

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**

REPLY BRIEF OF RELATOR

CITY OF GRANDVIEW, MISSOURI

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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 contains an endorsement which explicitly preserves all sovereign immunity-type defenses as allowed by Missouri law. 3

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REPLY TO ARGUMENT IN STATEMENT OF FACTS

Plaintiffs' initial argument the Respondent and Plaintiffs were not provided with a proper record is somewhat disingenuous and nothing more than a red herring argument to muddle the true issue. At the outset, the Plaintiffs pleaded the City waived immunity because it maintained the policy of insurance at issue in their Petition. *See Plaintiff's Petition for Damages*, ¶¶ 13-15, Relator's **EXHIBIT A**, INDEX 00004-5. To make this allegation, counsel for Plaintiffs had requested and received a full, certified copy of the City's applicable insurance policy with OneBeacon Government Risks in September 2014 *before suit was filed*, in order to make the allegations in the Petition. *See Reply Brief APPENDIX A7*, September 15, 2014 email from OneBeacon Government Risks to Plaintiff/Respondent's counsel informing counsel a certified copy of the City's policy of insurance, was being mailed to his office. In addition, Plaintiffs originally admitted in response to the City's Motion for Summary Judgment the fact that the City was insured under the policy and admitted the language of the Endorsement, which preserves the City's immunity. *See Plaintiffs' Sur-Reply/Supplemental Suggestions in Opposition to Defendant City of Grandview's Motion for Summary Judgment*, Relator's **EXHIBIT L**, INDEX 00410-411. Respondents also admitted the City was insured under the OneBeacon policy in its Answer to the Petition for Writ of Prohibition. *See Respondents' Answer to Relator's Petition for Writ of Prohibition*, at pp. 2-3, ¶¶ 14-16.

Respondents acknowledge they only discovered the fact that the policy attached to the original Motion for Summary Judgment was for the coverage year immediately after the Plaintiff's arrest in preparing their brief. *See Respondents' Brief* at p. 9-10.

The City has corrected the inadvertence and oversight (of all parties and the respondent trial court for that matter) and has provided a correct certified copy of the policy of insurance as a supplemental exhibit to the Petition for Writ of Prohibition. *See Relator's Supplemental/Corrected Exhibit List, filed contemporaneously herewith, EXHIBIT N1-N4, INDEX 000424-000771.* The City's supplemental exhibit is a copy of the same policy that Plaintiffs'/Respondents' counsel originally received, prior to filing suit, covering the time period of the incident at issue in the underlying case. The policy coverages contain identical language.¹ Likewise, the Endorsements preserving the City's sovereign immunity are identical in both policies.² The only actual difference between the submitted policies

¹ *Compare* the Law Enforcement Liability Coverage Form, **EXHIBIT D3**, INDEX 000320-000327, *with* **EXHIBIT N4**, Supplemental/Corrected Index, INDEX 000723-000730; *Compare* the Commercial General Liability Coverage Form for Government Risks, **EXHIBIT D3**, INDEX 000274-000296, *with* **EXHIBIT N4**, Supplemental/Corrected Index, INDEX 000677-000699; *Compare* the Public Officials Errors and Omissions Coverage Form Claims-Made for Government Risks, **EXHIBIT D3**, INDEX 000306-000319, *with* **EXHIBIT N4**, Supplemental/Corrected Index, INDEX 000709-000722.

² *Compare* Missouri Changes-Protection of Immunity Endorsement to Law Enforcement Liability Coverage Part, **EXHIBIT D4**, INDEX 000335, *with* **EXHIBIT N4**, Supplemental/Corrected Index, INDEX 000738; *Compare* Missouri Changes-Protection of Immunity to Commercial General Liability Coverage Part, **EXHIBIT D3**, INDEX 000303,

are the coverage dates. The material arguments for the explicit preservation of the City's sovereign immunity and entitlement to the permanent writ of prohibition are identical. The Court's analysis in its *de novo* review should thus be identical.³ Respondents have suffered no prejudice by the inadvertent inclusion of the policy for the subsequent coverage period. The Respondents have admitted the material policy Endorsement language of the policy. There is no material dispute of the pertinent facts. The Relator respectfully requests the Court consider the Supplemental/Corrected Exhibit and enter its permanent writ of prohibition, for the reasons stated in the Petition, Relator's Brief and herein.

POINT RELIED ON

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

with EXHIBIT N4, Supplemental/Corrected Index, INDEX 000706; *Compare* Missouri Changes-Protection of Immunity Endorsement to Public Officials Errors and Omissions Liability Coverage Part, **EXHIBIT D3**, INDEX 000330, *with EXHIBIT N4* Supplemental/Corrected Index, INDEX 000733.

