
SC 98517

IN THE MISSOURI COURT SUPREME COURT

Elizabeth Butala, et al., Mike Butterfield, Daniel Draper, et al., Amanda Reinsch, et al., Ken Browne, et al., Lisa Jaggie, et al., Ronda Higginbotham, Christopher Cummings et al., Appellants

v.

The Curators of the University of Missouri, Respondents.

Appeal from the Circuit Court of Boone County, Missouri

The Honorable J. Hasbrouck Jacobs

Case No. 19BA-CV01121 (*Butala*), 19BA-CV00032 (*Butterfield*), 18BA-CV00801 (*Draper*), 18BA-CV00803 (*Reinsch*), 18BA-CV02635 (*Browne*), 18BA-CV03348 (*Jaggie*), 18BA-CV03349 (*Higginbotham*); 18BA-CV03777 (*Cummings*)

SUBSTITUTE BRIEF OF APPELLANTS

BARTIMUS FRICKLETON
ROBERTSON RADER P.C.
Edward D. Robertson III MO #58801
James P. Frickleton MO # 31178
Michelle L. Marvel MO # 59816
Kelly C. Frickleton MO # 70066
11150 Overbrook Road, Suite 200
Leawood, KS 66211
913 266 2300
913 266 2366 (facsimile)
krobertson@bflawfirm.com
jimf@bflawfirm.com
mmarvel@bflawfirm.com
kellyf@bflawfirm.com

TODD N. HENDRICKSON MO #37460
12180 Old Big Bend Road
Kirkwood, MO 63122
314 721 8833
314 721 4944
todd@hendricksonlaw.com

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF CONTENTS	2
JURISDICTIONAL STATEMENT	16
STATEMENT OF FACTS	17
I. Procedural History.....	17
II. Factual Basis for the Claims Against the University.....	19
A. The Mizzou BioJoint Center and BioJoint Surgery.	19
B. The University’s Advertising of the Mizzou BioJoint Center.....	21
C. The University Purchased Insurance to Cover Any Advertising-Related Liability Incurred.....	24
PRELIMINARY STATEMENT	29
POINTS RELIED ON	32
ARGUMENT	36
I.....	36
 THE TRIAL COURT CORRECTLY CERTIFIED THE JUDGMENTS OF DISMISSAL FOR IMMEDIATE APPEAL PURSUANT TO RULE 74.01 (B) BECAUSE, WHEN MULTIPLE PARTIES ARE INVOLVED, RULE 74.01 (B) GRANTS TRIAL COURTS DISCRETION TO ENTER JUDGMENT AS TO ONE OR MORE BUT LESS THAN ALL PARTIES AND CERTIFY SUCH JUDGMENT FOR IMMEDIATE APPEAL IN THAT THE TRIAL COURT’S COMPLETE	

**DISMISSAL OF THE UNIVERSITY FROM THE LAWSUIT WAS A JUDGMENT
ELIGIBLE FOR RULE 74.01 (B) CERTIFICATION AND THE TRIAL COURT
APPROPRIATELY EXERCISED ITS DISCRETION IN CERTIFYING THE
JUDGMENT.36**

A. Standard of Review..... 36

B. The Trial Court’s Dismissal of the University was a Multi-Party Judgment Eligible
for Certification Under Rule 74.01 (b). 36

C. The Trial Court Properly Exercised Its Discretion to Certify These Dismissal
Judgments for Immediate Appeal..... 45

D. The Court Should Hold that the Trial Court’s Rule 74.01 (b) Certification Was
Proper..... 46

II. 47

**THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS’ CAUSES OF
ACTION AGAINST THE UNIVERSITY ON THE BASIS OF § 537.600 BECAUSE
ART. I, § 14 OF THE MISSOURI CONSTITUTION GUARANTEES THAT THE
COURTS WILL BE OPEN, AND A CERTAIN REMEDY SHALL BE AFFORDED
FOR EVERY INJURY TO A PERSON IN THAT § 537.600 DENIES EVERY
PERSON INJURED BY THE UNIVERSITY’S ACTS THAT DO NOT FALL
WITHIN THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY ANY
REMEDY FOR THE INJURY..... 47**

A. Standard of Review..... 47

B. Plaintiffs Preserved this Constitutional Challenge for Review.	47
C. By Denying the Possibility of Any Judicial Remedy to Persons Injured by the Non-Waived Torts of Public Entities such as the University, § 537.600 Violates ART. I, § 14 of the Missouri Constitution.	49
D. Conclusion	61
III.....	63
THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS BECAUSE § 537.610 R.S.MO. PROVIDES THAT A PUBLIC ENTITY MAY WAIVE SOVEREIGN IMMUNITY THROUGH THE PURCHASE OF LIABILITY INSURANCE IN THAT THE UNIVERSITY PURCHASED A POLICY THAT COVERS CLAIMS FOR DECEPTIVE ADVERTISING AND EXPRESSLY WAIVES SOVEREIGN IMMUNITY FOR THE DAMAGES PLAINTIFFS SEEK.....	63
A. Standard of Review.....	63
B. Sovereign Immunity in Missouri and the Circumstances in which Public Entities Waive It.	63
C. Plaintiffs Pled an Exception to Sovereign Immunity Pursuant to § 537.610.1.	65
1. Plaintiffs Pled the Existence of Insurance Coverage and Facts Triggering Coverage.....	66

2. The Policy’s “Missouri Sovereign Immunity Endorsement” Disclaims Sovereign Immunity for the Damages Plaintiffs Seek.	69
D. Alternatively, the Endorsement Was Never Properly Made Part of the Policy.	74
E. The Court Should Reverse the Trial Court’s Judgment.	76
IV.	77
THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS BECAUSE SOVEREIGN IMMUNITY DOES NOT APPLY TO THE PROPRIETARY FUNCTIONS OF CERTAIN PUBLIC CORPORATIONS IN THAT THE UNIVERSITY IS A PUBLIC CORPORATION TO WHOM THE GOVERNMENTAL/PROPRIETARY DISTINCTION APPLIES AND ITS BIOJOINT ADVERTISING IS A PROPRIETARY ACTIVITY.	77
A. The Governmental/Proprietary Distinction in Missouri.	77
B. The University of Missouri is a Public Entity with Its Own Governing Body that Can Act Proprietarily.	79
C. The Government/Proprietary Distinction Also Applies to “Municipal Corporations,” which Include Public Corporations Governed by Their Own Independent Boards Like the University.	80
D. What Constitutes a Municipal Corporation under Missouri law?	81
E. The University Is a Municipal Corporation for Purposes of Applying the Governmental/Proprietary Dichotomy.	84

F. The University’s Marketing Activities were for its Own Corporate, Proprietary Purposes.....	89
G. This Court Should Reverse.....	90
V.	92
THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS THE MMPA CLAIM BECAUSE SOVEREIGN IMMUNITY ONLY APPLIES TO TORT CLAIMS IN THAT AN MMPA CLAIM IS NOT A TORT BUT INSTEAD A <i>SUI GENERIS</i>, NON-TORT CAUSE OF ACTION.....	
A. Standard of Review.....	92
B. The Petitions Pled a Non-Tort Theory of Recovery Against the Curators to Which Sovereign Immunity Does Not Apply.	92
1. Sovereign Immunity Applies Only to Tort Claims.	92
2. The University’s Enabling Statute Confirms the Legislature’s Consent that the Curators May “Be Sued” for Non-Tort Claims.	92
3. Plaintiffs’ MMPA Claim Is Not a Tort to Which Sovereign Immunity Applies.	93
VI.....	101
THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS THE MMPA CLAIM BECAUSE THE MMPA IMPOSES LIABILITY UPON ANY “PERSON” WHO VIOLATES THE ACT IN THAT THE	

UNIVERSITY IS A “PERSON” WHICH BECOMES LIABLE WHEN IT VIOLATES THE ACT.....	101
A. The Curators are a “Person” Under the MMPA Who May Be Subject to Liability When They Violate the Act.	101
VII.	107
THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS’ MOTIONS FOR LEAVE TO FILE AMENDED PETITIONS BECAUSE RULE 67.06 PROVIDES THAT THE TRIAL COURT SHALL FREELY GRANT LEAVE TO AMEND UPON SUSTAINING A MOTION TO DISMISS IN THAT THE PLAINTIFFS’ PROPOSED AMENDMENTS WERE TIMELY, WOULD CURE THE DEFECT THE TRIAL COURT FOUND IN THE INITIAL PLEADING AND WOULD NOT PREJUDICE THE UNIVERSITY.	107
A. Standard of Review.....	107
B. If Amendment Would Have Cured the Defect the Trial Court Perceived in the Petition, the Trial Court’s Refusal to Allow Plaintiffs to File an Amended Pleading Was Too Harsh.	108
C. The Court Should Reverse.	111
CONCLUSION	112
CERTIFICATE OF COMPLIANCE	114
CERTIFICATE OF SERVICE	115

TABLE OF AUTHORITIES

Cases

<i>A.F. v. Hazelwood School District</i> , 491 S.W.3d 628, 633 (Mo. App. E.D. 2016).....	83
<i>Adams by and through Adams v. Children’s Mercy Hospital</i> , 832 S.W.2d 898 (Mo. banc. 1992).....	51, 54, 60
<i>Allen v. Salina Broadcasting, Inc.</i> , 630 S.W.2d 225, 228 (Mo. App. S.D. 1982).....	passim
<i>Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, LLC</i> , 248 S.W.3d 101, 107 (Mo. App. W.D. 2008)	104
<i>Bachtel v. Miller County Nursing Home Dist.</i> , 110 S.W.3d 799, 801 (Mo. banc 2003) ..	99
<i>Bailey v. City of New York</i> , 3 Hill 531 (1842).....	83
<i>Barker v. St. Louis County</i> , 104 S.W.2d 371 (Mo. 1937)	52
<i>Beverly Enterprises-Missouri, Inc., v. Department of Social Services, Division of Medical Services</i> , 349 S.W.3d 337, 352 (Mo. App. W.D. 2008).....	102
<i>Boyd v. Kansas City Area Transp. Authority</i> , 610 S.W.2d 414, 416 (Mo. App. W.D. 1980).....	107, 108, 111
<i>Brennan By and Through Brennan v. Curators of the University of Missouri</i> , 942 S.W.2d 432, 434 (Mo. App. W.D. 1997)	64
<i>Buemi v. Kerckhoff</i> , 359 S.W.3d 16, 20 (Mo. banc 2011)	42
<i>Catroppa v. Metal Bldg. Supply, Inc.</i> , 267 S.W.3d 812, 817 (Mo. App. S.D. 2008).....	97
<i>Dieser v. St. Anthony’s Medical Center</i> , 498 S.W.2d 419, 428 (Mo. banc 2016)	47
<i>Doe v. Phillips</i> , 194 S.W.3d 833, 842 (Mo. banc 2006)	56

<i>Dotson v. E.W. Bacharach, Inc.</i> , 235 S.W.2d 737, 738-39 (Mo. 1959).....	passim
<i>Finnegan v. Old Republic Title Co. of St. Louis, Inc.</i> , 246 S.W.3d 928, 930 (Mo. banc 2008).....	92
<i>Fisher v. State Highway Com'n of Missouri</i> , 948 S.W.2d 607, 609 (Mo. banc 1997)	53, 54, 58, 60
<i>Freeman Health System v. Wass</i> , 124 S.W.3d 504, 507 (Mo.App. S.D. 2004)	24
<i>Fugate v. Jackson Hewitt, Inc.</i> , 347 S.W.3d 81, 88 (Mo. App. W.D. 2011)	105
<i>Gabriel v. O'Hara</i> , 534 A.2d 488, 494-95 (Pa.Super.Ct. 1987)	95
<i>Gibson v. Brewer</i> , 952 S.W.2d 239, 244-45 (Mo. banc 1997).....	passim
<i>Hendricks v. Curators University of Missouri</i> , 308 S.W.3d 740, 745 (Mo.App.W.D. 2010).....	67, 69
<i>Huch v. Charter Communications</i> , 290 S.W.3d 721, 724-25 (Mo. banc 2009).....	102
<i>Independence-Nat. Educ. Ass'n v. Independent School Dist.</i> , 223 S.W.3d 131 (Mo. banc 2007).....	51
<i>Jones v. Marshall</i> , 750 S.W.2d 727, 728 (Mo. App. E.D. 1988)	97
<i>Jones v. State Highway Comm'n</i> , 557 S.W.2d 225, 227 (Mo. banc 1977)	passim
<i>Joske Corp. v. Kirkwood School Dist. R-7</i> , 903 F.2d 1199, 1201 (8 th Cir. 1990).....	77, 78
<i>Koller v. Ranger Ins. Co.</i> , 569 S.W.2d 372, 373 (Mo. App. E.D. 1978)	107, 111
<i>Kubley v. Brooks</i> , 141 S.W.3d 21, 29 (Mo. banc 2004).....	92, 93
<i>Langley v. Curators of University of Missouri</i> , 73 S.W.3d 808, 812 (Mo.App. 2002)....	63, 67, 69
<i>Laret Inv. Co. v. Dickmann</i> , 134 S.W.2d 65, 68 (Mo. banc 1939).....	82

<i>Lieffring v. Birt</i> , 204, S.W.2d 935, 937 (Mo. 1947).....	31
<i>Lincoln County Stone Co., v. Koenig</i> , 21 S.W.3d 142, 146 (Mo. App. E.D. 2000).....	106
<i>Linkage Corp. v. Trustees of Boston University</i> , 679 N.E.2d 191, 209 (Mass. 1997)	95
<i>Lockhart v. Kansas City</i> , 175 S.W.2d 814 (Mo.1943)	102
<i>Manzer v. Sanchez</i> , 985 S.W.2d 936, 939 (Mo. App. E.D. 1999)	107
<i>Marbury v. Madison</i> , 5 U.S. 137, 163 (1803)	58
<i>Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations</i> , 277 S.W.3d 670 (Mo. banc 2009)	55, 56, 60
<i>Mountain Grove Bank v. Douglas County.</i> , 47 S.W. 944, 947 (Mo. 1898)	51
<i>Moynihan v. City of Manchester</i> , 203 S.W.3d 774, 776 (Mo. App. E.D. 2006).....	108
<i>Muza v. Missouri Dept. of Social Services</i> , 769 S.W.2d 168, 173 n. 6 (Mo. App. W.D. 1989).....	107
<i>Newsome v. Kansas City, Missouri School District</i> , 520 S.W.3d 769, 776 (Mo. banc 2017).....	passim
<i>O’Grady v. Brown</i> , 654 S.W.2d 904, 908 (Mo. banc 1983)	99
<i>Oak Bluff Condominium Owner’s Ass’n, Inc. v. Oak Bluff Partners, Inc.</i> , 263 S.W.3d 708, 712 (Mo. App. W.D. 2008)	110
<i>Poindexter v. Greenhow</i> , 114 U.S. 270 (1885)	57
<i>Richardson v. State Highway & Transp. Com’n</i> , 863 S.W.2d 876, 884 (Mo. banc 1993)	52, 53
<i>Roth v. La Societe Anonyme Turbomeca France</i> , 120 S.W.3d 764, 774 (Mo. App. W.D. 2003).....	95

<i>Schoenlein v. Routt Homes, Inc.</i> , 260 S.W.3d 852, 854 (Mo. App. E.D. 2008)	97
<i>Slaney v. Westwood Auto, Inc.</i> , 322 N.E.2d 768, 779 (Mass. 1975)	95, 97
<i>Spires v. Edgar</i> , 513 S.W.2d 372, 373-77 (Mo. banc 1974)	passim
<i>St. Louis County v. Prestige Travel, Inc.</i> , 344 S.W.3d 708, 712 (Mo. banc 2011)	47
<i>St. Louis Housing Authority v. City of St. Louis</i> , 239 S.W.2d 289, 294 (Mo. banc 1951) 81, 84	
<i>State ex rel. Bd. of Trustees of City of North Kansas City Memorial Hospital v. Russell</i> , 843 S.W.2d 353, 358 (Mo. banc 1993)	73, 78, 79
<i>State ex rel. Bowman v. Inman</i> , 516 S.W.3d 367, 369 (Mo banc. 2017)	104
<i>State ex rel. Farmers Ins. Co., Inc. v. Murphy</i> , 518 S.W.2d 655, 662 (Mo. banc 1975) ..	42
<i>State ex rel. Johnson & Johnson v. Burlison</i> , 567 S.W.3d 168, 184 (Mo. banc 2019)	40
<i>State ex rel. Milham v. Rickhoff</i> , 633 S.W.2d 733 (Mo. banc 1982)	85, 86
<i>State ex rel. Missouri Dept. of Agriculture v. McHenry</i> , 687 S.W.2d 178, 181-82 (Mo. banc 1985)	80, 81, 82
<i>State ex rel. Nixon v. RCT Development Ass'n</i> , 290 S.W.3d 756, 760 (Mo. App. W.D. 2009)	102
<i>State ex rel. St. Louis Housing Authority v. Gaertner</i> , 695 S.W.2d 460, 463 n.1 (Mo. banc 1985)	91
<i>State ex rel. Upchurch v. Blunt</i> , 810 S.W.2d 515, 516 (Mo. banc 1991)	50
<i>State ex rel. Webster v. Areaco Inv. Co.</i> , 756 S.W.2d 633, 635 (Mo.App. E.D. 1988) ...	95, 99, 100, 106
<i>State v. Baker</i> , 524 S.W.2d 122 (Mo. banc 1975)	51

<i>State v. Spivey</i> , 700 S.W.2d 812, 815 (Mo. banc 1985)	31
<i>Steinberg v. St. Louis Union Trust Co.</i> , 502 S.W.2d 442, 443 (Mo. App. E.D. 1973) ...	108
<i>Thomas v. City of Kansas City</i> , 92 S.W.3d 92, 96 (Mo. App. W.D. 2002).....	110
<i>Ulrich v. CADCO, Inc.</i> , 244 S.W.3d 772, 777-78 (Mo.App. E.D.)	96
<i>V.S. DiCarlo Const. Co., Inc. v. State of Missouri</i> , 485 S.W.2d 52, 56 (Mo. 1972).....	93
<i>Ward v. West County Motor Co., Inc.</i> , 403 S.W.3d 82, 84 (Mo. banc 2013)	96
<i>Watts v. Lester E. Cox Medical Centers</i> , 376 S.W.3d 633, 642 (Mo. banc 2012).....	50, 51, 54, 60
<i>Wilkes v. Missouri Highway and Transp. Com’n</i> , 762 S.W.2d 27, 28 (Mo. banc 1988)..	61
<i>Wilson v. City of Louis</i> , No. SC97544—S.W.3d--, 2020 WL 302137 (Mo. banc Jan. 14 2020).....	passim
<i>Winston v. Reorganized School District R-2 Lawrence County, Miller</i> , 636 S.W.2d 324 (Mo. banc 1982)	53
<i>Wyman v. Missouri Dept. of Mental Health</i> , 375 S.W.3d 16, 18 (Mo. App. W.D. 2012)63, 92	
<i>Ziglin v. Players MH, L.P.</i> , 36 S.W.3d 786, 789 (Mo. App. E.D. 2001)	99
<i>Zueck v. Oppenheimer Gateway Properties, Inc.</i> , 809 S.W.2d 384, 388 (Mo. App. E.D. 1991).....	99

