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*)

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I.

Sofia v. Dodson, 601 S.W.3d 205, 208n.3 (Mo.banc2020) confirms the trial court's judgment was eligible for 74.01(b) certification. Factual overlap in the multi-party context does not prevent certification. *Id.* The judgment resolved all claims against the University; the Court should hold that the judgments were eligible for Rule 74.01(b) certification.

II.

A. Preservation.

A petition timely raises a constitutional issue if it: (1) raises the challenge at the first opportunity and (2) designates the provision(s) at issue. *Mayes v. Saint Lukes Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo.banc2014). A petitioner need only plead ultimate facts. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510-11 (Mo.App.1986). Pleading the ultimate fact simply does not render the allegation conclusory. Here, the petitions pleaded the ultimate fact that §537.600 violated Art. I, §14. D2p.43-44(Butala). This satisfied the preservation issue. *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo.banc 2011).

Plaintiffs substantively responded to the University's motion to dismiss and again referenced Art I., §14. D9p.32-33. Plaintiffs raised the issue on appeal and referred to these rights as "fundamental" (*i.e.* substantive). App.Br.WD82810, pp.70-71. Plaintiffs certainly could have developed the arguments more fully, but this does not mean the challenge was not preserved.

B. This is an Issue for the Court.

The issue here is not whether sound policy supports sovereign immunity, but whether a statute reinstating a feudal-doctrine of questionable origin, which other states

have abandoned or replaced with statutory tort claims acts[1], can continue to exist alongside Art I, §14. This is a question for the Court, not the legislature (as the University argues). MO. CONST. ART V, §3.

C. The Open Court's Provision Confers a Substantive Right the Cannot be Legislatively Abrogated Unless a Substitute Remedy is Provided.

The threshold question for an Art. I,§14 challenge is to determine the rights guaranteed by Art. I,§14. Open Courts jurisprudence usually focuses on procedural barriers to court access. *Missouri Alliance v. Department of Labor and Industrial Relations*, 277 S.W.3d 670, 682, n.1 (Mo.banc 2009)(Teitelman, J. dissenting). Consequently, cases stating that the open courts provision lacks a substantive component assume that Art. I,§14 only allows persons to pursue the causes of action the law recognizes. *See, e.g. Findley v. City of Kansas City*, 782 S.W.2d 393 (1990). But, "characterizing the remedy clause solely as a guarantee of equal access to the courts fails to account for all the clause's text." *Horton v. Oregon Health and Science University*, 376 P.3d 998, 1006 (Or. 2016). The text is as much about the *availability of a remedy* as it is about pursuing recognized claims. Restricting the provision to a procedural guarantee would allow the legislature to eliminate all common law actions for injury without providing a substitute. *Missouri Alliance*, at 682(Teitelman, J. dissenting).

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[1] *See* https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf for a summary of sovereign immunity in the 50 states.

Absent a substantive component, the promise of a certain remedy for every injury is empty, existing only by virtue of legislative whim. *Id*.[2]

Of the 39 other state constitutions that have open courts provisions, almost all of them recognize the doctrine of a substitute remedy to justify legislative change. *Id*. at 683 (citing David Schuman, *The Right to a Remedy*, 65 TEMP.L.REV. 1197, 1201 (1992); Thomas R. Phillips, *The Right to a Constitutional Remedy*, 78 N.Y.U.L.REV. 1309, 1335 (2003). The legislature may abrogate a common law cause of action for personal injury, but to do so constitutionally, it must provide an adequate substitute in its place. *Missouri Alliance*, at 683 (Teitelman, J. dissenting). Statutory tort claims acts "ensure[] that a solvent defendant will be available to pay damages up to [a cap]—an assurance that would not be present if the only person left to pay an injured person's damages were an uninsured, judgment proof state employee." *Horton*, 376 P.3d at 1029. "There is, in short, a *quid pro quo*." *Id*. It is absent in Missouri.

D. Section 537.600 Abrogates Recognized Causes of Action against Public Entities But Provides No Adequate Substitute.

"The existence of sovereign immunity is a *denial of a remedy* to a person injured by the state." *Findley*, 782 S.W.2d at 395 (emphasis added). *Jones v. State Highway Commmission*, 557 S.W.2d 225 (Mo. banc 1977) *established the common law of Missouri.* The legislative repeal of that common law provision permitting actions against

[2] *Horton* provides an exhaustive discussion of the history of open courts provisions.

the State required a substitute remedy, which does not exist.[3] Absent an adequate substitute, §537.600 denies persons a remedy against the public entity that caused their injury, leaving them--in many cases--with no option other than to pursue a potentially-judgment-proof state employee. Recognizing the existence of a substantive right, and adopting the rule of adequate substitute remedy "would leave the legislature free to abolish a common law cause of action for personal injury in favor of a statutory enactment that reflects current policy concerns, while preserving the state constitutional right to some form of adequate remedy for personal injury." *Missouri Alliance*, at 683 (Teitelman, J. dissenting).

