IN THE SUPREME COURT OF MISSOURI

APPEAL NO: SC98169

MARY J. MOORE,

Plaintiff/Appellant,

vs.

BI-STATE DEVELOPMENT AGENCY, D/B/A METRO,

Defendant/Respondent.

On Appeal from the Circuit Court of the City of St. Louis
The Honorable Christopher E. McGraugh
Circuit Court Cause No. 1622-CC10168

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Pursuant to Rule 84.04(f), Defendant Bi-State Development Agency d/b/a Metro ("Bi-State") adopts the Jurisdictional Statement set forth in Plaintiff's Substitute Brief.

STATEMENT OF FACTS[1]

PLAINTIFF'S PETITION

On September 1, 2016, Plaintiff filed a Petition in the Circuit Court of the City of St. Louis alleging Bi-State and its employee, Paula Crayton, negligently caused a motor vehicle accident on or about April 19, 2013. (L.F. 2, p. 1–2; App A6–A7.) Plaintiff's Petition alleged Ms. Crayton operated a "Metro public transportation motor vehicle" at the time of the accident. (L.F. 2, p. 2; App A7.)

Plaintiff's Petition made no allegations regarding the capacity of the Bi-State vehicle operated by Ms. Crayton. (L.F. 2; App A6–A11.) Plaintiff's Petition also failed to reference Bi-State's sovereign immunity, including the cap on damages from § 537.610, RSMo. (L.F. 2; App A6–A11.) In addition, Plaintiff's Petition included no allegations referencing any claimed financial responsibility requirements that purportedly waived Bi-State's sovereign immunity protections. (L.F. 2; App A6–A11.)

PROCEEDINGS AT THE TRIAL COURT

Plaintiff called Sergeant Patrick Haug of the St. Louis Metropolitan Police Department to testify regarding the accident. (T.R. 236:08–243:22.) Sergeant Haug responded to the accident and was the reporting officer identified by the Missouri Uniform Crash Report. (T.R. 237:25–238:03; App A5.) Plaintiff offered the Missouri Uniform

[1] Pursuant to Rule 84.04(f), Bi-State is dissatisfied with the accuracy and completeness of Plaintiff's Statement of Facts and therefore provides its own Statement of Facts. For instance, Plaintiff's citation for the speed of the Bi-State vehicle comes from the Plaintiff's opening statement and the same is not considered admissible evidence.

Crash Report into evidence as Exhibit 1. (T.R. 235:14–235:23; App A1–A5.) The trial court admitted Exhibit 1 without objection. (T.R. 235:24–25.) Exhibit 1 identifies the Bi-State vehicle operated by Ms. Crayton as a 2008 Freightliner and described as a "Small Bus (9-15 W/Driver)" as opposed to a "Large Bus (16+ W/Driver)." (App A3.)

Based on the Missouri Uniform Crash Report, Sergeant Haug testified Plaintiff did not report any injuries from the accident. (T.R. 242:20–243:01.) Sergeant Haug also testified there was only minor damage to the mirrors of the vehicles. (T.R. 243:02–243:13.)

On May 9, 2018, a jury returned a verdict in favor of Plaintiff and awarded $1,878,000 in damages. (L.F. 13.) On the same day, the trial court entered judgment against Bi-State in the amount found by the jury. (L.F. 14.)

BI-STATE'S MOTION FOR REMITTITUR

On June 8, 2018–before the May 9, 2018 judgment became final–Bi-State filed a Motion for Remittitur and Suggestions in Support. (L.F. 20–21.) In pertinent part, Bi-State argued the judgment of the trial court must be reduced by the cap on damages from § 537.610, RSMo to $420,606. (L.F. 20, p. 2; L.F. 21, p. 3–4.)

On July 19, 2018, Plaintiff filed Suggestions in Opposition to Bi-State's Motion for Remittitur. (L.F. 29.) Plaintiff argued § 70.429, RSMo and 49 C.F.R. § 387.25 *et seq.* required Bi-State to "satisfy all personal injury judgments of $5 million or less." (L.F. 29, p. 2.) Plaintiff asserted section 70.429 required Bi-State to comply with Title 49, Subtitle B, Chapter B of the Code of Federal Regulations as promulgated by the Federal Motor Carrier Safety Administration ("FMCSA"). (L.F. 29, p. 3.)

Based on her construction of the Federal Motor Carrier Safety Regulations ("FMCSR"), Plaintiff argued Bi-State was required to maintain financial reserves sufficient to satisfy liability for bodily injury in the amounts specified by 49 C.F.R. § 387.33. (L.F. 29, p. 3.) Plaintiff asserted the minimum amounts required were $5 million for all motor carriers with a seating capacity of 16 passengers or more, including the driver. (L.F. 29, p. 4.) Plaintiff argued the $5 million financial responsibility requirement was applicable to Bi-State. (L.F. 29, p. 4)(citing 49 C.F.R. §§ 387.29, 387.31, 387.33.)

Based on an excerpt from the deposition of Defendant Paula Crayton, Plaintiff argued the $5 million financial responsibility limit was applicable because of the passenger capacity of the Bi-State vehicle involved in the accident (L.F. 29, p.4; L.F. 34.) The cited deposition transcript reads as follows:

> Q. And you talked a little bit about what you were driving on the day of the incident, and we don't have a good picture of it. But Metro has these large passenger vans that sit, what, 20-plus people; correct?
> **A. I don't know if it seats that many.**
> Q. Okay. They're more like small bus –
> **A. Like 16.**
> Q. Oh, 16?
> **A. 16 to 18 maybe.**

(L.F. 34, p. 3; App A20.)

RULING BY THE TRIAL COURT

On August 31, 2018, the trial court entered an Order granting Bi-State's Motion for Remittitur and reduced the judgment to the statutory cap of $420,606. (L.F. 48.)

In its interpretation of section 70.429, the trial court held the phrase "safety rules

and regulations" referred to "those parts of 49 CFR designated as safety rules in 49 CFR § 355.5, and does not include Part 387 which deals with financial responsibility." (L.F. 48, p. 4.) The trial court reasoned the reference to "safety rules and regulations" intended to refer to Parts 390, 391, 392, 393, 395, 396, and 397 as designated in 49 C.F.R. § 355.5. (L.F. 48, p. 4–5.) "Section 70.429 RSMo, cannot be construed as a waiver because it does not expressly refer to the limits on liability in 49 CFR 387." (L.F. 48, p. 4.)

The trial court further held an administrative regulation adopted by a federal agency could not abrogate a limit on the waiver of sovereign immunity without the consent of the State of Missouri. (L.F. 48, p. 4.) The trial court also noted the Supreme Court of the United States only permits the abrogation of a State's sovereign immunity "when a state expressly consents to such a waiver, or where Congress has stated a clear intention to do so." (L.F. 48, p. 4, n. 1.)(citing *Sossamon v. Texas*, 563 U.S. 277 (2011) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1966)). The trial court reasoned Plaintiff failed to show either an express consent to the waiver by the State of Missouri or a statement of clear intention by Congress for the waiver. (L.F. 48, p. 4, n. 1.)

On September 12, 2018, the trial court entered an Amended Judgment that reduced the judgment against Bi-State from $1,878,000 to the statutory amount of $420,606 plus interest and costs, per section 537.610. (L.F. 50, p. 1.)

On September 14, 2018, Plaintiff filed a Notice of Appeal to the Missouri Court of Appeals, Eastern District challenging the Amended Judgment. (L.F. 51–54.)

On October 12, 2018, the Amended Judgment became a final judgment.

RULING BY THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

On August 27, 2019, the Court of Appeals, Eastern District issued an Opinion reversing the judgment of the trial court and held the cap on damages from section 537.610.2 did not apply to Bi-State. (Slip-Op, p. 9–10.)

The Opinion determines the vehicle operated by Bi-State was a "Call-A-Ride" bus that seats sixteen to eighteen passengers. (Slip-Op, p. 2.) The Opinion provides no citation to the Record on Appeal in support of its finding regarding the capacity of the Bi-State vehicle. (Slip-Op, p. 2.)

The Opinion construes section 70.429 to require Bi-State to comply with all "safety regulations" promulgated by the FMCSA in 49 C.F.R. Parts 300–399. (Slip-Op, p. 4–7.) Based on its interpretation, the Court of Appeals held the minimum financial responsibility for the Bi-State vehicle is up to $5 million. (Slip-Op, p. 7.)

