

THE SUPREME COURT OF MISSOURI

No. SC98169

MARY J. MOORE

Plaintiff/Appellant

vs.

BI-STATE DEVELOPMENT AGENCY d/b/a METRO

Defendant/Respondent

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

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ARGUMENT

Ms. Moore's argument on appeal is straightforward: (1) § 70.429 adopts and requires Bi-State to comply with the Federal Motor Carrier Safety Regulations; (2) the FMCSR requires Bi-State to satisfy judgments of \$5,000,000 or less for personal injuries caused by the negligent operation of buses with a seating capacity of 16 or more; (3) this requirement conflicts with § 537.610.2, which would cap Bi-State's liability at \$300,000; (4) pursuant to applicable rules of statutory construction, the later-enacted § 70.429, which is specific to Bi-State and claims based on the negligent operation of certain buses, controls over the earlier-enacted and more general damage cap of § 537.610; and (5) because Ms. Moore suffered personal injuries as the result of the negligent operation of a Bi-State bus with a seating capacity of 16 people or more, the trial court should have denied Bi-State's motion to impose the § 537.610.2 cap.

Bi-State and the Missouri Organization of Defense Lawyers, as amicus curiae, focus on the fourth prong of Ms. Moore's analysis, arguing that § 537.610.2 must control. Both rely heavily on authority holding that sovereign immunity statutes should be strictly construed, and the waiver of sovereign immunity must be express. But the waiver of Bi-State's sovereign immunity is not at issue – Bi-State's sovereign immunity for purposes of this action was expressly waived by § 537.600.1. Neither Bi-State nor MODL cites a single case holding that the damage cap reflected in § 537.610.2 is subject to the same deference.

MODL insists: "Plaintiff's theory is that in § 70.429, RSMo., the legislature waived immunity by excluding Bi-State" from the damage cap established in § 537.610.2. Amicus Br. 10. This is incorrect. Again, Ms. Moore's theory is that sovereign immunity was

expressly waived by operation of § 537.600.1. MODL argues that Ms. Moore’s theory “permits the legislature to waive immunity of political subdivisions without including the waiver language anywhere in the Revised Statutes of Missouri” and would turn over to the federal government “the question of whether there is a waiver.” *Id.* This is also incorrect. Accepting the premise of either argument would require the Court to ignore the “express and absolute” waiver of sovereign immunity for the negligent operation of motor vehicles stated in § 537.600.1.

Bi-State and MODL focus so intently on the principle that waivers of sovereign immunity must be express that they altogether ignore a canon of statutory construction with particular pertinence to this case. Remedial statutes like § 70.429 are to be interpreted broadly to grant the public the greatest possible protections and benefits. Bi-State’s arguments regarding the remaining prongs of Ms. Moore’s analysis similarly lack merit.

I. The later-enacted § 70.429, which is specific to Bi-State and specific to claims based on its negligent operation of buses, controls over the earlier-enacted general liability limitations of § 537.610.

When two statutes conflict, “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. v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. 2009).

Section 70.429 is the “chronologically later” statute. It was enacted in 1993—15 years after the damage cap in § 537.610.2 and 5 years after Bi-State was recognized as a “public entity” entitled to sovereign immunity. *See* § 537.610, RSMo. (noting the law was passed in 1978); *Trimble v. Ryan*, 745 S.W.2d 672, 675 (Mo. 1988) (holding that Bi-State

is a public entity protected by sovereign immunity). Section 70.429 is also the more particular statute because it addresses the damage liability of just one entity (Bi-State) for just one type of claim (personal injuries caused by the negligent operation of its buses with a seating capacity of 16 passengers or more), while § 537.610.2 addresses the damage liability of all public entities for all types of claims where sovereign immunity is waived.

Bi-State asserts that the “particular subject” at issue is sovereign immunity, then argues that § 537.610 specifically addresses sovereign immunity, while § 70.429 does not. However, Bi-State’s sovereign immunity for the underlying collision is not the “particular subject” at issue. The legislature expressly waived Bi-State’s sovereign immunity for the underlying collision when it enacted § 537.600.1. The “particular subject” at issue is the limit on Bi-State’s obligation to pay judgments for such claims. On that subject § 70.429 is the more specific statute.

It is also material to the analysis that § 70.429 is specific to Bi-State. In *State ex rel. Hillman v. Beger*, 566 S.W.3d 600 (Mo. 2019), this Court determined that § 559.105.2, RSMo. was the more specific statute and § 217.703.7 the more general based solely on the fact that the latter applied to all probationers, while the former applied only to probationers who had been ordered to pay restitution. *Id.* at 606. The fact that § 537.610.2 applies to all public entities, while § 70.429 applies solely and exclusively to Bi-State, requires the same conclusion.

