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ANNUAL UPDATE OF SUPREME COURT, 8TH CIRCUIT, AND MISSOURI CASES

Presented By:

Erin Seele & Dave Streubel

CUNNINGHAM, VOGEL & ROST, P.C.

legal counselors to local government

333 S. Kirkwood Road, Suite 300

St. Louis, MO 63122

314.446.0800

erin@municipalfirm.com;

www.municipalfirm.com

With Assistance By:

Lyndee Rodamaker

&

Alexandria Buettner

Summer Law Clerks at

CUNNINGHAM, VOGEL & ROST, P.C.

legal counselors to local government

U.S. Supreme Court Cases

***JANUS v. AFSCME*, No. 16-1466, 2018 U.S. LEXIS 4028 (June 27, 2018)** – *Public sector unions not allowed to exact agency fees from non-members; overruling longstanding Abood precedent.*

Janus was an Illinois public employee who was part of a block that voted to be represented by a union. However, Janus did not want to be a part of the union because he disagreed with many of its positions. The union in question was the only entity authorized to engage in collective bargaining or wage negotiations and employees were not allowed to hire other representation or represent themselves in wage negotiation. Although Janus was not a member, because he benefited from the union's collective bargaining, he was charged a fee to cover their expenses. In this case, that fee was 78.06% of the union membership fee. The Illinois Governor filed suit challenging the validity of the fees and was joined by Janus. The District Court dismissed the Governor's challenge for lack of standing but Janus was allowed to file his own complaint, which he did. The District Court dismissed the claim as it was foreclosed by *Abood*.

HELD (5-4): The state's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. The decision stems from the idea that forcing "free and independent individuals to endorse ideas they find objectionable raises First Amendment concerns." The decision in *Abood* is overruled because its reasoning does not hold up under the "exacting scrutiny" standard. The idea that agency fees are meant to promote "labor peace" is not sustainable as there is no correlation between the two and there are other less restrictive means to achieve labor peace. Additionally, there is no compelling state interest in controlling the risk of free-riders who benefit from the union without paying for it. Additionally, there is no state interest in adequately funded bargaining agents or improving the efficiency of the work force, which is strong enough to overcome exacting scrutiny.

Dissent (Kagan and Ginsburg, Breyer and Sotomayor joining): The Court has long held that government entities have latitude when it comes to regulating their employees' speech. The analysis in *Abood* is sound and there is a government interest in preventing inter-union conflict and clarity in only having a single union with which to negotiate. Unions have a legal duty to fairly represent all those, even non-members, who are a part of their class. With the majority's holding, there is no financial reason why anyone would continue to pay to be a part of the union, because they can still benefit from its action. The Court dismisses this argument and says that free riding concerns have never been enough to overcome the First Amendment challenges.

***SOUTH DAKOTA v. WAYFAIR, INC.*, 2018 WL 3058015, No. 17-494, (June 21, 2018)** – *"Physical Presence" is no longer required to establish a "substantial nexus" to the taxing State.*

South Dakota passed a sales tax which required out-of-state businesses, that on an annual basis either sold $100,000 of goods or services or had 200 separate transactions, to remit the sales tax to South Dakota. South Dakota's sales tax was only forward-looking and did not attempt to capture prior taxes owed. South Dakota also passed the sales tax by declaring an emergency, as their sales

tax receipts plummeted by an estimated $48-$58 million annually. Wayfair, Inc., and a few other large online retailers, challenged the sales tax as a burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. 1, § 8. These entities alleged they did not have a "substantial nexus" to South Dakota, as they had no physical presence within the state, and, thus, the sales tax violated the Commerce Clause. *See Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) (A state may tax exclusively interstate commerce, so long as certain requirements, including a "substantial nexus" to the taxing state, are met).

HELD (5-4): The Court ruled that prior precedent in *National Bellas Hess* and *Quill*, which created the "physical presence" requirement to prove an out-of-state business had a "substantial nexus" to the taxing state was "unsound and incorrect[,]" considering the economy of the 21st Century with large amounts of online retail sales. The Court also determined that the physical presence requirement from *Bellas Hess* and *Quill* actually distorted the market and created a burden on interstate commerce by giving an advantage to online retailers who did not have a physical presence in a state compared to brick-and-mortar stores, going so far as to negatively comment on some online retailers' advertisements that their products were "tax free."