Statutes

§ 1.020 (12) R.S.Mo. (2018)	104, 105, 106
§ 172.020	84, 93, 102

§ 287.780 R.S.Mo.....	97
§ 393.106 R.S.Mo. (1990).....	105
§ 394.315 R.S.Mo. (1990).....	105
§ 407.010 R.S.Mo.....	94, 101, 104, 105
§ 407.020.1 R.S.Mo.....	96
§ 407.020.2 R.S.Mo.....	105
§ 407.025 R.S.Mo. (1973).....	95, 97, 98, 101
§ 407.145 R.S.Mo.....	96
§ 432.070 R.S.Mo.....	75
§ 508.050	86
§ 512.020 (5) R.S.Mo.	37, 40
§ 512.020, R.S.Mo.....	42, 45
§ 537.080, R.S.Mo.....	97
§ 537.090	98
§ 537.600	passim
§ 537.610 R.S.Mo.....	passim
§ 82.210 R.S.Mo.....	54

Other Authorities

Hack, M., <i>Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities</i> , MO. L. REV., V. 58, at n. 51	83
Henry Sumner Maine, <i>ANCIENT LAW</i> , John Murray, Albermarle Street (1861)	55

Keller, R, <i>At University of Missouri Health Care, Business is Booming</i> , Columbia Daily Tribune (March 21, 2018)	88
McKinney, R., <i>MU Health Care's Revenue Hits \$1 Billion</i> , Columbia Daily Tribune (September 10, 2018)	87
Prosser and Keeton, <i>THE LAW OF TORTS</i> , p. 1 (5 th ed. 1984).....	94
Webster et al., <i>Combatting Consumer Fraud in Missouri</i>, 52 MO. L. REV. at 378	100
WEBSTERS' THIRD NEW INTERNATIONAL DICTIONARY, 788 (1971).....	56
William Webster, Richard Thurman & Mike Finkelstein, <i>Combatting Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act</i> , 52 MO. L. REV. 365, 367, 370 (1987).....	94, 101

Rules

Mo. R. Civ. Pr. 55.15.....	95
Mo. R. Civ. Pr. 67.06.....	107, 108
Rule 74.01 (b)	passim
Rule 81.05.....	16
Rule 84.04.....	30, 31
University of Missouri Collected Rules and Regulations § 100.020 (Patent and Plant Variety Regulations).....	90
University of Missouri System Collected Rules and Regulations § 70.010	75, 76

Regulations

15 C.S.R. § 60-8.020	96
----------------------------	----

15 C.S.R. § 60-9.020	96
15 C.S.R. § 60-9.070	96
15 CSR § 60-7.010.	102

Constitutional Provisions

Mo. CONST. ART. I, § 14	passim
Mo. CONST. ART. IV, § 35	82
Mo. CONST. ART. V, § 10.....	16, 30, 31
Mo. CONST. ART. VI, §7	88

JURISDICTIONAL STATEMENT

These consolidated appeals arise from judgments of dismissal the Circuit Court of Boone County, Missouri entered on May 22, 2019 in favor of the Curators of the University of Missouri (“the University”). D14, p.1 (*Butala*) (Appendix- A1); D37, p. 1 (*Butterfield*) (A2); D78 p. 1 (*Draper*) (A3); D21, p. 1 (*Reinsch*) (A4); D38, p1 (*Browne*) (A5); D21, p.1 (*Jaggie*) (A6); D21, p.1 (*Higginbotham*) (A7); D21, p1 (*Cummings*) (A8). The judgments completely dismissed the University from each case, leaving nothing left for the trial court to do as between the plaintiffs and the University. Pursuant to Rule 74.01 (b), the trial court certified its judgments as final for purposes of appeal. *Id.* Plaintiffs filed timely notices of appeal, which took effect June 23, 2019 pursuant to Rule 81.05. D10, p.1 (*Butala*); D33, p.1 (*Butterfield*); D73 p. 1 (*Draper*); D17, p 1 (*Reinsch*); D35, p.1 (*Browne*); D17, p.1 (*Jaggie*); D17, p.1 (*Higginbotham*); D18, p.1 (*Cummings*).

This Court has jurisdiction pursuant to MO. CONST. ART. V, § 10 (Appendix- A33) of the Missouri Constitution in that, on June 30, 2020, this Court ordered these consolidated appeals transferred to it after opinion from the Court of Appeals.

STATEMENT OF FACTS

I. Procedural History

Appellants are eleven individuals¹ who sued the University for misleading advertisements about a novel, proprietary and experimental tissue preservation system and surgical procedure performed at the Mizzou BioJoint Center. D2, pp. 1-44 (*Butala*); D18, pp.1-30 (*Butterfield*); D52, pp. 1-38 (*Draper*); D2, pp. 1-37 (*Reinsch*); D20, pp. 1-36 (*Browne*); D2, pp. 1-33 (*Jaggie*); D2, pp. 1-31 (*Higginbotham*); D2, pp. 1-34 (*Cummings*).² Each patient went on to have the surgery, which failed in each case. In *Butterfield*, *Draper*, *Reinsch*, *Browne*, *Jaggie*, *Higginbotham* and *Cummings*, plaintiffs asserted a sole claim against the University for violation of Chapter 407, R.S.Mo., the Missouri Merchandising Practices Act (“MMPA”). *Id.* The University moved to dismiss

¹ Twenty-two patients have now filed similar lawsuits.

² Appellants also sued James Stannard M.D., James Cook, D.V.M., PhD, OTC, OTSC and in *Higginbotham*, Mauricio Kfuri, M.D. Stannard is the medical director of the Mizzou BioJoint Center. He was the attending surgeon in all cases except *Higginbotham*, where Kfuri was the operating surgeon. Cook is the director of operations and scientific director of the BioJoint Center. He participated in the surgeries by shaping the osteochondral allografts that were implanted into each patient, which subsequently failed. In many of the plaintiff’s medical records, he is listed as a surgeon in the operative record. Cook is a veterinarian, not a medical doctor. The claims against the individuals, which consist of both the advertising related claims and medical malpractice, are not at issue in this appeal.

on March 4, 2019 on sovereign immunity grounds. *See* D58, p. 1-4 (*Draper*). The trial court granted the motion on April 18, 2019 without stating its reasons. D17, p. 8 (*Butterfield*); D51, p. 20 (*Draper*); D1, p. 17 (*Reinsch*); D19, p. 14 (*Browne*); D1, p. 12 (*Jaggie*); D1, p. 13 (*Higginbotham*); D1, p. 11 (*Cummings*). Without knowing the specific basis for the trial court's dismissal, plaintiffs filed motions for leave to assert a claim against the University for negligent misrepresentation. D17, p. 8 (*Butterfield*) D51, p. 20 (*Draper*); D1, p. 17 (*Reinsch*); D19, p. 14 (*Browne*); D1, p. 12 (*Jaggie*); D1, p. 13 (*Higginbotham*); D1, p. 11 (*Cummings*). The trial court denied those motions on May 13, 2019. D17, p. 9; (*Butterfield*) D51, p. 21 (*Draper*); D1, p. 17 (*Reinsch*); D19, p. 15); D1, p. 13 (*Jaggie*); D1, p. 14 (*Higginbotham*); D1, p. 12 (*Cummings*).

Butala was filed on March 14, 2019, after the University had moved to dismiss the other cases. D2, p. 1 (*Butala*). In *Butala*, the plaintiffs asserted one claim against the University under the MMPA and another for negligent misrepresentation. D18, pp. 1-30 (*Butala*). The University moved to dismiss both claims on April 19, 2019. D7, pp.1-4. The trial court granted that motion on May 13, 2019. D1, p. 9.

The trial court entered judgments of dismissal in all cases on May 22, 2019. D14, p.1 (*Butala*) (A1); D37, p. 1 (*Butterfield*) (A2); D78 p. 1 (*Draper*) (A3); D21, p. 1 (*Reinsch*) (A4); D38, p1 (*Browne*) (A5); D21, p.1 (*Jaggie*) (A6); D21, p.1 (*Higginbotham*) (A7); D21, p1 (*Cummings*) (A8). It certified those judgments as final for purposes of appeal pursuant to Rule 74.01 (b). *Id.* Plaintiffs then began these appeals. D10, p.1 (*Butala*); D33, p.1 (*Butterfield*); D73 p. 1 (*Draper*); D17, p 1 (*Reinsch*); D35, p.1 (*Browne*); D17, p.1 (*Jaggie*); D17, p.1 (*Higginbotham*); D18, p.1 (*Cummings*).

II. Factual Basis for the Claims Against the University.

A. The Mizzou BioJoint Center and BioJoint Surgery.

The University formed the Mizzou BioJoint Center in 2015 to develop, test and market proprietary products and services on patients within the Missouri Orthopaedic Institute, which is part of the University of Missouri Health System. D2, p. 7-10; 32-33. The claims against the University arise out of the advertising of these proprietary activities. BioJoint Surgery involves the transplantation of human tissue called an osteochondral allograft (“OCA”) into the knee joint. D2, pp. 6-8.³ An OCA is a combination of bone and cartilage tissue taken from the knee joint⁴ of a deceased person. D2, p. 6. In an OCA transplant surgery, a surgeon removes native cartilage and bone

³ Because the factual allegations central to these consolidated appeals are the same in each case, plaintiffs cite to the legal file in *Butala* for ease of reference unless otherwise indicated.

⁴ The knee joint is where the bottom part of the femur (thigh bone) meets the top part of the tibia (shin bone). The knee has three compartments: (1) medial (inside); (2) lateral (outside); and (3) patellofemoral (middle). The medial and lateral compartments have two bony surfaces that articulate against each other--a femoral condyle (bottom of the femur) and the tibial plateau (top of the tibia). The patellofemoral compartment also has two bony surfaces that articulate against each other--the trochlea (groove of the femur) and the patella (knee cap). Soft, slippery tissue called cartilage coats each of these bony surfaces and allows the bones to glide smoothly over each other as the joint articulates.

from the knee of a patient and replaces it with the OCA harvested from a deceased donor. D2, p. 6. As discussed below, the University created a process for storing and preserving OCAs after harvesting, and it created the Center to test and market this now-patented proprietary technology, which it hoped would generate revenues within the medical world.

Orthopedic surgeons have used OCAs for decades to repair small, focal areas of cartilage damage in the knee that are surrounded by otherwise healthy native bone and cartilage. D2, p.7. Orthopedic surgeons do not, however, use OCAs to treat widespread degenerative osteoarthritis that affects multiple compartments of the knee, or as a substitute for artificial partial or total knee replacement. D2, p. 7. This is because OCA transplants performed on two or more opposing surfaces of the knee, called a bipolar transplant,⁵ are unsafe in that they have proven failure rates as high as eighty-six percent (86%). D2, p. 7.

The catalyst for the BioJoint Center was the proprietary tissue preservation system Cook developed for OCAs. The University calls this system the Missouri Osteochondral Allograft Preservation System (MOPS); and they contend it “more than doubles the storage life of bone and cartilage grafts from organ donors.” D2, p. 9. Having secured

⁵ One example of a bipolar surgery would be where OCAs are placed on both the medial femoral condyle and medial tibial plateau such that the two grafts must articulate against each other when the joint moves. Another example would be where grafts are placed in both the trochlea and patella.

patent protection for MOPS, the University stands to reap substantial financial benefits from sales of MOPS preserved OCAs in the private sector should MOPS become commercially successful. D2, p. 10.

In an effort to develop a medical database to support their proprietary technology, the defendants convince patients to undergo surgeries that result in large OCAs-preserved with MOPS-being implanted into multiple compartments and upon opposing surfaces of the knee joint (bipolar OCA transplants) in a single surgery—the very same surgery studies show will fail up to 86% of the time. D2, p.7-8. The University marketing department has coined this procedure “Mizzou BioJoint Surgery; and they sell it as a viable alternative to traditional partial or total knee replacement. D2, p.8-9. In some instances, the defendants have replaced entire knees with OCAs in patients having osteoarthritis. D20, p. 12-14 (*Browne*). The defendants are the only people in the country doing this type of surgery on this patient population. Tr. 48.

B. The University’s Advertising of the Mizzou BioJoint Center.

The University has spent millions of dollars advertising the BioJoint Center, the purpose of which is to induce persons to purchase OCAs preserved with the University’s MOPS in conjunction with a BioJoint Surgery. D2, p. 9-10; 32-33. To assist it, the University hired multiple private advertising agencies to target specific consumers for Mizzou BioJoint Surgery. D2, p. 9. It launched a multimedia marketing campaign that involved direct-to-consumer television, radio, online, print, billboard and sporting event advertising. D2, p. 9. Along with Stannard and Cook, the University is responsible for the content of the Mizzou BioJoint advertisements. D2, p 32.

Despite knowing internally that bipolar OCA transplant surgeries fail up to 86% of the time, the advertisements told the public that Mizzou BioJoint Surgery is a viable and proven alternative to traditional joint replacement surgery. D2, p.9. They claimed the procedure was equally as effective as, and a viable alternative to, traditional joint replacement surgery. D2, p.9. Traditional joint replacement surgery lasts 20 years in 85% of patients. D2, p. 6-7, 9. The University further represented that Mizzou BioJoint Surgery can eliminate the need for a total knee replacement. D2, p. 33. They stated that Mizzou BioJoint Surgeries are effective for at least 10 years, even though the defendants have only performed them since 2014. D2, p. 9. D51, p. 10.⁶ They further contend Mizzou BioJoint Surgery has a success rate as high as 92.3 percent. Tr. 48.

The advertisements, though, were deceptive and misleading. D2, pp. 32-38. The defendants have created an internal data registry, which tracks how their surgeries have performed over time. Tr. 47; D2, p.9. The advertised success rates come from this data. Tr. 48. The data shows dramatically different results than the success statistics the defendants have published. D2, p. 9; Tr. 48. The University also misled consumers by pointing to the success statistics for traditional OCA transplant surgeries (to treat isolated cartilage defects in the knee) as proof that their more extensive, experimental and prone-to-fail surgeries performed at the Mizzou BioJoint Center are efficacious. D2, p. 34.

The University's advertising of the Mizzou BioJoint Center has failed to advise prospective consumers of the following:

⁶ The content of the advertisements has changed since these cases were filed.

1. that the surgery is experimental often denied by medical insurance plans, D2, p. 33;
2. that there is insufficient data to determine the long-term success of Mizzou BioJoint Surgery, D2, p. 33;
3. that the functional survival of Mizzou BioJoint Surgery is 10 years or longer, D2, p. 33-34;
4. that Mizzou BioJoint Surgery can obviate the need for a total knee replacement, D2, p. 33-34;
5. that the survival and efficacy statistics regarding bipolar OCA transplant surgeries are not as advertised, D2, p. 33-34;
6. the actual outcome statistics for Mizzou BioJoint Surgery, D2, p. 33-34;
7. the actual risks of Mizzou BioJoint Surgery, including the degree of negative impact such surgery would have on subsequent treatment, including total knee replacement, D2, p. 33-34;
8. that their process for implanting OCAs is not in fact approved by the FDA as advertised, D2, p. 33-34.
9. that the surgeries performed on specific patients featured in advertisements were significantly different than the surgeries offered to plaintiffs, D2, p. 34.

Based in part upon these misrepresentations, plaintiffs purchased merchandise⁷ in the form of OCAs and Mizzou BioJoint Surgery for personal purposes and sustained ascertainable losses of money in the form of expenses for the OCAs and Mizzou BioJoint Surgeries, as well as the additional treatment they will need as a result of the failed procedures. D2, p. 35.

The University advertised the Mizzou BioJoint Center and MOPS (1) to acquire human test subjects for proprietary medical devices, technologies and surgical techniques, including MOPS, (2) for the purpose of trying to make money from proprietary medical devices, technologies and surgical techniques, (3) so that it might receive patent royalties from MOPS, (4) to enhance the reputation of the MU Health System and the individual defendants, and (5) to increase the revenues of the Missouri Orthopaedic Institute. D2, pp. 32-36. In other words, the University advertised Mizzou BioJoint Surgery not for the common good of all, but for the purposes of specially benefitting itself and the individual defendants. D2, p. 33.

C. The University Purchased Insurance to Cover Any Advertising-Related Liability Incurred.

The University has purchased three insurance policies (one primary, two excess), which cover advertising-related liability. D3, pp. 1-60; D5, pp. 1-16; D6, pp. 1-18.⁸ The

⁷ Medical goods and services meet the statutory definition of merchandise. *Freeman Health System v. Wass*, 124 S.W.3d 504, 507 (Mo.App. S.D. 2004).

⁸ The second two layers of coverage follow the form of the base policy.

base policy describes the coverage as “Comprehensive Data Security, Liability, and Business Resilience Insurance.” D3, p. 9. The named insured is “The Curators of the University of Missouri...” D3, pp. 1, 9. Coverage Provision F of the policy provides “Multimedia Liability” coverage. D3, pp. 9, 14. It covers the University for “Damages or Claims Expenses” arising “out of an alleged “Multimedia Wrongful Act” by the Assured or parties for whom the Assured is Vicariously Liable.” D3, p. 14. The policy defines “Multimedia Wrongful Act” to mean, in part:

Any act, error, omission, misstatement or misleading statement in connection with the gathering, collection, broadcasting, creation, distribution, exhibition, performance, preparation, printing, publication, release, display, research, or serialization of Material that results in:

3. False advertising, including an alleged violation of Section 43(a) of the Lanham Act or any similar federal, state, local or foreign statutes;

...

7. Negligence regarding the content of any Material,

...

10. Unfair competition or trade practices, including but not limited to dilution, confusion, deceptive trade practices or unfair trade practices, civil actions for consumer fraud, false, disruptive or misleading advertising or misrepresentation in advertising, but only if alleged in conjunction with any of the acts listed in paragraphs 1 through 9 above.

D3, pp. 27-28. “Material” means “media content in any form, including without limitation, advertising and written, printed, video, electronic, digital or digitized content.” D3, p. 27.

Page 59 of the policy includes a form titled Contract Endorsement, Missouri Sovereign Immunity. D3, p. 59. The endorsement states:

1. It is hereby understood and agreed that:
 - 1) Certain Assureds are granted sovereign, governmental, tort, official and/or governmental function immunity under the law of the State of Missouri and that such Assureds may be protected from certain Claims by virtue of such immunity.
 - 2) The procurement of coverage afforded under this policy is not intended, nor shall it be construed, to waive any rights of sovereign, governmental, tort, official governmental function or other immunity granted to any Assured under the laws of the State of Missouri.
 - 3) Accordingly, it is agreed that, except for Damages or Claims Expenses subject to all other terms and conditions of the policy, the Underwriters shall not pay Ultimate Net Loss⁹ for Claims for which the Assured is Granted immunity under the laws of the state of Missouri.