TRANSFER TO THE SUPREME COURT OF MISSOURI

On September 11, 2019, Bi-State filed a Motion for Rehearing and Suggestions in Support to the Court of Appeals, Eastern District. On the same day, Bi-State also filed an Application for Transfer to the Supreme Court of Missouri.

On September 30, 2019, the Court of Appeals, Eastern District denied Bi-State's Motion for Rehearing and Application for Transfer to the Supreme Court of Missouri.

On October 15, 2019, Bi-State filed an Application for Transfer to the Supreme Court of Missouri pursuant to Rule 83.04. On October 17, 2019, Bi-State filed an Amended Application for Transfer to the Supreme Court of Missouri pursuant to Rule 83.04.

On November 19, 2019, this Court sustained Bi-State's Application for Transfer from the Missouri Court of Appeals, Eastern District and ordered the cause to be transferred.

POINTS RELIED ON

[ARGUMENTS IN RESPONSE TO POINT I OF PLAINTIFF'S BRIEF]

I. Section 70.429 does not contain language demonstrating the Missouri General Assembly intended to create an exception to Bi-State's sovereign immunity protections.

Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors, 476 S.W.3d 913 (Mo. banc 2016)

§ 537.600, RSMo.

§ 537.610, RSMo.

Templemire v. W & M Welding, Inc., 433 S.W.3d 371 (Mo. banc 2014)

II. Section 70.429 does not reflect a necessary implication to create an exception to Bi-State's sovereign immunity and any requirement to procure insurance does not waive sovereign immunity protections.

Bachtel v. Miller County Nursing Home Dist., 110 S.W.3d 799 (Mo. banc 2003)

Holesapple v. Mo. Hwys. & Transp. Comm'n, 518 S.W.3d 836 (Mo. App. 2017)

Newsome v. Kansas City, 520 S.W.3d 769 (Mo. banc 2017)

Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106–159

III. There is no conflict between section 70.429 and section 537.610.

Earth Island Inst. v. Union Elec. Co., 456 S.W.3d 27 (Mo. banc 2015)

State ex rel. City of Jennings v. Riley, 236 S.W.3d 630 (Mo. banc 2007)

49 C.F.R. § 355.5

49 C.F.R. § 387.33(b)

POINTS RELIED ON (CONTINUED)

IV. Even if a conflict exists between section 70.429 and section 537.610, the conflict should be resolved in favor of section 537.610.

O'Flaherty v. State Tax Com., 680 S.W.2d 153 (Mo. banc 1984)

S. Metro Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659 (Mo. banc 2009)

§ 537.610, RSMo

§ 70.429, RSMo

V. Plaintiff failed to plead the exception to sovereign immunity currently sought.

Hummel v. St. Charles City R-3 Sch. Dist., 114 S.W.3d 282 (Mo. App. 2003)

Burke v. City of St. Louis, 349 S.W.2d 930 (Mo. 1961)

A.F. v. Hazelwood Sch. Dist., 491 S.W.3d 628 (Mo. App. 2016)

VI. Even if this Court agrees with Plaintiff's argument, the matter must be remanded for further proceedings regarding the capacity of Bi-State's vehicle.

Bass v. Nooney Co., 646 S.W.2d 765 (Mo. banc 1983)

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758 (Mo. banc 2007)

ARGUMENT

I. Section 70.429 does not contain language demonstrating the Missouri General Assembly intended to create an exception to Bi-State's sovereign immunity protections.

The cap on damages set forth in section 537.610 is applicable to Plaintiff's claim and the trial court correctly granted Bi-State's Motion for Remittitur. Based on a purported "exception" to section 537.610, Plaintiff asks this Court to disregard the sovereign immunity cap on damages and increase Bi-State's potential liability from $420,606 per person to $5 million per person. Plaintiff's "exception" eviscerates any semblance of the protections expressly intended for by the Missouri General Assembly.

More importantly, Plaintiff's "exception" has no basis in Missouri law and must be rejected. Plaintiff's argument fails for a simple reason: section 70.429 does not contain the necessary explicit language intending to create an exception to Bi-State's sovereign immunity protections. Without question, section 70.429 does not contain any language that expressly strips Bi-State of its sovereign immunity protections. Indeed, section 70.429 does not reference sovereign immunity, does not reference financial responsibility, and does not discuss the amount recoverable against Bi-State.

From the outset, Plaintiff's argument contains a fatal flaw and necessarily fails. For good reason, Missouri law demands explicit and express statutory language to find a waiver of sovereign immunity. Plaintiff fails to meet her burden and thus cannot justify the substantial exception to sovereign immunity sought from this Court.

A. Any waiver or exception to sovereign immunity must be strictly construed.

Only the Missouri General Assembly can waive sovereign immunity for public entities like Bi-State by using explicit statutory language. *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985). The Missouri General Assembly has reaffirmed sovereign immunity as the rule with limited exceptions for (1) dangerous conditions of public property and (2) negligent operation of a motor vehicle by a public employee. § 537.600.2, RSMo. The Missouri General Assembly has also limited the liability of "public entities" for these exceptions to $420,606 per person and $2,865,300 per occurrence.[2] 537.610.1, RSMo.

Any statutory provision that purports to waive sovereign immunity or create an exception to sovereign immunity must be strictly construed. *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324, 328 (Mo. banc 1982).

> The principle of sovereign immunity is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created.

Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors, 476 S.W.3d 913, 921 (Mo. banc 2016)(quoting *Nichols v. United States*, 74 U.S. 122, 126 (1869)). Because of these

[2] Section 537.610.1 provides a limit of $300,000 per person and $2,000,000 per occurrence. Section 537.610.5 adjusts these amounts in accordance with the Implicit Price Deflator for Consumption Expenditures. In 2018, the applicable limits were $420,606 per person and $2,865,330 per occurrence. Missouri Department of Insurance, *Sovereign Immunity Limits*, www.insurance.mo.gov/industry/sovimmunity.php

overriding interests, any additional waiver or exception to sovereign immunity must be explicitly created in the statute. *Id.*

"[A] strict construction of a statute presumes nothing that is not expressed." *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014)(citation omitted). "The operation of the statute must be confined to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter." *Id*. (quotation omitted).

B. Section 70.429 does not explicitly create an exception to sovereign immunity.

Plaintiff's argument boils down to a purported exception created by section 70.429 to the sovereign immunity cap on damages in section 537.610. In order to waive sovereign immunity or create an exception to sovereign immunity, Plaintiff must identify explicit language in section 70.429 intending for such a result. *Id*. No such language exists and thus Plaintiff's argument fails under Missouri law.

Based on section 70.429, Plaintiff argues the Missouri General Assembly intended for Bi-State to be liable up to $5 million per person–a direct contradiction of the sovereign immunity protections expressly afforded to Bi-State via section 537.610. But section 70.429 does not contain any language calling for such a dramatic result. The absence of explicit language in section 70.429 regarding an "exception" to the cap on damages proves fatal to Plaintiff's argument. The same deficiency also renders Plaintiff's arguments about the FMCSR and the "conflict" between sections 70.429 and 537.610 moot and irrelevant.

1. History of sovereign immunity in Missouri.

Given Plaintiff's argument, it is necessary to revisit the history of sovereign immunity in Missouri. *State ex rel. Bd. of Trustees v. Russell*, 843 S.W.2d 353, 357 (Mo. banc 1992)("Because of the peculiar history of sovereign immunity in Missouri, a proper understanding of the current law requires a review of the past.") Indeed, the history of sovereign immunity in Missouri directly informs the statutory construction of purported waivers or exceptions to sovereign immunity.

Since 1821, sovereign immunity existed as a part of Missouri common law for the government and its political subdivisions. *City of Bellefontaine Neighbors*, 476 S.W.3d at 921 (citation omitted). In 1977, this Court abrogated the doctrine of sovereign immunity under common law. *Jones v. State Highway Com.*, 557 S.W.2d 225, 227 (Mo. banc 1977).

In 1978, the Missouri General Assembly responded by overruling *Jones* with the enactment of sections 537.600 and 537.610. *City of Bellefontaine Neighbors*, 476 S.W.3d at 921. Section 537.600 reinstates sovereign immunity to "public entities" and carves out "limited exceptions to a general rule of immunity." *Id*. (quoting *Bartley v. Special School Dist.*, 649 S.W.2d 864, 868 (Mo. banc 1983)). Bi-State is undisputedly a "public entity" entitled to sovereign immunity under sections 537.600 and 537.610. *State ex rel. Trimble v. Ryan*, 745 S.W.2d 672, 675 (Mo. banc 1988).