It is worth noting that the Court's opinion only addressed the "substantial nexus" factor of South Dakota's tax, and did not address the other factors in the *Complete Auto* test, which stipulates that the tax must:

> (1) apply to an activity with a substantial nexus with the taxing State;
> (2) be fairly apportioned;
> (3) not discriminate against interstate commerce; and
> (4) be fairly related to the services the State provides.
> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)

However, the Court commented approvingly of South Dakota's tax, which required, on an annual basis, either $100,000 in goods and services in South Dakota, or 200 separate transactions, prior to the attachment of any remittance requirements. The Court expressed concern over how start-ups and small businesses may be burdened by interstate taxation and knowing each individual state's taxation schemes, but indicated that technology should soon become readily available to help such smaller businesses comply with the law.

Concurrence (Thomas): *National Bellas Hess* and *Quill*, along with the Court's entire negative Commerce Clause jurisprudence, should be overruled.

Concurrence (Gorsuch): *National Bellas Hess* and *Quill* are judicially-created "tax shelters" that judges have no authority to create in the first place and, therefore, should be overruled. However, it is unclear if the text of the Commerce Clause would authorize Article III courts to invalidate state laws "that offend no congressional statute."

Dissent (Chief J. Roberts, Breyer, Sotomayor, and Kagan): By discarding the "physical-presence rule," the Court risks altering the dynamics of the national economy, which should only be done by Congressional action, and not to "expiate a mistake [the Court] made over 50 years ago."

***COLLINS v. VIRGINIA*, 138 S.Ct. 1663 (US 2018)** – *Police cannot invade the curtilage without a warrant.*

County police officer observed the driver of a black and orange motorcycle commit various traffic violations within the span of a few weeks, both times with the motorcycle evading officers' attempts to perform a stop. County police suspected the motorcycle to be stolen and in the possession of petitioner, Collins, through photos on Collins' Facebook page. One photo showed the motorcycle parked at the top of a driveway. County police tracked down the address of the house in the photo, went to its location, and discovered the motorcycle in the driveway with a tarp covering it. Because the motorcycle's position matched that of the one in the Facebook photo, the officer approached the motorcycle, removed the tarp, and confirmed it was the same motorcycle in the photos and previous traffic incidents. The police ran the tags and confirmed the motorcycle was stolen. The police then placed the tarp back over the motorcycle and waited for Collins to return. The police never obtained a search warrant. Once Collins returned, he was arrested for receiving stolen property. Collins argued to suppress the motorcycle as evidence on the grounds that the police conducted an illegal, warrantless search of his property. The Virginia Supreme Court ultimately upheld the conviction on the grounds that the automobile exception applies to vehicles parked on private property.

HELD (8-1): The Court held that the automobile exception to the Fourth Amendment, which protects against unreasonable searches and seizures, does not allow officers to enter a home or its curtilage in order to search a vehicle without a search warrant. The automobile exception arises out of the concern that the "ready mobility" of automobiles would allow them to be moved out of a jurisdiction before a search warrant could be obtained, and, therefore, officers with probable cause may search vehicles. The justification is that unlike homes, automobiles are already under strict regulation by the government and are examined as part of the routine duties of police officers while making traffic stops. Neither one of these justifications apply to the home or curtilage, which is the area outside the home to which home life extends. Just as an officer could not enter a home to search an automobile that he sees through the window, an officer may not enter the curtilage of a home to search a vehicle without a warrant. This limitation applies even if the officer has probable cause.

Concurrence (Thomas): Recognizing that the exclusionary rule, which prohibits admitting evidence obtained during an illegal search, is apparent in Federal jurisprudence, but skeptical that the Court has authority to impose that rule on the states.

Dissent (Alito): Hallmark of Fourth Amendment jurisprudence is to prevent against "unreasonable" searches and seizures, and the search of the motorcycle here was not unreasonable. Application of automobile exception inconsistent with previous "exigency-based" exceptions, like "emergency aid" exception, which allow officers to enter curtilage and dwellings warrantless.

