

IN THE
SUPREME COURT OF MISSOURI

No. SC98169

MARY J. MOORE

Plaintiff/Appellant

Vs.

BI-STATE DEVELOPMENT d/b/a METRO

Defendant/Respondent

Appeal from the Circuit Court of the City of St. Louis
The Honorable Christopher E. McGraugh, Circuit Judge

**BRIEF OF MISSOURI ORGANIZATION OF DEFENSE LAWYERS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 attorneys involved in defending civil litigation. It includes attorneys who regularly represent public entities, including special districts and other governmental entities like the defendant/respondent Bi-state Development Agency (“Bi-State”).

With regard to public entities, MODL’s goals include ensuring that there is a proper balance between providing relief for individuals who have been injured and preserving the ability of the entity to fulfill its obligation to serve the public. Establishing that balance is a legislative function. But in cases such as this one, the courts are drawn in.

Once this Court enters the fray, MODL is drawn in. This Court, as always, is asked only to address a specific question on a specific set of facts—here, a question of sovereign immunity for a unique sort of governmental entities. But the Court’s analysis will necessarily touch, at least implicitly, on broader issues—and be binding on lower courts in a variety of other cases. MODL files this brief to assist the Court in determining the legislative will—and to protect not just individuals who are injured, but the broader interests of the people of Missouri.

This brief is being filed with consent of all parties (*i.e.*, plaintiff Mary Moore and defendant Bi-State Development Agency), given by their counsel, pursuant to Rule 84.05(f)(2).

ARGUMENT

I. **The Court should reiterate that for the Missouri General Assembly to waive the sovereign immunity of political subdivisions, the waiver must be explicit or express—not implied or inferred.**

This is a statutory construction case. In deciding such cases, this Court aims to determine what the legislature intended. *See Roesing v. Director of Revenue*, 573 S.W. 3d 634, 639 (Mo. 2019) (“In interpreting the meaning of section 577.041.1, the primary rule of statutory interpretation is to give effect to legislative intent in the plain language of the statute.”); *State ex rel. Hillman v. Beger*, 566 S.W. 3d 600, 604-05 (Mo. 2019) (“Any time a court is called upon to apply a statute, the primary obligation ‘is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning,’” quoting *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. 2009)); *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) (“The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.”), quoted with approval, *Dickemann v. Costco Wholesale Corp.*, 550 S.W. 3d 65, 68 (Mo. 2018)

In doing so, the Court looks first to plain language. “But, when two statutes — each plain and unambiguous on their own — conflict with each other, resort to certain canons of construction remains appropriate.” *Hillman v. Beger*, 566 S.W. 3d at 605.

Application of those canons—of which there are dozens—can quickly become problematic. For, as this Court has recently observed, “[r]arely will all canons align to counsel the same result. *Id.* at 606. “Most often, for every rule suggesting one resolution, another rule exists that suggests the contrary.” *S. Metro. Fire Prot. Dist.*, 278 S.W.3d at 666.

In a few areas, however, this Court has defined a hierarchy among canons—or, to the same effect, this Court has set out a rule of interpretation that must be used for a class of statutory construction questions. And the legislature has, appropriately, relied on those hierarchies or rules in drafting legislation.

Sovereign immunity is one area in which this Court has set out a particular, overriding rule or hierarchy—one that applies when considering waivers (or alleged waivers) of such immunity.

This Court, of course, once abolished that immunity. *Jones v. State Highway Comm’n*, 557 SW 2d 225, 230 (Mo. banc 1977). But the legislature immediately restored it, with very limited exceptions. § 537.600, RSMo. *See, e.g., Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. 2016); *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. 2016). Since *Jones*, the legislature has only rarely, and in very limited ways, backtracked from its broad application of immunity.

Sovereign immunity in Missouri thus remains expansive in scope—and the Court has declared that it is up to the legislature alone to define its exception:

This Court has recognized that “the legislative intent [in reversing *Jones*] 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.”

Id., quoting *Bartley v. Special Sch. Dist. of St. Louis Cnty.*, 649 S.W.2d 864, 868 (Mo. banc 1983).

Most important here, this Court has required that the legislature create exceptions or waivers in a way that is readily evident—a way in which it is clear that the legislature knowingly took particular a step back toward the *Jones* result. Thus, when considering waivers of sovereign immunity, this Court, using synonyms, has repeatedly and consistently declared and applied—before or overriding other canons of construction—the requirement that any waiver must be *explicit* and *express*.

For example, the Court has declared that it “cannot read into the statute an exception to sovereign immunity or imply waivers not ***explicitly*** created in the statute.” *Metro-St. Louis Sewer Dist. U-City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. 2016) (emphasis added).

And this Court has demanded “strict construction”—an approach to construction that “presumes nothing that is not ***expressed***.” *Cosby v. Treasurer*, 579 S.W. 3d 202, 204 n.4 (Mo. 2019) (emphasis added), quoting *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. 2014), and in turn *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010).

Whether the word is “explicit” or “expressed,” the rule is that the legislature must demonstrate through the actual language of the statute that it has waived immunity.