E. Laws in Other States Discredit the University's Policy Arguments.

Contradicting the University's doomsday scenario, other states have restricted sovereign immunity or replaced it with statutory tort claims acts, and none has devolved into chaos. Statutory caps and liability insurance (like that which the University purchased here) protect the state's coffers while at the same time providing certain—but predictable—remedies. Rights the citizens preserved for themselves are sacrosanct, and must be preserved if the constitution is to have meaning.

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[3] Currently, the only exceptions are for car crashes or dangerous property conditions.

III.

The University deliberately purchased broader coverage for multimedia liability and a corresponding broader waiver of immunity –and now asks the Court to rescue it from that choice. It wants to shield itself (and its carrier) from liability for deceiving Missourians through false advertising about the efficacy of a proprietary product it developed and from which it hoped to profit commercially.

The University admits it purchased broader coverage not only for its employees, but also itself for liabilities arising from a wide swath of possible claims that could arise in conjunction with its business pursuits. The "business resiliency" policy achieves broader coverage not only through its coverage agreements, but also by modifying its standard sovereign immunity non-waiver provision to bring claims not excluded by the policy's definition of **Damages** back within coverage (and waiver). In an about-face from what it argued below,[4] the University now concedes these modifications were deliberate. Resp.Br.75-78.

Section 537.610 expressly authorized the University to purchase broader coverage, and a corresponding broader waiver of immunity, then it had done in other contexts. The University's choice to do so in conjunction with its patent-driven pursuits echoes the fundamental purpose of §537.610, which allows public corporations to protect those it might injure through torts which §537.600 does not enumerate. The University is bound by the language of the policy it obtained, not the policy it now says it intended to obtain.

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[4] Tr. 36-37.

A. The Rule Governing Contract Interpretation Controls.

The purchase of insurance pursuant to §537.610 is a deliberate, express and absolute immunity waiver "for the purposes covered by such policy of insurance…." made pursuant to statutory authority. §537.610.

When interpreting a policy's coverage—and what the public entity has unequivocally waived—the Court relies on "the rules applicable to contract construction." *Langley v. Curators*, 73 S.W.3d 808, 812 (Mo.App.2002). Unwilling to be bound by that rule, the University suggests the Court should apply undefined, heightened canons of construction applicable only to insurance contracts purchased under §537.610. This is not what *Zweig v. Metropolitan St. Louis Sewer Dist*, 412 S.W.3d 223, 246 (Mo.banc 2013) holds. The cases recognize that *statutory* (as opposed to purchased-insurance) waivers of sovereign immunity are to be narrowly construed.[5] The Court should decline the invitation to create special rules for insurance policies purchased under §537.610.

B. Correct Waiver Analysis Under §537.610.

Because the extent of waiver is commensurate with "the purposes covered by such policy of insurance" the *first step* is determining what the policy covers outside of the two statutory exceptions created in §537.600. For any such claims covered, sovereign immunity is waived. §537.610.

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[5] *State ex rel. REJIS v. Saitz*, 798 S.W.2d 705, 707 (Mo.banc 1990) (citing *State ex rel. St. Louis Housing Authority v. Gaertner*, 695 S.W.2d 460, 463 (Mo.banc 1985).

A public entity may purchase insurance but retain immunity by including a non-waiver provision in the policy. *Newsome v. Kansas City, Missouri School District*, 520 S.W.3d 769, 776 (Mo.banc 2017). The *second step*, then, is determining whether the policy contains a non-waiver provision.

The analysis does not stop there, though. The extent to which a non-waiver provision retains sovereign immunity depends upon that provision's terms. It could retain sovereign immunity completely, or only partially. Thus, the *third step* requires interpreting the provision to determine whether it achieves a complete or partial retention of immunity.

C. This Policy's Non-Waiver Provision Contains Exceptions and Accomplishes Only a *Partial* Retention of Immunity.

Here, the University could have used the same non-waiver language contained in its Health Care Liability Policy. D4p.2. It could have contracted for the same all-inclusive non-waiver provision contained in its self-insurance plan. *See Langley*, 73 S.W.3d at 811 (setting out language). It did neither. Had it done so, *Langley* would control. Here, the University built an exception into the non-waiver provision that is absent from the other insuring agreements it provided in discovery.

The cardinal principle of contract interpretation is to ascertain the parties' intent. *Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 123 (Mo.App.2009). That intent is gleaned *from the contract terms alone.* (absent an ambiguity). *Id.* The University says its policy is not ambiguous. See, Resp.Subst.Br.72 ("unequivocal").