D3, p. 59.

The policy defines Damages as “the following amounts, whether incurred by the Assured on its own behalf or incurred by parties for whom it is Vicariously Liable:

1. a monetary judgment, award or settlement;

⁹ “Ultimate net loss means the difference between the actual Loss and the amount with which sovereign immunity provides.” D3, p. 59.

2. pre-judgment interest;
3. post judgment interest that accrues after the entry of the judgment...
4. subject to the policy's terms, conditions, and exclusions, punitive, exemplary and multiple damages where such damages are legally insurable
...

Damages shall not include or mean:

1. Future profits, restitution, or disgorgement of profits by and any Assured, or the cost to comply with orders granting injunctive or non-monetary relief...
2. Return or offset of fees, charges, royalties or commission for goods...
3. Liquidated damages...
4. Fines, penalties, sanctions, taxes or loss of tax benefits...

D3, p. 24. Claims expenses include attorney's fees, legal costs and expenses and appeal bonds. D3, pp. 21-22.

This endorsement is different than the Sovereign Immunity Endorsement contained within the University's Health Care Liability policy, which covers University doctors for medical malpractice. Specifically, the endorsement in the health care policy restricts coverage to "defense costs and expenses" where sovereign immunity applies, whereas the policy providing the multi-media liability

insurance covers both “Claims Expenses” and “Damages” even where sovereign immunity would otherwise apply. D4, p. 2; D3, p. 59.

The Missouri Sovereign Immunity Endorsement in the base policy at issue was not issued contemporaneously with policy. D3, p. 11. Instead, it is dated November 3, 2017--one month after the policy was issued. D3, pp. 11, 59. The University’s regulations require all contracts to “be executed in the name of the Curators of the University of Missouri and signed by the President thereof, the President of the University, the Vice President for Finance, or such other office as may be specifically designated by the Board....” D9, p. 25. The endorsement was never subsequently executed in accordance with the University’s contracting regulation. D3, p. 59.

Plaintiffs pled these facts and policy provisions in their Petitions. D2, p. 4-5. They further alleged this policy language covers claims arising out of the University’s deceptive and misleading advertising. D2, p. 35.

Plaintiffs further pled constitutional challenges to § 537.600 *et seq.* D2, pp. 42-43.

PRELIMINARY STATEMENT

The trial court entered judgments on the merits in favor of the University following motions to dismiss. Those judgments removed the University as a party from these lawsuits entirely, leaving nothing else for trial court to do as between the plaintiffs and the University. For judgments that completely dismiss one of multiple parties from a lawsuit (a multi-party judgment), it has been the law of Missouri for more than 50 years that trial courts have the discretion to certify such judgments as final for purposes of appeal. *Dotson v. E.W. Bacharach, Inc.*, 235 S.W.2d 737, 738-39 (Mo. 1959); *Spires v. Edgar*, 513 S.W.2d 372, 373-77 (Mo. banc 1974); *Gibson v. Brewer*, 952 S.W.2d 239, 244-45 (Mo. banc 1997). Accordingly, because earlier appellate resolution of whether the dismissal was correct would further the interests of judicial economy, the trial court properly exercised its discretion to certify its judgments for appeal pursuant to Rule 74.01 (b). Neither party contested the validity of the trial court's Rule 74.01 (b) certification.

The Court of Appeals, however, held that it had no jurisdiction to consider the appeals under Rule 74.01 (b). Relying on this Court's recent decision in *Wilson v. City of Louis*, No. SC97544—S.W.3d--, 2020 WL 302137 (Mo. banc Jan. 14 2020), the Court of Appeals held, for what appears to be the first time in Missouri, that when a trial court completely dismisses one of multiple parties against whom a claim is asserted from a lawsuit, there is no judgment at all for the trial court to certify under Rule 74.01 (b). It dismissed the appeals without reaching the merits.

Believing the Court of Appeals had misapplied *Wilson* and decades of binding precedent, plaintiffs applied to this Court for transfer. The Court granted transfer, presumably to address this issue.

This history presents an unusual procedural posture for an appeal in that the Court granted transfer on a procedural issue not raised by the parties but upon which the appellants believe the trial court ruled correctly. In a typical case where this Court grants transfer, the appellant is only challenging the rulings of the trial court, and any opinion the Court of Appeals issued prior to transfer ceases to exist as a practical matter. Here though, the appellants assert that the trial court acted correctly in certifying the judgments for appeal and instead assert that the Court of Appeals acted erroneously in dismissing the appeal. Rule 84.04 directs appellants to focus on points of trial court error and, thus, does not directly address this scenario.

Likewise, MO. CONST. ART. V, § 10 (A33) states that after transfer upon order of this Court, “[t]he Supreme Court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.”¹⁰ (emphasis added). ART. V, § 10 gives this Court discretion either (1) to decide the jurisdictional question (and potentially the constitutional questions raised as well that would fall within its exclusive jurisdiction) and then remand the remainder of

¹⁰ This was a change from the prior Constitution which stated at sec. 6 that “the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process.” *Lieffring v. Birt*, 204 S.W.2d 935, 937 (Mo. 1947).

the case to the Court of Appeals, or (2) to hear and decide the entire appeal. *State v. Spivey*, 700 S.W.2d 812, 815 (Mo. banc 1985). In prior cases involving questions of appellate jurisdiction first raised by the Court of Appeals, this Court has ruled the jurisdictional question and transferred the remainder of the cause back to the Court of Appeals where the remaining merits issues would normally be decided. *Lieffring v. Birt*, 204, S.W.2d 935, 937 (Mo. 1947). This Court has done the same with regard to appeals involving constitutional challenges to statutes that also involve issues the Court of Appeals would normally decide first, and perhaps finally. *Spivey*, 700 S.W.2d at 815 (stating “[o]ral argument in this Court was confined to the issue of constitutional validity noted by the Court of Appeals....We conclude that the remaining points should be subject to further argument, which can most appropriately be had in the Court of Appeals. We therefore, in the exercise of the discretion conferred upon us by Art. V, Sec. 10 of the Missouri Constitution, advise the Court of Appeals that the defendant’s Point I demonstrates no ground for reversal and retransfer for its consideration of the remaining points”).

Appellants do not know how the Court intends to exercise the discretion Art. V, sec. 10 affords. Accordingly, to avoid waiving any claims of error and to address all potential scenarios, appellants brief the issue of jurisdiction, as well as the substantive arguments raised before the Court of Appeals, in the form Rule 84.04 dictates.

POINTS RELIED ON

- I. THE TRIAL COURT CORRECTLY CERTIFIED THE JUDGMENTS OF DISMISSAL FOR IMMEDIATE APPEAL PURSUANT TO RULE 74.01 (B) BECAUSE, WHEN MULTIPLE PARTIES ARE INVOLVED, RULE 74.01 (B) GRANTS TRIAL COURTS DISCRETION TO ENTER JUDGMENT AS TO ONE OR MORE BUT LESS THAN ALL PARTIES AND CERTIFY SUCH JUDGMENT FOR IMMEDIATE APPEAL IN THAT THE TRIAL COURT’S COMPLETE DISMISSAL OF THE UNIVERSITY FROM THE LAWSUIT WAS A JUDGMENT ELIGIBLE FOR RULE 74.01 (B) CERTIFICATION AND THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN CERTIFYING THE JUDGMENT.**

§ 512.020 (5) R.S.Mo.

Missouri Rule of Civil Procedure 74.01 (b).

Gibson v. Brewer, 952 S.W.2d 239 (Mo. banc 1997);

Wilson v. City of Louis, No. SC97544—S.W.3d--, 2020 WL 302137 (Mo. banc Jan. 14 2020).

- II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS’ CAUSES OF ACTION AGAINST THE UNIVERSITY ON THE BASIS OF § 537.600 BECAUSE ART. I, § 14 OF THE MISSOURI CONSTITUTION GUARANTEES THAT THE COURTS WILL BE OPEN, AND A CERTAIN REMEDY SHALL BE AFFORDED FOR EVERY INJURY TO A PERSON IN THAT § 537.600 DENIES EVERY PERSON INJURED BY THE UNIVERSITY’S ACTS THAT DO NOT FALL WITHIN THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY ANY REMEDY FOR THE INJURY.**

Mo. CONST. Art I, § 14.

Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 642 (Mo. banc 2012);

Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations, 277 S.W.3d 670 (Mo. banc 2009) (Teitelman, J. dissenting);

Richardson v. State Highway & Transportation Commission, 863 S.W.2d 876 (Mo. banc 1993) (Holstein, J. concurring in result).

III. THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS BECAUSE § 537.610 R.S.MO. PROVIDES THAT A PUBLIC ENTITY MAY WAIVE SOVEREIGN IMMUNITY THROUGH THE PURCHASE OF LIABILITY INSURANCE IN THAT THE UNIVERSITY PURCHASED A POLICY THAT COVERS CLAIMS FOR DECEPTIVE ADVERTISING AND EXPRESSLY WAIVES SOVEREIGN IMMUNITY FOR THE DAMAGES PLAINTIFFS SEEK.

§ 537.610 R.S.Mo. (2018);

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

IV. THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS BECAUSE SOVEREIGN IMMUNITY DOES NOT APPLY TO THE PROPRIETARY FUNCTIONS OF CERTAIN PUBLIC CORPORATIONS IN THAT THE UNIVERSITY IS A PUBLIC CORPORATION TO WHOM THE GOVERNMENTAL/PROPRIETARY DISTINCTION APPLIES AND ITS ADVERTISING OF THE BIOJOINT CENTER IS A PROPRIETARY ACTIVITY.

§ 537.600 R.S.Mo. (2018)

Allen v. Salina Broadcasting, 630 S.W.2d 225 (Mo. App. S.D. 1982);

St. Louis Housing Authority v. City of St. Louis, 239 S.W.2d 289 (Mo. banc 1951);

§ 172.020 R.S.Mo. (2018).

- V. THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS THE MMPA CLAIM BECAUSE SOVEREIGN IMMUNITY ONLY APPLIES TO TORT CLAIMS IN THAT AN MMPA CLAIM IS NOT A TORT BUT INSTEAD A *SUI GENERIS*, NON-TORT CAUSE OF ACTION.**

§ 407.025 R.S.Mo. (2018);

Linkage Corp. v. Trustees of Boston University, 679 N.E.2d 191 (Mass. 1997);

Bernard v. Central Carolina Truck Sales, Inc., 314 S.E.2d 582 (N.C. App. 1984);

Slaney v. Westwood Auto, Inc., 322 N.E.2d 768 (Mass. 1975).

- VI. THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS THE MMPA CLAIM BECAUSE THE MMPA IMPOSES LIABILITY UPON ANY “PERSON” WHO VIOLATES THE ACT IN THAT THE UNIVERSITY IS A “PERSON” WHICH BECOMES LIABLE WHEN IT VIOLATES THE ACT.**

§ 407.010 (5) R.S.Mo. (2018);

Lockhart v. Kansas City, 175 S.W.2d 814 (Mo. 1943).

§ 1.020 (12) R.S.Mo. (2018).

- VII. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS’ MOTIONS FOR LEAVE TO FILE AMENDED PETITIONS BECAUSE RULE 67.06 PROVIDES THAT THE TRIAL COURT SHALL FREELY GRANT LEAVE TO AMEND UPON**

SUSTAINING A MOTION TO DISMISS IN THAT THE PLAINTIFFS' PROPOSED AMENDMENTS WERE TIMELY, WOULD CURE THE DEFECT THE TRIAL COURT FOUND IN THE INITIAL PLEADING AND WOULD NOT PREJUDICE THE UNIVERSITY.

Missouri Rule of Civil Procedure 67.06;

Moynihan v. City of Manchester, 203 S.W.3d 774 (Mo. App. E.D. 2006);

Oak Bluff Condominium Owner's Ass'n, Inc. v. Oak Bluff Partners, Inc., 263 S.W.3d 708 (Mo. App. S.D. 2008);

Boyd v. Kansas City Area Transportation Authority, 610 S.W.2d 414 (Mo. App. W.D. 1980).

ARGUMENT

I.

**THE TRIAL COURT CORRECTLY CERTIFIED THE JUDGMENTS OF
DISMISSAL FOR IMMEDIATE APPEAL PURSUANT TO RULE 74.01 (B)
BECAUSE, WHEN MULTIPLE PARTIES ARE INVOLVED, RULE 74.01 (B)
GRANTS TRIAL COURTS DISCRETION TO ENTER JUDGMENT AS TO ONE
OR MORE BUT LESS THAN ALL PARTIES AND CERTIFY SUCH JUDGMENT
FOR IMMEDIATE APPEAL IN THAT THE TRIAL COURT’S COMPLETE
DISMISSAL OF THE UNIVERSITY FROM THE LAWSUIT WAS A JUDGMENT
ELIGIBLE FOR RULE 74.01 (B) CERTIFICATION AND THE TRIAL COURT
APPROPRIATELY EXERCISED ITS DISCRETION IN CERTIFYING THE
JUDGMENT.**

A. Standard of Review.

The question of whether a judgment is eligible for certification under Rule 74.01 (b) is a legal question over which this Court exercises *de novo* review. *Wilson*, at * 5. The Court reviews the separate question of whether the trial court should have certified an eligible judgment for abuse of discretion. *Id.*

B. The Trial Court’s Dismissal of the University was a Multi-Party Judgment Eligible for Certification Under Rule 74.01 (b).

The right to appeal is purely statutory. *Id.* at * 3. Section 512.020 (5) R.S.Mo. authorizes an appeal from a “final judgment.” A “judgment can be appealable [as a final judgment] if it resolves every claim (or, at least, the last unresolved claim) in a lawsuit.” *Id.* But that is not the only type of judgment that qualifies as a “final judgment” under 512.020 (5). Rule 74.01 (b) provides, in relevant part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or **when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties** only upon an express determination that there is not just reason for delay.

Rule 74.01 (b) (emphasis added). Reading Rule 74.01 (b) with § 512.020(5) together shows that certification under the Rule is available only for final judgments. A trial court decision that disposes of a judicial unit of claims—here all of the claims brought against a single party—is a final judgment for purposes of § 512.020(5). *Wilson*, at * 4.

By its plain terms, Rule 74.01 (b) applies to both multi-claim and multi-party scenarios. For orders that completely dismiss one of multiple parties from a case (a multi-party order), it has been the law in Missouri for more than half a century that a trial court’s dismissal of all claims against one of multiple defendants disposes of a distinct judicial unit and creates a final judgment the trial court may certify for immediate appeal. *Dotson*, 235 S.W.2d at 738-39; *Spires*, 513 S.W.2d at 373-77; *Gibson*, 952 S.W.2d at 244-45. *Wilson* reaffirmed this time-honored principle when it stated that the “judicial unit” requirement was satisfied when there is a “judgment that disposes of all claims by

or against one or more-but fewer than all-of the parties.” *Wilson*, at * 4. Obviously, if an order disposing of all claims by or against one or more, but fewer than all, of the parties resolves a judicial unit, it must necessarily also be a final judgment.

On the other hand (a hand not at issue in this case), multi-claim orders that dismiss one of multiple claims asserted against a party, but which leave other claims pending against that party, require a separate analysis. For a trial court to certify a multi-claim order under Rule 74.01 (b), the order must first actually be a judgment in that it resolves an entire claim (as opposed to resolving only one of multiple types of relief sought under a claim). Second, the judgment on the claim must resolve a judicial unit, which only occurs when the claim the judgment resolves is truly distinct from those claims that remain pending. As to this question, factual overlap between the claims matters because claims that arise from the same factual occurrence and transaction are not distinct, even though they may have been pled separately. *Id.* at * 5.¹¹ Therefore, orders that resolve only one of several claims against a party, but which leave other claims arising out of the same transaction or occurrence to be determined between those parties, do not resolve a judicial unit, are not a final judgment. and cannot be certified for immediate appeal. *Id.*

Gibson v. Brewer, 952 S.W.2d 239 (Mo. banc 1997) explains how Rule 74.01 (b) operates in multi-claim and multi-party scenarios. Gibson sued two defendants-the

¹¹ Factual overlap does not prevent a Rule 74.01 (b) certification in the multi-party context because by dismissing one party from the lawsuit entirely, the judgment disposes of a judicial unit. *Dotson*, 235 S.W.2d at 738-39; *Spires*, 513 S.W.2d at 373-77; *Gibson*, 952 S.W.2d at 244-45.

Catholic Diocese of Kansas City-St. Joseph and Father Michael Brewer. *Id.* at 243. The petition pleaded sexual abuse by the priest and Diocese against the plaintiff, using that common factual predicate to assert 9 counts: battery, negligent hiring/ordination/retention, negligent failure to supervise, negligent infliction of emotional distress, intentional infliction of emotion distress, breach of fiduciary duty, conspiracy, agency liability, and independent negligence of the Diocese. *Id.* at 243-44. The trial court entered two judgments, one of which was a multi-claim judgment, and one of which was a multi-party judgment. The first judgment dismissed all counts against the Diocese leaving nothing else for the trial court to do as between Gibson and the Diocese. *Id.* at 244. The second judgment dismissed some, but not all, of the counts asserted against Brewer. *Id.* The trial court certified both judgments for immediate appeal under Rule 74.01 (b). *Id.* at 243.

The latter order as to Brewer was a multi-claim order. It completely disposed of some of the claims asserted against him, but left others pending. “A trial court may enter judgment on less than all claims and certify that there is no just reason for delay.” *Id.* However, because that judgment left causes of action pending against Brewer that arose from the same occurrence that gave rise to the dismissed claims, it was not eligible for certification under Rule 74.01 (b) because it did not resolve a complete judicial unit of claims. *Id.* at 274-75.

Part of the confusion that arose in this case lies in the meaning of the word “claim.” The word “claim” in the singular under Rule 74.01 (b) necessarily means all

causes of action arising from a common set of facts or occurrences.¹² The Court’s phrase “less than all claims” in *Gibson* necessarily defines the term “claims” to mean independent, separate causes of action that arise from a different set of facts or occurrences. Thus, an order that disposes of a claim, but leaves another claim or claims pending, is appealable only if the trial court’s order leaves pending causes of action that arise from facts different from those upon which the dismissal of a claim was based. If causes of action arising from these same facts remain, no judicial unit is resolved, no final judgment can be entered and Rule 74.01 (b) does not permit an appeal because § 512.020 (5) does not permit appeals except from final judgments. Accordingly, this Court dismissed the appeal as to the Brewer multi-claim order.