³ If the Court accepts Respondents' argument the record is now incorrect and should serve as grounds to deny the Petition for Writ of Prohibition, it would only cause another Motion for Summary Judgment to be filed with the respondent trial court, with presumably the same decision, resulting in yet another round of petitions for writ of prohibition to be filed. In any case, another appeal on this issue would be inevitable.

§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 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)

REPLY ARGUMENT

The City is cloaked with sovereign immunity and the Court should make its writ of prohibition permanent. The Court should reject the arguments in Respondents’ Brief because they seek the wholesale change in Missouri law. Respondents argue for overturning not only this Court’s precedent, but also that of every other Missouri Court considering the issue of an insurance policy’s express preservation of sovereign immunity. It is certainly not amiss to recast this Court’s guidance in *State ex rel. Board of Trustees of North Kansas City Hospital v. Russell*, 843 S.W.2d 353, 360 (Mo. banc 1992). Respondents conveniently ignore “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 *Russell* and its progeny). Respondents likewise ignore the Court’s ruling in *Russell* that for purposes of an express preservation of the City’s immunity such as contained in the OneBeacon insurance policy at issue, any differences between 537.610 RSMo. or Section 71.185 RSMo. are immaterial. See *Hendricks*, 308 S.W.3d at 744, n. 4 (“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.”).

It also bears repeating, the Endorsement preserving the City’s immunity in the OneBeacon policy at issue is very clear as to the parties’ intent: **“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, EXHIBIT D4, INDEX 000335, and EXHIBIT N4 Supplemental/Corrected Index, INDEX 000738.*

Of utmost importance, the Respondents totally ignore, **“[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 fact the City's policy with OneBeacon does not contain identical language to the myriad of other and different policies, all of which have been found to preserve sovereign immunity, does not establish a waiver as Respondents argue. This case is not about contract construction. However, the OneBeacon policy Endorsement's language is more concrete and specific than the other policies cited by the City in its initial brief (and even recounted by plaintiffs). The Court should find this policy's clear and unambiguous language states the intent to preserve the City's immunity and disregard Respondents' attempt to muddy the water with extraneous arguments as set forth below. Simply put, the Endorsement's clear language preserves the City's immunities as allowed by Missouri law.

As much as the Respondents/Plaintiffs would like to argue contract interpretation and construction, this case simply does not involve an alleged breach of contract. The parties to the insurance contract, The City of Grandview and OneBeacon Government Risks, by the explicit language of the policy endorsement, expressed their intent to preserve the City's sovereign immunity under common and statutory law. The actual parties to the contract do not assert a breach nor ambiguity to the insurance policy. Respondents' exhausting list of authorities regarding policy interpretation and ambiguity do not apply here and should not sway the Court. The case law cited by Respondents (which the City originally cited in support of the writ of prohibition) that actually discuss the preservation of sovereign immunity by policy language or endorsement establishes the City's entitlement to relief.

The exhausting list of contract interpretation and ambiguity cases cited in Respondents' brief specifically do not involve consideration of a policy endorsement that

preserves a governmental entity's sovereign immunity from tort claims under Missouri law, such as the City's policy does in this case.⁴

⁴The City is cognizant of the Court's disfavor of string citations. However, it is important to note that Respondents attempt to draw the Court's attention away with unnecessary and inapplicable case law that does not address the material issues and subject of the Petition for Writ of Prohibition. Each of the cases cited by Plaintiffs either consider first party breach of contract actions and/or do not involve a preservation of sovereign immunity by endorsement as specifically allowed by Missouri law. *See V.S. DiCarlo Construction Co., Inc. v. State of Missouri*, 485 S.W.2d 52, 55 (Mo. banc 1972)(A breach of contract case for which there is no sovereign immunity; case also predates the sovereign immunity waiver statute § 537.600 *et seq.* and is pre-*Russell and Brennan*); *Weathers v. Royal Indemnity Co.*, 577 S.W.2d 623, 626 (Mo. banc 1979)(Equitable garnishment action by judgment creditor regarding an accident involving rental vehicle); *Poage v. State Farm Fire & Cas. Co.*, 203 S.W.3d 781, 783 (Mo. App. 2006)(First party insurance claim for injuries sustained in a boating accident); *Alea London Ltd. V. Bono-Soltysiak Enterprises*, 186 S.W.3d 403, 412 (Mo. App. 2006)(First party action against insurer for coverage under employee dishonesty policy); *Southern General Ins. Co. v. WEB Associates-Electronics, Inc.*, 879 S.W.2d 780, 782 (Mo. App. 1994)(Declaratory action to determine coverage for an airplane accident); *Peters v. Employer's Mut. Cas. Co.*, 853 S.W.2d 300, 302 (Mo. banc 1993)(Declaratory action to determine whether policy covered a school's faculty member's