Bi-State also argues that § 537.610 is the chronologically later statute because it was amended in 1989, 1999 and 2009. As correctly recognized by the Court of Appeals, however, the fact that § 537.610 was amended after the enactment of § 70.429 does not

make it the chronologically later statute. The subsequent amendments used substantially the same language and did not reflect an intent by the legislature to address the conflict one way or the other:

The fact that Section 537.610 was amended after the enactment of Section 70.429 has no consequence here. Missouri law is guided by the “well-established principle that [w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” Earth Island Inst., 456 S.W.3d at 33 (internal quotation omitted); see also Mispagel v. Mo. Highway & Transp. Comm’n, 785 S.W.2d 279, 281 (Mo. banc 1990) (citing Sections 537.600, 610, Cum. Supp. RSMo 1989) (finding the specific Section 537.600 necessarily prevailed over the general Section 537.610 where the reenactment of Section 537.610 via legislative amendment in substantially the same language did not change its status as an earlier statute.

Slip op. at 9; App. A24.¹ Thus, § 70.429 is the more specific and later-enacted statute and must control over § 537.610.2.

Bi-State’s and MODL’s arguments on this point focus primarily on an alternate canon of statutory construction. They stress that “statutory provisions that waive sovereign immunity must be strictly construed” and that exceptions to sovereign immunity must, therefore, be express. Appellee Br. 21; Amicus Br. 6-12. The argument ignores that (1) Bi-State’s sovereign immunity was expressly waived by operation of § 537.600.1, and (2) § 70.429 is a remedial statute that must be construed broadly to effectuate its beneficial purpose, with all doubts resolved in favor of its application.

¹ Except for this citation, all citations to “App. A__” in this brief refer to the “Appendix to Appellant’s Substitute Reply Brief” filed contemporaneously herewith.

A. The Missouri legislature expressly waived Bi-State's sovereign immunity for negligent driving by enacting § 537.600.1.

Ms. Moore is not seeking to establish a new exception to sovereign immunity. The exception to sovereign immunity applicable to this action already exists. In § 537.600.1, the legislature expressly waived sovereign immunity for injuries caused by a public employee's negligent operation of a motor vehicle. *See also Wollard v. City of Kansas City*, 831 S.W.2d 200, 202 (Mo. 1992) (recognizing that the enactment of § 537.600 expressly and absolutely waived sovereign immunity for torts arising out of a public employee's negligent operation of a motor vehicle).

Ms. Moore pleaded and proved that she was injured as the direct result of Bi-State's employee, Paula Crayton, negligently operating a Bi-State bus within the course of her employment. *See generally*, L.F. 2; Tr. 138-341. Thus, Bi-State's sovereign immunity was waived by operation of § 537.600.1.

This neutralizes many of Bi-State's and virtually all of MODL's arguments. Bi-State and MODL argue that § 70.429, unlike §§ 537.600.1 and 537.600.2, does not contain express language stating that sovereign immunity "is hereby expressly waived in the following instances." Appellee's Brief at pgs. 23-24. But there is no reason § 70.429 would need to contain this language when it already exists in § 537.600.1. Similarly, Bi-State's argument that Ms. Moore cannot rely on a fourth exception to sovereign immunity if she already falls within one of the existing exceptions stated in § 537.600 makes no sense: Ms. Moore is relying on an exception stated in § 537.600 and is not trying to establish a new exception.

This confusion extends to the authority cited by Bi-State and MODL on this topic. Every case they cite addresses the statutory language necessary to waive a public entity's sovereign immunity and subject it to suit. *See Cosby v. Treasurer*, 579 S.W.3d 202, 204 n.4 (Mo. 2019) (recognizing that when a statute requires strict construction a court "presumes nothing that is not expressed"); *Metro St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913 (Mo. 2016) (addressing whether sovereign immunity was waived and the public entity could be subjected to suit); *State ex rel. Bd. of Trustees of City of N. Kansas City Memorial Hosp. v. Russell*, 843 S.W.2d 353 (Mo. 1992) (same); *State ex rel. Cass Med. Center v. Mason*, 796 S.W.2d 621 (Mo. 1990) (same); *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184 (Mo. 1985) (same); *State ex rel. Bd. of Bartley v. Special School Dist.*, 649 S.W.2d 863 (Mo. 1983) (same); *Cromeans v. Morgan Keegan & Co., Inc.*, 1 F.Supp.3d 994 (W.D. Mo. 2014) (same). Not one cited case addresses the specificity of the language necessary to alter the damage caps stated in § 537.610.2.

The confusion also undermines Bi-State's criticism of Ms. Moore's reliance on *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799 (Mo. 2003). Bi-State asserts that *Bachtel* has no application to this action because it "*did not* address a waiver of the cap on damages for sovereignly immune entities under section 537.610" and addressed a statute that "*expressly* permitted causes of action against otherwise sovereignly immune entities." Appellee's Brief at 28-29 (emphasis in original). Bi-State ignores that Ms. Moore identified this distinction in her opening brief. It is a feature not a flaw.

Bachtel addressed the actual waiver of sovereign immunity – *i.e.* immunity from suit – while this action addresses the damage cap that applies once sovereign immunity has been waived. *Bachtel*, 110 S.W.3d at 800. Bi-State cannot reasonably argue that the threshold for “express” should be any greater in this action than it was in *Bachtel*. To the contrary, Bi-State’s failure to cite a single case requiring an express waiver to the damage cap effectively concedes that there is no such requirement.