In overruling *Jones* and reinstating sovereign immunity, the Missouri General Assembly also announced two "absolute waivers" of sovereign immunity for public entities under limited circumstances. § 537.600.1(1–2), RSMo.

> The conclusion reached is that the legislative intent was not to carve out legislative exceptions to what under *Jones* became a judicial abrogation of sovereign immunity, but was, rather, to overrule *Jones* and to carve out limited exceptions to a general rule of immunity.

State ex rel. Cass Med. Center v. Mason, 796 S.W.2d 621, 622 (Mo. banc 1990).

The first limited exception is for the negligent operation of motor vehicles and is the only exception applicable to this case. § 537.600.1(1), RSMo. The waiver of sovereign immunity for claims arising out of the operation of motor vehicles is "absolute" in all cases regardless of whether the public entity was functioning in a governmental or propriety capacity. § 537.600.2, RSMo. The "absolute waiver" also applies in all cases "whether or not the public entity is covered by liability insurance for tort." § 537.600.2, RSMo.

The Missouri General Assembly further limited the liability of public entities for circumstances in which sovereign immunity is waived. As currently enacted, section 537.610 limits recovery against public entities to $420,606 per person and $2,865,330 per occurrence. § 537.610.2, RSMo. The intent of section 537.610 is "readily apparent" and serves the purpose of balancing "the need for protection of governmental funds against a desire to allow redress for claimants injured in limited classes of accidents." *Winston*, 636 S.W.2d at 328. See also *City of Bellefontaine Neighbors*, 476 S.W.3d at 921 ("The doctrine is intended to lessen the expense and delay of lawsuits and to allow predictability as to the monetary expenses and needs of a public utility.")

Because section 537.600 expressly rebuked *Jones* and created "limited exceptions" to the general rule of sovereign immunity, Missouri courts are bound to "hold that statutory

provisions that waive sovereign immunity **must be strictly construed**." *Id*. at 922 (quoting *Bartley*, 649 S.W.2d at 868 (emphasis added). "In other words, in the absence of an **express statutory exception** to sovereign immunity, or a recognized common law exception . . . sovereign immunity is the rule and applies to all suits against public entities . . . ." *Id.* at 921–22 (emphasis added).

Missouri courts cannot waive sovereign immunity by relying on implications. "For a statute to waive sovereign immunity, 'the intent of the legislature to waive sovereign immunity must be express rather than implied.'" *Cromeans v. Morgan Keegan & Co.*, 1 F.Supp.3d 994, 996 (W.D. Mo. 2014)(quoting *Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003)).

As made clear by *City of Bellefontaine Neighbors*, it does not matter if this Court considers Plaintiff's construction of section 70.429 to serve as an exception or a waiver. Either characterization requires explicit statutory language that removes Bi-State's sovereign immunity protections. More importantly, either characterization demands strict scrutiny in this Court's interpretation and construction of section 70.429.

2. Section 70.429 does not explicitly waive Bi-State's sovereign immunity.

It is undeniable the Missouri General Assembly specifically conferred sovereign immunity upon Bi-State with limited exceptions, subject to a cap on damages from section 537.610. Plaintiff seeks to add another exception based on the following:

> All interstate and intrastate United States Department of Transportation safety rules and regulations shall apply to all operations of the bi-state development transit system.

> On May 26, 1993, the agency shall not be eligible to receive state funds unless it adopts a policy to comply with this requirement.
>
> § 70.429, RSMo.

Clearly, section 70.429 does not contain any explicit or express language suggesting the Missouri General Assembly intended to create an exception to Bi-State's sovereign immunity or otherwise modify the cap on damages. As an initial matter, section 70.429 fails to reference sovereign immunity or the ability to collect damages against Bi-State. Section 70.429 is also silent about the amounts recoverable against Bi-State under the exception of section 537.600.1(1). Finally, section 70.429 does not reference the cap on damages applicable to Bi-State under section 537.610.2. The absence of explicit language regarding *any* of these pertinent topics cannot warrant a waiver of sovereign immunity or an exception to the cap on damages.

If the Missouri General Assembly intended to act as argued by Plaintiff, the language used in section 70.429 would–at the very least–reference sovereign immunity or the ability to obtain damages against Bi-State. The absence of express intent can be seen in the dramatic contrast between section 70.429 and section 537.600. Unlike section 70.429, section 537.600 clearly establishes "waivers" to Bi-State's sovereign immunity:

> [T]he immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions **is hereby expressly waived in the following instances**:
>
> § 537.600.1, RSMo (emphasis added).

> The **express waiver** of sovereign immunity . . . are **absolute waivers** of sovereign immunity in all cases within such situations . . . .
>
> § 537.600.2, RSMo (emphasis added).

No similar language appears in section 70.429. As made clear above, there is no question the Missouri General Assembly acted explicitly when reinstating sovereign immunity and creating limited and defined exceptions. It is equally clear that section 70.429 does not contain language of a similar character to the language used in section 537.600.

Similarly, the difference in language between the Missouri General Assembly's decision to place a cap on damages and section 70.429 shows the Missouri General Assembly did not intend for Plaintiff's "exception." As previously discussed, the Missouri General Assembly waived sovereign immunity for Bi-State for the operation of motor vehicles, but also limited the damages available under the exception as follows:

> The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.610, **shall not exceed** two million dollars for all claims arising out of a single accident or occurrence and **shall not exceed** three hundred thousand dollars for any one person in a single accident or occurrence . . . .
>
> § 537.610.2, RSMo (emphasis added).

If the Missouri General Assembly sought to increase Bi-State's per person limit of liability from $420,606 to $5 million–a nearly twelve-fold increase–one would expect *some* language in section 70.429 calling for such a result.

Another example of how the Missouri General Assembly explicitly intended to waive sovereign immunity–under certain circumstances–can be seen in the "insurance exception" to sovereign immunity. In addition to the two absolute waivers of sovereign immunity, section 537.610.1 provides that a public entity may purchase insurance for tort claims. Again, the language used in the "insurance exception" is a stark contrast from section 70.429:

> 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 . . . and in such amount . . . .
>
> § 537.610.1, RSMo (emphasis added).

In a separate statute, the Missouri General Assembly similarly waived sovereign immunity for municipalities purchasing insurance under certain circumstances:

> Any municipality engaged in the exercise of governmental functions may carry liability insurance . . . and **shall be liable** as in other cases of torts for property damage and personal injuries . . . while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.
>
> § 71.185.1, RSMo (emphasis added).

The language of section 71.185.1, while not explicitly referencing sovereign immunity, makes clear the intent of the Missouri General Assembly to hold municipalities liable under certain circumstances. See *Brennan by & Through Brennan v. Curators of the Univ. of Missouri*, 942 S.W.2d 432, 436–37 (Mo. App. 1997). Similar language does not appear in section 70.429 or in any of the "safety rules and regulations" cited by Plaintiff.

II. Section 70.429 does not reflect a necessary implication by the Missouri General Assembly to create an exception to Bi-State's sovereign immunity and any requirement to procure insurance does not waive sovereign immunity.

Because Plaintiff clearly cannot identify any explicit statutory language calling for an exception to Bi-State's sovereign immunity, Plaintiff relies on a purported implication from the incorporation of "safety rules and regulations" of the Department of Transportation ("DOT"). In order to expand Bi-State's liability, Plaintiff cherry-picks financial responsibility requirements from the FMCSR as promulgated by the FMCSA. Plaintiff's argument is misguided for two primary reasons.

First, Plaintiff selectively chooses the financial responsibility requirements from the FMCSR as the "safety rules and regulations" of the DOT referenced by section 70.429. While Plaintiff benefits from such a construction, the text of section 70.429 neither refers to the FMCSA nor the FMCSR. Indeed, it would have been impossible for the Missouri General Assembly to incorporate regulations from the FMCSA because the FMCSA did not exist when section 70.429 was enacted in 1993. Yet Plaintiff boldly claims that the FMCSR, promulgated by the FMCSA, were the "safety rules and regulations" that the Missouri General Assembly required Bi-State to comply with when it passed section 70.429 in 1993. (Plaintiff's Substitute Brief, p. 15.)