damaged personal property); *Ritchie v. Allied Property & Cas. Ins. Co.*, 307 S.W.3d 132, 134 (Mo. banc 209)(First party action to recover underinsured motorist benefits from insurance company); *Merlyn Vandervort Investments, LLC v. Essex Ins. Co. Inc.*, 309 S.W.3d 333, 336 (Mo. App. 2010)(First party breach of contract and vexatious refusal to pay fire damage claim); *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007)(First party action against insurance company for underinsured motorist benefits); *State on Inf. Huffman v. Sho-Me Power Co-op*, 191 S.W.2d 971, 976 (Mo. 1946)(*Quo warranto* proceeding); *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010)(Equitable garnishment against defendant's insurer after entry of judgment against defendant, plaintiff's supervisor); *City of Columbia v. Henderson*, 399 S.W.3d 493, 496 (Mo. App. 2013)(Appeal of municipal court conviction for ordinance violation of City's exotic animal ordinance); *Shelter Mut. Ins. Co. v. Ballew*, 203 S.W.3d 789, 794 (Mo. App. 2006)(Declaratory judgment action by insurer as to whether coverage existed for home purchaser's claim for negligent misrepresentation.); *Drury Co. v. Missouri United School Ins. Council*, 455 S.W.3d 30, 37-38 (Mo. App. 2014)(Breach of contract action brought by subcontractor under builder's risk policy); *Cottey v. Schmitter*, 24 S.W.3d 126, 128-129 (Mo. App. 2000)(Sovereign immunity waived because negligent operation of motor vehicle by employee of Missouri Highway Transportation Commission); *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 46 (Mo. banc 2009)(First party breach of contract action for uninsured motorist benefits); *Chamnes v. Am. Family Mut. Ins. Co.*, 226 S.W.3d 199, 207-208 (Mo. App. 2007)(Direct first party action for stacking of uninsured motorist benefits);

The only issue presented is whether the policy at issue waives sovereign immunity. Plaintiffs/Respondents attempt to recast this matter as some type of breach of contract case is improper. Plaintiffs/Respondents do not have standing to bring an action for enforcement of any part of the policy of insurance between the City and OneBeacon. There is no breach of contract claim in this case. Plaintiffs are not parties to the insurance contract. Plaintiffs are not third party beneficiaries to the insurance contract. Plaintiffs are not judgment creditors. Thus, Plaintiffs lack standing to assert a claim for breach of contract or to somehow enforce or rewrite the insurance contract as they would desire or intend. *See Drury Co. v. Missouri United School Ins. Counsel*, 455 S.W.3d 30, 34 (Mo. App. E.D. 2014)(in a breach of contract action brought by subcontractor/third party beneficiary to a builder's risk policy, court holds only parties and third-party beneficiaries have standing to enforce a contract). The Court should simply reject the attempt to morph the City's Petition for writ of prohibition into a breach of contract action.

Finally, Respondents' argument regarding contract interpretation, while not germane to the City's entitlement to relief, gives short shrift to the fact that the policy provides coverage for the City's liability for claims for which sovereign immunity is waived by statute, automobile and dangerous property claims. Plaintiffs also largely ignore the law enforcement liability coverage extends to other insureds, such as employee police

Kennedy v. Safeco Ins. Co. of Illinois, 413 S.W.3d 14, 17 (Mo. App. 2013)(Direct breach of contract action for stacking underinsured motorist coverage).

officers, to which statutory sovereign immunity does not apply. Not only does the Endorsement preserving the City's sovereign immunity control over other policy language, the policy does not provide illusory coverage. The Court should make its Writ permanent because the City is immune.

CONCLUSION

The Court should make its Writ of Prohibition permanent and require the Honorable Jack Grate to enter judgment on behalf of the City of Grandview in this case. The City is vested with sovereign immunity from Plaintiffs' *sole* claim for vicarious liability for the alleged actions of its police officers. The bottom line is the City's insurance policy explicitly preserves the City's sovereign immunity for the claims made by Plaintiffs in the underlying action. Plaintiffs bring no action for negligent operation of an automobile, dangerous condition of City property, or injury from a proprietary function or activity. The Endorsement explicitly and clearly preserves the City's immunities as allowed by Missouri law and the Court's precedent. The Endorsement language controls and does not create ambiguity or illusory coverage as a matter of Missouri law. In any case, Respondents' desire to rebrand the matter before the Court as a breach of contract claim should not change this Court's precedent and the rulings of most every other Missouri court considering the issue. The Plaintiffs do not have standing to even raise the arguments of breach of contract or contract interpretation. The City's sovereign immunity is the rule and any exception is to be narrowly construed, not broadly, as Plaintiffs would desire.

For all of the reasons stated in its Petition, Relator's Brief, and for those herein, the City respectfully requests the Court make its Writ of Prohibition permanent.

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 3,317 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 February 3, 2016, with copies via electronic mail, to:

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