Conversely, the judgment entered in favor of the Diocese left open no remedies for Gibson, and left no causes of action pending, against that defendant. *Id.* at 245. It was, therefore, a multi-party order and a judgment in favor of the Diocese: “[a] circuit court may enter judgment as to fewer than all parties and certify that there is no just reason for delay.” *Id.* As to such judgments, this Court confirmed that “[w]hen one defendant, but not all defendants, is dismissed from a case, the trial court **may designate its judgment as final** ‘for purposes of appeal.’” *Id.* (emphasis added). This was so even where some

¹² “Claims” may be joined because they “assert a right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and...[a] question of law or fact common to all of them will arise in the action.” *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168, 184 (Mo. banc 2019) (Wilson, J. dissenting).

of the same claims remained pending against the other defendant (Brewer) who remained a party to the case because, by dismissing the Diocese completely from the case, the trial court adjudicated all of the rights and liabilities between the plaintiff and the Diocese in a manner that disposed of a complete judicial unit--the unit comprised of all of the plaintiff's claims against that dismissed party (the Diocese). *Id.*

Like the order dismissing all claims asserted against the Diocese in *Gibson*, the trial court's order here dismissing the University from this case was a multi-party order, not a multi-claim order. These plaintiffs sued three defendants, the University, James Stannard and James Cook. The trial court's dismissal eradicated all claims and causes of action the plaintiffs had against the University. It completely removed the University from the lawsuit. It left nothing for the trial court to do as between the plaintiffs and the University. It was, therefore, a judgment that disposed of judicial unit of claims (all of the plaintiff's claims against the University), which the trial court had discretion to designate as final for purposes of appeal. *Gibson*, 952 S.W.2d at 245; *Wilson*, at * 4.

The Court of Appeals, however, read *Wilson* to mean that trial courts may no longer permit an appellate determination of the propriety of a ruling completely dismissing a party from litigation under Rule 74.01 (b) if the plaintiff has also made the same claims against other defendants (who could have been sued in entirely separate lawsuits). In other words, the Court of Appeals read *Wilson* to say that so long as a common set of facts/occurrences exists, Rule 74.01 (b) does not permit an appeal even where one party is completely dismissed from a lawsuit.

Wilson did not so hold, and the Court of Appeal's opinion is a radical departure from this Court's previous interpretations of Rule 74.01 (b). This departure obliterates the time-tested distinction embedded in Rule 74.01 (b) between multi-party cases and multi-issue cases. Worse, the Court of Appeals opinion has essentially robbed the Rule of its fundamental purpose: to promote judicial economy, expedite final disposition of litigation and prevent inconsistent results due to multiple separate lawsuits." *State ex rel. Farmers Ins. Co., Inc. v. Murphy*, 518 S.W.2d 655, 662 (Mo. banc 1975); accord, *Buemi v. Kerckhoff*, 359 S.W.3d 16, 20 (Mo. banc 2011).

Wilson, however, did not overrule this Court's prior Rule 74.01 (b) precedent as to multi-party judgments or strike the multi-party/multi-claim distinction from the rule. In fact, *Wilson* did not even involve a multi-party order. Instead, it involved one order (the October 25 Declaratory Order on Count I) that was not a judgment in the first place because it did not even resolve an entire cause of action (the claim for injunctive relief under Count I remained pending even after this order was entered). *Wilson*, at * 6. As this order failed to resolve an entire claim, it could not be considered a judgment in the first instance and there was no appellate jurisdiction under § 512.020 R.S.Mo. *Id.*

The other orders from which the parties took appeals in *Wilson* resolved causes of action, but did not resolve all claims by or against at least one party. *Id.* at 7. Thus, they were not multi-party judgments. Rather, they were multi-claim judgments because they resolved only one of multiple claims. *Id.* However, because the dismissed causes of action arose out of the same underlying operative facts and legal theories as the claims

that remained pending after the judgments, those judgments did not dispose of a judicial unit eligible for certification under Rule 74.01 (b). *Id.*

Wilson, thus, neither involved a multi-party order nor changed the analysis that has governed Rule 74.01 (b) certification for multi-party orders. In fact, it reaffirmed that an order resolving all claims (all causes of action) by or against at least one party disposes of a judicial unit and therefore, is a judgment that may be certified under Rule 74.01 (b) at the trial court's discretion. *Id.* at * 4 (stating "the first alternative meaning of 'judicial unit' is a **judgment that disposes of all claims by or against one or more-but fewer than all-of the parties**") (citing *Gibson*, 952 S.W.2d at 245) (emphasis added). That is, *Wilson* confirmed this Court's prior precedent that "[w]hen one defendant, but not all defendants, is dismissed from a case, the trial court may designate its judgment as final for purposes of appeal." *Gibson*, 952 S.W.2d at 245.

The Court of Appeals reached the wrong result by mistakenly applying the analysis that applies to a multi-claim order to a multi-party judgment scenario. As a result, its opinion directly conflicts with *Gibson*, *Wilson* and 50 years of precedent holding that a trial court's complete dismissal of one of multiple defendants against whom the plaintiff has made a claim is a judgment a trial court may certify for immediate appeal. *Id.*; see also *Dotson*, 235 S.W.2d 738-39; *Spires*, 513 S.W.2d at 373-77. An order that resolves only one prayer for relief sought under a single claim, like the Declaratory Order on Count I in *Wilson*, does not even resolve an entire claim and is, therefore, not a judgment. Likewise, the existence of remaining claims arising from the same set of facts as the dismissed claim is critical to analyzing the appealability of a

multi-claim judgment. But, a multi-party order, like the one at issue in this case, is a judgment because it resolves an entire claim as to one or more, but fewer than all, parties to the lawsuit. *Gibson*, 952 S.W.2d at 245; *Wilson* at * 4. In other words, a multi-party order completely adjudicates the rights and liabilities between the plaintiff and the dismissed defendant and, therefore, completely resolves that claim such that it constitutes a judgment that disposes of a distinct judicial unit. *Id.*

Where a trial court's complete dismissal of a party is erroneous, the rule guards against the resulting prejudice to the plaintiff and the trial court of having to try the same case twice. *See Spires*, 513 S.W.2d at 374 (stating "[i]n the instant case it seems obvious that if the order dismissing defendant Edgar is erroneous a trial of plaintiff's claim without the presence of Edgar might well prejudice a determination of the issue of the alleged wrongful foreclosure. Furthermore, plaintiffs will never be afforded the right to try their case against all defendants against whom they have a right to proceed under the law in one trial"); *see also Dotson*, 325 S.W.2d at 739 (stating "[o]n the record here it would seem appropriate to determine the propriety of Starr's counterclaim against plaintiff before proceeding to trial on the other issues. If its dismissal be error, that error might well prejudice, or foreclose, a determination of the other issues"). It likewise protects the dismissed defendant from being relieved of the duty to defend only to later learn that it faces liability because it should have been in the litigation all along. On prior occasions, this Court has gone so far as to invite trial courts to make the certification to avoid these types of snares. *Id.* But rather than avoiding these conundrums as the Rule was designed to do, the Court of Appeals opinion in this case sets these traps. Moreover,

if that rationale stands, it will effectively eliminate the multi-party portion of Rule 74.01 (b) as there are seldom multi-party cases in which the facts giving rise to the claim against one defendant are wholly unrelated to the facts giving rise to claims made against other defendants.

Wilson correctly recognized the overriding control of § 512.020, R.S.Mo. on appeals and carefully delineated the requirements for Rule 74.01 (b) certification for both multi-claim and multi-party judgments. The Court should hold that the trial court's order disposing of all claims brought against the University was a judgment eligible for certification under Rule 74. 01 (b).

C. The Trial Court Properly Exercised Its Discretion to Certify These Dismissal Judgments for Immediate Appeal.

The trial court's certification of these judgments for immediate appeal hewed carefully to the fundamental purpose of Rule 74.01 (b); it was, therefore, an appropriate exercise of discretion. The trial court rightly recognized that the interests of judicial economy would be most served through early appellate resolution of the sovereign immunity question. Resolution of that legal question prior to when the case against the remaining defendants is tried would conserve judicial and party resources by eliminating the risk of having to try the exact same case twice with largely the same evidence. It would further guard against prejudice that might otherwise befall both plaintiffs and the University. It ensures that the plaintiffs are afforded their right to try their case against all defendants against whom they have a right to proceed under the law in one trial. *See Spires*, 513 S.W.2d at 374; *Dotson*, 325 S.W.2d at 739. It likewise protects the

University from being relieved of the duty to defend only to later learn that it faces liability after many of the facts have been established in its absence. These considerations show that the trial court carefully exercised the discretion Rule 74.01 (b) afforded to it. This exercise of discretion should not be disturbed.

D. The Court Should Hold that the Trial Court's Rule 74.01 (b) Certification Was Proper.

The trial court's order completely dismissing the University from the case was a multi-party judgment that disposed of a distinct judicial unit because it resolved all of the plaintiffs' claims against a single party. As a certifiable judgment, Rule 74.01 (b) vested the trial court with discretion to certify the judgment for immediate appeal, and the court reasonably exercised its discretion to do so here. Accordingly, the Court should hold that that the trial court entered a judgment in favor of the University and that the trial court's act of certifying that judgment as final for purposes of appeal was consistent with the purposes underlying Rule 74.01 (b) and a proper exercise of judicial discretion.

II.

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS’ CAUSES OF ACTION AGAINST THE UNIVERSITY ON THE BASIS OF § 537.600 BECAUSE ART. I, § 14 OF THE MISSOURI CONSTITUTION GUARANTEES THAT THE COURTS WILL BE OPEN, AND A CERTAIN REMEDY SHALL BE AFFORDED FOR EVERY INJURY TO A PERSON IN THAT § 537.600 DENIES EVERY PERSON INJURED BY THE UNIVERSITY’S ACTS THAT DO NOT FALL WITHIN THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY ANY REMEDY FOR THE INJURY.

A. Standard of Review.

The Court reviews Constitutional challenges to a statute *de novo*. *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011).

B. Plaintiffs Preserved this Constitutional Challenge for Review.

Generally speaking, “[t]o properly raise a constitutional question, one must: (1) raise the constitutional questions at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. *Id.* But, “there can be no fixed rule as to when or how or at what stage of the proceedings the [constitutional] question should be raised in each case.” *Dieser v. St. Anthony’s Medical Center*, 498 S.W.2d 419, 428 (Mo. banc 2016) (citation omitted).

The purpose of requiring a constitutional question to be raised at the earliest opportunity is “to prevent surprise to the opposing party and afford the trial court an opportunity to fairly identify and rule on the issue.” *Id.* at 429 (citation omitted). Where that purpose is served, the issue is preserved. *Id.*

The University first raised sovereign immunity through a motion to dismiss the original petition. Each plaintiff thereafter amended his or her Petition to assert constitutional challenges to the sovereign immunity statutes. D52 (*Draper*); D18 (*Butterfield*); D2 (*Reinsch*); D20 (*Browne*); D2 (*Jaggie*); D2, (*Higginbotham*); D2 (*Cummings*). The amended pleadings explicitly referenced the Constitutional provisions at issue and described the ultimate facts—prohibiting otherwise recognized causes of action against the University—that violate the Open Courts provision. D52, p. 37 (*Draper*); D18, p. 29-30 (*Butterfield*); D2, p. 36 (*Reinsch*); D20, p. 35 (*Browne*); D2, p. 32 (*Jaggie*); D2, p. 30 (*Higginbotham*); D2, p. 33 (*Cummings*).

In response to the amended petitions, the University again moved to dismiss on the basis of sovereign immunity, and it further sought to have the Court overrule the constitutional challenges. D58 (*Draper*); D23 (*Butterfield*); D7 (*Reinsch*); D25 (*Browne*); D7 (*Jaggie*); D7 (*Higginbotham*); D7 (*Cummings*). The plaintiffs’ responses addressed the University’s constitutional arguments. D62, p. 32-35 (*Draper*); D25, p. 32-35 (*Butterfield*); D9, p. 32-35 (*Reinsch*); D27, p. 32-35 (*Browne*); D9, p. 32-35 (*Jaggie*); D9, p. 32-35 (*Higginbotham*); D9, p. 32-35 (*Cummings*).

In *Butala*, the plaintiffs knew the University would raise sovereign immunity. Therefore, they included constitutional challenges to the sovereign immunity statutes in

their original Petition. D2, p. 43-44 (*Butala*). The University again moved to dismiss on the basis of sovereign immunity in *Butala* and asked the court to overrule the constitutional challenges. D7 (*Butala*). Plaintiff's again responded to these arguments in their response. D9, p. 32-35 (*Butala*).

After the trial court entered judgment dismissing the University from the case and certified its judgments as final under Rule 74.01 (b), Plaintiffs raised the issue as a point of error before the Court of Appeals. The defendants cannot legitimately claim to have been unfairly surprised, and both the trial court and court of appeals had the opportunity to address the merits of the challenge. Accordingly, the constitutional challenge was timely asserted and preserved at each step.

C. By Denying the Possibility of Any Judicial Remedy to Persons Injured by the Non-Waived Torts of Public Entities such as the University, § 537.600 Violates ART. I, § 14 of the Missouri Constitution.

1. With Two Exceptions, § 537.600 Immunizes Public Entities from Tort Liability for Injuries They Cause.

Section 537.600 is a statutory adoption of common law sovereign immunity that serves to insulate public entities from liability when their tortious conduct results in injury. Section 537.600 waives sovereign immunity for torts in two scenarios (1) where the injury results from the public entity's negligent operation of an automobile and (2) where the injury results from a dangerous condition of public property. The statute, thus,

leaves persons injured by the torts of public entities outside of the automobile or dangerous property contexts without any remedy for their injury.

2. One of the Judicial Branch's Essential Functions is to Scrutinize the Constitutionality of Legislative Enactments.

It is fundamental that statutes, which are enacted by a particular group of legislators elected to serve during any given legislative session, and which are sometimes later modified or extinguished by a subsequent group of different legislators, may not limit constitutional rights. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 642 (Mo. banc 2012). Such rights, being fundamental, “are beyond the reach of hostile legislation.” *Id.* Naturally, this foundational premise also applies (and must apply especially) to legislation that is designed chiefly to benefit the state at the expense of its citizens.¹³ Any statutory attempt to place limits on constitutionally guaranteed rights amounts to an impermissible legislative alteration of the constitution. *Watts*, 376 S.W.3d at 642. While a statute should not be declared unconstitutional unless it clearly contravenes a constitutional provision, “[i]f a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991).

¹³ This is exactly, what the maxim “the king can do no wrong” accomplishes; it provides a benefit to the sovereign (freedom from liability and the ability to dodge financial responsibility) at the expense of the citizens the sovereign has accidentally, or perhaps even intentionally, injured.

These principles are so essential to the role of the judicial branch that that this Court has, on occasion, reversed its own prior holdings on constitutional issues. *Watts*, 376 S.W.3d at 644 (overruling *Adams by and through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc. 1992)). “[T]he adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.” *Id.* Overturning erroneous precedent is particularly important where the precedent violates a constitutional right because:

[i]f the people are dissatisfied with the construction of a statute, the frequently recurring sessions of the legislature afford easy opportunity to repeal, alter, or modify the statute, while the constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations, and, if a decision construes the constitution in a manner not acceptable to the people, the opportunity of changing the organic law is remote. Moreover, no set of judges ought to have the right to tie the hands of their successors on constitutional questions, any more than one general assembly should those of its successors on legislative matters.”

Id. (citing *Mountain Grove Bank v. Douglas County*, 47 S.W. 944, 947 (Mo. 1898).

Thus, while this Court should always consider the question of whether to overturn precedent carefully, “it nonetheless has followed its obligation to do so where necessary to protect constitutional rights of Missouri’s citizens.” *Watts*, 376 S.W.3d at 644 (citing as examples *Independence-Nat. Educ. Ass’n v. Independent School Dist.*, 223 S.W.3d 131 (Mo. banc 2007); *State v. Baker*, 524 S.W.2d 122 (Mo. banc 1975), *Barker v. St. Louis*

County, 104 S.W.2d 371 (Mo. 1937). The question this appeal now asks the Court to consider is whether § 537.600 can continue to coexist alongside MO. CONST. ART. I, § 14 of Missouri’s constitution, or whether it amounts to an impermissible legislative limitation on the fundamental right of certain remedy for every injury set forth in Missouri’s Bill of Rights.

2. Sovereign Immunity and this Court’s Prior Constitutional Considerations of It.

The concept of sovereign immunity finds its footing in centuries-old English common law, forged in a feudal age when a person’s birthright determined his capacity to rule without any check on his authority. It has a tortured and questionable history in this state, and rightfully so.

Whether the doctrine of governmental tort immunity is part of the common law of Missouri is debatable. The origins of the doctrine are shrouded in the mists of time. Missouri adopted the English common law as it existed in the year 1607. § 1.010, R.S.Mo. The first reported case in which the doctrine of sovereign immunity was applied was *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng.Rep. 359 (1788). That case purports to rely on “Brooke’s Abridgements,” apparently published in 1573. The accuracy for the authority of the doctrine is suspect.

Richardson v. State Highway & Transp. Com’n, 863 S.W.2d 876, 884 (Mo. banc 1993) (Holstein, J. concurring in result).

In *Jones v. Missouri State Highway Com’n*, 557 S.W.2d 225 (Mo. banc 1977) this Court concluded that it was “the proper function of the court in applying the principles of a limited constitutional government” to reject the common law rule of sovereign tort

immunity and declare the governmental liable for its torts, “consistent with the proposition that the government is not, the American system, all powerful.” *Id.* at 227-28. The legislature’s response was to pass § 537.600 *et seq* the following session. With § 537.600, the 1978 General Assembly doubled-down on the very notion this Court rejected the prior year--that the government is all powerful.

Four years after its passage, this Court upheld § 537.600 against an equal protection attack in *Winston v. Reorganized School District R-2 Lawrence County, Miller*, 636 S.W.2d 324 (Mo. banc 1982). Applying a rational basis test, the Court concluded that the sovereign immunity statutes did offend the notion of equal protection under the law. *Id.* at 328. The “open courts” provision was not at issue.

In 1993 and 1997, respectively, this Court decided two cases involving constitutional challenges to a different statute, § 537.610. *Richardson*, 863 S.W.2d at 876; *Fisher v. State Highway Com’n of Missouri*, 948 S.W.2d 607, 609 (Mo. banc 1997). Both *Richardson* and *Fisher* involved allegations of a dangerous highway condition, a circumstance in which § 537.600 waives sovereign immunity. Thus, neither case asked threshold question-whether the legislative reinstatement of sovereign immunity set forth in § 537.600 was constitutional. Instead, the focus was on § 537.610, the provision which caps the recovery a plaintiff may have against the state when sovereign immunity is waived.

The plaintiffs in *Richardson* challenged § 537.610 on the basis of the equal protection, due process and right to trial by jury provisions. *Richardson*, 863 S.W.2d at 879. Again, the open courts provision was not at issue. *Id.* The Court upheld § 537.610

in the face of these challenges; however, one member of the Court, Judge Holstein, disputed the constitutional analysis and concurred only in the result because the constitutional questions were not adequately raised. *Id.* at 882-885.