***MURR, v. WISCONSIN*, 137 S.Ct. 1933 (US 2017)** – *Validity of state regulation imposing a minimum one acre of developable land for the use and sale of lots was not considered a regulatory taking.*

In 1976, Wisconsin enacted a regulation preventing the use or sale of adjacent lots under common ownership located next to the St. Croix River, unless they have at least one acre of useable area. The regulation also required that local municipalities pass ordinances that imposed the same restrictions. The regulation included a grandfather clause for lots under separate ownership as of January 1, 1976 and a merger clause saying if any adjacent lots come into common ownership in the future, those lots would then be subject to the regulation. The Murr siblings came into ownership of two adjacent lots, the first, Lot F, in 1994 and then Lot E in 1995. After deciding to sell Lot E as part of their plan to improve the land, they were denied a variance by their city as the usable area on each of the lots individually was 0.98 acres. The Murrs then sued and the Wisconsin Court of Appeals found against them deciding that the two lots acted as a single unit for the purpose of the takings analysis.

HELD (5-3): The Court upheld the decision of the Wisconsin Court of Appeals and ruled that modern takings jurisprudence supported the evaluations of the takings claim in relation to the property as a whole, not the individual lots in the property. In the past, the Court has refused to parcel the property for the purpose of a regulatory takings analysis. Additionally, the Court based its decision on the idea that individual states may not "shape and define property rights and reasonable investment-backed expectations." Courts must evaluate other factors to determine the relevant denominator to use when assessing if a regulation amounts to a taking. These factors are the treatment of the land under local and state law, the physical characteristics of the land, and the value of the property under the challenged regulation. After assessing these factors, the Court found that no taking had occurred of the Murrs' land. The merger provision, which was challenged by the Murrs, is a classic way of gradually bringing existing lots that did not meet the regulation's requirements up to the standards imposed, and when paired with the grandfather clause, it allows property owners to maintain rights while allowing the state to impose regulations.

DISSENT: (Roberts, Thomas and Alito joining): The majority's adaption of a new definition of property rights for the purpose of the takings analysis is incorrect and instead the traditional approach relying on the state law which defines the boundaries should be followed.

DISSENT: (Thomas, separate dissent filed): A fresh look is necessary for the takings analysis so that it can stay grounded in the Fifth Amendment.

Gorsuch took no part in the consideration or decision.

***TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. v. COMER*, 137 S. Ct. 2012 (2017)**
– The refusal of a Department of Natural Resources' grant failed rigorous scrutiny necessary for policies which discriminate based on religious character and violated the Free Exercise Clause of the First Amendment.

The Trinity Lutheran Church Child Learning Center runs a child daycare center under the auspices and on the property of the Trinity Lutheran Church. The Center has a playground which was covered in gravel. In 2012, the Center applied for the Missouri Scrap Tire Program, which is run by the Missouri Department of Natural Resources and "offers reimbursement grants for nonprofits that install playground surfaces made from recycled tires." Although the Center ranked fifth on the list of 44 applicants, they were not one of the 14 recipients of the grant that year. In the letter they received denying their application, the Center was told that the Department had a policy, pursuant to the Missouri Constitution, of not providing financial assistance directly to a Church. Trinity Lutheran sued, and the District Court dismissed the suit saying the Free Exercise Clause of the First Amendment "prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit withholding an affirmative benefit on account of religion." The Eighth Circuit affirmed this decision with a divided panel.

HELD (6-1-2): The Department's policy of not awarding grants to religiously affiliated institutions violated Trinity Lutheran's rights under the First Amendment's Free Exercise Clause. Policies like that of the Department discriminate against religious institutions by denying them otherwise available public benefits solely based on their religious character. The Court compared this case to *McDaniel v. Paty*, 435 U.S. 618 (US 1978), where a Tennessee law that prevented ministers from serving in the state's constitutional convention was condemned because it denied participation based on status as a minister. This situation is not like that in *Locke v. Davey*, 540 U.S. 712 (US 2004), in which Washington State was allowed to condition the award of a scholarship on the money not being used to pursue a degree in theology as that is an "essentially religious endeavor." The policy of the Department does not survive the "most rigorous scrutiny" standard that the Court applies to laws imposing a disability on account of religious status and, therefore, the case is reversed and remanded.