The question in *Bachtel* was whether an entity otherwise protected by sovereign immunity could be sued under the Omnibus Nursing Home Act. *Id.* at 800. The Court did not require magic language in the Act to find that such a waiver had occurred. *Id.* at 803. The Act did not mention “sovereign immunity” or “waiver” or any of the other words and phrases that Bi-State argues are necessary. *Id.* Instead, it was enough that the Act stated that nursing home districts could be sued and that it was reasonable to infer that the legislature knew some of those nursing home districts would be “public entities” otherwise entitled to sovereign immunity. *Id.* at 805.

The same is true here. Section 70.429 contains express language: “[a]ll interstate and intrastate United States Department of Transportation safety rules and regulations ***shall apply*** to all operations of the bi-state development transit system.” Given that the statute addressed a single entity – Bi-State – it is reasonable to infer that the legislature knew it was announcing requirements that would affect a public entity entitled to sovereign immunity. Accordingly, as in *Bachtel*, to the extent that those “safety rules and regulations” conflict with § 537.610.2 – which they do – the language of § 70.429 should be deemed “express” and govern.

The question of sovereign immunity has already been answered – Bi-State is subject to suit for the claims at issue. This Court has previously recognized that the damage cap presents a separate question:

While statutory damage caps allow for full compensation of individuals with lesser damages, they do not allow for full compensation of individuals who suffer more significant injuries or death. The remedy for this problem, however, lies with the legislature to reexamine the amount and the manner in which the caps should be applied to catastrophic cases.

Hodges v. City of St. Louis, 217 S.W.3d 278, 288 (Mo. 2007).

The legislature has reexamined this question in the specific context of the catastrophic injuries caused by the negligent operation of Bi-State’s buses. § 70.429, RSMo. Based on existing law, it sufficiently expressed its intent to raise the damage cap under such circumstances through the enactment of § 70.429. Any argument by Bi-State to the contrary should be viewed with skepticism. Bi-State maintains exactly the minimum financial responsibility limits required by § 70.429 and the FMCSR in the form of a “self-insured retention of \$5,000,000.00 per occurrence which is applicable only to third party liability claims against which [Bi-State] is not sovereignly immune.” L.F. 41:5-6, 45:2-3.

B. Section 70.429, must be construed broadly with all doubts resolved in favor of applying the statute to effectuate its beneficial purpose

A “remedial statute” is one enacted for the protection of life and property and in the interest of public welfare. *Hagan v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. 1998). Remedial statutes are construed broadly to effectuate the statute’s purpose and “to accomplish the greatest public good.” *Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 761 (Mo. 2014); *Hagan*, 968 S.W.2d at 706. They must be

interpreted “so as to meet the cases which are clearly within [its] spirit or reason...or within the evil which it was designed to remedy.” *Utility Service Co. v. Dept. of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. 2011). “Doubts about the applicability of a remedial statute are resolved in favor of applying the statute.” *Id.*

Section 70.429 is a remedial statute. This Court has long held that “the carrier of passengers” must exercise “the highest degree of care” for the safety of those aboard its vehicles. *Woas v. St. Louis Transit Co.*, 96 S.W. 1017, 1020 (Mo. 1906). The legislature’s adoption of the safety regulations established by the federal government—including the particular safety regulation requiring meaningful assurance of the capacity to provide compensation for actual damage caused by carrier negligence—furthered that public interest in the safe operation of Bi-State’s buses.

Bi-State cites 1993 SB 114 as “proof” that § 70.429 was concerned only with the MetroLink system and its funding. The bill proves the contrary. The laws enacted through SB 114 were not specific to MetroLink but instead applied to Bi-State’s entire “mass transportation system, passenger transportation facilities, conveyances, and other property that the agency may own, lease, or operate.” 1993 Mo. SB 114; Appellee’s App. A12. In addition to funding those safety measures, it allowed Bi-State to employ safety officers, prohibited weapons and alcoholic beverages on all Bi-State vehicles, and provided that “[n]o vehicle shall be operated carelessly, or negligently, or in disregard of the rights or safety of others or without due caution and circumspection.” *Id.*; Appellee’s App. A16.

To further these safety efforts, the bill granted Bi-State the right to “adopt rules and regulations for the proper operation of its passenger transportation facilities and

conveyances.” *Id.*; Appellee’s App. A13. And, as part of those rules and regulations, the legislature required that Bi-State adopt the “United States Department of Transportation safety rules and regulations” for purposes of “all operations of the Bi-State Development transit system.” *Id.* Appellee’s App. A17.

The minimum financial responsibility requirements reflected in the FMCSR and adopted by § 70.429 were also designed to protect life and property – something expressly acknowledged when the regulations were promulgated:

The purpose of the financial responsibility provision of the Bus Regulatory Reform Act of 1982 is to create additional incentives to motor carriers to operate their buses in a safe manner and to assure that they maintain adequate levels of financial responsibility sufficient to satisfy claims covering public liability and property damage. The legislative history of Section 18 indicates a congressional belief that the establishment of minimum levels of financial responsibility to enhance safety will also ensure that adequate sources of compensation are available to compensate those who may be injured while traveling by bus.