Fisher, decided four years later, did involve an open courts challenge to § 537.610. With very limited analysis, the Court upheld § 537.610. *Fisher*, 948 S.W.2d at 611. Because the case involved a dangerous condition of public property--a scenario where sovereign immunity was already waived--and because 537.610 simply capped damages on what could be recovered but did not foreclose access to the courts, there was no Art. I, § 14 violation. Moreover, the majority's open courts analysis cited principally to *Adams*, which this Court has since criticized fiercely for overlooking the more fundamental premise that a statute cannot limit constitutional rights. *Watts*, 376 S.W.3d at 643. Once again, Judge Holstein, in an opinion concurring in part dissenting in part in which Judge Price joined, disputed the majority's constitutional analysis. *Fisher*, 948 S.W.2d at 613.

It does not appear that this Court has addressed a direct challenge to § 537.600 on the basis of the open courts provision, although the Court has discussed this issue in other cases involving challenges to other statutes. See *Findley v. City of Kansas City*, 782 S.W.2d 393, 395-96 (Mo. banc 1990) (addressing a challenge to § 82.210 R.S.Mo. which required persons injured by the city to provide written notice of a claim within 90 days as a prerequisite to commencing a lawsuit). In the context of notice of claim statutes, the Court stated that it did not view Art. I, § 14 as conferring any substantive rights. *Id.* at 396. It further stated that the legislature may constitutionally impose sovereign immunity

by statute, but it cited only to *Winston* for this proposition, which again addressed only an equal protection challenge. *Id.* The notion that the open courts provision does not confer any substantive rights has since been called into question. *Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations*, 277 S.W.3d 670 (Mo. banc 2009) (Teitelman, J. dissenting).

Respectfully, it is time for the court to re-examine the full breadth of the rights conferred in the open courts provision and address whether the statutory imposition of sovereign immunity found in § 537.600 can continue to survive in light of those constitutional guarantees. This inquiry should be accompanied by a recognition that as the march of the law has proceeded from status to contract, Henry Sumner Maine, *ANCIENT LAW*, John Murray, Albermarle Street (1861), that march has also recognized a shift from immunity based on status to liability based on responsibility. To continue to hold that government can do no wrong is a denial of the reality that government's reach has so metastasized that it is woven into nearly everything we do. It competes directly with (and often overwhelms economically) private entities, and no longer can be said to occupy only the palace of indirect influence and to issue edicts based on good will. Like the people it governs, and from whom it takes its authority to act, government can be greedy, rapacious and untruthful as it steps into the economic world – and it does so precisely because the economic incentives erected in the law to defeat fraud in the private sector do not apply to a governmental entity that markets knowing untruths.

3. Article I, § 14: the “Open Courts” Provision Confers both Substantive and Procedural Rights, Not Simply a Procedural Guarantee.

Article I, § 14 guarantees:

“[t]hat the courts of justice shall be open to every person, and **certain remedy afforded for every injury to person**, property or character, and **that right and justice shall be administered without** sale, **denial** or delay.

MO. CONST. Art. I, § 14 (A30) (emphasis added). This is the Missouri constitution’s “open courts” provision. It unambiguously declares that “a certain remedy afforded for every injury to person” is a fundamental “right” under the Missouri Constitution that “shall be administered without...denial....” A30. It makes no exception for injuries to persons caused by public entities, or for any other class of tortfeasor for that matter. To the contrary, the word “every” means: “being each individual or part of a class or group whether definite or indefinite in number **without exception**.” WEBSTERS’ THIRD NEW INTERNATIONAL DICTIONARY, 788 (1971) (emphasis added).

On prior occasions, this Court has described the open courts provision as a “procedural safeguard that ensures a person has access to the courts when that person has a legitimate claim recognized by law” as opposed to a substantive right. *Missouri Alliance for Retired Americans*, 277 S.W.3d at 675 (Mo. banc 2009). However, this Court has also described the “open courts” provision as a “second due process clause to the state constitution.” *Id.* Due process has both procedural **and substantive** components. *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006). The Court’s prior jurisprudence on the “open courts” provision has focused almost exclusively on the procedural aspect but, respectfully, it has neglected the substantive component.

“In addition to the plain language of the open courts provision, the very nature of article I, section 14 provides strong evidence of a substantive component.” *Missouri Alliance for Retired Americans*, 277 S.W.3d at 682 (Teitelman, J. dissenting).

“Substantive due process rights are created only by the constitution.” *Phillips*, 194 S.W.3d at 842. Art. I, § 14 creates such a right. “Under a due process analysis, no one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.” *Id.* at 682-83 (citing *Poindexter v. Greenhow*, 114 U.S. 270 (1885)). “If the state cannot deny redress for injuries to property, then surely it cannot deny redress for personal injuries without violating the specific due process guarantee of a ‘certain remedy’ for ‘every injury to person.’” *Id.* at 683. The promise of a remedy for every injury is a substantive one.

Case law from the 39 other states that have constitutional provisions similar to Missouri’s open courts provision confirms the existence of a substantive component. *Id.* Almost all of these states recognize the doctrine of a substitute remedy, or *quid pro quo*, to justify legislative change. *Id.* “The requirement of an adequate substitute remedy recognizes that a meaningful state constitutional guarantee of a remedy for personal injury must include a substantive guarantee of an adequate legal remedy for personal injury.” *Id.*

Therefore, by its plain terms, the open courts provision does more than simply confer a procedural “right to pursue in the courts the causes of action the substantive law recognizes.” *Fisher v. State Highway Com’n of Missouri*, 948 S.W.2d 607, 611 (Mo.

banc 1997). Indeed, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

Marbury v. Madison, 5 U.S. 137, 163 (1803). “One of the first duties of government is to afford that protection.” *Id.* Through § 537.600, the legislature has taken that away from persons injured by the conduct of public entities. The Court should, therefore, hold that Art. I, § 14 creates a substantive guarantee of a certain remedy for every injury to person in addition to the procedural promise that persons may pursue in the courts the causes of action the substantive law recognizes. The Court should further hold that the legislature may not strip a person of the substantive right to a certain remedy for every injury through a statute which, in addition to eliminating the remedy entirely, provides for no adequate substitute.

4. Section 537.600 Violates Both the Substantive and Procedural Components of the Open Courts Provision.

Section 537.600 deprives persons injured by a public entity of the substantive constitutional guarantee of a certain remedy for every injury. Except for cases involving car accidents and dangerous conditions of public property, the statute takes away the possibility of any judicial remedy at all, effectively slamming the courthouse door in the face of such persons. It denies, in wholesale fashion, any legal remedy whatsoever to a person who has the misfortune of suffering injury at the hands of a public entity, such as the University. It declares to such injured person: “you have no legal remedy against the tortfeasor that caused your injury; the courts are not open to you.” Nor does it provide for any substitute remedy to accommodate for this deprivation. The remedy is simply

denied. *Findley*, 782 S.W.2d at 395 (confirming “the existence of sovereign immunity is a denial of a remedy to a person injured by the state”). This prohibition stands in stark contrast to the contravening promise etched into Article I, sec. 14 of Missouri’s Bill of Rights.

The deprivation of the right to certain remedy is particularly perverse in this case when considering the private, proprietary nature of the University’s activities that were the root cause of these plaintiffs’ injuries. Here, the University is not claiming immunity for injuries caused through the performance of its governmental functions. Rather, it is claiming immunity for injuries caused in the midst of a detour into the private sector, activities which are also performed by private persons or companies who are liable for their torts. Yet, the University is saying that even though a remedy would exist in the event one of those private entities caused injury, there is no remedy here for the same conduct--simply because it is the University. It is not hard to imagine the perverse incentives such a rule would create for public corporations that choose to wade off into the private sphere. Indeed, this is exactly how the University got to the place where it’s conduct gave rise to this series of growing cases. Thus, at a minimum, the Court should hold that 537.600 violates the open courts provision as applied in this case, which involves proprietary, not governmental activity.

The open courts provision guarantees the right to certain remedy for personal injury. And, while the legislature has the authority to eliminate a cause of action, “[t]he authority to abolish a common law cause of action, however, does not necessarily entail the unfettered authority also to abolish all remedies for personal injury.” *Missouri*

Alliance for Retired Americans, 277 S.W.3d at 682 (Teitelman, J. dissenting). Section 537.600 takes that guarantee of a certain remedy away from persons unfortunate enough to have been injured at the hands of public officials. “If the legislature is free to abolish all remedies for personal injuries, then the right to a ‘certain remedy’ for personal injury is not a right at all but, instead, is relegated to the status of a privilege that exists only by virtue of legislative whim.” *Id.*

Even if the open courts provision did not create a substantive right, § 537.600 also violates the procedural aspect of the open courts provision. Procedural speaking, the open courts provision invalidates laws that arbitrarily inhibit a plaintiff’s ability to pursue in the courts causes of action the substantive law recognizes. *Fisher*, 948 S.W.2d at 611. In applying the procedural test “[t]his Court has distinguished between statutes that impose procedural bars to access, and statutes that change the common law by the elimination (or limitation of) a cause of action.” *Id.* (citing *Adams*, 832 S.W.2d at 905). “The former are not permitted; the latter are a valid exercise of legislative prerogative.” *Id.* In other words, the legislature may eliminate a common law or statutory cause of action entirely, but it may not take constitutional protections away from a plaintiff seeking relief under existing causes of action. *Watts*, 376 S.W.3d at 643 (stating “[n]othing in it suggested a legislature can take constitutional protections from a plaintiff seeking relief under existing causes of action”). “If that could be done, it would make the constitutional protections of only theoretical value—they would exist only unless and until limited by the legislature.” *Id.*

Section 537.600 is not a statute that abolishes any recognized cause of action. Instead, it tells a person that would otherwise have a remedy through a recognized cause of action that they may not pursue it before the courts. Thus, the statute establishes a procedural bar for plaintiffs that could otherwise seek remedies against public entities under existing causes of action but for the statute. *See Wilkes v. Missouri Highway and Transp. Com'n*, 762 S.W.2d 27, 28 (Mo. banc 1988) (describing § 537.600 as “procedural or remedial”). In this case, the plaintiffs have asserted MMPA claims against the University, which is a statutory cause of action recognized in Missouri. The General Assembly could eliminate the MMPA, but it cannot, at least within constitutional limits, create that cause of action and then erect a procedural barrier that prohibits a certain class of plaintiffs from pursuing that remedy before the Courts (at least without ensuring that some alternative or substitute remedy is available). The open courts provision, with its promise of open courts and a certain remedy may for every injury, simply does not permit such a procedural bar to access.

D. Conclusion

A plaintiff’s right to pursue a remedy for a wrong perpetrated by another, including a public entity, is a substantive fundamental right found in the Missouri Constitution. The Court should hold that § 537.600, as currently enacted, deprives plaintiffs of the substantive guarantee of a certain remedy for every injury to person promised in the open courts provision. It should further hold that § 537.600, as currently enacted, erects an impermissible procedural barrier to court access for plaintiffs seeking remedies under existing, recognized causes of action. Finally, the Court should at a

minimum hold that the statute is unconstitutional as applied to this case in that it denies a remedy for conduct that is private and proprietary in nature.

III.

THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS BECAUSE § 537.610 R.S.MO. PROVIDES THAT A PUBLIC ENTITY MAY WAIVE SOVEREIGN IMMUNITY THROUGH THE PURCHASE OF LIABILITY INSURANCE IN THAT THE UNIVERSITY PURCHASED A POLICY THAT COVERS CLAIMS FOR DECEPTIVE ADVERTISING AND EXPRESSLY WAIVES SOVEREIGN IMMUNITY FOR THE DAMAGES PLAINTIFFS SEEK.

A. Standard of Review.

“Appellate review of a trial court’s grant of a motion to dismiss is *de novo*.”

Wyman v. Missouri Dept. of Mental Health, 375 S.W.3d 16, 18 (Mo. App. W.D. 2012).

“The court treats the plaintiff’s averments as true and liberally grants the plaintiff all reasonable inferences.” *Id.* “In addition, the existence of sovereign immunity, and questions of statutory interpretation, are issues of law which [the Court] review[s] *de novo*.” *Id.* Finally, “[t]he interpretation of the meaning of an insurance policy is a question of law.” *Langley v. Curators of University of Missouri*, 73 S.W.3d 808, 812 (Mo.App. 2002).

B. Sovereign Immunity in Missouri and the Circumstances in which Public Entities Waive It.

Historically, sovereign immunity existed in Missouri as an antiquated remnant of the English common law. *Jones*, at 227. In *Jones*, the Missouri Supreme Court prospectively abrogated sovereign immunity for tort claims. *Id.* at 230. The following legislative term, the General Assembly enacted § 537.600 R.S.Mo, which reinstated sovereign immunity for tort claims as follows:

Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect.

§ 537.600.1.

The 1978 codification of sovereign immunity was not absolute. In addition to the two waivers found in § 537.600, § 537.610 created another waiver. (A23). It provides that a political subdivision “may purchase liability insurance for tort claims and, in doing so, waive its sovereign immunity for claims covered by the insurance policy.” *Newsome v. Kansas City, Missouri School District*, 520 S.W.3d 769, 776 (Mo. banc 2017). “When a public entity purchases liability insurance, § 537.610 provides that immunity is waived as to torts other than those set out in § 537.600 to the extent of and for the specific purposes covered by the insurance purchased.” *Brennan By and Through Brennan v. Curators of the University of Missouri*, 942 S.W.2d 432, 434 (Mo. App. W.D. 1997).

Section 537.610.1 acknowledges circumstances in which it is desirable for a public entity to waive sovereign immunity in cases involving activities other than the negligent operation of a motor vehicle or a dangerous condition on public property. *See*

Id. This waiver occurs through the entity's deliberate choice to purchase liability insurance. § 537.610.1. When this occurs, the entity elects to protect those it might injure through conduct other than an automobile accident or a dangerous condition of public property. The waiver is limited to the maximum amount of the public entity's liability coverage, subject to a statutory maximum limit. § 537.610.1-2. A case in which a public entity controlled by its own governing body (such as the Curators) chooses to protect itself, and those it injures, from the false or misleading advertising of goods and services is a paradigmatic example of why § 537.610.1 exists. This is particularly so when the goods and services are aimed at the creation of products that may result in a patent that will provide a financial boon to the University. Such financial incentives fall outside the usual purpose of public education. The purchase of insurance, thus, protects the University while it is acting outside its typical governmental purpose and when it has entered a world usually reserved for the private sector. Said differently, what the University is doing here is not educational; it is seeking economic value and better-than-market returns by the deployment of its own venture capital. It has purchased insurance to protect it during this venture.

C. Plaintiffs Pled an Exception to Sovereign Immunity Pursuant to § 537.610.1.

A plaintiff asserting a claim against the University must plead facts establishing a waiver of sovereign immunity. *Newsome*, 520 S.W.3d at 775-76. Plaintiffs met their burden by pleading the existence of insurance coverage for the University that, pursuant

to § 537.610.1, waives sovereign immunity for advertising-based misrepresentations. D2, p. 4-5; D3, pp. 1-60; D5, pp. 1-16; D6, pp. 1-18.

1. Plaintiffs Pled the Existence of Insurance Coverage and Facts Triggering Coverage.

Beginning in 2015, the Curators launched a multi-million dollar, multi-media marketing campaign, the primary purpose of which was to advance its proprietary human tissue preservation system through surgeries performed at the Mizzou BioJoint Center. The University advertised this procedure, which no other facility in the country was offering, in an effort to bring its proprietary, experimental preservation system and surgery to market. D2, p. 9, 31-38. The advertisements, however, were deceptive and misleading. They misrepresented the nature of the surgery, the success rate of the surgery, the risks of the surgery and the fact that the surgery was experimental. D2, p. 33-34.

Because it was operating in the private sphere, the University purchased three liability insurance policies to cover claims arising out of its non-governmental, advertising activities. D2, pp. 4-5; D3, pp. 1-60; D5, pp. 1-16; D6, pp. 1-18.¹⁴ The base

¹⁴ Because the University initially produced its policies under a protective order, plaintiffs identified the policies in their First Amended Petitions and filed them separately as sealed exhibits. The University later agreed to remove the confidential designation.

layer policy is a “Data Protection Liability Insurance Policy.”¹⁵ D3, p. 1. It describes the coverage as “Comprehensive Data Security, Liability and Business Resilience Insurance.” D3, p. 9. The policy contains Coverage F, which applies to “Multimedia Liability.” D3, pp. 9, 14.

Coverage F states:

The Underwriters shall pay on behalf of the **Assured**¹⁶ those amounts, in excess of the applicable retention and up to the applicable Sublimit or Liability, that:

1. the **Assured** is legally obligated to pay as **Damages or Claims Expenses**; and that
2. arise from a **Claim** first made against any **Assured** during the **Policy Period or Extended Reporting Period**; and that
3. arise out of an actual or alleged **Multimedia Wrongful Act** by the **Assured** or parties for whom the **Assured** is **Vicariously Liable**; and
4. provided such **Multimedia Wrongful Act** takes place on or after the **Retroactive Date** set forth in Item 6 of the Declarations.

¹⁵ This Court has examined the University’s insurance coverage in the medical negligence context. *Langley*, 73 S.W.3d at 811-13; *Hendricks*, 308 S.W.3d at 743-47. It does not appear any court has evaluated the endorsement in the Data Protection Policy, which contains materially different language. *See, infra*.

¹⁶ “Assured” includes the Curators as well as its employees. D3, p. 17.

D3, p. 14. (emphasis denotes a defined term).

The policy defines **Multimedia Wrongful Act** to include:

any act, error, omission, misstatement or misleading statement in connection with the gathering, collection, broadcasting, creation, distribution, exhibition, performance, printing, publication, release, display, research, or serialization of **Material** that results in:

...

3. false advertising...;

...

7. negligence regarding the content of any **Material**;

...

10. unfair competition or trade practices, including but not limited to dilution, confusion, deceptive trade practices or unfair trade practices, civil actions for consumer fraud, false, disruptive or misleading advertising or misrepresentation in advertising, but only if alleged in conjunction with any of the acts listed in paragraphs 1 through 9 above.

D3, pp. 27-28 (underlined emphasis added, other emphasis in original). “**Material**”

means: “media content in any form, including without limitation, advertising and

written, printed, video, electronic, digital or digitized content.” D3, p. 27 (emphasis

added).

These contract terms confirm the very purpose of this insurance is to cover misrepresentations made while advertising--precisely what plaintiffs allege the University did here. D2, pp. 31-38.

2. The Policy's "Missouri Sovereign Immunity Endorsement" Disclaims Sovereign Immunity for the Damages Plaintiffs Seek.

A political subdivision may purchase liability insurance and at the same time preserve sovereign immunity. *Newsome*, 520 S.W.3d at 776; *Langley*, 73 S.W.3d at 811. To do so, the political subdivision must purchase "an insurance policy that disclaim[s] coverage for any actions that would be prohibited by sovereign immunity." *Newsome*, 520 S.W.3d at 776. To determine the extent to which the policy disclaims (or retains) coverage for actions that sovereign immunity would otherwise prohibit, the Court must interpret what the policy actually says. *Langley*, 73 S.W.3d at 812; *see also Hendricks v. Curators University of Missouri*, 308 S.W.3d 740, 745 (Mo.App.W.D. 2010). "The interpretation of an insurance policy is a question of law," and the Court "applies the rules applicable to contract construction." *Langley*, 73 S.W.3d at 812.