Second, even if Plaintiff's construction of the "safety rules and regulations" was accepted, any requirement for financial responsibility does not negate the sovereign immunity cap on damages. An obligation to carry insurance for a certain amount is not the same as waiving sovereign immunity for claims arising out of motor vehicle accidents. The

obligation to carry insurance for such claims does not change sovereign immunity because the Missouri General Assembly already addressed the cap on damages.

A. Section 70.429 does not reflect a necessary implication by the Missouri General Assembly to create an exception to Bi-State's sovereign immunity.

As previously discussed, Plaintiff fails to cite any language in section 70.429 calling for Bi-State's liability to increase from $420,606 to $5 million. Instead, Plaintiff improperly relies on a single case–*Bachtel v. Miller Cnty. Nursing Home Dist.*–to argue the Missouri General Assembly intended to create an exception to section 537.610. (Plaintiff's Substitute Brief, p. 24–27)(citing 110 S.W.3d 799 (Mo. banc 2003)).

The facts of *Bachtel* are clearly distinguishable from the present matter and do not advance Plaintiff's argument. As an initial matter, this Court in *Bachtel* did not address a waiver of the cap on damages for sovereignly immune entities under section 537.610. The holding in *Bachtel* is limited to whether the Omnibus Nursing Home Act ("Act") created a private cause of action and therefore waived sovereign immunity. Plaintiff improperly attempts to expand the holding of *Bachtel*–which was decided only upon the Act–to waive Bi-State's sovereign immunity cap under section 537.610. This Court should not be persuaded by a clear apples-to-oranges comparison that conflates a waiver of sovereign immunity with a waiver of the cap on damages.

More specifically, in *Bachtel*, this Court held the Act intended to create a private cause of action for employees retaliated against by nursing homes subject to the Act. *Id.* at 803 (citing *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522, 525 (Mo. App.

1994)). Due to the terms of the Act, a private cause of action could be asserted against nursing homes considered "public entities" and otherwise protected by sovereign immunity. *Id*.

In *Bachtel*, the nursing home argued sovereign immunity prohibited suit because the "Act does not contain specific language stating that the doctrine of sovereign immunity is waived as to nursing home districts." *Id*. This Court rejected the argument and reasoned "certain magic words" were not required to waive sovereign immunity. *Id*. at 804. Instead, the intent of the Missouri General Assembly must be express rather than implied and that the Missouri General Assembly could express its intent through language other than stating "sovereign immunity is waived." *Id*.

Because the Act permitted suits against the nursing home, this Court ultimately rejected the nursing home's argument as follows:

> But, under the District's argument, the courts would be required to hold that even nursing home residents were barred from suing under the specific authorizing provisions of the statute. Such a rule would render meaningless the provisions of the Act allowing suits by residents of homes operated by nursing home districts. The legislature is presumed not to have enacted a meaningless provision.

Id. "Since an employee of a private nursing home can sue under the provisions of the Act for retaliation, and as the provisions so permitting are expressly made to nursing home districts, their language **provides the express showing of legislative intent required to find a waiver of sovereign immunity.**" *Id*. at 805 (emphasis added).

Plaintiff ignores the factual limitations of *Bachtel* and the ultimate holding that the Missouri General Assembly expressly permitted causes of action against otherwise sovereignly immune entities. In assessing the waiver of sovereign immunity, this Court found it significant the Missouri General Assembly would permit a resident to sue an otherwise sovereignly immune entity. Of course, it would be meaningless for the Missouri General Assembly to confer such a right if sovereign immunity ultimately barred the claim.

Unlike the Act considered in *Bachtel*, there is nothing in the text of section 70.429 or the "safety rules and regulations" of the DOT that permit recovery against Bi-State beyond the cap on damages. Bi-State is not insisting upon "magic words" like the nursing home in *Bachtel*. Bi-State merely insists upon the test set forth by this Court: an express intention to waive sovereign immunity and increase the cap on damages.

B. The incorporation of "safety rules and regulations" from the DOT does not reflect a necessary inference that the Missouri General Assembly intended to expand the cap on damages.

Plaintiff misstates the purpose of the Missouri General Assembly in enacting section 70.429. Plaintiff claims the purpose of section 70.429 is to create incentives for motor carriers to operate their vehicle in a safe manner and adopt the FMCSR as promulgated by the FMCSA. (Plaintiff's Substitute Brief, p. 25–26.) Plaintiff clearly overreaches in making this argument and ignores the obvious intent of the Missouri General Assembly in passing section 70.429:

> On May 26, 1993, the agency shall not be eligible to receive state funds unless it adopts a policy to comply with this requirement.

As made clear by its explicit remedy, the purpose of section 70.429 addressed **funding**–not a waiver of sovereign immunity from $420,606 to $5 million in order to promote safety. Plaintiff's logic of citing the intent of the FMCSA to discern the intent of the Missouri General Assembly should be viewed skeptically. This is particularly true when the Missouri General Assembly spoke clearly about its intent in section 70.429.

1. The intent of section 70.429 was to address funding and the MetroLink system.

"Insight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of the enactment." *Bachtel*, 110 S.W.3d at 801 (citing *Sermchief v. Gonzales*, 660 S.W.2d 683, 688 (Mo. banc 1983)).

The Missouri General Assembly passed section 70.429 as part of Senate Bill No. 114. 1993 Mo. SB 114 (App A12–A17.) Until this case, section 70.429 has never been cited by any Missouri court. The Missouri General Assembly has also never amended section 70.429 since its original passage in 1993. Contrary to Plaintiff's assertion, the Missouri General Assembly did not enact section 70.429 at the time of enacting most of the laws governing Bi-State.

Instead, the Missouri General Assembly did not enact section 70.429 until May of 1993. (App A12–A17.) Senate Bill No. 114 repealed section 94.665 and enacted four new sections in lieu of the same. (App A12–A17.)

Section 70.378 authorized Bi-State to employ safety officers for its transportation system and facilities. (App A12–A14.) Section 74.450 prohibited various types of conduct on the "facilities" of Bi-State–including a specific provisions pertaining to the entrance upon the "light rail conveyances of the agency without payment of the fare . . . ." (App A14–A17.)

Section 94.655 was the final enactment of the Bill. (App A17.) Section 94.665 addresses cities that adopted a transportation sales tax. (App A17.) Section 94.665(1) preserves the ability of Bi-State and its employees to collectively bargain. (App A17.)

Section 94.665(2) of the Bill provides the current text of section 70.429. (App A17.) For unknown reasons, section 94.665(2) was apparently renamed as section 70.429.

The final provision of the Bill provides its terms became in full force and effect upon passage and approval:

> Because of the need for law enforcement on light rail systems in the immediate future, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.
>
> 1993 Mo. SB 114 (App A12–A17.)

But for the emergency clause provision of Senate Bill 114, section 70.429 would not have gone into effect until 90 days after the adjournment of the session. Mo. Const. Art. III, § 29. Of course, this would have been inadequate as the MetroLink would begin

operating less than two months later.[3] The emergency clause makes clear the subject of section 70.429 was to address safety and funding issues associated with the MetroLink–not any waivers of Bi-State's sovereign immunity for its vehicles.

2. The Missouri General Assembly could not have been referencing the FMCSA as that entity did not exist in 1993.

Plaintiff provides minimal justification for relying on the FMCSA as the "safety rules and regulations" of the DOT in the first place. Plaintiff references the FMCSA and the FMCSR repeatedly in arguing that the FMCSR constitute the "safety rules and regulations" intended to be required by the passage of section 70.429 in 1993. Of course, section 70.429 does not reference the FMCSA, the FMCSR, or financial responsibility requirements. Indeed, the Missouri General Assembly could not reference the FMCSA as that entity did not exist in 1993. The FMCSA did not come into existence until 2000. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106–159, §§ 107(a)("This Act shall take effect on the date of the enactment of this Act; except that the amendments made by section 101 shall take effect on January 1, 2000.") Therefore, it is impossible that the DOT "safety rules and regulations" meant to refer to the FMCSA or the FMCSR.

C. The requirement to purchase insurance up to a certain amount cannot be an "additional" waiver of sovereign immunity.

Plaintiff relies on a number of "safety rules and regulations" in an attempt to reach the ultimate conclusion that Bi-State must carry liability insurance up to $5 million and

[3] Mark Schlinkmann, Metro Link Will Open On Time, Officials Say, St. Louis Post-Dispatch, May 21, 1993, at A8.

satisfy judgments up to that amount. Regardless of Plaintiff's illogical premise, the sovereign immunity protections afforded to Bi-State under section 537.610 do not change.