48 Fed. Reg. 52679 (Nov. 21, 1983); App. A2.

As a remedial statute, § 70.429 must be construed broadly to effectuate its purpose and “accomplish the greatest public good.” *Utility Service Co.*, 331 S.W.3d at 658. That purpose is only accomplished if § 70.429, and the requirements of 49 C.F.R. § 387.33 that it adopts, are applied to this action, as required by the legislature. This action reflects exactly the type of case that falls within §§ 70.429’s and 387.33’s “spirit or reason” and exactly the type of “evil” they were designed to remedy. Bi-State, through the operation of one of its large buses, caused Ms. Moore severe injuries. If Bi-State is not required to

compensate Ms. Moore for those personal injuries up to the minimum financial responsibility requirements, the purpose of the statute and the regulation are defeated.

C. The preponderance of the applicable canons of statutory construction indicate that § 70.429 must control.

When construing conflicting statutes, “[r]arely will all canons align to counsel the same result.” *Beger*, 566 S.W.3d at 606 (citing *S. Metro Fire Prot. Dist.*, 278 S.W.3d at 666 (“Most often, for every rule suggesting one resolution, another rule exists that suggests the contrary.”)). “But, ordinarily, the preponderance of the guidance offered by these canons generally will point in one direction, and this Court is well-advised to heed it when it does.” *Id.*

Here, the preponderance of the guidance offered by the rules of statutory construction points toward § 70.429. Bi-State’s arguments regarding the construction of sovereign immunity laws does not change the fact that both the rule favoring the later-enacted and more specific statute and the rule calling for liberal interpretation of remedial statutes fairly demand that § 70.429 control over § 537.610.2.

II. Section 70.429 adopts and requires Bi-State to comply with the FMCSR.

Section 70.429 states that “[a]ll interstate and intrastate United States Department of Transportation safety rules and regulations shall apply to all operations of the bi-state development transit system.” The “operations of the bi-state development transit system” at issue are Bi-State’s bus operations. The DOT safety rules and regulations relating to the operation of buses are contained in the FMCSR. *See generally* §§ 350.101 RSMo., *et seq.*

Accordingly, the legislature was necessarily adopting and requiring Bi-State to comply with the FMCSR, when it enacted § 70.429.

Bi-State asserts that the legislature could not possibly have been referencing the FMCSR when it enacted § 70.429 in 1993 because the Federal Motor Carrier Safety Administration did not exist at that time. This assertion is partially correct and entirely misleading. It is correct that the FMCSA did not exist in 1993. It was formed in 1999 to take over the Federal Highway Administration's responsibilities for motor carrier safety. *See* 49 U.S.C. § 113; Pub.L. 106-159, Title I, § 4; *see also* 48 Fed. Reg. 52678 (Nov. 1, 1983); App. A1. However, it is misleading to insinuate that this means the FMCSR did not exist in 1993.

The FMCSR have existed since at least 1968. *See e.g.* 49 C.F.R. § 390.1 (1984); App. A143 (noting the source as 33 Fed. Reg. 19727 (Dec. 25, 1968)). The FMCSR relating to minimum financial responsibility requirements for bus operators – 49 CFR Part 387 – were promulgated in 1983. *See* 48 Fed. Reg. 52679 (Nov. 21, 1983); App. A2. Notably, the original version of § 387.33 published in 1983 stated that, effective November 19, 1985, “[f]or-hire motor carriers of passengers” would be required to maintain minimum levels of financial responsibility of \$5,000,000 for “[a]ny vehicle with a seating capacity of 16 passengers or more.” *Id.* at 52684; App. A7. Accordingly, the same minimum financial responsibility requirements that exist today have existed continuously as part of the FMCSR since 1985, including in 1993 when § 70.429 was enacted.

Bi-State also asserts that § 70.429 could have been referring to the regulations of one of the DOT's other administrative bodies. Bi-State, however, fails to identify a viable

alternative. The only specific alternative suggested by Bi-State is the Federal Transit Administration’s “safety certification training curriculum” reflected in 49 C.F.R. § 672.1, *et seq.* However, unlike the FMCSR, 49 C.F.R. § 672.1, *et seq.* did **not** exist in 1993. The FTA was not authorized to establish the regulations until 2012; the temporary version of § 672.1, *et seq.* was not effective until May 28, 2015; and the final version was not published until July 19, 2018. 49 U.S.C. § 5329; 83 Fed. Reg. 34053 (Jul. 19, 2018); App. A126.

Ultimately, there are no legitimate grounds to suggest that the legislature could have been referring to anything other than the FMCSR when it required Bi-State to comply with the “United States Department of Transportation safety rules and regulations.”