Concurrence (Thomas and Gorsuch): It is troubling that the Court endorses *Locke* even in a mild sense, but the Court appropriately read it narrowly.

Concurrence (Breyer): It is important to note the nature of the service in question here as a public benefit, but it is essential to leave the analysis of the First Amendment's application to other public benefits for another day.

Dissent (Sotomayor and Ginsburg joining): The decision in this case requires the Constitution to tolerate the allocation of funds directly to a church. Providing this kind of funding to a Church directly supports the facilities that church uses to spread its beliefs which violates the Establishment Clause.

8th Circuit Cases

***UNITED STATES v. CRUMBLE*, 878 F.3d 656 (8th Cir. 2018)** – *Search warrant not required to search abandoned cell phone left by fleeing defendant.*

A tan Buick, which had previously been one of two cars that were exchanging shots, crashed into a house and a witness reported two male occupants fleeing the site. One of these men, Crumble, was found hiding behind a shed and was then brought back to the crash site by police. At the crash site, Crumble denied any knowledge about the shootings or the crash. Later that day, an officer found a cell phone in the Buick and the officer applied for a search warrant the next day. The county approved the warrant and the officer found a video which showed Crumble in the Buick holding a handgun. Crumble was then charged and moved to have the evidence from the cell phone suppressed. While a magistrate judge recommended suppressing the evidence, the district court judge denied the request and allowed the evidence to remain admissible as Crumble had abandoned the phone and, therefore, lost his Fourth Amendment protection.

HELD: The district court did not err in admitting the evidence from the cell phone and such admission was not a violation of the Fourth Amendment. It has long been held that the Fourth Amendment does not pertain to abandoned property. The standard of review for the district court's decision in this case is clear error, which the Court does not find. Based on the totality of the circumstances, it is not a clear error on the part of the district court to say that Crumble abandoned the cell phone. Crumble voluntarily ran away from the vehicle and its contents while fleeing and denied knowledge of the shooting or the Buick, thus further indicating his desire to abandon the car.

***HAVLAK v. VILLAGE OF TWIN OAKS*, 864 F.3d 905 (8th Cir. 2017)** – *Court upholds licensing ordinance requiring permit for all commercial activity in public park.*

The Village of Twin Oaks enacted an ordinance requiring a license for commercial activity in the City park. Twin Oaks Park has many photogenic features, which became an attraction for commercial photographers. To protect the park from excessive commercial activity and its effects and to balance the interests of all park patrons, Twin Oaks passed an ordinance requiring all interested in using the park for commercial purposes to obtain a permit. The ordinance required a $100 fee for the permit and an application period of either 48 hours or 14-days (depending on the size and duration) in advance of the activity. The plaintiff, a commercial photographer, filed a lawsuit claiming the ordinance violated her First Amendment rights.

HELD: The court rejected plaintiff's free-speech claim and found that even if plaintiff's photography was protected speech, the ordinance was a reasonable time, place, and manner regulation. In rejecting plaintiff's challenge, the court explained that the demonstrated intent behind the licensing ordinance was not to burden speech, but to address legitimate concerns, including safety. The court also disagreed with the plaintiff's contention that the application periods "chilled" artistic expression and that the $100 fee was too expensive. The advanced application periods allowed for ample time to adequately review and process permit applications,

and the $100 fee helped balance administrative costs, including the cost of having a police officer present in the park during the commercial activities. The court also noted that the ordinance did not allow Twin Oaks unfettered discretion in reviewing the permits because it contained standards and objective factors to be considered. Therefore, all permits for commercial activity were equally evaluated.

***BANKS v. SLAY*, 875 F.3d 876 (8th Cir. 2017)** – *Properly served but unnamed government entities cannot evade liability for judgment against employee in official capacity.*

Michael Banks ("Plaintiff") was falsely arrested by a St. Louis City (the "City") police officer in 2002. Plaintiff filed a § 1983 suit against the officer in his official and personal capacities, also naming the entire St. Louis Board of Police Commissioners ("Board") in their official capacities. After amendment, the Board members were removed from the complaint. However, Plaintiff still served the Board a copy of the complaint and summons in accordance with state procedure. When no response was filed, Plaintiff moved for and was awarded default judgment against the officer in his personal and official capacities. However, no mention of pre- or post-judgement interest was contained in the judgment or requested in the motion. Plaintiff filed a petition to enforce the judgment in the district court seeking mandamus relief against the Board and three City officials. The City was ordered to pay the judgment.