As previously discussed, Plaintiff fails to identify any explicit language in section 70.429 that requires Bi-State to pay up to $5 million per person. Instead, Plaintiff exclusively relies on liability insurance requirements. The premise of the argument fails because the procurement of liability insurance–even if required by section 70.429–would not change the sovereign immunity cap on damages expressly afforded to Bi-State under section 537.610.

Because the procurement of liability insurance does not constitute an explicit waiver to sovereign immunity for that amount, a sovereignly immune entity subject to an express waiver under section 537.600.1(1–2) cannot further waive its immunity by purchasing insurance in excess of the statutory limits. *Holesapple v. Mo. Hwys. & Transp. Comm'n*, 518 S.W.3d 836, 842 (Mo. App. 2017). Therefore, any requirement that Bi-State purchase additional insurance cannot further waive Bi-State's sovereign immunity or disregard the cap on damages under section 537.610.

In *Holesapple*, the plaintiffs sued the Missouri Highways and Transportation Commission ("MHTC") for wrongful death based on the dangerous conditions in construction overseen by the MHTC. *Id*. at 838–39. The jury returned a verdict against MHTC for $6,700,000 that was reduced to the prior cap of $409,123. *Id*. The plaintiff sought reversal of the reduction by arguing MHTC waived sovereign immunity "by procuring liability insurance with larger limits" that covered the wrongful death claim. *Id*.

In a thorough discussion of the history of sovereign immunity in Missouri, the court in *Holesapple* noted the "insurance exception" to sovereign immunity applies to torts other than the two exceptions set forth in section 537.600. *Id.* at 840 (citing *Brennan*, 942 S.W.2d at 436). The court rejected the plaintiff's argument that procuring additional insurance enlarged the sovereign immunity cap on damages for MHTC because "sovereign immunity was already explicitly waived by statute for a dangerous condition of a public entity's property pursuant to section 537.600.1(2)." *Id.* at 841–42. See also *Newsome v. Kansas City*, 520 S.W.3d 769, 781 (Mo. banc 2017)("[T]he fact the District purchased liability coverage in excess of $403,139 is immaterial; it could not, by law, waive its sovereign immunity to an amount exceeding the limits of § 537.610.")

Plaintiff's argument is indistinguishable from the rejected argument in *Holesapple* and *Newsome* and should be rejected by this Court. As in *Holesapple*, it is undisputed the present dispute concerns one of the two "absolute" exceptions to sovereign immunity– injuries arising out of the operation of motor vehicles or motorized vehicles. RSMo, § 537.600.1(1). As such, the "absolute waiver" applies to this case "whether or not the public entity is covered by a liability insurance for tort." RSMo, § 537.600.2.

Plaintiff merely argues the purchase of insurance by Bi-State waived its sovereign immunity up to the $5 million limit. Plaintiff's argument lacks merit because the insurance waiver exists only for torts "other than the two exceptions set forth in section 537.600." *Id.* at 842 (citing *Brennan*, 942 S.W.2d at 436; *Langley v. Curators of Univ. of Missouri*, 73 S.W.3d 808, 811–12 (Mo. App. 2002); *Fantasma v. Kansas City Bd. of Police Comm'rs*,

913 S.W.2d 388, 391 (Mo. App. 1996); and *Fields v. Curators of Univ. of Missouri*, 848 S.W.2d 589, 592–93 (Mo. App. 1993)). "As such, waiver under the insurance exception as provided by § 537.610.1 simply does not apply." *Id*. at 843.

The Missouri General Assembly spoke clearly and explicitly in limiting the liability of Bi-State for claims arising out of the operation of its vehicles to the amounts set forth in section 537.610.1. These amounts limit recovery to amounts *at or less* than the statutory limits of $420,606 per person. *Kubley v. Brooks*, 141 S.W.3d 21, 29, n.9 (Mo. banc 2004). "To permit a greater monetary recovery would ignore the plain language of that statute, which expressly applies to any 'such policy of insurance purchased pursuant to the provisions of this section.'" *Holesapple*, 518 S.W.3d at 843–44 (quoting Mo. Rev. Stat. § 537.610.1).

III. There is no conflict between section 70.429 and section 537.610.

In order to determine whether section 70.429 supersedes the cap on damages from section 537.610, Plaintiff must demonstrate an irreconcilable conflict between the statutes. Absent a conflict, this Court must apply section 537.610 according to its plain language. Without question, section 537.610 limits Bi-State's liability to $420,606 per person. Because no conflict exists, the plain meaning of section 537.610 must be enforced and the trial court correctly reduced Plaintiff's recovery to $420,606.

A. Standard of review and rules of statutory interpretation.

"Statutory interpretation is an issue of law that this Court reviews de novo." *Finnegan v. Old Rep. Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc

2008)(citation omitted). "The primary rule of statutory interpretation is to ascertain the intent of the General Assembly from the language used and to give effect to that intent." *Id*. (citation omitted). "In determining legislative intent, this Court considers the language of the statute and words employed in their plain and ordinary meaning." *Id*. (citation omitted). "[T]he canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended." *Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). The primary rule of statutory interpretation is "to give effect to legislative intent as reflected in the plain language of the statute at issue." *Id*. (citation omitted).

Before resorting to the application of the principles of statutory construction, an irreconcilable conflict must exist between the two statutes in question. *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015)(citing *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007)). The existence of a conflict is a "precondition to the application of the principles of statutory construction." *City of Jennings*, 236 S.W.3d at 631 (citing *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 909–10 (Mo. banc 2006)). "When 'two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect.'" *Earth Island Inst.*, 456 S.W.3d at 33 (quoting *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009)).

B. Section 70.429 does not adopt the financial responsibility requirements set forth in Part 387.

Plaintiff argues the phrase "safety rules and regulations" in section 70.429 must incorporate 49 C.F.R. § 387.33–the financial responsibility requirements set forth by the FMCSA–an administration within the DOT. Plaintiff's argument requires several leaps of logic in the interpretation of "safety rules and regulations" that should be rejected.

1. Section 70.429 cannot be construed to reference the FMCSA and FMCSR.

Of note, section 70.429 never mentions the FMCSA or the FMCSR. Instead, section 70.429 simply refers to the DOT. The DOT is not exclusively comprised of the FMCSA and includes many other Administrations that also pass "safety rules and regulations." For instance, the Federal Transit Administration ("FTA") implements a safety certification training curriculum that applies to all recipients of federal financial assistance. 49 C.F.R. § 672.1, *et seq.* Section 70.429 provides no indication as to whether it meant to refer to the FTA, the FMCSA, or any other Administration[4] within the DOT that promulgates "safety rules and regulations."

Plaintiff's argument becomes more tenuous when considering the FMCSA did not exist at the time of enactment of section 70.429. The Missouri General Assembly passed section 70.429 as part of Senate Bill No. 114 and the same went into effect on May 26,

[4] The other Administrations within the DOT include the Office of the Secretary, the National Highway Traffic Safety Administration, the Federal Aviation Administration, the Office of the Inspector General, the Federal Highway Administration, the Pipeline and Hazardous Materials Safety Administration, the Federal Railroad Administration, the Saint Lawrence Seaway Development Corporation, and the Maritime Administration.

1993. (App A12–A17.) Until now, section 70.429 has never been interpreted or cited by any Missouri court. The Missouri General Assembly has also never amended section 70.429.

2. The Missouri General Assembly could not have made a "conscious choice" to subject Bi-State to the "safety rules and regulations" of the FMCSA.

Plaintiff asserts the Missouri General Assembly deliberately removed Bi-State from 49 C.F.R. § 390.3(f)(2) that excludes agencies established under a multi-state compact from following safety regulations. (Plaintiff's Substitute Brief, p. 14.) More importantly, Plaintiff assumes that the Missouri General Assembly intended to not only remove Bi-State from the exclusion, but also to impose certain financial responsibility obligations under the FMCSA. The Missouri General Assembly could not have made a "conscious choice" to subject Bi-State to the "safety rules and regulations" of the FMCSA as alleged by Plaintiff or otherwise intended to disregard § 390.3(f)(2) since the FMCSA did not exist when the Missouri General Assembly expressed its intent in 1993.