III. The FMCSR require Bi-State to maintain minimum levels of financial responsibility of \$5,000,000 for personal injuries caused by the negligent operation of its buses with a seating capacity of 16 people or more.

The FMCSR requires “for-hire motor carriers of passengers operating motor vehicles in interstate or foreign commerce” to maintain minimum levels of financial responsibility of \$5,000,000 to cover “liability for bodily injury or property damage” caused by “[a]ny vehicle with a seating capacity of 16 passengers or more, including the driver.” 49 C.F.R. §§ 387.25, 387.29, 387.31, 387.33. Bi-State is a for-hire motor carrier of passengers operating motor vehicles in interstate commerce. Accordingly, Bi-State’s minimum financial responsibility for bodily injury caused by its 16-passenger buses is \$5,000,000. *Id.*

In response, Bi-State asserts that (1) the minimum financial responsibility requirements are not part of the FMCSR; (2) Bi-State, as an entity funded in part by federal grants, is excepted from the \$5,000,000 minimum financial responsibility requirement; and

(3) the Missouri legislature did not have the authority to impose this “burden” on Bi-State absent express approval from the State of Illinois. For the reasons discussed below, all three of these arguments lack merit.

A. The minimum financial responsibility requirements are part of the FMCSR.

Bi-State argues that Part 387 is not part of the FMCSR. Ms. Moore anticipated and addressed this argument in her opening brief. Title 49, Subtitle B, Chapter III, Subchapter B of the *Code of Federal Regulations*, which includes Part 387, is titled “Federal Motor Carrier Safety Regulations.” See 49 C.F.R. § 350.101 (Title Page). Moreover, Part 390 of Subchapter B, titled “Federal Motor Carrier Safety Regulations; General” incorporates the entirety of Subchapter B, generally, and Part 387, specifically. 49 C.F.R. §§ 390.1; 390.3(a), (c). Accordingly, whether by title or by incorporation, Part 387 is part of the FMCSR.

Bi-State asserts that Part 390 does not incorporate Part 387 because Part 390 does not expressly use the word “incorporate.” This hyper-technical criticism ignores the plain language of Part 390. Section 390.3(a) states that the rules of Subchapter B “are applicable to” employers, employees and commercial motor vehicles that transport passengers in interstate commerce. Section 390.3(c) states that Part 387 “is applicable to” motor carriers, subject to the requirements of Part 387. Section 390.3(e) states that “[e]very employer shall be knowledgeable of and comply with all regulations contained in this subchapter” – *i.e.* Subchapter B. Although Part 390 does not use the word “incorporate,” it expressly requires compliance with Subchapter B, generally, and Part 387, specifically.

Part 387 also announces that it is part of the FMCSR. From its inception in 1983 through the present, the regulation has declared that the purpose of its minimum financial responsibility requirements is to “create additional incentives to carriers to operate their vehicles in a safe manner.” 49 C.F.R. § 387.25; 48 Fed. Reg. at 52683; App. A6. There is no room to doubt that Part 387 is part of the FMCSR.

B. Bi-State’s reliance on subsection (b) of § 387.33 is misplaced because that subsection has never been effective.

Bi-State asserts that, even if Part 387 is part of the FMCSR, it still is not required to comply with its \$5,000,000, minimum financial responsibility requirements. Bi-State relies on language in subsection (b) of § 387.33, which establishes an exception for entities that operate in multiple states and in areas that are funded by certain federal grants. 49 C.F.R. § 387.33(b). Whether Bi-State can satisfy the requirements of § 337.33(b) is immaterial because subsection (b) never has been effective.

As noted above, 49 C.F.R. § 387.33 was first promulgated in 1983. 48 Fed. Reg. at 52683-84; App. A6-7. At that time, there was no subsection (b), nor any of the language relied on by Bi-State for its purported exception. *Id.* The only limitation on the applicability of § 387.33 was the general limitations on the applicability of Part 387 stated in 49 C.F.R. § 387.27.² *Id.*

² Pursuant to § 387.27, Part 387 does not apply to motor vehicles (1) “transporting only school children and teachers to or from school,” (2) “providing taxicab service[s]” and “having a seating capacity of less than 7 passengers,” or (3) “carrying less than 16 individuals in a single daily round trip to commute to and from work.” There is no argument that any of these exceptions apply to Bi-State.

On August 23, 2013, the FMCSA published a rule amending multiple parts of the FMCSR. 78 Fed. Reg. 52608 (Aug. 23, 2013); App. A10. This included an amendment to § 387.33 that, for the first time, added subsection (b) and the language relied on by Bi-State. *Id.* at 52651; App. A53. The rule, however, stated that the amendments (except for those to §§ 390.19, 392.9(b), and 366.2, which have no bearing on this action) would not be effective until October 23, 2015. *Id.* at 52608; App. A10.