Why demand actual language, that is, an express or explicit statement? Why reject the concept, applied in so many other contexts, that in this realm the legislative will can be implied or inferred—*i.e.*, that something can be

“read into the statute” though not actually stated? Among the many reasons are these three:

First, so that it is undisputed that the legislators know what they are doing. As this Court has recognized, the legislature established a general rule. By telling the legislature that if a new law is going to modify sovereign immunity, it must do so expressly, this Court ensured that legislators would act with knowledge. In that sense, the Court’s instruction is like the constitutional instruction in the Missouri constitution’s “clear title” clause of our constitution (Art. III, § 23): it provides “a way of keeping ‘individual members of the legislature and the public fairly apprised of the subject matter of pending laws.’” *Home Builders of Greater St. Louis v. State*, 75 S.W.3d 267, 269-270 (Mo. 2002) (citations omitted).

Second, so that those who sit on public governmental bodies—nearly all of them non-lawyers—can look at the statutes and see where liability has (or limits on liability have) been waived. Perhaps Bi-State is so large and sophisticated that its Board hires a lawyer to always be in the room when the Board meets, ready to advise the Board on the subtleties of the interaction between state and federal law. But that is not true of every governmental body. The language of the legislature should be clear enough that trustees of the smallest town or village, the commissioners of the smallest county, and the board members of the smallest school district are on notice that the legislature has modified the immunity that was expressly preserved in § 537.600—and regulated by the caps in § 537.610, or not.

Third, to preserve separation of powers by recognizing that the legislature is entitled to rely on this Court’s instruction. Legislators should not discover, after the fact, that they impliedly waived immunity when the

judicial branch has repeatedly told the legislative branch that there will be no implied and inferred waivers.

II. The Court should not dilute the requirement that waivers of sovereign immunity be explicit or express by allowing the waiver theory here to breach that standard.

This appeal, particularly as argued by the plaintiff and decided by the Court of Appeals, threatens the validity and vitality of the requirement that waivers be explicit and express.

Plaintiff cannot point to any statute in which the Missouri General Assembly said that the limits it expressly and explicitly imposed on liability in § 537.610 do not apply to Bi-State. Plaintiff's theory is that in § 70.429, RSMo., the legislature waived immunity by excluding Bi-State from those caps. But § 70.429 says nothing of the sort.

In light of the requirement that waivers be explicit and express, Plaintiff's theory is problematic, in at least two respects.

First, Plaintiff's theory—adopted by the Court of Appeals, Eastern District—permits indirect, unannounced waivers. That is, it permits a legislator who is proposing a waiver to hide the waiver by referencing some outside source. It permits the legislature to waive immunity of political subdivisions without including the waiver language anywhere in the Revised Statutes of Missouri. The Court should reject the argument that a waiver can be explicit and express when it doesn't appear in Missouri statute at all.

Second, that theory turns over to a third party—here, the U.S. Department of Transportation—the question of whether there is a waiver, or the scope of the waiver. And in doing so, the theory makes the scope of the waiver a moving target—a line that can change without any legislative action

whatsoever. After all, in Plaintiff's view, whether today there is a cap of \$1 or \$420,609 or no cap at all depends not on an act of the Missouri General Assembly, but on the vagaries of federal rulemaking.

Plaintiff even implies that the placement of the regulatory language matters: She suggests that the waiver exists here because the Department of Transportation included financial responsibility language in what the Code of Federal Regulations (published not by the Department but by the National Archives and Records Administration) *labels* "safety regulations." See Appellant's Brief at 14. But the scope of a waiver in Missouri law cannot be judged by the structure of or labels contained in the Code of Federal Regulations. If it were reasonable to conclude that the General Assembly imported changeable federal regulations into the Revised Statutes of Missouri by referencing "United States Department of Transportation safety rules and regulations" (§ 70.429), then what would constitute a "safety rule or regulation" would necessarily be judged according to *Missouri* statutory construction. The question would be whether a Missouri alderman, commissioner, or board member would consider an immunity waiver inferred from the actual language of such a rule to be a "**safety** rule or regulation."

But if the Court is going to hold onto the requirement that the Missouri General Assembly itself act expressly and explicitly—as it should—and to have that rule retain its vitality, it should reject the premise that a nonspecific reference to a general area of federal rulemaking is enough.

Rejecting the Plaintiff's theory would serve the interests discussed above; following Plaintiff's approach would harm those interests. When a legislator looks at a bill, that legislator should be able to tell whether it changes the immunity of a political subdivision (here, Bi-State, but elsewhere, perhaps all political subdivisions) in her district. And when a non-

lawyer member of a public governmental body considers actions that could affect liability, that member should be able to look at the Revised Statutes of Missouri, not search for and through the Code of Federal Regulations or some other non-Missouri, un-enacted source, to determine the extent of potential liability.

Applied here, it would not be evident to either a legislator or a member of the Bi-State board that in § 70.429 the legislature changed sovereign immunity. This is simply not an instance in which the legislature has explicitly and expressly redefined the scope of sovereign immunity.

CONCLUSION

For reasons stated above, the Missouri Organization of Defense Lawyers urges the Court to retain and apply the requirement that waivers of sovereign immunity be made by, and only by, explicit and express statements of the Missouri General Assembly, readily available to and understandable by Missouri government officials who must rely on them.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief of Missouri Organization of Defense Lawyers as Amicus Curiae in Support of Respondent complies with Rule 55.03 and with the limitations contained in Rule 84.06(b). I further certify that this Brief contains 2,546 words, as determined by the Microsoft Word 2010 word-counting system.

/s/ James R. Layton