Although not referenced on the Data Protection policy's declaration pages (D3, pp. 9-11), attached to the policy produced to plaintiffs was a contract endorsement styled "Missouri Sovereign Immunity." D3, p. 59. The endorsement retains sovereign immunity for certain types of damages but, **critically, disclaims it for others, including those plaintiffs seek in this case.** The full text of the endorsement states:

I. It is hereby understood and agreed that:

1) Certain Assureds are granted sovereign, governmental tort, official and/or governmental function immunity under the law of the State of Missouri and

that such Assureds may be protected from certain Claims by virtue of such immunity.

2) The procurement of coverage afforded under this policy is not intended, nor shall it be construed, to waive any rights of sovereign, governmental tort, official, governmental function or other immunity granted to any Assured under the laws of the State of Missouri.

3) Accordingly, it is agreed that, **except for Damages or Claims Expenses** subject to all other terms and conditions of the policy, the Underwriters shall not pay Ultimate Net Loss for Claims for which the Assured is granted immunity under the laws of the State of Missouri.

II. Section VI, Definitions, is amended as follows:

YYY. Ultimate Net Loss means the difference between the actual loss and the amount with which sovereign immunity provides.

All other terms of the policy remain unchanged.

D3, p. 59) (emphasis added).

The endorsement, thus, provides that sovereign immunity is retained except for “Damages” and “Claims Expenses,” which are defined terms. Said differently, the endorsement **disclaims** sovereign immunity for what the policy defines as “Damages” and “Claims Expenses.”

The policy’s definition of “Damages” distinguishes between various types of relief. Specifically, it excludes from the definition of “Damages” “future profits,

restitution, or disgorgement of profits...the cost to comply with orders granting injunction or non-monetary relief, the return or offset of fees, charges, royalties, or commissions for goods or services already provided...liquidated damages...fines, penalties, sanctions, taxes, or loss of tax benefits.” D3, p. 24. Because these types of relief are neither “Damages” nor “Claims Expenses”¹⁷ as the policy defines those terms, the endorsement retains the University’s sovereign immunity for actions seeking such relief. *Newsome*, 520 S.W.3d at 776.

“Damages” does, however, include

“the following amounts, whether incurred by the Assured on its own behalf or incurred by parties for whom it is Vicariously Liable:

1. a **monetary judgment, award or settlement**;
2. **prejudgment interest**;
3. **post-judgment interest** that accrues after the entry of judgment and before the Underwriters have paid, offered to pay or deposited in court that part of the judgment within the applicable limit of liability;

¹⁷ “Claims Expenses” include: attorney fees, legal costs and expenses resulting from the investigation, adjustment, defense and appeal of claims and appeal bonds. D3, pp. 21-22.

4. subject to this policy's terms, conditions, and exclusions, **punitive, exemplary and multiple damages** where such damages are legally insurable....

D3, p. 24) (emphasis added). Thus, when read in its entirety, the endorsement clearly says that the University disclaims sovereign immunity for any multi-media related claim that seeks a monetary judgment award or settlement not exempted from the policy's definition of "Damages." D3, pp 24, 59. In other words, the **endorsement disclaims sovereign immunity for the very damages plaintiffs seek in this case**, which are monies lost as a result of the University's deceptive, corporate advertising.

The significance of this language becomes even clearer when comparing it to the different sovereign immunity endorsement contained in the University's medical negligence policies. For liability arising out of health care related incidents, the University has purchased a Health Care Umbrella Liability Policy. D2, p. 5; D4 pp. 1-2. That policy also contains a "Missouri Sovereign Immunity" endorsement. D4, p. 2. It, however, states:

It is understood and agreed that:

- 1) Certain insureds are granted sovereign, governmental tort, official and/or governmental function immunity under the laws of the State of Missouri and that such insureds may be protected from certain claims by virtue of such immunity.
- 2) The procurement of coverage afforded under this policy is not intended, nor shall it be construed, to waive any rights of sovereign,

governmental tort, official, governmental function or other immunity granted to any insureds under the laws of the State of Missouri.

3) Accordingly, it is agreed that, **except for defense costs and expenses**, subject to all other terms and conditions of the policy, the company shall not pay ultimate net loss for claims for which the insured is granted immunity under the laws of the State of Missouri.

All other terms and conditions of the policy remain unchanged.

D4, p. 2 (emphasis added).

Rather than disclaim sovereign immunity for certain “Damages,” the Health Care Umbrella policy endorsement provides that, where sovereign immunity would otherwise apply, the policy only covers defense costs and expenses. That is, the policy provides no coverage for claims to which sovereign immunity would apply beyond the cost of defense. D4, p. 2. This Health Care endorsement is much narrower than the one in the Data Protection policy; and it confirms that the Data Protection Policy has broader coverage, covering not just claims expenses where sovereign immunity would otherwise apply, but also the “Damages” plaintiffs seek in these cases.¹⁸ It further makes sense that the University would purchase broader coverage in the Data Protection policy, and retain less of its sovereign immunity, because that policy is designed to cover the University’s

¹⁸ The endorsement at issue in *State ex rel. Bd. of Trustees of City of North Kansas City Memorial Hospital v. Russell* further solidifies the point. 843 S.W.2d at 360.

“business” activities that venture beyond its historically immune governmental purpose. D3, p. 9.

The University could have chosen to purchase a Data Protection policy with an endorsement identical to the one in the Health Care Umbrella Liability policy to fully retain sovereign immunity. It did not; and when it was brought face to face with these clear policy terms before the trial court, the University argued that the endorsement in the Data Protection Policy really intended to say the same thing as the Health Care Umbrella policy, and that the material differences should just be ignored on the basis that these were different companies’ policy forms. Tr. 36-37. There is no rule of construction, however, that states a Court should change words in one insurance policy based upon what is written in another insurance policy. Rather, the law mandates that the policy be enforced as written, not as a party wishes it was written after litigation ensues. The fact that the University, in the advertising context, chose to purchase insurance that covers settlements, awards and judgments in addition to defense costs confirms beyond cavil that it has waived sovereign immunity for the advertising claims arising out of its proprietary activities in this case. § 537.610.1.

D. Alternatively, the Endorsement Was Never Properly Made Part of the Policy.

An endorsement that is not properly made part of a policy does not retain sovereign immunity. *Newsome*, 520 S.W.3d at 776-66. This is what happened here.

The insurer issued the Data Protection policy on October 4, 2017. D3, p. 11. The endorsement was not attached to the policy when issued. D3, pp. 10-11. Instead, it was

added on November 3, 2017, nearly a month later. D3, p.59. This is significant because the endorsement does not indicate it was ever executed in the name of the Curators and signed by an official with authority to contract on the Curators' behalf as the University's contracting procedures require. University of Missouri System Collected Rules and Regulations § 70.010. (A36). Plaintiffs pled this fact. D2, p. 5; D3, p. 59.

In *Newsome*, the Kansas City, Missouri School District argued that it retained sovereign immunity through an endorsement, which stated the insurer “shall not be liable to make any payment for Loss in connection with any Claim made against any insured...that is barred by the defense of sovereign immunity and nothing in this Policy shall constitute a waiver of the defense of sovereign immunity.” *Id.* at 776. This Court disagreed, ruling that the endorsement never became part of the policy. *Id.* at 775-777. Specifically, § 432.070 R.S.Mo. required all contracts executed by the school district be subscribed to by an authorized agent of the school district. *Id.* at 776. The sovereign immunity endorsement was not subscribed to by any authorized agent of the District. *Id.* The Supreme Court held that “[b]ecause the attempted execution of Endorsement 14 did not comply with all of the requirements of § 432.070, the District cannot rely on Endorsement 13 to preserve sovereign immunity that was otherwise waived by its purchase of liability insurance.” *Id.* at 776-77.

Newsome controls. The University's regulations require that all contracts be “executed in the name of the Curators of the University of Missouri and signed by the President thereof, the President of the University, the Vice President for Finance, or such other office as may be specifically designated by the Board....” University of Missouri

System Collected Rules and Regulations § 70.010. (A36). There is no indication that this **change in contract terms was ever signed and made effective by the appropriate person authorized do so under the University's regulations.** D3, p. 59. Absent strict compliance with the University's contracting procedures, the endorsement never became part of the policy, and the Curators cannot rely on it to establish that they preserved sovereign immunity. *Newsome*, 520 S.W.3d at 776-77.

E. The Court Should Reverse the Trial Court's Judgment.

Because the plaintiffs pled facts establishing that (1) the Data Protection Policy covers and disclaims sovereign immunity for the plaintiffs' claims and (2) the University never made the Missouri Sovereign Immunity endorsement part of the policy in accordance with its own regulations, the trial court erred in dismissing the MMPA claim in *Butterfield*, *Draper*, *Reinsch*, *Browne*, *Jaggie*, *Higginbotham* and *Cummings*. It further erred dismissing the MMPA and negligent misrepresentation claims in *Butala* because the policy covers both claims. Because the University waived sovereign immunity pursuant to § 537.610.1, this Court should reverse.

IV.

THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS BECAUSE SOVEREIGN IMMUNITY DOES NOT APPLY TO THE PROPRIETARY FUNCTIONS OF CERTAIN PUBLIC CORPORATIONS IN THAT THE UNIVERSITY IS A PUBLIC CORPORATION TO WHOM THE GOVERNMENTAL/PROPRIETARY DISTINCTION APPLIES AND ITS BIOJOINT ADVERTISING IS A PROPRIETARY ACTIVITY.¹⁹

A. The Governmental/Proprietary Distinction in Missouri.

If sovereign immunity and the constitutional guarantee of open courts and a certain remedy for every injury can co-exist, then that immunity cannot extend to a public corporation’s forays into proprietary, profit-making and entrepreneurial endeavors that result in injury.

“Prior to *Jones*, when a state entity functions in a *governmental or sovereign capacity*, that entity could not be sued in a tort action absent express statutory consent.” *Joske Corp. v. Kirkwood School Dist.* R-7, 903 F.2d 1199, 1201 (8th Cir. 1990) (emphasis in original). “However, these entities could be sued in tort actions when functioning in a *proprietary capacity*.” *Id.* (emphasis in original). After *Jones*, § 537.600 reinstated “such sovereign or governmental immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date....” § 537.600.1.

¹⁹ The *de novo* standard of review also applies to Point IV.

Because § 537.600 reinstated sovereign immunity as it existed at common law, “issues of sovereign immunity require examination of the statute and reference to the pre-*Jones* common law.” *State ex rel. Bd. of Trustees of City of North Kansas City Memorial Hospital v. Russell*, 843 S.W.2d 353, 358 (Mo. banc 1993). Moreover, because the governmental/proprietary distinction was part of the common law prior to *Jones*, it “remains by implication in effect in Missouri today.”²⁰ *Joske Corp.*, 903 F.2d at 1201-02. Indeed, § 537.600 expressly recognizes the existence and application of the proprietary/governmental sovereign immunity analysis for every public entity.

2. The express waiver of sovereign immunity in the instances specified in subdivision (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity....

§537.600.2.

Given the legislature’s continued recognition of the importance of the governmental/proprietary distinction, that distinction remains a critical part of sovereign

²⁰ Section 537.600.2 acknowledges the existence of the governmental/proprietary distinction.

immunity analysis. Drawing the line between the two is difficult²¹ only in close cases – and this is not a close case.

B. The University of Missouri is a Public Entity with Its Own Governing Body that Can Act Proprietarily.

A public entity fulfills a public purpose through “enabling statutes that expressly grant them corporate existence.” *Russell*, 843 S.W.2d 353, 356. Thus a “public entity” has as its “fundamental feature of an existence separate and distinct” from the level of government it serves. *Id.*

Respectfully, it is high time for Missouri law to conclude clearly that political subdivisions of the state, including public entities such as institutions of higher learning named in the constitution that are not governed directly by the state’s executive branch but by independent boards, elected councils, or bodies who have independent corporate existence, are liable for injuries they cause to persons while engaging in non-governmental activities. Further, it is now time for the Court to conclude that when an otherwise generalized governmental function (health care) takes on non-governmental purposes (here, the creation of proprietary, patent-protected products or systems intended

²¹ The “maze of inconsistencies” the close cases produced led to “uneven and unequal results which defy understanding.” *Jones*, 557 S.W.2d at 229; *Allen v. Salina Broadcasting, Inc.*, 630 S.W.2d 225, 228 (Mo. App. S.D. 1982).

to generate profits for the university outside the direct²² provision of health care to a patient), sovereign immunity does not shield the profit-making motive. Said a bit less delicately, sovereign immunity should never protect the University from liability when it turns Missouri citizens into misled guinea pigs for experimentation designed to test the efficacy of a product the University intends to sell around the world – if it works. This case presents that opportunity.

C. The Government/Proprietary Distinction Also Applies to “Municipal Corporations,” which Include Public Corporations Governed by Their Own Independent Boards Like the University.

State ex rel. Missouri Dept. of Agriculture v. McHenry, 687 S.W.2d 178, 181-82 (Mo. banc 1985), stated that “[t]he proprietary-governmental dichotomy applies only in the law of **municipal corporations**, and not to activities of the state.” Based upon this principal, the Supreme Court in *McHenry* concluded that a suit for money damages could not proceed against the Missouri Department of Agriculture. *Id.* The Court reasoned that the Department of Agriculture, as an agency of the State and part of the executive branch, could only engage in governmental activities such that it enjoyed sovereign immunity for all of its activities because they were always governmental. *Id.* The Court questioned whether the agency was a suable entity at all given that it was an agency of the State rather than its own separate corporate body. *Id.* at 181.

²² The patented product developed by the University was intended to be made available to the healthcare industry world-wide.

McHenry confirms that the State itself enjoys full sovereign immunity.

Accordingly, because entities such as the legislature, the courts and state agencies can only engage in one type of function (governmental) they can never be subject to the governmental/proprietary dichotomy. It simply cannot apply.

This begs the question though: what should be considered a “municipal corporation” for purposes of sovereign immunity? Some courts, including the trial court in this case, have confused the concepts of a “municipal corporation” or “municipality” with the narrower concept of a city or town. *See Rennie*, 521 S.W.2d at 424. This mistaken view arises from the loose use of terminology and misunderstands what a municipal corporation really is. This confusion has caused some litigants and courts to adopt too narrow a view with regard to when the governmental/proprietary test applies. Such a view would allow some public corporations to wade off into the private sphere to advance their own interests without any regard for the laws that constrain their private competitors and without any consequence should those proprietary ventures injury Missouri citizens.

D. What Constitutes a Municipal Corporation under Missouri law?

“The word ‘municipal’ is derived from the Latin ‘*municipalis*,’ and implies the right of local self-government.” *St. Louis Housing Authority v. City of St. Louis*, 239 S.W.2d 289, 294 (Mo. banc 1951). The term “local self-government” does not refer only to a geographic limitation, such as the borders of a city or town. Instead, it refers to the fact that an entity has its own governing body that can make decisions to specially benefit itself (locally) rather than the state’s public at large. In other words, a “local”

government can perform both acts that benefit the state's public (which are known as governmental acts) and acts designed to exclusively benefit itself locally (which are known as proprietary, or corporate acts).

The terms municipality and municipal corporation, therefore, include cities and towns, but are not limited to cities and towns. *Id.* at 294-95. "Municipality now has a broader meaning than 'city' or 'town,' and presently includes bodies public or essentially governmental in character and function and distinguishes public bodies...from corporations only quasi-public in nature." *Id.* at 294. Moreover, "[m]unicipal corporation now also **includes a corporation created principally as an instrumentality of the state but not for the purpose of regulating the internal local and special affairs of a compact community.**" *Id.* at 295 (emphasis added). This Court "has adopted the broader definition." *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65, 68 (Mo. banc 1939).

The other characteristic that distinguishes municipal corporations from the State is their existence as corporate bodies separate from the State. For instance, in *McHenry*, the defendant was the Missouri Department of Agriculture, a state agency. *McHenry*, 687 S.W.2d at 181. The Department of Agriculture is part of the Executive Branch and does not exist independent of the State. MO. CONST. ART. IV, § 35. It does not control its own budget or even appoint its own officers. It is directly subject to a state-wide legislature (the General Assembly) and control over the day-to-day affairs by the Chief Executive Officer (the Governor). Accordingly, the Supreme Court concluded in

McHenry that suing the Department of Agriculture was no different than suing the State itself. *Id.* 181-82.

Municipal corporations, on the other hand, have their own, independent corporate existence. Because they “operate as both political subdivisions of the state and independent corporations, immunity bars only those claims arising out of the performance of the municipalities’ governmental functions, not its corporate or proprietary ones.” *A.F. v. Hazelwood School District*, 491 S.W.3d 628, 633 (Mo. App. E.D. 2016).

Read as a whole, the case law concludes that a “municipal corporation” is a public entity that functions as its own corporate body independent from the state government, and which has its own governing body capable of acting both locally (*i.e.* for the benefit of its own corporate interests) or governmentally (*i.e.* for the benefit of the public at large). The common law governmental/proprietary distinction applies to any such entity. *See Allen v. Salina Broadcasting, Inc.*, 630 S.W.2d 225 (Mo. App. S.D. 1982).

The first case recognizing the governmental/proprietary dichotomy, which is better described as a public v. private purpose, confirms this is the proper interpretation. “The distinction is usually traced to *Bailey v. City of New York*, 3 Hill 531 (1842).” Hack, M., *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, MO. L. REV., V. 58, at n. 51. That case involved allegations of negligence surrounding the construction of a dam. *Bailey*, 3 Hill at 538. The Court’s inquiry focused not on whether the public entity was a city versus some other type of public entity but on whether the public entity was acting for a public or private purpose:

If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.

Id. at 539.

Bailey teaches that the application of the governmental/proprietary distinction was not meant to turn upon labels (is it a city, county or school district?), but on whether the public entity is one capable of acting “privately” in addition to acting “publicly.” *Id.* To be clear, much of the existing proprietary function jurisprudence focuses on cities because those public entities commonly engage in functions having a private, or local, character. However, the test applies to any public entity that exists independently as its own corporate body, and which has the capacity to venture off into the private sphere to advance its own corporate interests. *See Allen*, 630 S.W.2d at 226-229.