3. The "safety regulations" of the FMCSR do not include the financial responsibility requirement from Part 387.

Even accepting Plaintiff's argument that section 70.429 must refer to the FMCSA or some other unspecified predecessor regulation, the "safety rules and regulations" of the FMCSA do not include financial responsibility requirements. Plaintiff asserts Part 387 must be considered a part of the "safety rules and regulations" even though the FMCSA does not consider the same to be "safety regulations" in the first place:

> *Federal Motor Carrier Safety Regulations (FMCSRs)* means those safety regulations which are contained in parts 390, 391, 392, 393, 395, 396, and 397 of this subchapter.

49 C.F.R. § 355.5 (App A22.)

As made clear by the FMCSA's own definition, the financial responsibility requirements are not considered "safety rules and regulations" and thus would not fall within the purview of section 70.429.

Plaintiff attempts to skirt the FMCSA's definition of "safety regulations" by pointing to §§ 390.3(a), (c) as an "incorporation" of the entirety of Subchapter B and the financial responsibility requirements from Part 387. (Plaintiff's Substitute Brief, p. 14.) However, a full reading of §§ 390.3(a), (c) makes clear that Plaintiff inserts language not present in the cited regulations in order to expand the scope of the FMCSR.

The entirety of § 390.3(a) reads as follows:

> The rules in subchapter B of this chapter are applicable to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce.

The entirety of § 390.3(c) reads as follows:

> The rules in part 387 of this chapter, Minimum Levels of Financial Responsibility for Motor Carriers, are applicable to motor carriers as provided in §§ 387.3 or 387.27 of this chapter.

Based on the foregoing, Plaintiff incorrectly claims that Part 390 therefore "expressly incorporates the entirety of Subchapter B, specifically including Part 387 at issue in this appeal." (Plaintiff's Substitute Brief, p. 14.)

The language used in §§ 390.3(a), (c) does not support Plaintiff's claim of "incorporation." Indeed, neither regulation states the rules of subchapter B or Part 387 are a part of Part 390. Instead, the regulations simply state that the previously announced rules continue to be "applicable" to motor carriers. Such an announcement does not change Part 390 or incorporate Part 387.

If Part 387 was intended to be within the FMCSR, it would have been defined as such in 49 C.F.R. § 355.5. Even assuming Part 390 could make Part 387 a part of the FMCSR, the language of Part 390 would need to expressly adopt and incorporate by reference the entirety of Part 387–not simply announce that Part 387 remains applicable to motor carriers in general.

The flaws in Plaintiff's logic become more glaring considering the necessary strict construction when interpreting a purported waiver or exception to sovereign immunity. The FMCSA clearly states what is a "Federal Motor Carrier Safety Regulation." The only regulations considered to be the FMCSR come from Parts 390, 391, 392, 393, 395, 396, and 397 and do not include Part 387. As such, the financial responsibility requirements–per the FMCSA's own language–simply cannot be considered the "safety rules and regulations" of the DOT.

C. Even if section 70.429 adopts 49 C.F.R. § 387.33, the same does not require Bi-State to maintain $5 million in financial responsibility.

Plaintiff argues the requirements of financial responsibility from the FMCSA require Bi-State to satisfy $5 million in judgments for the operation of vehicles with a

seating capacity of 16 or more. However, Plaintiff does not cite an applicable regulation on this issue. Instead, Plaintiff relies on 49 C.F.R. § 387.301(a) to argue that Bi-State must maintain insurance "conditioned to pay a final judgment" recovered against Bi-State. (Plaintiff's Substitute Brief, p. 16–17.) Plaintiff's argument overlooks the full text of section 387.301(a) which only applies to a for-hire motor carrier "**transporting exempt commodities** subject to Subtitle IV, part B, chapter 135 of title 49, United States Code . . . ." 49 C.F.R. § 387.301(a)(emphasis added). Plaintiff conveniently leaves out the relevant text that makes clear this requirement only applies to the carriers of commodities–not passengers.

1. The applicable financial responsibility requirements are dictated by the highest amount set between the State of Missouri and the State of Illinois.

Unlike § 387.301(a)–which applies to certain exempt commodities–the limits of liability for passengers appears in 49 C.F.R. § 387.33. In §387.33(a), this regulation provides the same minimum limits of $5 million for any vehicle with a seating capacity of 16 passengers or more, including the driver, and $1.5 million for any vehicle designed or used to transport 15 passengers or less, including the driver, for compensation. 49 C.F.R. § 387.33(a).

However, these requirements are limited by the following:

> *Limits applicable to transit service providers.* Notwithstanding the provisions of paragraph (a) of this section, the minimum level of financial responsibility for a motor vehicle used to provide transportation services within a transit service area under an agreement with a Federal, State, or local government funded, in whole or in part, with a grant under 49 U.S.C. 5307,

> 5310 or 5311 . . . will be the highest level for any of the States in which it operates.
>
> This paragraph applies to transit service providers who operate in a transit service area located in more than one State, as well as transit service providers who operate in only one State but interline with other motor carriers that provide interstate transportation within or outside the transit service area.

49 C.F.R. § 387.33(b); 387.303(b)(1)(iii)(App'x A23.)

The foregoing exception from subsection (b) is applicable to Bi-State as it operates within a transit service area within the States of Missouri and Illinois and is funded in whole or in part under a federal grant under 49 U.S.C. §§ 5307, 5310, or 5311. Bi-State receives federal funding pursuant to 49 U.S.C. § 5307 as a "recipient" of an Urbanized Area Formula Grant. In 2019, St. Louis, Missouri and St. Louis, Illinois received federal funding from the FTA as authorized by the Fixing America's Surface Transportation Act (FAST) and The Consolidated Appropriations Act, 2019 (Pub. L. 116-6).[5]

As made clear, the financial responsibility requirements cited by Plaintiff simply do not apply to Bi-State. Instead, the required financial responsibility "will be the highest level for any of the States in which it operates." Plaintiff fails to address this pertinent regulation and never developed any evidence at trial regarding the potential financial responsibility requirements of Bi-State. In particular, Plaintiff never established whether the Bi-State vehicle traveled interstate or intrastate or even whether § 387.33 is guided by the vehicle

[5] Information available through the website for the Federal Transit Administration. https://www.transit.dot.gov/funding/apportionments/table-3-fy-2019-section-5307-and-5340-urbanized-area-formula-appropriations (accessed last on February 12, 2020).

involved in the occurrence or the overall operations of the motor carrier. Both Illinois and Missouri require different levels of financial responsibility depending upon whether the for-hire carrier travels interstate or intrastate and the overall seating capacity of the vehicle. Of course, any requirement of financial responsibility has absolutely no effect on the sovereign immunity protections afforded to Bi-State via section 537.610.

2. The financial responsibility requirements of the FMCSA cannot burden the Bi-State Compact without the approval of the States of Missouri and Illinois.

As an interstate compact entity between Missouri and Illinois, Bi-State is created pursuant to the Compact Clause of the United States Constitution with congressional approval. *Jordan v. Bi-State Dev. Agency*, 561 S.W.3d 57, 60 (Mo. App. 2018)(citing U.S. Const. art. I § 10, cl. 3.) "Bi-state entities . . . are unique because three separate sovereigns are involved–the federal government and two states." *Id*. (citation omitted). "In a bi-state compact, one state may not enact legislation that unilaterally imposes burdens upon the compact 'absent the concurrence of the other signatories.'" *Id*. (quoting *Bi-State Dev. Agency of the Missouri-Illinois Metro Dist. v. Dir. of Rev.*, 781 S.W.2d 80, 82 (Mo. banc 1989)).

Even if Plaintiff's argument were accepted as true, the purported incorporation of the financial responsibility requirements by section 70.429 would be invalid as to Bi-State due to the absence of any acquiescence by the State of Illinois. Under the rules of a bi-state compact, "one party may not impose burdens upon the compact absence the concurrence

of the other signatories." *Id*. (citing *Redbird Engineering Sales, Inc. v. Bi-State Dev. Agency of Missouri-Illinois Metro Dist.*, 806 S.W.2d 695 (Mo. App. 1991)).

In sum, the State of Missouri cannot impose an impermissible unilateral burden on the compact without the concurrence of the State of Illinois. *Id*. Here, Plaintiff has failed to show any concurrence by the State of Illinois to the purported increase in financial responsibility requirements and waiver of sovereign immunity in the State of Missouri.