Even if it were ambiguous, it would be construed in favor of coverage. *Seeck v. Geico General Ins. Co*., 212 S.W.3d 129, 131-32 (Mo.banc 2007).

Read as a whole: *First*, the policy covers the claims. The University's brief points to no exclusion barring coverage. It admits the purpose of this insurance was to cover "a broad range of claims." Resp.Br.p.59. The claims at issue are commensurate with "the purposes covered by such policy of insurance." §537.610.

Second, the policy contains a non-waiver provision, which the Court must apply.

Third, the University created an exception in this non-waiver provision for what falls under the policy's definition of **Damages**. D3, p.59. Because the provision contains this exception, it only *partially retains* immunity for claims seeking relief that falls outside the definition of **Damages**. That is, the provision retains immunity for claims falling outside the policy's definition of **Damages**, but claims for relief falling within that definition remain covered--and waived--because the purpose of the insurance is to cover those claims in spite of sovereign immunity.

Here is how the provision works. Consistent with basic policy structure, the policy defines **Damages** broadly (*i.e*. "a monetary judgment, award or settlement") and then limits it with exclusions (*i.e*. "[d]amages shall not include or mean future profits, restitution, disgorgement of profits," etc….) D3p.24. Claims seeking excluded forms of relief, such as disgorgement of profits, do not seek **Damages**; therefore, they continue to remain behind immunity's shield. Assume for instance that the University

misappropriated the name of a high-profile athlete to market its MOPS allograft product.[6] The athlete could sue the University in tort for violating her right of publicity, claiming the University must disgorge profits gained through unauthorized use of the athlete's likeness.[7] The policy covers the claim. It defines Multimedia Wrongful Act to include any "act" done "in connection with" the "publication" "of Material that results in" "infringement or interference with rights of privacy or publicity." D3p.27. However, the policy's definition of **Damages** excludes "disgorgement of profits." The University would, therefore, retain immunity because this relief would not fall within the exception for **Damages** set forth in the non-waiver provision.

Here, though, plaintiffs do not seek relief that falls outside the policy's definition of **Damages**. Instead, the claims seek compensatory tort damages and punitive damages. D2p.35-36. Because this relief falls under **Damages**, it falls within the exception built into the non-waiver provision; the claims remain covered—and waived. D3p.24, 59. The "purpose" of the insurance is to cover such claims *in spite of the University's sovereign immunity*. §537.610.

The University suggests it deliberately changed this endorsement to ensure coverage for its employees, and to account for scenarios where its sovereign immunity

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[6] *See generally Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo.banc 2003) for a similar claim.

[7] Unjust pecuniary gain is a measure of damage available for this claim. *Id*.

might be unavailable. Resp.Br.75-78. The most readily-apparent flaw in this logic is that an exception for **Damages** is entirely unnecessary to achieve either objective. A simple statement--like the one in the self-insurance plan--already affords immunity to the University when it is available and allows for coverage when it is not. Likewise, the same statement would protect University employees defined as additional "insureds" by affording them the protections of official immunity where it is available and providing coverage where it is not.

The more plausible explanation for the deliberate change is that the University knew it was wading into areas detached from its governmental purpose; and it desired broader coverage. The policy protects the financial interests of the University while engaged in these activities.

A more basic point is that the Court should not venture beyond the contract terms at all. "Disregarding either party's secret surmise or undisclosed assumption, the court must ascertain the parties' meaning and intent as expressed in the language used and give effect to that intent." *City of St. Joseph*, 251 S.W.3d at 367. The University's created-for-litigation purpose "cannot cause the court to read into the contract something that it does not say, create an ambiguity or show an obligation other than expressed in the written instrument." *Id*. at 369 (citation omitted).

Finally, the University contends the endorsement does not exempt **Damages** because the policy definition and coverage agreement exclude any amount which the Assured is "not financially or legally obligated to pay." The reasoning is circular. The University says it is never "legally obligated to pay" **Damages** because its sovereign

immunity means it never has a legal obligation to pay. This Court has rejected this argument, holding that it "misreads the language of section 537.610.1 that waives sovereign immunity for 'the purposes' covered by the insurance." *Amick v. Pattonville-Bridgeton Terrace Fire Protection District*, 91 S.W.3d 603, 605 (Mo.banc 2002) (overruling *State ex rel. Ripley County v. Garrett*, 18 S.W.3d 504 (Mo.App.2000)).

The University cites *State ex rel. Cass Medical Center v. Mason*, 796 S.W.2d 621 (Mo.banc 1990) for the proposition that *Amick* is inapplicable where a policy contains a non-waiver provision. This fails to appreciate the progression of the case law. *Garrett* relied heavily on *Cass*. *Garrett*, 18 S.W.3d 504. In *Amick*, this Court overruled *Garrett*, which like this case, involved a policy containing a non-waiver endorsement. *Amick*, 91 S.W.3d at 605. To the extent *Cass* stands for the proposition that a policy preserves immunity when it limits coverage to acts the insured is "legally obligated to pay," the Court should formally extend *Amick*'s overruling of *Garrett*.