On October 21, 2015, the FMCSA extended the effective date to September 20, 2016. 80 Fed. Reg. 63695, 63709 (Oct. 21, 2015); App. A58. On July 28, 2016, the FMCSA published a correction extending the effective date to January 14, 2017. 81 Fed. Reg. 49553 (Jul. 28, 2016); App. A78. On January 17, 2017, the FMCSA – retroactive to January 14, 2017 – suspended the effective date indefinitely. 82 Fed. Reg. 5292 (Jan. 14, 2017); App. A.81. To date, the suspension has not been lifted. *See* 83 Fed. Reg. 22865, 22876-77 (May 17, 2018); App A108, 119-20 (reflecting the most recent changes to the regulations and confirming that the amended version of § 387.33 remains suspended).

On January 17, 2017, the FMCSA also promulgated “temporary” regulations to avoid any confusion regarding the effective language during the duration of the suspension. 82 Fed. Reg. at 5307; App. A96. The “temporary” version of § 387.33 – codified in § 387.33T – contained the same requirements and the same limited exceptions as the original version of § 387.33 promulgated in 1983. *Id.*; App. A96. It contained neither a subsection (b), nor the language relied on by Bi-State for its purported exception. *Id.* It is this version of § 387.33 – § 387.33T – that remains effective up to and through the present. *See* 83 Fed. Reg. at 22876-77; App A119-20 (reflecting the most recent changes to § 387.33 and

acknowledging that § 387.33T remains the effective version).

The exception stated in § 387.33(b) and relied on by Bi-State has never actually existed. Accordingly, Bi-State has been subject to the same \$5,000,000 minimum financial responsibility requirement since § 70.429 was passed by the Missouri legislature in 1993 and its argument for an exception to that requirement fails as a matter of law.

C. The Missouri legislature did not impose “an impermissible unilateral burden” on Bi-State.

Bi-State argues that the Missouri legislature did not have the authority to require that it comply with the \$5,000,000 minimum financial responsibility requirements of § 387.33 without the concurrence of the State of Illinois. This argument fails because (1) the \$5,000,000 minimum financial responsibility requirements do not create a “unilateral burden” on Bi-State; and (2) the State of Illinois expressly authorized the State of Missouri to establish its own requirements for Bi-State’s operations.

It is correct that “[i]n a bi-state compact, one state may not enact legislation that unilaterally imposes burdens upon the compact ‘absent the concurrence of the other signatories.’” *Jordan v. Bi-State Dev. Agency*, 561 S.W.3d 57, 60 (Mo. App. 2018) (quoting *Bi-State Dev. Agency of the Missouri-Illinois Metro Dist. v. Dir. of Rev.*, 781 S.W.2d 80, 82 (Mo. 1989)). But this rule applies only to legislation that constitutes a “reprobation of the compact” and not to legislation that constitutes an “approbation.” *Bi-State*, 781 S.W.2d at 82. Where the legislation does not create a unilateral burden, the concurrence of the other signatories to the bi-state compact is unnecessary. *Id.*; see also *Kansas City Area Transp. Authority v. State of Mo.*, 640 F.2d 173, 174-75 (8th Cir. 1981).

A liability cap of \$5,000,000, rather than \$420,606, does not constitute a “unilateral burden” because Illinois has no cap at all. Under the Illinois Local Government and Governmental Employees Tort Immunity Act, a “local public entity,” like Bi-State, is entitled to certain protections from tort claims. *See* 745 ILCS 10/1-101, *et seq.* However, this does not include a cap on compensatory damages. *See Id.* To the contrary, the Act requires Bi-State and other public entities “to pay tort judgments or settlements for compensatory judgments.” *Hubble v. Bi-State Development Agency of Illinois-Missouri Metropolitan Dist.*, 938 N.E.2d 483, 494 (Ill. 2010) (citing 745 ILCS 10/9-102).

Given the lack of any kind of cap in Illinois, Missouri could eliminate its cap altogether without imposing a “unilateral burden.” That Missouri has elected to cap Bi-State’s liability for compensatory damages at all is a *benefit* constituting “approbation” of the compact.

Moreover, even if it were a “unilateral burden,” it was expressly authorized by the State of Illinois. In 1995, Illinois enacted a law authorizing Bi-State to adopt rules and regulations for its operations without concurrence from Illinois or Missouri. 45 ILCS 110/5(h). If Missouri or Illinois law was inconsistent with Bi-State’s rules, the conflicting portion of the rule would be rendered void in the conflicting state’s jurisdiction:

The Bi-State Development Agency shall have the power to adopt rules and regulations for the proper operations of its passenger transportation facilities and conveyances and for the proper conduct by all persons making use of its facilities and conveyances, including its parking lots and all property used by the public. Notwithstanding the provisions of Article V of the compact creating the Bi-State Development Agency, any rules and regulations adopted under this subsection need not be concurred in or specifically authorized by the legislatures of

either state. In the event that any such rules and regulations of the Bi-State Development Agency contravene the laws, rules or regulations of the signatory state or its agency, the laws, rules, and regulations of the signatory state shall apply and the conflicting portions of the rules or regulations of the Bi-State Development Agency shall be void within the jurisdiction of that signatory state.

Id.