E. The University Is a Municipal Corporation for Purposes of Applying the Governmental/Proprietary Dichotomy.

For purposes of the governmental/proprietary test, the Court should hold that the University will be considered a “municipal corporation” consistent with how this Court has previously defined that term. *St. Louis Housing Authority*, 239 S.W.2d at 294-95. It is its own independent corporate entity. § 172.020. (A13). Like a town or a city, it has the power to “sue and be sued” in its own name, and unlike a state agency, it is

unequivocally a suable entity. § 172.020. It has its own governing body (the Curators), which act like a board of directors overseeing a private corporation or a city council governing a town. It enacts its own local legislation. *See* University of Missouri System Collected Rules and Regulations, *available at* https://www.umsystem.edu/ums/rules/collected_rules. And, as its own corporate body with its own governing board, it chooses its own President, controls its own employees, and, for these purposes, has the capacity to make decisions to engage in activities that either further its own corporate, proprietary interests, or, like education, are purely governmental in character. It has even set up its own subsidiary nonprofit corporation--the UM Health System which is controlled by its own board of directors. (A37). The Supreme Court in *Todd*, a case involving the University, even seems to have recognized the University's governmental/proprietary duality when it wrote: “[i]n the absence of express statutory provision, a public corporation or quasi corporation, **performing governmental functions**, is not liable in a suit for negligence.” *Todd*, 147 S.W.2d at 1064 (emphasis added).

Additionally, the University has actually argued in prior cases that it is a municipal corporation. *State ex rel. Milham v. Rickhoff*, 633 S.W.2d 733 (Mo. banc 1982). *State ex rel. Milham* involved a claim of libel against the KOMU television station in Columbia, Missouri, which is owned and operated by the University. The University moved to dismiss not on the basis of sovereign immunity (perhaps because it recognized the proprietary nature of that activity) and instead claimed that venue was improper under § 508.050 because it was a municipal corporation. *Id.* at 734. In a split 4-3 decision, the

Supreme Court ultimately concluded that for venue purposes under § 508.050, the University would not be treated as a municipal corporation, but was careful to note that the phrase “may vary in meaning on the time, place and circumstance under which it is used.” *Id.* at 735.

For purposes of the governmental/proprietary distinction, which is the issue here, the University is an independent public body with its own governing board that has the capacity to act both for its own interests and the state’s public. It is, thus, “localized”²³ in that it can act both corporately and governmentally, privately or publicly and free from the constraints that a state entity such as the Department of Agriculture are cabined by. It can only be immune for acts that are governmental in character.

Additionally, even were the Court to adopt a narrower definition of municipal corporation that would exclude the University, *Allen* and *Barker* show that circumstances exist where it is appropriate to apply the distinction to entities that are “arms of the state.” *Allen* involved a claim against a school district arising out of defamatory statements made by a radio station the school district operated. *Allen*, 630 S.W.2d at 226. The school district sought summary judgment, claiming it was entitled to sovereign immunity. *Id.* The trial court granted the motion; however, the Court of Appeals, relying on *Barker*, 581 S.W.2d 818, reversed. *Id.*

²³ Even if the phrase local did refer to a geographic description, the University has a local character. See *State ex rel. Milham*, 633 S.W.2d at 737 (Welliver, J, dissenting).

The Court recognized that “a school district is a public corporation forming an integral part of the State and constituting the instrumentality of the State utilized by the State in discharging its constitutionally invoked governmental function of imparting knowledge to the State’s youth.” *Id.* The Court further noted that school districts are an arm of the State and based on this fact, the Supreme Court held in *Rennie v. Bellview School District*, 521 S.W.2d 423 (Mo. banc 1975) and *Beiser v. Parkway School District*, 58 S.W.2d 277 (Mo. banc 1979) that it would not enter the maze of the governmental/proprietary dichotomy in this area. Nonetheless, the Court concluded, based upon *Barker*, that “those functions of a school district that do not serve this noble purpose are proprietary functions and are not given immunity.” *Allen*, 630 S.W.2d at 227. The Court, accordingly, reversed the trial court’s grant of summary judgment because issues of fact remained as to whether or not the school district was acting for proprietary reasons.

The same rationale applies here. The fact of the matter is that the University is not like the Department of Agriculture, the Legislature or the Courts. Aspects of it are now big business, focused on their own “growth” and a “very strong balance sheet.” See McKinney, R., *MU Health Care’s Revenue Hits \$1 Billion*, Columbia Daily Tribune (September 10, 2018).²⁴ Here it functions as a private medical device company, no

²⁴ Available at <https://www.columbiatribune.com/news/20180910/mu-health-cares-revenue-hits-1-billion>.

different than Medtronic or General Electric – except for its claim that unlike those companies, it can mislead and injure without consequence.

Elsewhere, the University is entering the business of health insurance.²⁵ *See* Keller, R, *At University of Missouri Health Care, Business is Booming*, Columbia Daily Tribune (March 21, 2018). The type of insurance the University has procured for these activities—“**Business** Resiliency Insurance”—confirms that the primary purpose of these activities is to further the Curators “business,” not governmental, interests. Where the University strays from its noble public purpose to wade into the field of private business and injures people in the process, such functions do not enjoy immunity. *See Allen*, 630 S.W.2d at 227. Section 537.600.2 even seems to recognize this through its reference to the governmental/proprietary test.

Sometimes the argument is made that the University of Missouri is different than any other political subdivision because Article IX, §9(a) of the state constitution establishes its board of curators. But that argument ignores that the state constitution actually establishes the structure of county governing bodies, MO. CONST. ART. VI, §7, and makes other specific provisions for local governance. *See*, Art. VI, generally. Yet no one concludes that counties or cities are not political subdivisions subject to the governmental/proprietary distinction – and no one should argue that mere mention in the

²⁵ Available at <https://www.columbiatribune.com/news/20180321/at-university-of-missouri-health-care-business-is-booming>.

constitution cloaks the University with the same immunity as the Department of Agriculture.

F. The University's Marketing Activities were for its Own Corporate, Proprietary Purposes.

Assume for a moment that the justifiably well-regarded University of Missouri School of Veterinary Medicine decided that commercially available cat and dog food did not serve the health needs of those pets. The School developed a new pet food, advertised its benefits and sold it by the box carload. After a cat ate the food for about a year, it developed significant medical difficulties leading to blindness and an early death. Should the University escape liability simply because it is the University?

Or assume that the Medical School developed a children's vitamin supplement, claimed its health benefits and sold it to parents throughout the state and country. Like the pet food illness and death followed from the use of the vitamin. May the University escape liability?

Both of these activities are proprietary. They are proprietary because they compete with existing private sector companies and have profit motives.

The conduct plaintiffs have alleged--the development of experimental medical technologies and the advertisement of those technologies to acquire test patients in an effort to bring those technologies to market—is quintessentially proprietary. Indeed, the plaintiffs' petitions allege that the defendants, among other things, advertised and marketed Mizzou BioJoint Surgery for the purposes of (1) trying to acquire human test subjects for proprietary medical devices, technologies and surgical techniques (2) trying

to bring proprietary medical devices, technologies and surgical techniques to market in order to make money (3) earning patent royalties for itself and Cook (4) enhancing the reputation of the Missouri Orthopaedic Institute, the MU Health System and the individual defendants and (5) increasing its own revenues. D2, p. 33. These allegations show the University marketed Mizzou BioJoint Surgery not for the common good, but for the purposes of specially benefitting the MU Health System and the individual defendants (a distinctly local and private purpose). D2, pp. 32-33.

These allegations stand in sharp contrast with the University's historical public purpose of education. Here, the University has transformed into a private medical device company, the primary purpose of which is to secure advantages, emoluments and money for itself and the individuals involved in the creation of those devices.²⁶ See University of Missouri Collected Rules and Regulations § 100.020 (Patent and Plant Variety Regulations). The conduct alleged is proprietary by any measure, and there should be no sovereign immunity for it. *Allen*, 630 S.W.2d at 227.

G. This Court Should Reverse.

Courts that have refused to apply the test to school districts have reasoned that school districts only provide education, which is always a governmental function. See

²⁶ University Regulation 100.020 (Patent and Plant Variety) shows just how the University and individual defendants stand to benefit from the commercialization of any BioJoint related patented technology. Available at https://www.umsystem.edu/ums/rules/collected_rules/business/ch100/100.020_patent_and_plant_variety_regulations.

State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 463 n.1 (Mo. banc 1985) (Blackmar, J. dissenting). When the University was first created over 100 years ago, it may have been more akin to a purely governmental entity since it had one essential function—educating Missouri’s youth. *See Todd*, 147 S.W.2d at 1064 (the Board of Curators is “a public corporation for educational purposes” and an “agency or arm of the state”). This remains one of the University’s chief functions, and plaintiffs agree the University acts in a governmental capacity when performing that important function.

But to continue to pretend the University is nothing more than an educational institution based upon antiquated case law ignores the reality that the University’s governing body has evolved and now chooses to engage in several proprietary, economically-driven activities designed to further its own corporate interests. As a separate, independent corporation, the University should be subject to liability when it acts for its own private emolument and injures members of the Missouri public in the process. Sovereign immunity was never intended to shield a public corporation from liability when it heads off into the private sphere and engages with members of the public as if it were a private corporation – and lies to the public in the bargain.

V.

THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS THE MMPA CLAIM BECAUSE SOVEREIGN IMMUNITY ONLY APPLIES TO TORT CLAIMS IN THAT AN MMPA CLAIM IS NOT A TORT BUT INSTEAD A *SUI GENERIS*, NON-TORT CAUSE OF ACTION.

A. Standard of Review.

The Court of Appeals reviews the trial court’s grant of a motion to dismiss *de novo*. *Wyman*, 375 S.W.3d at 18. “Statutory interpretation is an issue of law that this Court reviews de novo. *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008).

B. The Petitions Pled a Non-Tort Theory of Recovery Against the Curators to Which Sovereign Immunity Does Not Apply.

1. *Sovereign Immunity Applies Only to Tort Claims.*

“As is evident, section 537.600 expressly states it applies only to suits in tort...” *Kubley v. Brooks*, 141 S.W.3d 21, 29 (Mo. banc 2004) (emphasis in original). The statute “does not address or govern the liability of the State under non-tort theories of recovery.” *Id.* Accordingly, the State and its political subdivisions are subject to suits based upon non-tort causes of action. *Id.*

2. *The University’s Enabling Statute Confirms the Legislature’s Consent that the Curators May “Be Sued” for Non-Tort Claims.*

Section 172.020 states that the University “shall be known by the name of ‘The Curators of the University of Missouri’, and by that name shall have perpetual succession, **power to sue and be sued, complain and defend in all courts**....” § 172.020 (emphasis added). Section 172.020 is a general enabling act. It not only incorporates the University as its own separate body, but also confers broad authority for the University to “sue and be sued.” See *V.S. DiCarlo Const. Co., Inc. v. State of Missouri*, 485 S.W.2d 52, 56 (Mo. 1972).

“Statutory authority to sue and be sued is sufficient consent to suit to waive the doctrine of immunity of the sovereign from suit without its consent.” *Kubley*, 141 S.W.3d at 31. So, “[w]hile section 537.600 reinstated sovereign immunity in tort, it did not negate *Jones*’ statement that an enabling statute’s provision that the agency can ‘sue and be sued’ is sufficient to constitute a consent to suit other than in tort.” *Id.* at 30. “Indeed, *Jones*’ statements that the ‘sue and be sued’ language constitutes a waiver of immunity from suit, although not of sovereign immunity in tort, simply reiterated settled law.” *Id.* Were the University “not liable to the discipline of the courts in proper cases it would be like the monster of whom we read in Mrs. Shelly’s *Frankenstein* (1817)...The state of Missouri has not created such a monster.” *Kubley*, 141 S.W.3d at 30; see also *Todd*, 147 S.W.2d at 1063 (stating “[t]here is no doubt that this defendant has the right to sue and is liable to be sued in some kinds of action.”).

3. Plaintiffs’ MMPA Claim Is Not a Tort to Which Sovereign Immunity Applies.

“[A] really satisfactory definition of a tort has yet to be found.” Prosser and Keeton, *THE LAW OF TORTS*, p. 1 (5th ed. 1984). The term “tort” is “nothing but an abbreviation in which the user of the term defined may please himself...” *Id.* at p. 4. To ascertain whether an MMPA claim is a tort cause of action, the Court should examine the history and purpose of the MMPA, the elements of the claim, the nature of the damages available as well as the regulations the attorney general has promulgated.

States began enacting consumer protection statutes in the 1960s. Missouri enacted the MMPA in 1967. § 407.010 R.S.Mo. *et seq.* (1967). (A15).

Such legislation was needed because common law remedies had proved often ineffective. Tort actions for deceit in cases of misrepresentation involved proof of scienter as an essential element and were subject to the defense of “puffing.”...Proof of actionable fraud involved a heavy burden of proof, including a showing of intent to deceive...Actions alleging breach of express and implied warranties in contract also entailed burdensome elements of proof....

Bernard, 314 S.E.2d at 584; *see also* William Webster, Richard Thurman & Mike Finkelstein, *Combatting Consumer Fraud in Missouri: The Development of Missouri’s Merchandising Practices Act*, 52 MO. L. REV. 365, 367, 370 (1987) (recognizing that the legislative intent behind the MMPA was to provide effective protection for consumers in the marketplace who were not otherwise protected by existing law (*i.e.* tort and contract law)).

As originally enacted, the MMPA vested enforcement powers only in the Attorney General. § 407.010 *et seq.* (1967). This confirms the General Assembly did not view the

MMPA as a “tort.” In fact, the General Assembly did not adopt a statutory private right of action in favor of consumers until 1973. § 407.025 R.S.Mo. (1973). (A17). Rather than a tort, consumer protection statutes, including the MMPA are *sui generis*. *Linkage Corp. v. Trustees of Boston University*, 679 N.E.2d 191, 209 (Mass. 1997); *Gabriel v. O’Hara*, 534 A.2d 488, 494-95 (Pa.Super.Ct. 1987); *Bernard v. Centarl Carolina Truck Sales, Inc.*, 314 S.E.2d 582, 584 (N.C.App. 1984); *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 779 (Mass. 1975). This is because “[a] determination that conduct is unfair or deceptive is **not dependent on traditional tort or contract theories** and represents a finding under a statute that creates new substantive rights.” *Linkage*, 679 N.E.2d at 209 (emphasis added). It is a civil action “which is separate and distinct” from tort and contract causes of action. *Gabriel*, 534 A.2d at 495. It is not “subject to the traditional limitations of preexisting causes of action such as tort for fraud and deceit.” *Slaney*, 322 N.E.2d at 779. To the contrary, because the General Assembly designed the MMPA precisely to eliminate the burdensome proof requirements of tort and contract law, a claim arising under the MMPA cannot be a tort.

a. An MMPA Claim Lacks the Elements of a Tort.

An MMPA claim is distinctly different from common law fraud. *See State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo.App. E.D. 1988). To prove fraud, a claimant must establish nine (9) elements. *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 774 (Mo. App. W.D. 2003). There are heightened pleading requirements for fraud claims. Mo. R. Civ. Pr. 55.15.

An MMPA claim does not require several elements that would be essential for tort liability—namely reliance and intent. Instead, an MMPA claim requires only that the plaintiff (1) purchase merchandise (2) for personal, family or household purposes and (3) suffer an ascertainable loss of money or property as a result of an unlawful practice. *Ulrich v. CADCO, Inc.*, 244 S.W.3d 772, 777-78 (Mo.App. E.D.); *Ward v. West County Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. banc 2013). The claim focuses strictly on the transaction, just as contract law would. Absent these tort elements, the heightened pleading requirement does not apply to an MMPA claim. *Ulrich*, 244 S.W.3d at 777. The claim is not a tort.

The regulations the Missouri Attorney General has promulgated pursuant to § 407.145 R.S.Mo. confirm the MMPA is not just a statutory fraud claim. 15 C.S.R. § 60-8.020 states explicitly that “***proof of deception, fraud, or misrepresentation is not required*** to prove unfair practices as used in § 407.020.1 R.S.Mo.” (emphasis added). Moreover, there is no tortious *mens rea* requirement a claimant must meet to state a claim under the MMPA. “Reliance, actual deception, knowledge of deception, intent to mislead or deceive, or any other culpable mental state such as recklessness or negligence, are not elements of deception as used in section 407.020.1 R.S.Mo.” 15 C.S.R. § 60-9.020.²⁷ This is distinctly different from tort liability, which must be premised upon

²⁷ Nor is any such mental state a required element for claims based upon misrepresentation. 15 C.S.R. § 60-9.070.

negligence or intent. *See Jones v. Marshall*, 750 S.W.2d 727, 728 (Mo. App. E.D. 1988). Consequently, an action for misrepresentation under the MMPA is not a tort.

b. The MMPA Does Not Allow for Tort Damages.

Tort law permits damages that extend well beyond traditional contract remedies, such as non-economic damages for emotional distress and pain and suffering. A tort plaintiff can, thus, state a valid cause of action even in the absence of an economic loss.

An MMPA claim lacks these essential tort ingredients. It requires that the aggrieved consumer suffer “an ascertainable loss of money or property” and only allows for recovery of “actual damages.” § 407.025.²⁸ Indeed, damages under the MMPA are generally measured by the contractually-rooted benefit-of-the-bargain rule. *Schoenlein v. Routt Homes, Inc.*, 260 S.W.3d 852, 854 (Mo. App. E.D. 2008).²⁹

To be clear, the General Assembly can create a statutory tort. Section 537.080, R.S.Mo., which creates the cause of action for wrongful death, and § 287.780 R.S.Mo., which creates the cause of action for wrongful discharge following a workman’s

²⁸ The statute does allow for the imposition of punitive damages, but this confirms that an MMPA claim is *sui generis*--“neither wholly tortious nor wholly contractual in nature.” *Bernard*, 314 S.E.2d at 584; *Slaney*, 322 N.E.2d at 779.

²⁹ While this measure of damages is available in a fraudulent inducement scenario, benefit of the bargain relief has traditionally been one of the measures of contract damages. *See Catroppa v. Metal Bldg. Supply, Inc.*, 267 S.W.3d 812, 817 (Mo. App. S.D. 2008).

compensation claim, do just that. But, with each of those statutes, the General Assembly incorporated traditional tort proof requirements and tort damages into the right of action. For instance, the wrongful death statute incorporates the same tort principles that would have been available if death had not ensued. § 537.080 (stating “[w]henver the death of a person results from any act...which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party...which, would have been liability if death had not ensued shall be liable in an action for damages....”). Likewise, § 287.780 extends common law tort liability for retaliatory discharge to employers who fire their employees for exercising their worker’s compensation rights. Moreover, the language the legislature chose to describe the cause of action in each statute is significant. Both statutes create a broad civil “action for damages.” This allows for the recovery of not only monetary losses but also damages that would otherwise be available in tort, *e.g.* non-economic damages. In fact, § 537.090 goes so far as to explicitly list the full array of tort damages a claimant may recover.

The General Assembly, however, did something different with the MMPA. It did not create a broad civil “action for damages” as it did in the wrongful death and retaliatory discharge contexts. Rather, it reserved the private right of action only for those who could show an “ascertainable loss of money or property,” and it limited recovery to those compensatory damages. § 407.025. This choice to restrict a plaintiff’s remedy to contract damages reflects a deliberate intent to create something besides a tort.

c. An MMPA Claim Has a Purpose Different from Tort Law.

“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 enactment.” *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003). The MMPA was not designed with tort law objectives in mind.

