to The City's sovereign immunity for Plaintiffs' claims, Plaintiffs wrongfully allege The City waived its statutory sovereign immunity by the purchase of insurance. See *Petition for Damages, Exhibit A*, ¶¶ 13-15, INDEX 000004-5. Plaintiffs' belief is wrong both factually and legally. The clear, unequivocal and unambiguous language of the "Protection of Immunity Endorsement" to the policy states: **"This policy and any of the coverages associated therewith does not constitute, nor reflect an intent by you to waive or forego any defenses of sovereign immunity and governmental immunity available to any insured, whether based upon statute(s), common law or otherwise, including Missouri Revised Statute Section 537.610 or any amendments; or Missouri Revised Statute Section 71.185 or any amendments."** See *"Protection of Immunity" endorsement to City's Policy of Insurance, Amended Statement of Uncontroverted Material Facts, Exhibit D*, INDEX, 00028-29, EXHIBIT D4, INDEX 000335.

The City does not waive its sovereign immunity by purchase of insurance when the policy specifically preserves the defense. *See Conway v. St. Louis County*, 254 S.W.3d 159, 167 (Mo. App. E.D. 2008)(“[T]he Missouri Supreme Court has determined that where the insurance policy includes a disclaimer concerning the waiver of sovereign immunity, it has not been waived under section 537.610.1.”)(citing *State ex rel. Board of Trustees of North Kansas City Hospital v. Russell*, 843 S.W.2d 353, 360 (Mo. banc 1992)). The Courts in *Conway* and *Board of Trustees of North Kansas City Hospital* considered policies with similar language which preserved the governmental defendants’ immunity:

The coverage provided by this protected self-insurance plan does not apply to any claim or ‘suit’ which is barred by the doctrines of sovereign immunity as official immunity although 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.

Id. This Court in *Board of Trustees of North Kansas City Hospital* found this type of policy provision does not waive the governmental entity's sovereign immunity even when Section 537.610 RSMo.⁴ or Section 71.185 RSMo.⁵ are considered. **This Court ruled Section 71.185 predated Section 537.610 by several years, and the differences in the language**

⁴ Section 537.610.1 RSMo. Provides in pertinent part:

The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single 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, and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and **only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section** and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state....

⁵ Section 71.185 RSMo. provides in pertinent part:

of the statutes are immaterial when the policy specifically preserves sovereign immunity. 843 S.W.2d at 360. See *Hendricks v. Curators of Univ. of Missouri*, 308 S.W.3d 740, 744, n. 4 (Mo. App. W.D. 2010)(“While *Russell* involved a possible waiver of the immunity of a municipal entity under § 71.185, the Court held that the language of §§ 71.185 and 537.610.1 did not materially differ.”).

The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single 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, and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and **only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section** and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state....

Missouri courts are uniform in following the Court’s guidance in *Russell* “that an express non-waiver provision in a liability insurance policy purchased by a governmental entity defeats any waiver of sovereign immunity under § 537.610.1.” *Hendricks v. Curators of Univ. of Missouri*, 308 S.W.3d 740, 744 (Mo. App. W.D. 2010)(citing *Topps v. City of Country Club Hills*, 272 S.W.3d 409, 417–18 (Mo. App. E.D. 2008); *Conway v. St. Louis County*, 254 S.W.3d 159, 167 (Mo. App. E.D. 2008); *Parish v. Novus Equities Co.*, 231 S.W.3d 236, 246 (Mo. App. E.D. 2007); *State ex rel. Ripley County v. Garrett*, 18 S.W.3d 504, 508–09 (Mo. App. S.D. 2000); *Casey v. Chung*, 989 S.W.2d 592, 594 (Mo. App. E.D. 1998)); *See also Brennan By and Through Brennan v. Curators of the University of Missouri*, 942 S.W.2d 432, 436 (Mo. App. W.D. 1997)(“The purchase of liability insurance does not waive sovereign immunity unless it provides for coverage of liability other than the two exceptions set forth in § 537.600.”); *See Fantasma v. Kansas City, Mo., Bd. of Police Com'rs*, 913 S.W.2d 388, 391 (Mo. App. W.D. 1996)(“under § 537.610, RSMo 1994, when a public entity purchases liability insurance for tort claims, sovereign immunity is waived to the extent of and for the specific purposes of the insurance purchased.”)(citing *State ex rel. Board of Trustees of North Kansas City Hospital*, 843 S.W.2d at 360); *See also for e.g. Epps v. City of Pine Lawn*, 353 F.3d 588, 595 (8th Cir. (Mo.) 2003)(holding the City’s policy of insurance noting “that liability will not be broadened beyond the limitations of [§§ 537.600 and 537.610 of the Revised Missouri Statutes – Missouri’s sovereign immunity statutes]” does not constitute a waiver of and preserves the City’s sovereign immunity)).