D. Even accepting Plaintiff's construction as accurate, the statutes can still be harmonized to avoid an impossible conflict.

Even if Bi-State were required to maintain $5 million in financial responsibility, such a requirement does not diminish Bi-State's sovereign immunity protections. As previously discussed, no regulation of the DOT addresses sovereign immunity or prevents the State of Missouri from protecting a public entity through sovereign immunity. Again, the existence of liability coverage beyond the limits of liability cannot waive sovereign immunity to an amount above the limits of section 537.610. *Newsome*, 520 S.W.3d at 781.

Even if the requirement of financial responsibility could waive sovereign immunity to an amount above the limits of section 537.610, the FMCSA does not call for such a result. The requirement of financial responsibility is limited to the payment of a "final judgment" and therefore does not preempt protections afforded via sovereign immunity.

Section 70.429 does not create an "impossible" conflict with the limits of liability set forth in section 537.610. Like the language of section 70.429, the language of 49 C.F.R. § 387.33 does <u>not</u> address the issue of sovereign immunity and the limitation of what <u>can</u>

be recovered in a "final judgment" against a motor carrier. Moreover, the financial responsibility requirements of 49 C.F.R. § 387.33 can be harmonized with the cap on damages from section 537.610.

Plaintiff's argument rests upon the financial responsibility requirements of the FMCSA. However, the financial responsibility requirements only exist with respect to the satisfaction of a "final judgment" and not the amount of damages found against a motor carrier:

> No for-hire motor carrier . . . shall engage in interstate or foreign commerce, and no certificate shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the FMCSA surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or agreements, in the amounts prescribed in § 387.303, **conditioned to pay any final judgment** recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance of use of motor vehicles in transportation . . . .

49 C.F.R. § 387.301(a)(1)(emphasis added).

Even if this regulation applied to Bi-State and could somehow apply to sovereign immunity protections, the FMCSA only references a "final judgment" against a motor carrier. In this case, there is no "final judgment" against Bi-State in excess of the statutory cap. As a matter of law, no judgment against Bi-State could be entered in excess of the amounts prescribed by section 537.610. See *Newsome*, 520 S.W.3d at 781.

Simply put, a "final judgment" in excess of the cap on damages could not be entered against Bi-State and therefore the financial responsibility requirement can be satisfied

while not conflicting with the cap on damages. Such a construction is necessary in order to give effect to the plain meaning of section 537.610 and the express limitation of liability against "public entities" like Bi-State.

Even if this Court considers a "final judgment" to include an amount found by the jury–before any reduction due to defenses like sovereign immunity–the financial responsibility requirements can still be harmonized with the cap on damages. The requirement of $5 million in financial responsibility functions as an aggregate limit.[6] As made clear by the DOT and the FMCSA, the $5 million requirement was never intended to serve as a "per person" limit as argued by Plaintiff. More importantly, the Missouri General Assembly never sought to balance the needs of sovereign immunity with the protection of its citizens in such a manner to permit virtually unlimited recovery.

Indeed, Plaintiff's argument of a $5 million "per person" limit would lead to an extraordinarily bizarre result in which Bi-State would have virtually unlimited liability despite the clear intention of the Missouri General Assembly. For instance, under Plaintiff's construction, a catastrophic accident involving a bus with 16 passengers would be subject to $5 million per person and thus potentially exposing Bi-State to ***$80 million*** in total liability. Such a result cannot possibly be entertained when the Missouri General

[6] United States Department of Transportation, Federal Motor Carrier Safety Administration, *Motor Carrier Financial Responsibility Report to Congress*, p. 6 (2018). Accessible via https://www.fmcsa.dot.gov/mission/policy/motor-carrier-financial-responsibility-report-congress. (App A26–A28.)

Assembly has spoken explicitly to limit Bi-State's liability to $420,606 per person and $2,865,330 per occurrence.

IV. Even if a conflict exists between section 70.429 and section 537.610, the conflict should be resolved in favor of section 537.610.

Although Bi-State maintains that section 70.429 and section 537.610 can–and must–be read in harmony, Bi-State alternatively argues that any conflict should be resolved in favor of section 537.610.

Section 537.610 addresses the relevant subject–sovereign immunity–in much more specific terms than section 70.429. In addition to being the more specific statute, section 537.610 was also more recently amended by the Missouri General Assembly and therefore functions as a chronologically later statute than section 70.429.

A. Section 537.610 is the more specific statute.

"[W]here one statute deals with a **particular subject** in a **general way**, and a second statute treats a part of the **same subject** in a **more detailed way**, the more general should give way to the more specific." *O'Flaherty v. State Tax Com.*, 680 S.W.2d 153, 154–55 (Mo. banc 1984)(emphasis added)(citations omitted). Here, the "particular subject" is sovereign immunity and the amount recoverable against Bi-State. Therefore, section 537.610 is more specific than section 70.429.

Of the two statutes, only section 537.610 expressly addresses the topic of sovereign immunity and expressly limits the amount recoverable against Bi-State. In contrast, section 70.429 does not address the topic of sovereign immunity or expand the amount recoverable

against Bi-State beyond the $420,606 per person limit from section 537.610.

As held by *O'Flaherty*, section 70.429 must give way to the only statute addressing sovereign immunity. As the more specific statute, section 537.610 provides the precise cap on damages recoverable against Bi-State. Meanwhile, section 70.429 does not discuss the topic of sovereign immunity or any cap on damages for a sovereignly immune entity.

In addition, Section 537.610 remains the more specific statute even considering the "safety rules and regulations" of the DOT. Plaintiff fails to identify any DOT regulation that would conflict with the sovereign immunity cap under section 537.610 given that 49 § 387.301(a) clearly does not require Bi-State to satisfy judgments up to $5 million.

Even if this Court believes the "financial responsibility" requirements of 49 C.F.R. § 387.33 conflict with the cap on damages, the conflict must still be resolved in favor of section 537.610. As previously discussed, Plaintiff's cited regulations only require that final judgments up to $5 million be satisfied. 49 C.F.R. § 387.301(a). Due to the protections of section 537.610, Bi-State was never called upon to satisfy a final judgment in excess of the per person sovereign immunity cap on damages. In any event, none of the cited regulations discuss the issue of sovereign immunity and the cap on damages and thus remain far less specific than the express and explicit terms of section 537.610.

B. Section 70.429's limited application to Bi-State does not make it more "specific" than section 537.610 regarding sovereign immunity.

The fact section 70.429 only applies to Bi-State is a red herring and should not distract this Court from assessing the specificity of the subject-matter of both statutes–

sovereign immunity. The limited application of section 70.429 to Bi-State does not cause its subject-matter to be more specific than any other law under all circumstances. The rules of statutory interpretation require a consideration of the purpose and effect of the competing statutes–not simply whether one statute applies only to Bi-State or includes other entities.

The relevant issue in this case is the sovereign immunity protections afforded to Bi-State by the Missouri General Assembly. As previously discussed, only one statute addresses sovereign immunity–section 537.610. In contrast, the subject-matter of section 70.429 could not be any broader. Per its terms, section 70.429 simply incorporates unknown and unidentified "safety rules and regulations" without any mention of sovereign immunity, financial responsibility, or the FMCSA and therefore cannot be held to address the sovereign immunity cap on damages in a more specific manner than section 537.610.

C. The Missouri General Assembly has amended section 537.610 more recently than section 70.429.

"If harmonization [of competing statutes] is impossible, a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute." *S. Metro Fire Prot. Dist.*, 278 S.W.3d at 666.

In addition to functioning in a more particular way than section 70.429, section 537.610 has also been more recently amended and enacted by the Missouri General

Assembly. In 1993, the Missouri General Assembly passed section 70.429. The Missouri General Assembly has never amended section 70.429 since its passage.

In contrast, the Missouri General Assembly initially enacted section 537.610 in 1978, but subsequently amended the same in 1989, 1999, and 2009. As made clear by its legislative history, section 537.610 has been more recently amended and enacted than section 70.429 and therefore should control over the same from a chronological perspective.