Second, the extent to which the endorsement disclaims sovereign immunity is an antecedent question. If the endorsement preserves coverage for **Damages** in spite of immunity, then the University *does* have a legal obligation to pay (because it has waived immunity under 537.610 by exempting **Damages** from the non-waiver clause).

The Court cannot interpret the non-waiver provision without reference to the exceptions it carves out any more than it could interpret a policy's coverage without referencing its exclusions. This non-waiver provision excepts these claims for relief. which results in the claims remaining covered and waived under §537.610.

IV.

A. The Municipality/Municipal Corporation Test is a False Dichotomy.

By reinstating the common law predating *Jones*, and by explicitly referencing the governmental/proprietary test in §537.600, the General Assembly kept the governmental/proprietary distinction alive. These distinctions, though, are "riddled by pitfalls of terminology… ('municipality' versus 'municipal corporation'), and…('governmental' versus 'proprietary' function)." *Saitz,*798 S.W.2d at 706. This has led to seemingly irreconcilable results. Some cases limit the test to "municipalities," which they limit to cities, towns or villages. *Id.* at 707. Others use the broader term "municipal corporation." *State ex rel. Missouri Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 181-82 (Mo.banc 1985). Still others apply the test to "arms of the state" for activities clearly outside of their governmental purpose. *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo.banc 1979); *Allen v. Salina Broadcasting, Inc*., 630 S.W.2d 225 (Mo.App.1982).

It is important for the Court to understand how the law got to this point.

Historically, the State itself and certain public corporations/political subdivisions have enjoyed full sovereign immunity. *Cullor et ux. Jackson Township, Putnam County, et al*., 249 S.W.2d 393, 395 (Mo.1952). To understand what "full sovereign immunity" meant at common law, it is important to recognize the assumption underlying that concept. The rationale was that the State and some entities were "formed for the *sole* purpose of exercising *purely governmental* powers" and were, therefore, *incapable* of acting proprietarily. *Id*. (emphasis added); s*ee also Page v. Metro. St. Louis Sewer Dist.*,

377 S.W.2d 348, 352 (Mo.1964) (describing "a metropolitan sewer district"…"exercising only governmental powers."); *D'Acourt v. Little River Drainage Dist.*, 245 S.W. 394, 396 (Mo.App.1922)("the drainage district is strictly … exercising governmental functions…."). Thus, what "full sovereign immunity" meant at common law was that a public entity *only* capable of acting governmentally could not incur liability for the "improper exercise" of its power. *Cullor*, 249 S.W.2d at 395. It has *never* meant that a public corporation that is not a municipality can enter the private sector for its own pecuniary/commercial gain and obtain an unfair advantage under an immunity blanket. We know this because the pre-*Jones* common law did not grant entities exercising proprietary functions full immunity. *Id*. Rather, "their liability or nonliability in tort depend[ed] on the character of the particular function involved as being governmental on the one hand, or proprietary on the other." *Id*.

Yet, because some judges assumed that municipal corporations were the only public entities capable of exercising proprietary functions, cases began to describe the application of the governmental/proprietary dichotomy with reference to that label. *Saitz*, 796 S.W.2d at 707 (stating "REJIS is not an incorporated city, town or village. The governmental-versus-proprietary distinction is therefore inapplicable…."). Yet *Saitz* was also based upon the assumption that REJIS was *only* capable of "exercising exclusively governmental functions." *Id*. Indeed, all of the cases *Saitz* cites for the proposition that municipal corporations--that are not more narrowly defined as municipalities--enjoy full sovereign immunity define the former to have only the ability to act governmentally.

The problem with continuing to apply the governmental/propriety test with reference to whether something is a municipality is that sometimes the assumption underlying that term (that it is the *only* type of public entity capable of acting proprietarily) proves false. For instance, what happens when a school district, which is considered an "arm of the state" only capable of acting governmentally, chooses to operate a non-student radio station after hours? Or, what happens when a University chooses to develop a proprietary tissue preservation system, patent it, advertise it falsely, and then sell it nationwide for use in surgeries for a profit? There should be no immunity. *See Allen*, 630 S.W.2d at 228.

If the law is that proprietary conduct is immune simply because a school district or University is not a municipality, then the law has lost sight of what the governmental/propriety test was originally designed to achieve and substituted a false dichotomy in its place. Worse, it will have contorted the concept of full sovereign immunity (that entities only capable of acting governmentally are immune for all of their activities because they are all governmental) that predated *Jones*.