“Tort law is concerned with the allocation of losses arising out of human activities...The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as a result of the [negligent] conduct of another.” *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 388 (Mo. App. E.D. 1991). Therefore, when the General Assembly creates a statutory tort, it acts with a similar purpose in mind. *See O’Grady v. Brown*, 654 S.W.2d 904, 908 (Mo. banc 1983) (stating “[t]he manifest purpose of our [wrongful death] statute is clearly to provide, for a limited class of plaintiffs, compensation for the loss of companionship, comfort, instruction, guidance, counsel...and support of one who would have been alive but for the defendant’s wrong.”).

The MMPA, on the other hand, is not concerned with tort law objectives. Rather, its purpose is “to preserve fundamental honesty, fair play and right dealings in **public** transactions.” *State ex rel. Webster*, 756 S.W.2d at 635 (emphasis added). In other words, the MMPA imposes the **contractual covenant of good faith and fair dealing onto public transactions and extends it to advertisements.**³⁰

³⁰ An advertisement as an invitation to make an offer. *See Ziglin v. Players MH, L.P.*, 36 S.W.3d 786, 789 (Mo. App. E.D. 2001).

The fact that the initial version of the Act did not include a private right of action further shows the General Assembly did not create a tort. When the General Assembly did create a private cause of action in 1973, it did so not with the purposes of tort law in mind but because the Attorney General's office lacked the resources to adequately protect Missouri's consumers. Webster et al., *Combatting Consumer Fraud in Missouri...*, 52 MO. L. REV. at 378. Thus, the purpose of the action was not to establish a tort remedy, but instead to create private attorneys general in order to assist the Attorney General's office in preserving "the fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Webster*, 756 S.W.2d at 635. To hold the University responsible for engaging in a deceptive, proprietary advertising campaign designed to enrich itself at the expense of Missouri consumers furthers the prime objective of the MMPA: to preserve integrity in public transactions. *Id.*

VI.

THE TRIAL COURT ERRED IN GRANTING THE UNIVERSITY’S MOTION TO DISMISS THE MMPA CLAIM BECAUSE THE MMPA IMPOSES LIABILITY UPON ANY “PERSON” WHO VIOLATES THE ACT IN THAT THE UNIVERSITY IS A “PERSON” WHICH BECOMES LIABLE WHEN IT VIOLATES THE ACT.³¹

A. The Curators are a “Person” Under the MMPA Who May Be Subject to Liability When They Violate the Act.³²

The MMPA is an all-encompassing statute designed to protect consumers in the Missouri marketplace. *See generally* William Webster et al., *Combatting Consumer Fraud in Missouri: the Development of Missouri’s Merchandising Practices Act*, 52 MO. L. REV. at 370. It imposes liability upon any “person” who violates the act and causes any other “person” to suffer an ascertainable loss of money or property. § 407.025. Section 407.010 (5) (2018) defines “person” as follows:

any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee, or cestui que trust thereof.

³¹ The *de novo* standard of review that applies to Point IV also applies to Point VI.

³² The University did not raise this argument in its original motion to dismiss.

This broad definition reflects an intent to encompass all types of persons, entities and corporations--not just those that are exclusively “business” in nature or which operate for a profit. *See State ex rel. Nixon v. RCT Development Ass’n*, 290 S.W.3d 756, 760 (Mo. App. W.D. 2009) (stating “MMPA violations may be committed by both entities and individuals”). This is also how the Attorney General’s office interprets it. 15 C.S.R. § 60-7.010 (defining “person” to mean, “association, corporation, individual, institution, natural person, organization, partnership, trust or any other legal entity”).³³

The University is its own independent corporate body. § 172.020. The University, however, has contended it is not a “person” under the MMPA because it is a public corporation. This argument, however, overlooks that a public corporation will be treated as a private corporation while acting in furtherance of its corporate, proprietary interests. *Lockhart v. Kansas City*, 175 S.W.2d 814 (Mo.1943). *Lockhart* held that a municipal corporation would be considered a “corporation” for purposes of liability

³³ In the MMPA, the legislature “granted the attorney general authority to promulgate all rules necessary to the administration and enforcement of the provisions of the act, which include the authority to promulgate rules setting out the scope and meaning of the act.” *Huch v. Charter Communications*, 290 S.W.3d 721, 724-25 (Mo. banc 2009) (quoting § 407.145 R.S.Mo.) This includes the ability to define terms. 15 CSR § 60-7.010. Such “properly adopted and promulgated rules have independent power as law....” *Huch*, 290 S.W.3d at 725. “The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight.” *Beverly Enterprises-Missouri, Inc., v. Department of Social Services, Division of Medical Services*, 349 S.W.3d 337, 352 (Mo. App. W.D. 2008).

under the Occupational Disease Act because it was acting in its private, corporate capacity. *Id.* at 819. It based this holding in part on (1) the broad purpose of the statute (to cover all employees subject to occupational diseases), (2) the fact that the statute made no exception for municipal corporations and (3) the well- established principal that a municipal corporation exercising its business powers will be regarded as a private corporation. *Id.* at 817-19.

Lockhart applies here. Having its own local governing body clearly capable of acting both publicly and privately, the University is a municipal corporation for purposes of applying the governmental/proprietary distinction. *See* Point IV. The conduct at issue in this case was proprietary and performed in furtherance of its own business interests, a fact the University has never contested (nor could it). If the University is going to advertise in furtherance of its private, patent driven interests, it should be treated no differently under the MMPA than another private corporation engaged in the same business. *See Id.* at 719. This is the only result that is consistent with the MMPA’s purpose.

The Secretary of State’s records likewise confirm that the Curators have established the University of Missouri Health System, which oversees the Missouri Orthopaedic Institution and the BioJoint Center, **as a nonprofit corporation.** (A37). Under § 407.010 (5) non-profit corporations are “persons” under the MMPA.

This interpretation of the statute is further consistent with how the General Assembly has instructed courts to interpret term “person” in the Missouri statutes. § 1.020 (12) R.S.Mo. (2018).³⁴ (A9). In relevant part, § 1.020 (12) provides:

“As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or the context thereof:

...

(12) the word “**person**” may extend and **be applied to bodies politic and corporate**, and to partnerships and other unincorporated associations.

§ 1.020 (underlined emphasis added, bold emphasis in original).

“Statutes relating to the same subject matter are *in pari materia* and should be construed harmoniously.” *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, LLC*, 248 S.W.3d 101, 107 (Mo. App. W.D. 2008); *see also State ex rel. Bowman v. Inman*, 516 S.W.3d 367, 369 (Mo banc. 2017). Here, both section 407.010 (5) and § 1.020 (12) may be read harmoniously. Section 1.020 states that unless the General Assembly “otherwise specially provide[s],” the term “person” may be applied to bodies politic and corporate. Nothing in Chapter 407 “specially provides” that corporations that also happen to be bodies politic are not persons under the Act. To the contrary, the General Assembly specifically listed those entities³⁵ to whom the MMPA

³⁴ This Chapter of the Missouri Revised Statutes is titled “Laws in Force and *Construction of Statutes*.” (emphasis added).

³⁵ That list includes owners of newspapers, television and radio stations or any entity subject to regulation by the director of insurance, financial institutions and professional

does not apply in the MMPA. § 407.020.2 R.S.Mo. That list did not include bodies corporate and politic.

If the General Assembly had intended to deviate from the default interpretation of “person” as set forth in § 1.020 (12) and exempt public corporations from the Act, it would have specially provided in the MMPA’s list of exemptions. *See Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 88 (Mo. App. W.D. 2011) (stating “if the legislature had intended that the credit services organization statutes did not apply to tax preparers who offer or obtain RALs for their customers, it could have included them in section 407.637.2’s list of exemptions. That the legislature did not indicates its intent that the credit services organization statutes apply to such entities”). The deliberate choice not to exempt any public corporation confirms that the Court should construe the term “person” consistent with § 1.020 (12) to include the University, particularly in a case where it is acting in furtherance of its own private interests or as a non-profit entity.

Although the statute does not make any such distinction, the University has also contended that the General Assembly intended to limit the reach of “corporation” in § 407.010(5)’s definition of person to private corporations. But, when the General Assembly has limited the meaning “person” to private corporations in the past, it has done so explicitly in the statute. § 393.106 R.S.Mo. (1990); § 394.315 R.S.Mo. (1990) (previously defining person to include, among other things, a “private corporation”).³⁶ In

registration, the director of the division of credit unions and the director of the division of finance. § 407.020.2 (1)-(2).

³⁶ These statutes were subsequently amended to remove “person” as a defined term.

other words, the legislature specially provided in the definition of person that it was not meant to apply to bodies corporate and politic. This is not what the General Assembly did in the MMPA, and the Court should not read such a limitation into the statute contrary to § 1.020 (12).

Including the University in the definition of “person” in this case is the only reading of the statute that is consistent with its underlying purpose: “to preserve fundamental honesty, fair play and right dealings in *public* transactions.” *State ex rel. Webster*, 756 S.W.2d. at 635 (emphasis added). “We must construe the statute in light of the purposes the legislature intended to accomplish and the evils it intended to cure.” *Lincoln County Stone Co., v. Koenig*, 21 S.W.3d 142, 146 (Mo. App. E.D. 2000). “A statute must not be interpreted narrowly if such an interpretation would defeat the purpose of the statute.” *Id.* The only way to ensure that integrity exists in *public* transactions is to subject public corporations that engage in public transactions, particularly proprietary ones, to the requirements of the Act. To hold that the MMPA does not apply to the Curators would lead to the conclusion that the University’s corporate board could intentionally lie to Missouri citizens in an effort to procure their business--a result the General Assembly could never have intended. This Court should reverse.

VII.

THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS' MOTIONS FOR LEAVE TO FILE AMENDED PETITIONS BECAUSE RULE 67.06 PROVIDES THAT THE TRIAL COURT SHALL FREELY GRANT LEAVE TO AMEND UPON SUSTAINING A MOTION TO DISMISS IN THAT THE PLAINTIFFS' PROPOSED AMENDMENTS WERE TIMELY, WOULD CURE THE DEFECT THE TRIAL COURT FOUND IN THE INITIAL PLEADING AND WOULD NOT PREJUDICE THE UNIVERSITY.³⁷

A. Standard of Review

This Court reviews the trial court's decision to deny a motion for leave to amend a pleading for abuse of discretion. *Boyd v. Kansas City Area Transp. Authority*, 610 S.W.2d 414, 416 (Mo. App. W.D. 1980). "A trial court's discretion, however, is limited by Mo. R. Civ. Pr. 67.06." (A28). *Koller v. Ranger Ins. Co.*, 569 S.W.2d 372, 373 (Mo. App. E.D. 1978) (disapproved of on other grounds by *Muza v. Missouri Dept. of Social Services*, 769 S.W.2d 168, 173 n. 6 (Mo. App. W.D. 1989)). "In reviewing the decision of the trial court, we are concerned with whether justice is furthered or subverted by the trial court's decision." *Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo. App. E.D. 1999).

³⁷ Point VII applies to the *Butterfield*, *Draper*, *Reinsch*, *Browne*, *Jaggie*, *Higginbotham* and *Cummings* cases.

B. If Amendment Would Have Cured the Defect the Trial Court Perceived in the Petition, the Trial Court’s Refusal to Allow Plaintiffs to File an Amended Pleading Was Too Harsh.

Missouri Rule of Civil Procedure 67.06 states in relevant part:

On sustaining a motion to dismiss a claim...the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed.

Rule 67.06. In other words, “[a] trial court should not arbitrarily refuse to grant leave to amend a petition held to be insufficient.” *Steinberg v. St. Louis Union Trust Co.*, 502 S.W.2d 442, 443 (Mo. App. E.D. 1973). This is because “[o]rdinarily when a first pleading is ruled to be insufficient in a trial court, the party is afforded a reasonable time to file an amended pleading if desired.” *Boyd*, 610 S.W.2d at 416.

“When considering to allow a party to amend a pleading, there are a number of factors which the trial court should consider, including: (1) hardship to the moving party if leave to amend is not granted; (2) reasons for failure to include any new matter in previous pleadings; (3) timeliness of the application; (4) whether an amendment could cure any defects of the moving party’s pleading; and (5) injustice to the party opposing the motion.” *Moynihan v. City of Manchester*, 203 S.W.3d 774, 776 (Mo. App. E.D. 2006).

Here, plaintiffs’ requests to file amended petitions were timely. The first time the University raised the issue that they were not a “person” under the MMPA was in their

motion to dismiss the First Amended Petition.³⁸ The trial court granted the University's motion to dismiss without stating its reasons. This left plaintiffs unclear as to whether the Court believed the university had waived sovereign immunity for the advertising claims but granted the motion because it had wrongly concluded the University was not a "person" under the MMPA. As such, plaintiffs immediately moved to amend their petitions to allege an alternative cause of action based upon the same conduct, which did not require plaintiffs to satisfy any statutory definition. D17, p. 8 (*Butterfield*) D51, p. 20 (*Draper*); D1, p. 17 (*Reinsch*); D19, p. 14 (*Browne*); D1, p. 12 (*Jaggie*); D1, p. 13 (*Higginbotham*); D1, p. 11 (*Cummings*). The motion for leave to amend attached a copy of the proposed amended pleading and was otherwise timely.

If the trial court had granted the motion on the definitional "person" issue, then the proposed amended pleading would have cured the trial court's (incorrectly) perceived defect in the petition. That is, to the extent the trial court granted the motion to dismiss solely on the basis of an erroneous belief that the University was not a person under the MMPA, the proposed amendment would have cured that defect because a negligent misrepresentation contains no statutory definition of "person," and the Data Protection policy waives sovereign immunity for that proprietary/corporate conduct. Under that scenario, plaintiffs had an avenue to proceed against the University based upon the facts already pled.

³⁸ This is also why the negligent misrepresentation claim was not included in the original petition and why it was first raised in an amended pleading.

Granting leave was therefore required because “[a] trial court should not dismiss a petition merely because the factual allegations seem more consistent with something other than plaintiff’s stated legal theory.” *Thomas v. City of Kansas City*, 92 S.W.3d 92, 96 (Mo. App. W.D. 2002). Rather, “[t]he character of the cause of action is determined from the facts stated in the petition and not by the name given the action.” *Id.* In other words, if the facts as plaintiffs alleged more appropriately gave rise to a negligent misrepresentation claim rather than an MMPA claim, then the trial court should have given plaintiffs the opportunity to plead that cause of action. *Id.*

There would be no prejudice to the University by allowing plaintiffs to plead the negligent misrepresentation count. “Prejudice is not measured by whether one party or the other would stand to suffer financial loss as a result of the court ruling.” *Oak Bluff Condominium Owner’s Ass’n, Inc. v. Oak Bluff Partners, Inc.*, 263 S.W.3d 708, 712 (Mo. App. W.D. 2008). “Instead, prejudice suffered by the non-moving party is measured by whether a party is deprived of a legitimate claim or defense because the motion for leave to amend caught that party by surprise after it had developed its strategy.” *Id.* Here, the proposed amendment was based upon the exact same facts. Just as was the case in *Oak Bluff*, the university is aware of these facts and would not suffer surprise or be deprived of any defense. *Id.* at 713. There is no trial date. The University still has all defenses available to it and ample time to develop a strategy.

Finally, the hardship to plaintiffs resulting from the Court’s denial of the motion for leave is extreme. Plaintiffs would be prohibited from pursuing a legitimate claim in a

circumstance where the University has waived sovereign immunity, a draconian result which would cause a subversion of justice the Court ought to strive to avoid.

C. The Court Should Reverse.

“The whole spirit of our present rules of practice is to freely permit amendments to pleadings ‘when justice so requires.’” *Koller*, 509 S.W.2d at 373. “The dismissal with prejudice without leave to amend was too harsh....” *Boyd*, 610 S.W.2d at 417. Thus, if the Court concludes that sovereign immunity does not bar the claim, but that the University is not a “person” under the MMPA (a result that would be inconsistent with the MMPA and the proprietary capacity in which the University was acting in this case), it should reverse and remand with instructions to allow plaintiffs to plead their negligent misrepresentation claims in *Butterfield*, *Draper*, *Reinsch*, *Browne*, *Jaggie*, *Higginbotham* and *Cummings*, and should reverse outright the dismissal of the negligent misrepresentation claim in *Butala* as requested in the previous points.

CONCLUSION

WHEREFORE, plaintiffs respectfully ask the Court to hold that the trial court properly certified its dismissal judgments for immediate appeal under Rule 74.01 (b), to declare § 537.600 to be in violation of Art. I, § 14 of the Missouri Constitution (the open courts provision), and to reverse the trial court's judgments of dismissal in their entirety and remand each case for further proceedings. Alternatively, should the Court find that sovereign immunity does not apply for any of the reasons set forth above, but that the University is not a "person" under the MMPA, the Court should reverse the trial court's judgments of dismissal as to the negligent misrepresentation claim in *Butala*, and should reverse and remand the remaining cases with instructions to grant plaintiffs leave to plead a claim against the University for negligent misrepresentation.

Respectfully submitted,

/s/ Edward D. Robertson III

Edward D. Robertson III MO #58801

James P. Frickleton MO # 31178

Michelle L. Marvel MO # 59816

Kelly C. Frickleton MO # 70066

BARTIMUS FRICKLETON

ROBERTSON RADER P.C.

11150 Overbrook Road, Suite 200

Leawood, KS 66211

913 266 2300

913 266 2366 (facsimile)

krobertson@bflawfirm.com

jimf@bflawfirm.com

mmarvel@bflawfirm.com

kellyf@bflawfirm.com

TODD N. HENDRICKSON MO #37460

12180 Old Big Bend Road

Kirkwood, MO 63122
314 721 8833
314 721 4944
todd@hendricksonlaw.com

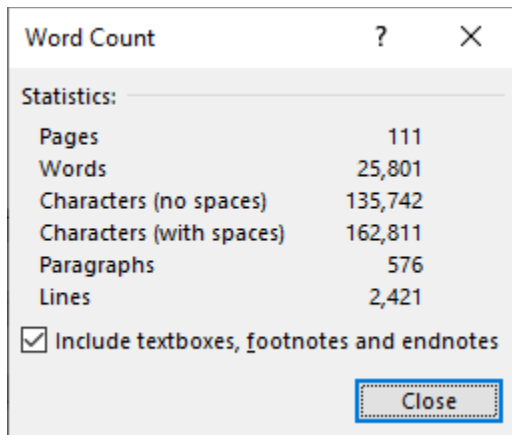
ATTORNEYS FOR APPELLANTS

Brief was prepared using Norton Anti-Virus and were scanned and certified as virus free.

/s/ Edward D. Robertson III

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 25,801 words in the brief (except the cover, signature block, certificate of compliance, and certificate of service) according to the word count of Microsoft Word used to prepare the brief.



/s/ Edward D. Robertson III

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Substitute Brief of Appellants and Appendix was served on Respondents via the Missouri Courts E-filing System on August 3, 2020, and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03 (a).

Respectfully submitted,

/s/ Edward D. Robertson III

ATTORNEYS FOR APPELLANTS