Evidently, the Missouri General Assembly did not see any irreconcilable conflict between the statutes at any point in time. *Control Tech. & Solutions v. Malden R-1 Sch. Dist.*, 181 S.W.3d 80, 83 (Mo. App. 2005)("[W]e presume the legislature acts with knowledge of statutes involving similar or related subject matters.")(citation omitted). When enacting section 70.429, the Missouri General Assembly saw no need to clarify the scope of section 537.610. Similarly, the Missouri General Assembly saw no need to clarify the scope of section 70.429 when amending section 537.610 in 1999 and 2009.

D. Section 537.610 controls over section 70.429.

Assuming this Court believes a conflict exists between these statutes, the canons of construction require that section 537.610 prevails over section 70.429. This Court's analysis should focus on the true subject-matter of each statute and the extent to which each statute addresses the topic of sovereign immunity and the amounts recoverable against Bi-State.

Section 70.429 discusses sovereign immunity, if at all, in a tangential manner by referencing "safety rules and regulations" without any further discussion. In contrast, section 537.610 expressly states Bi-State cannot be liable for more than $420,606 per person due to its status as a sovereign immune "public entity." In addition to addressing a more specific and relevant topic, the Missouri General Assembly also amended section 537.610 *after* section 70.429–thus making it the chronologically later statute.

Plaintiff's resolution of the conflict rests upon a superficial analysis that must be rejected. The fact section 70.429 only applies to Bi-State does not automatically make it more specific than any other statute which also applies to Bi-State. Instead, this Court should resolve any conflict by assessing the degree to which the statutes address sovereign immunity. Through this lens, it is clear section 537.610 is more specific and controls.

V. Plaintiff failed to plead the exception to sovereign immunity currently sought.

In addition to improperly construing section 70.429, Plaintiff's argument regarding sovereign immunity was never pled at the trial court level. Plaintiff's Petition did not allege any facts suggesting that section 70.429 eviscerates the cap on damages under section 537.610. Plaintiff should not be permitted to raise the issue of an exception to the cap on damages for the first time in response to a Motion for Remittitur when Plaintiff's alleged damages were known and Plaintiff nevertheless declined to plead an exception to the cap on damages.

Permitting Plaintiff to raise an exception to sovereign immunity until the last possible moment wrongly encourages litigants to retain stealth arguments throughout

litigation. This Court should not promote such tactics. Missouri law clearly required Plaintiff to specifically plead any exception to sovereign immunity at the outset of litigation. Without question, Plaintiff's Petition failed to do so and thus Plaintiff failed to properly seek an exception to Bi-State's sovereign immunity based on section 70.429.

"Because the liability of a public entity for torts is the exception to the general rule of sovereign immunity, a plaintiff must specifically plead facts demonstrating the claim is within an exception to sovereign immunity." *Hummel v. St. Charles City R-3 Sch. Dist.*, 114 S.W.3d 282, 284 (Mo. App. 2003)(citing *Burke v. City of St. Louis*, 349 S.W.2d 930 (Mo. 1961)).

In the underlying case, Plaintiff sought two exceptions to the general rule of sovereign immunity. First, Plaintiff sought to invoke the exception to sovereign immunity for injuries arising out of the operation of motor vehicles under section 537.600.1(1). Second, Plaintiff sought to invoke an exception to the cap on sovereign immunity set forth by section 537.610 based on the requirements of section 70.429.

Without question, Plaintiff's Petition clearly invokes the first exception by pleading that Plaintiff was in an automobile accident with an employee of Bi-State. (L.F. 2.)(App A6–A11.) However, Plaintiff's Petition includes no allegations remotely suggesting the second exception to Bi-State's sovereign immunity protections. (L.F. 2.)(App A6–A11.)

Plaintiff's Petition simply alleges Bi-State's employee "was operating a Metro public transportation motor vehicle" and the same collided with the side of Plaintiff's vehicle. (L.F. 2, p. 2.)(App A7.) Plaintiff's Petition makes no allegations regarding the

capacity of the vehicle or otherwise asserts that section 70.429 and the FMCSR require that Bi-State maintain financial responsibility up to $5 million per person and the same waives Bi-State's sovereign immunity. (L.F. 2.)(App A6–A11.)

The absence of such allegations is fatal to Plaintiff's argument that a second exception to Bi-State's sovereign immunity exists. Plaintiff proceeds no differently than a litigant seeking an exception to sovereign immunity based on the presence of insurance. Under those circumstances, the plaintiff bears the burden of pleading and proving the existence of an insurance policy and that the terms of the policy cover the plaintiff's claim. *A.F. v. Hazelwood Sch. Dist.*, 491 S.W.3d 628, 635 (Mo. App. 2016).

The same pleading requirements for invoking an insurance exception are equally applicable to this case. If Plaintiff wanted to argue that section 70.429 negated Bi-State's sovereign immunity protections, she needed to raise the issue in her pleadings.

VI. Even if this Court agrees with Plaintiff's argument, the matter must be remanded for further proceedings regarding the capacity of Bi-State vehicle.

Plaintiff's argument to expand the sovereign immunity cap on damages to $5 million depends on the passenger capacity of the Bi-State vehicle. As contended by Plaintiff, the cap escalates to $5 million per person if the Bi-State vehicle had a capacity of 16 passengers or more. The trial court never determined the capacity of the Bi-State vehicle and this issue remains wholly unresolved.

To the extent this Court agrees with Plaintiff's argument, the matter must be remanded for further factual proceedings to determine the capacity of the Bi-State vehicle.

For the question of damages to be moot on remand, it is essential that the trial court or jury necessarily decided every fact essential to liability and damages. See *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007). "Where a possibility of proof exists which the plaintiff has not fully developed, a remand rather than reversal is permissible." *Bass v. Nooney Co.*, 646 S.W.2d 765, 774 (Mo. banc 1983).

The evidence in the Record reveals the capacity of the Bi-State vehicle was disputed and not adequately proven by Plaintiff. As previously discussed, Plaintiff's Petition did not include any allegations regarding the capacity of the Bi-State vehicle. The only evidence regarding this issue was presented at trial and yielded conflicting results.

At trial, Plaintiff introduced Exhibit 1–the Missouri Uniform Crash Report authored by Sergeant Patrick Haug. (T.R. 235:14–25.) Under the heading "Vehicle Body Types," Exhibit 1 provided options to describe the Bi-State vehicle as either a "Small Bus (9-15 W/Driver)" or a "Large Bus (16+ W/Driver)." (App A3.) Sergeant Haug placed an "X" in the box corresponding to "Small Bus (9-15 W/Driver)"– indicating the Bi-State vehicle did not have a capacity of 16 or more passengers including the driver. (App A3.)

Plaintiff relied on the deposition testimony of Defendant Paula Crayton to assert the Bi-State vehicle had a capacity of 16 or more passengers as follows:

> Q. But Metro has these large passenger vans that sit, what, 20-plus people; correct?
> **A. I don't know if it seats that many.**
> Q. Okay. They're more like small bus –
> **A. Like 16.**
> Q. Oh, 16?
> **A. 16 to 18 maybe.**

(L.F. 34, p. 3.)(App A18–A21.)

Clearly, the testimony of Defendant Crayton was equivocal on the issue of how many passengers the Bi-State vehicle could hold. At most, the response by Defendant Crayton conflicted with the Missouri Uniform Crash Report. And it remains entirely unclear as to the true capacity of the Bi-State vehicle involved in the accident.

The trial court never reached this factual question because it determined the cap on damages from section 537.610 applied. To the extent the trial court misapplied the law, it would be wholly improper to reverse the judgment of the trial court because the decision would not be supported by substantial evidence. Instead, the matter would need to be remanded for further proceedings to determine the capacity of the Bi-State vehicle.

CONCLUSION

The trial court's judgment should be affirmed in all respects and this Court should deny the relief sought by Plaintiff.

Alternatively, should this Court agree with the legal arguments asserted by Plaintiff, this matter must be remanded to the trial court for further proceedings to decide the factual question of the capacity of the Bi-State vehicle involved in the accident.

CERTIFICATE OF COMPLIANCE

As required by Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03, a copy of this brief was served upon counsel for Plaintiff via the electronic filing system as set forth in the Certificate of Service, and this brief complies with the limitations contained in Rule 84.06(b).

This brief was prepared using Microsoft Word, is proportionally spaced and contains 12,679 words, not including material contained in the cover, certificate of compliance, certificate of service, signature block, and appendix.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that the original pleading was signed by the attorney or record and a copy of the foregoing has been electronically served on all counsel of record via the Court's electronic filing system on this 19th day of February, 2020.

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