Section 70.429 required Bi-State to adopt the “United States Department of Transportation safety rules and regulations” for purposes of its operations. Illinois expressly authorized Bi-State to adopt such rules and regulations and obviated the need for a “unilateral burden” analysis by addressing how any conflicts between such rules and its laws would be addressed.

IV. The minimum financial responsibility requirements of the FMCSR conflict with the damage caps provided in § 537.610.2.

There is an irreconcilable conflict between § 70.429 and § 537.610.2. Section 70.429 obligates Bi-State to satisfy judgments of up to \$5,000,000 for personal injuries caused by the negligent operations of its buses with a seating capacity of 16 passengers or more. Section 537.610.2 would cap Bi-State’s liability at \$300,000 under those same circumstances. The application of § 537.610.2, therefore, would necessarily prohibit Bi-State from complying with the requirements of § 70.429 for judgments in excess of \$300,000.

Bi-State suggests that the statutes can be harmonized by reading §§ 70.429 and 387.33 to require that it maintain \$5,000,000 of coverage, without ever having to use that

coverage to pay a judgment in excess of \$300,000. Bi-State cannot “harmonize” the statutes by gutting the very purpose of §§ 70.429 and 387.33 in this fashion.³

“The primary rule of construction of statutes is to ascertain the lawmakers’ intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and ‘*the manifest purpose of the statute, considered historically,*’ is properly given consideration.” *Cummins v. Kansas City Public Service Co.*, 66 S.W.2d 920, 925 (Mo. 1933) (emphasis added). This is particularly true in the context of remedial statutes, which are to be construed broadly to effectuate the statute’s purpose and “to accomplish the greatest public good.” *Tolentino*, 437 S.W.3d at 761; *Hagan*, 968 S.W.2d at 706; *see also City of St. Louis v. Carpenter*, 341 S.W.2d 786, 789 (Mo. 1961) (explaining that remedial statutes are afforded a liberal construction because they are “enacted for the protection of life and property” or “introduce some new regulation conducive to the public good”).

As discussed above, the minimum financial responsibility requirements promulgated in § 387.33 and adopted by § 70.429 serve a dual purpose – both of which are remedial. First, the requirements “create additional incentives to motor carriers to operate

³ Bi-State’s position ignores still more canons of statutory interpretation. Its proposed interpretation of § 70.429 would result in an absurdity. This Court has recognized repeatedly that “[a] statute should not be construed to lead to an absurd result.” *See, e.g., Community Federal Sav. & Loan Ass’n v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. 1988). The Court also has recognized that “[t]he legislature is presumed not to enact meaningless provisions” and that “[t]he provisions of a legislative act must be construed and considered together and, if possible, all provisions must be harmonized and every clause given some meaning.” *Wollard*, 831 S.W.2d at 203.

their buses in a safe manner.” 48 Fed. Reg. at 52679; App. A2. Second, they ensure that “adequate sources of compensation are available” for members of the public injured by bus collisions. *Id.* Bi-State’s construction of §§ 387.33 and 70.429 would denigrate rather than effectuate both purposes.

A motor carrier’s incentive to operate its buses in a safe manner is driven by the financial consequences of failing to do so. *See* 48 Fed. Reg. at 52680; App. A3 (noting “the congressional belief that ‘the public will be better served by the proposed limits, especially considering that motor carriers would have greater incentives to create and maintain more effective safety programs to help keep their premiums lower’”). By allowing Bi-State to avoid the financial responsibility of having to pay up to \$5,000,000 for catastrophic personal injuries, that incentive is removed. Further, if Bi-State has \$5,000,000 that it is never actually required to pay to the public as compensation for the tortious conduct of its employees, the “adequate sources of compensation” are non-existent and the public is unprotected.

To satisfy even the most basic of their intended purposes, §§ 387.33 and 70.429 must be construed to require Bi-State to not just have \$5,000,000 in available coverage but to pay up to \$5,000,000 for personal injuries caused by the negligent operation of its buses with a seating capacity of 16 people or more.

V. Ms. Moore suffered personal injuries as the result of the negligent operation of a Bi-State bus with a seating capacity of 16 people or more.

Ms. Moore pleaded that she suffered personal injury caused by Ms. Crayton’s negligent operation of a Bi-State bus. L.F. 10 at 1-3. She alleged that Bi-State breached its

duty to exercise the highest degree of care and “to operate its vehicle ... in conformance with all applicable laws and rules governing .. public transportation safety.” *Id.* at 2-3, ¶¶ 6-7, 10. Corporations are presumed to know the law. *See Garr v. Countrywide Homes Loans, Inc.*, 137 S.W.3d 457, 462 (Mo. 2004) (stating that “banking corporations, as are other parties, are presumed to know the law”). Bi-State’s lament that Ms. Moore “failed to plead the exception to sovereign immunity currently sought” should find no purchase in this Court.⁴