The notion of full sovereign immunity has never meant, *and should never mean*, that a public corporation can enter areas reserved for the private sector and injure without consequence just because they are not cities, towns or villages. To be clear, the state itself enjoys "full sovereign immunity." It can, in fact, only act governmentally and cannot be held liable for the negligent performance of those acts. *McHenry*, 687 S.W.2d at 181-82. But for any public entity that has corporate existence apart from the State, and a governing body capable of making decisions to benefit itself, the Court should rid the

law of the false dichotomy that has arisen and return to the true common law test, which has always been whether the entity is one that can engage in proprietary activities, not whether it is a particular type of municipal corporation.[8]

B. The University is not the State.

A distinction exists between the state itself, and separate corporate bodies that also exercise powers the state has delegated. Cities, towns and villages are bodies corporate and politic; they are independent bodies, but they exercise public powers. *Counts v. Morrison-Knudsen, Inc.*, 663 S.W.2d 357, 362 (Mo.App.1983); §80.020 RSMo. Likewise, §172.020 establishes the University as body corporate and politic. As a body corporate, the University has independent existence; it is not the State. As a body politic, it may exercise the governmental powers the state has delegated to it. But, because it is its own corporation with its own governing body, it has the capacity to act in its self-interest as determined by an independent Board of Curators. §172.010 RSMo. The

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[8] The University contends that subjecting it to the governmental/proprietary distinction would result in an impermissible alteration of the pre-*Jones* common law. Not so. Plaintiffs are asking the Court to clarify what the distinction really meant at common law before this false dichotomy entered the picture. Moreover, the fact that no pre-1977 case subjected the University to the distinction does not mean the distinction did not apply to it at common law. It simply means the issue was never considered, most likely because the University was not yet venturing beyond it its primary governmental function—education.

Curators do not report to the governor, are not subject to removal at the whim of the governor and are not subject to the day—to—day control of the chief executive. *Contrast McHenry*, 687 S.W.2d at 182. The University exercises its authority as a government unto itself. Precisely because it is a separate public body, which can act in furtherance of its own self-interests, no case should hold that the University *is* the state. It should have sovereign immunity when it acts as "a public corporation for educational purposes" and, in that limited regard, as an "agency or arm of the State." *Todd v. Curators*, 147 S.W.2d 1063, 1064 (Mo.1941). The opposite ought to be true when the University acts in proprietary ways.

C. The Conduct at Issue is Proprietary.

To this point, the University has *never* argued that the conduct at issue was not proprietary. It neither made that argument before the trial court nor the court of appeals. D7p.1-4; D8p.1-16; Resp.Br. WD82810 pp.48-50. Indeed, the development of a specific medical device that is patented, advertised and sold in the private market is a far cry from operating a hospital for the public benefit. Just because an act has tangential relationship to "health care" does not mean that act is performed in furtherance of the governmental purpose of furthering the public health. Under the University's logic, there is no line at all limiting what it could do on the business side of health care.

Governmental activities benefit the state's public at large. Proprietary functions are those performed for the specific benefit or profit of the entity performing them. *Junior College Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 447 (Mo.banc 2004). Historically, governmental services are more likely to be funded through taxes,

but when a public entity enters the private sector, it is more likely to charge a price for its services just as private competitors do. *Zweig*, 412 S.W.3d at 241.

The University's newfound argument tries to fit its conduct within the generalized provision of health care so that it may come under *State ex rel. Bd. of Trustees of the City of North Kansas City Memorial Hosp v. Russell*, 843 S.W.2d 353 (Mo.banc 1992). Alternatively, it argues this was just academic research. Clearly, the University has gone well-beyond just providing orthopaedic services or conducting cutting-edge medical research. It took the next step; developing a product (MOPS allografts) akin to a medical device or drug. It patented that product. It launched a multi-media campaign designed to lure persons into having a surgery where that product would be implanted. It purchased business resiliency insurance to cover those advertising activities. And now, it is trying to use the results of those surgeries to sell that product for a profit in direct competition with private companies who make similar products. This conduct is fundamentally proprietary, and the fact that the University is deploying its venture capital (and advertising it) nationwide confirms the purpose of this activity is not just to benefit the state's public at large, but instead the University's financial interests.

Where a public corporation (1) steps outside its reliance on tax revenues, (2) enters into marketplace competition to profit from entrepreneurial enterprises and (3) purchases liability insurance to protect it during such venture, sovereign immunity is abandoned precisely because the policy of the law does not advantage the corporation against its competitors by absolving it from liability while its private sector competitors must face liability when they mislead their customers. This is because the entity is no longer

subject to the concerns expressed in *Todd*--that the government "has no funds, nor means of raising funds, for the purpose of paying damages for tort nor is its property subject to execution for such purpose." *Id.*

D. Even if Court Adheres to the Municipality/Municipal Corporation False Dichotomy, It Should Categorize the University as "Municipality."