The court in *Parish v. Novus Equities Co.*, *supra*, considered the policy of insurance held by the municipality, City of Sunset Hills, Missouri, with similar language to the City of Grandview's OneBeacon Policy Endorsement. The plaintiffs' claimed, among other things, negligence against the City for allegedly failing to oversee a developer's financing of a redevelopment project. The City's policy of liability insurance contained the following endorsement, which specifically references both statutes, as does the City's policy in this case:

Your purchase of this policy isn't a waiver under:

Missouri Revised Statute Section 537.610 or any of its amendments; or

Missouri Revised Statute Section 71.185 or any of its amendments;

of sovereign or governmental immunity of any protected person for tort liability.

231 S.W.3d at 246. The *Parish* court held the City "retains its full sovereign immunity when the insurance policy contains a disclaimer stating that the entity's procurement of the policy was not meant to constitute a waiver of sovereign immunity." *Id.* (citing *Langley v. Curators of Univ. of Missouri*, 73 S.W.3d 808, 811 (Mo. App. W.D. 2002)). Just as in *Parish* and *Langley*, the Court should find the Endorsement preserves the City's immunity and issue the Permanent Writ requiring the entry of summary judgment for the City.

Plaintiffs argue the Endorsement preserving the City's sovereign immunity renders the policy ambiguous and meaningless because it promises coverage in parts of the policy but then takes away coverage by the Endorsement. Missouri courts have specifically rejected these types of arguments. As the Western District reiterated in *Hendricks*, "[i]f the

language of the endorsement and the general provisions of the policy conflict, the endorsement will prevail, and the policy remains in effect as altered by the endorsement.” *Hendricks v. Curators of Univ. of Missouri*, 308 S.W.3d 740, 746 (Mo. App. W.D. 2010)(citing *Abco Tank & Mfg. Co. v. Fed. Ins. Co.*, 550 S.W.2d 193, 198 (Mo. banc 1977)).

The policy is also not rendered meaningless or ambiguous by the endorsement. The court rejected an identical argument in *Hendricks*. The non-waiver clause in City of Grandview’s Endorsement does not eliminate all coverage; the policy provides coverage for The City on claims in the two instances where immunity is waived by statute (which are not applicable here) and provides coverage for law enforcement Insureds who are not vested with sovereign or other official governmental immunity. *Hendricks*, 308 S.W.3d at 746. It is the Plaintiffs’ heavy burden to prove the existence of a policy that covers their claim against The City, especially in light of the unambiguous preservation of sovereign immunity. *Topps v. City of Country Club Hills*, 272 S.W.3d 409, 415 (Mo. App. E.D. 2008). Plaintiffs’ arguments do not overcome Missouri statutory and common law which preserves the City’s sovereign immunity. The Court should issue its Permanent Writ of Prohibition because Summary Judgment for the City is warranted.

CONCLUSION

Relator The City of Grandview, Missouri, is cloaked with the protection of Sovereign Immunity. Under Missouri law the City’s immunity protects the City from Plaintiffs’ claims of vicarious liability for the alleged actions of its police officers. Pursuant to Missouri Revised Statute Section 537.600, there are only two exceptions to this City’s

immunity, neither of which apply in this case. It is uncontroverted in this case, there is no claim of injury caused by a dangerous condition of the City's property or the negligent operation of a City motor vehicle. Likewise there is no claim the injury arose from the City's performance of a proprietary function. It cannot be disputed The City has sovereign immunity for the governmental function of the operation and supervision of its police department and officers.

The City has not waived its sovereign immunity by the purchase of liability insurance. Its policy contains a clear and unambiguous endorsement which preserves the City's immunity. Under Missouri law, in cases involving questions of the application of Sovereign Immunity, the endorsement controls. Contrary to the argument attempted by Plaintiffs the endorsement does not render the insurance policy meaningless as it provides coverage for those claims and insureds to which immunity has not been waived or does not apply.

Prohibition is the appropriate remedy when the trial court wrongfully deprives a governmental entity, such as the City of Grandview, of the absolute defense of sovereign immunity. For the reasons stated herein, the City of Grandview respectfully requests the Court make its preliminary writ of prohibition permanent, requiring the entry of summary judgment on behalf of the City.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by Rule 55.3; and complies with the limitations contained in Rule 84.06(6); and was prepared in Microsoft Word in Times New Roman with 13-point font; and there are 5,033 words in the brief.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed with the Court via the ECF filing system on December 23, 2015, with copies via electronic mail, to:

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