Although Bi-State has suggested no authority for a requirement that Ms. Moore have alleged a seating capacity of 16 or more, Ms. Crayton’s testimony established that capacity. L.F. 34, p. 3. Because this testimony was received without objection, the petition is deemed amended to conform to that evidence. *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 441 (Mo. 2002) (citing Mo.R.Civ.P. 55.33(b)). Further, Bi-State’s reliance on *Hummel v. St. Charles City R-3 Sch. Dist.*, 114 S.W.3d 282 (Mo. App. 2003), is misplaced. *Hummel* addressed the allegations necessary to invoke the insurance exception to sovereign immunity provided in § 537.610.1. *Id.* at 284. Ms. Moore is not seeking to assert an exception to sovereign immunity. She does not need one. *See Point I.A., supra.*

Bi-State also contends for the first time that there is a question regarding the seating capacity of its bus and that the case should be remanded to the Circuit Court because “the

⁴ In *Garr* this Court observed: “Concluding that a sophisticated mortgage company is not on notice because a customer’s demand letter fails to cite or reprint a copy of the statute being invoked indulges an unreasonable assumption that institutional lenders are utterly unaware of their statutory obligations unless advised by their customers.” 137 S.W.3d at 462.

capacity of the Bi-State vehicle was disputed and not adequately proven by Plaintiff,” Resp. Br. 53-54. The agency never suggested the inadequacy of Ms. Moore’s proof of seating capacity as a basis for opposing the application of § 70.429. This argument is waived and should not be considered. *See J.A.R. v. D.G.R.*, 426 S.W.3d 624, 630 (Mo. 2014) (refusing to consider argument raised in appellant’s substitute brief where the argument was not asserted in appellant’s brief to the Court of Appeals); see also Mo. R. Civ. P. 83.08(b) (stating that a party’s substitute brief “shall not alter the basis of any claim that was not raised in the court of appeals brief”).

Bi-State cites *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983), for the proposition that “[w]here a possibility of proof exists which the plaintiff has not fully developed, a remand rather than reversal is permissible.” *Bass* offers no support for remanding this case. The omission of proof here was Bi-State’s. Ms. Moore re-submitted the transcript of Ms. Crayton’s testimony to the Circuit Court in support of her opposition to the agency’s motion. L.F. 29, 34. Although Bi-State clearly intended to invoke § 537.610.2 if the jury awarded damages in excess of that statute’s cap, it failed to introduce evidence controverting Ms. Crayton’s testimony. And, although the police offer was called the stand and questioned by both parties at trial, Bi-State never suggested at trial or in any Circuit Court (or Court of Appeals) proceeding that the police report proved otherwise. Tr. 236:1-243:22.

VI. The legislature did not “hide” a waiver of sovereign immunity in § 70.429, nor does the statute fail to inform Bi-State of its liability for negligent operation of large buses.

MODL contends that the opinion of the Court of Appeals “permits indirect, unannounced waivers [of sovereign immunity],” allows the legislature “to waive the immunity of political subdivisions without including the waiver language anywhere in the Revised Statutes of Missouri,” and enables “a legislator who is proposing a waiver to hide the waiver by referencing some outside source.” Amicus Br. 10-11. The organization warns that non-lawyers serving on local governmental bodies will not be able “to determine the extent of potential liability” if Ms. Moore’s theory prevails. *Id.* 11-12.

Again, § 70.429 did not waive Bi-State’s immunity from liability for damage caused by the negligent operation of its larger buses. Section 537.600 did that “expressly and absolutely.” The remainder of MODL’s contention is a solution in search of a problem—and the problem is not present in this case.

As MODL posits: “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.” *Id.* 9. Section 70.429 affects only Bi-State. It applies to no other agency or political subdivision except the “large and sophisticated” one that enjoys the continuous presence and advice of attorneys—likely because it understands that it operates a mass transit system that is rife with the potential for harm to individuals and naturally subject to regulation at every level of government. Section 70.429 has no potential to fool or lull the agency and officials to whom it applies into misapprehending the extent of their liability for tortious conduct.

CONCLUSION

The judgment of the Circuit Court should be reversed for the reasons set forth in this brief, Ms. Moore's opening brief, and the opinion of the Court of Appeals. The case should be remanded to the Circuit Court for the entry of judgment in the amount of \$1,878,000.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Reply Brief of Appellant Mary J. Moore complies with Rule 55.03, and with the limitations contained in Rule 84.06(b) and Local Rule 360. I further certify that this brief contains 7,569 words, excluding the cover, this certificate, and the signature block, as determined by the Microsoft Word 2010 word-counting system.

/s/ Michael Gross _____

CERTIFICATE OF SERVICE

I hereby certify that, on March 27, 2020, the foregoing Substitute Reply Brief of Appellant Mary J. Moore was filed electronically with the Clerk of the Missouri Supreme Court to be served by operation of the Court's electronic filing system pursuant to Missouri Supreme Court Rule 103.08 on Bharat Varadachari and Katherine Jacobi of Hepler Broom LLC and Donald L. O'Keefe, Jr., James D. Ribaud, and Timothy M. McAleenan, Jr. of Gausnell, O'Keefe & Thomas, LLC, as counsel of record for Respondent Bi-State Development Agency d/b/a Metro.

/s/ Michael Gross _____