The University insists "municipality" must be narrowly defined relying on *Saitz*, 798 S.W.2d at 707. However, the above analysis shows that the pre-*Jones* common law distinguished between "municipality" and "municipal corporation" based on whether the entity had the authority to engage in non-governmental activities. Clearly, the University has the authority/ability to engage in non-governmental activities. Moreover, post-1977 cases implying that the distinction between a "municipality" and a "municipal corporation" is about a geographic authority to operate ignore the pre-1977 law which makes the scope of authority to act non-governmentally the differentiating criteria.

Likewise, cases evaluating whether the University is a municipal corporation are trying to fit the University within a statute the creates rights or obligations in municipal corporations. *See, e.g. State ex rel. Milham v. Rickhoff*, 633 S.W.2d 733, 735 (Mo.1982). That the University is not a municipal corporation (by a 4-3 vote) for venue purposes does not mean a public corporation is never a municipal corporation for every purpose. The better analysis asks about the powers granted, not the nomenclature employed. And, when the University's powers are considered, it has the same authority to act as a municipality—governmentally and proprietarily.

V.

The University's effort to pigeon-hole the MMPA into the broad category of "statutory torts" is unavailing. So is its attempt to paint plaintiffs' MMPA claims as repackaged medical malpractice. Resp.Br.p.98. The MMPA claim is based on the University's advertising used in connection with its sale of merchandise to plaintiffs. Whether health care providers negligently treated plaintiffs is a separate issue. The University—not plaintiffs—is trying to repackage the MMPA claims as malpractice claims.

The University says the MMPA creates a "statutory tort." Neither *Hope v. Nissan N. Am., Inc*, 353 S.W.3d 68, 85 (Mo.App.2013) nor *Heckadon v. CFS Enterprises, Inc*. 400 S.W.3d 372, 378-79 (Mo.App.2013) address this question, and the University points to no other case branding the MMPA as a tort. Instead, the University erroneously relies on RESTATEMENT (SECOND) OF TORTS §874A (1977) and cases analyzing *implied* statutory causes of action. *See Bachel v. Miller Cty Nursing Home Dist.*, 110 S.W.3d 799, 803 (Mo.banc 2003); *State ex inf. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 112 (Mo.App.1984). But, "[b]y its express terms, this section [§874A] is inapplicable to statutes which provide for a civil remedy." *Johnson v. Kraft*, 885 S.W.2d 334, 336 (Mo.1994).

Unlike the statutes at issue in *Bachel* and *Ashcroft*, §407.025 expressly creates a private cause of action, and the legislature drafted the precise contours of this unique civil

action into the statute. *See* §407.025 (dictating venue[9] requirements, its elements, limitations on damages, and the time when such action accrues). This drafting choice stands in contrast to other "statutory torts" (including the examples the University cites) that create actions with broad, unrestricted damages traditionally available in tort, including those for emotional pain and suffering. §537.053 (dram shop law), §273.036 (dog bite statute), §213.111 (Missouri Human Rights Act)[10]; *see also,* §287.780, §537.080.

A "statutory tort" necessarily allows for tort damages (*i.e.* economic and non-economic), has tort proof requirements and exists to further tort law purposes. *Zueck v. Oppenheimer*, 809 S.W.2d 384, 388 (Mo.App.1991). A consumer protection statute does none of these. Section 407.025 does not allow for the recovery of non-pecuniary losses

[9] The venue limitation is significant because it takes MMPA claims out of the purview of the venue statute, §508.010, which requires litigants to determine whether a count sounds in tort.

[10] This Court, in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87 (Mo.2003), interpreted §213.111 as a tort for the purposes of determining the right to a jury trial. That case stated an MHRA claim fits the modern tort framework "because it was an action for recovery of money *only* and involved issues of fact." *Id.* at 87. The University's edited quotation removes the qualifying "only," which is notable since the MMPA provides for recovery of money *and* equitable relief. Resp.Br.p.99.

and does not require tortious *mens rea*. 15 C.F.R. §60-9.020. An MMPA claim likewise has a distinct purpose. *See State ex. rel Webster v. Areaco Inv. Co*., 756 S.W.2d 633, 635 (Mo.App.1988). Without these hallmarks of tort claims, the MMPA cannot be fairly categorized as a "statutory tort."

While the legislature can certainly create a statutory "tort," it can also create a statutory claim that is not a "tort." It could have explicitly created a "tort action"—language it has written in other contexts—but it did not. §§537.294, 516.097, 447.712.

The MMPA is not statutory-fraud. It exists to protect consumers who were not otherwise protected by the existing tort or contract law. William Webster, *et al*, *Combatting Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act*, 51 MO.L.REV. 365, 367, 370 (1987). The legislature could have replaced common law fraud with the MMPA, but it did not. *Compare* §538.210 (creating "[a] statutory cause of action for damages against a health care provider…replacing any such common law cause of action"). Instead, the MMPA "supplements"[11] (not supplants) the traditional remedies with a new cause of action that is neither dependent on traditional tort nor contract theories and which creates *per se* liability for trade practices the legislature has condemned.

Appellants' MMPA claim, which is neither rooted in tort nor contract, and which is separate and distinct from tort and contract law, is *sui generis;* it cannot be lumped in

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[11] *Ullrich v. Cadco, Inc*., 244 S.W.3d 772, 777-78 (Mo.App.2008) (the enhanced pleading requirements for fraud do not apply to MMPA claims).

with other torts. *Linkage Corp v. Trustees of Boston University*, 679 N.E.2d 191, 209 (Mass.1997).

VI.

A. Section 407.010 Applies to the University

The University relies on *Carpenter v. King*, 679 S.W.2d 866, 868 (Mo.1984). *Carpenter* holds the State and its agencies are not subject to §59.313, RSMo., which authorized the St. Louis recorder of deeds to assess a fee for filing any "instrument." When the Director of Revenue sought to file a release of a sales tax lien, the City attempted to charge the filing fee. The Director declined. Litigation ensued. The Court concluded the State was not subject to the fee because, generally, the State is not subject to its own statutes. This conclusion preserved "the state's sovereign rights and protect[ed] its capacity to perform necessary *governmental* functions." *Id*. (emphasis added).

However, the general rule *Carpenter* recognizes excepts statutes protecting against injury and wrong. *Carpenter* cited *Hayes v. Kansas City*, 241 S.W.2d 888, 892 (Mo.1951) for authority that the State need not pay the statutory fee. *Hayes* cited 59 C.J. §653 for that conclusion:

> 'The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and **the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and**

> **justice, and the prevention of injury and wrong.**' 59 C.J. §653, pp. 1103–1104.

Hayes, 241 S.W.2d at 892 (emphasis added). The University does not acknowledge this important exception or the general rule that an otherwise public entity not protected by sovereign immunity because it is acting in a proprietary capacity must face the same liabilities as its private sector competitors. *Lockhart v. Kansas City*, 175 S.W.2d 814, 816-19 (Mo.banc 1943).

The MMPA protects consumers by preserving "fundamental honesty, fair play and right dealings in public transactions." *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 414 (Mo.banc 2014). To achieve this injury-and-wrong-preventing purpose, §407.020.1 makes the "act, use or employment by any person" of any unfair or deceptive practice done "*in connection with* the sale or advertisement of any merchandise" unlawful (emphasis added). The University is within the purview of this injury-and-wrong-preventing statute.

B. The University is a Person for Purposes of §407.010, *et seq*.

The University next contends it is not a "person" "within §407.010. It argues this Court's conclusion for purposes of the former corporate venue statute, that "where the term 'corporation' is used in our statutes and Constitution it uniformly refers to private or business organizations, not to public corporations," controls. *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo.2004). Setting aside the obvious difference between a venue analysis and this case, *Ormerod* relies on *City of Webster Groves v. Smith*, 102

S.W.2d 618, 620 (Mo.1937), the holding of which is actually much more limited: "[i]t is our conclusion that the word 'corporation' as used does not include a municipality and therefore *a municipality* is not within the act." *Id.* (emphasis added).

Similarly, the other case *Ormerod* cites, *Cas. Reciprocal Exch. v. Missouri Employers Mut. Ins. Co.*, 956 S.W.2d 249, 254 (Mo.banc 1997), requires three elements for an entity to qualify as a public entity:

> "(1) the governmental or public entity must be formed by government itself or by the voters acting as a group; (2) the entity must be controlled by and directly answerable to one or more public officials, public entities, or the public itself; and (3) the entity must perform a service traditionally performed by the government."

Id. When the acts are proprietary, they are not governmental. *Riley v. City of Indep.*, 167 S.W. 1022, 1025 (Mo.1914). The contention here is that the University's specific acts are *not* governmental, but proprietary. *See* Point IV. The University thus qualifies as a "person" within the meaning of §407.010 because it is acting as a private corporation. *Lockhart v. Kansas City*, 175 S.W.2d 814, 816-19 (Mo.banc 1943)(distinguishing *Smith*, 102 S.W.2d 618).[12]

[12] *Krasney v. Curators*, 765 S.W.2d 646 (Mo. App.1989) is distinguishable on this basis as well. The Court did not address whether any public entity would fit within the statutory definitions at issue if it were acting proprietarily.

C. Expressio Unius est Exclusio Alterius Does Not Apply.

Lastly, the University claims the statutory definition of "person" is exclusive such that "the express mention of one thing implies the exclusion of another" (*i.e.* if the definition does not specify public corporations it means only private ones are liable for lying to their customers).

> But all the authorities agree that the maxim is a mere auxiliary rule of construction in aid of the fundamental objective, which is to ascertain the intention of the lawmakers; and that it must be applied with caution… the application of the maxim 'should produce a rational interpretation and support a policy which may be reasonably supposed to have dictated the enactment…the maxim may properly be invoked 'only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.'

Springfield City Water Co. v. Springfield, 182 S.W.2d 613, 618 (Mo.1944).

The University advertised a specific thing--not general healthcare or orthopaedic services–but an experimental/patented tissue preservation system and procedure using that system. It was not knee treatment – but a proprietary product coupled with a service designed to sell the product. The very reason for the governmental/proprietary distinction is to place the government in the same position as the private sector when the government chooses to enter that sector.

When the University acts as a private person, it should be treated no differently than its competitors who are subject to the MMPA.

It would be absurd to conclude that the legislature's use of the broad word "corporation" in §407.010 did not include every kind of corporation, especially when §1.020(12) anticipates that "corporation" includes a public corporation when the statute serves a remedial purpose of which the University has run afoul. The two statutes are not at loggerheads; they must be read *in pari materia*.

The Attorney General's regulations should be given credence. The regulation, 15 C.S.R. §60-7.010 is consistent with the legislature's intent. The University, acting as an entrepreneurial enterprise competing in the economic marketplace is a person within §407.010.

VII.

The University contends the trial court's order denying plaintiffs leave to amend to add a negligent misrepresentation claim is not properly before the Court. Resp.Br. p.47n.9, 108. Since the trial court is not required to grant leave to amend post-dismissal *sua sponte*, it was incumbent on appellants to raise the issue post-dismissal to preserve it. *Schauer v. Gundaker Movits Real Estate Co.*, 813 S.W.2d 112, 116 (Mo.App.1991). After the trial court entered its dismissal order (D.51p.20)(Draper)[13], Plaintiffs sought leave to amend. D68(Draper)). The Court denied the motion. (D51p.21)(Draper). It then entered judgment in favor of the University. D78(Draper). There is no legally cognizable reason why the Court should review the dismissal aspect of the judgment but not the denial of leave to amend. Indeed, appellate courts regularly review motions to amend as part and parcel of a dismissal judgment. *See Boley v. Knowles*, 905 S.W.2d 86 (Mo.banc 1995); *Atkins v. Jester*, 309 S.W.3d 418, 421 (Mo.App.2010). When the trial court denied that timely-filed motion to amend, that order merged into the judgment of dismissal. Moreover, once the case is appropriately before the Court, the scope of appellate review is defined by the points relied on. *Moore*, 96 S.W.3d at 901 n.4.

Nor would amendment be futile if the Court determines the University does not have sovereign immunity for these activities. The University's futility argument simply assumes the applicability of immunity even though that is contested.

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[13] Similar orders were entered in the other cases except *Butala*, where the negligent misrepresentation claim was already made.

Finally, there was no delay in seeking amendment. The plaintiffs did not know the University would claim it was not subject to the MMPA (and in fact it didn't even make that claim in its initial motion to dismiss, which the trial court denied). A negligent misrepresentation claim would allow the plaintiffs to proceed against the University in the event sovereign immunity is waived but the MMPA does not apply. Plaintiffs efforts to amend the petition were, therefore, timely and appropriate.

"Amendments are now unlimited in scope and, in the absence of prejudice to other parties or harmful consequences of delay…courts should be extremely liberal in permitting them." *Steinberg v. St. Louis Union Tr. Co.*, 502 S.W.2d 442, 443 (Mo.App.1973). Should the Court grant Points II, III or IV, it should permit plaintiffs to plead a cause of action for negligent misrepresentation.

Respectfully submitted,

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

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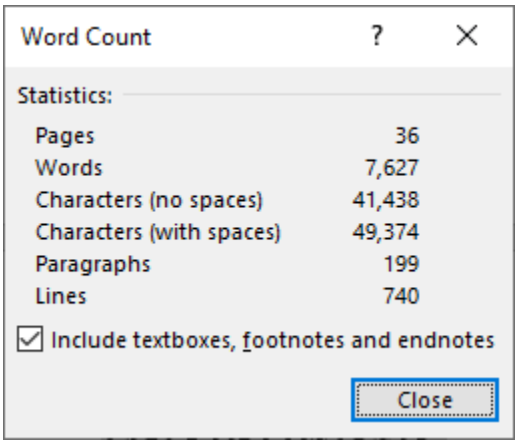
CERTIFICATE OF COMPLIANCE

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 7,627 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.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Substitute Reply Brief of Appellants was served on Respondents via the Missouri Courts E-filing System on September 25, 2020, and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03 (a).

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