HELD: The court reiterated the Supreme Court's notion that "an official-capacity suit is a suit against a government entity 'in all respects other than name.'" Therefore, because the Board members were served with a summons in accordance with state procedure, the municipality was on notice of the suit, even if they went unnamed in the underlying lawsuit because the defendant was named in his official capacity. "[A] plaintiff puts the [governmental entity] on notice that relief is sought against it by suing an officer in his official capacity." Further, the Court concluded that because post-judgment interest was not requested, nor added to the judgment, the denial of post-judgment interest was proper.

***BALL v. CITY OF LINCOLN*, 870 F.3d 722 (8th Cir. 2017)** – *City's prohibition of leaflet distribution valid in area deemed nonpublic forum.*

The City of Lincoln, Nebraska (the "City") had a policy designating a City-owned plaza area outside of an arena a non-public forum and prohibited leaflet distribution on the plaza. The plaintiff was handing out leaflets on the plaza in violation of this policy and was arrested for trespassing. The plaintiff filed suit against the City claiming his First Amendment free-speech rights were violated.

HELD: The Eighth Circuit held that the plaza area was a nonpublic forum, and, therefore, the City could prohibit leaflet distribution on the plaza. The court reasoned that because the plaza area was physically distinct from the adjacent public sidewalks (the plaza was marble, the sidewalk concrete), the designed and actual use was primarily commercial, and the evidence showed that the City's primary intent with respect to the plaza area was to facilitate safe and efficient

commercial events at the arena, the area was not a traditional public forum. Because of this, the regulation was not subject to strict scrutiny. The simple fact that members of the public "are permitted to come and go at will" does not mean that the area was a "public forum," and thus, the City's policy of prohibiting leaflet distribution was sufficiently reasonable in relation to its purpose for the policy.

Missouri Court Cases

***NOWDEN v. DIVISION OF ALCOHOL & TOBACCO CONTROL, MO. DEPT. OF PUBLIC SAFETY*, 2018 WL 2927729, No. SC 96496, June 12, 2018** – *Dismissal of non-contested case filed as contested case upheld.*

Nowden worked as a special agent for the Division of Alcohol and Tobacco Control ("DATC"). Nowden was terminated from his position after his state vehicle was discovered containing multiple prohibited items in it and it was discovered he was inspecting a location where he had a conflict of interest. Nowden's termination letter informed him that it was "subject to [his] right to appeal as set forth in Missouri Department of Public Safety's Policy G-2." Nowden also received a copy of the department policy and a notice of disciplinary action form, which stated Nowden needed to submit any application for appeal by a certain date. Nowden filed his application two days late, and the DATC notified him his appeal was untimely. Nowden filed a complaint with the Administrative Hearing Commission, which dismissed the complaint on the basis that Nowden was "not a merit employee entitled to hearing before Commission" and that DATC policy controlled the appeal procedure. Nowden then sought judicial review of his termination in the circuit court pursuant to § 536.100. The circuit court dismissed the petition with prejudice due to Nowden's failure to exhaust administrative remedies. The Court of Appeals affirmed.

HELD: The Supreme Court held that because Nowden filed his petition pursuant to § 536.100, which governs contested cases, the dismissal was proper because the court had no jurisdiction. The Court stated that while the DATC's policy provides the option for a hearing, it does not *require* one, which makes this a non-contested case. Further, under DATC's policy, if one chooses a hearing, the director retains the final decision-making authority after the hearing. The court stated that "when a proceeding is merely advisory and does not bind the decision maker, then the administrative proceeding or hearing does not make the matter a contested case, and review is not pursuant to § 536.100."

***STATE EX REL. BRYAN TRAVIS ROBINSON v. LINDLEY-MYERS*, No. SC96719, June 12, 2018** – *Required to exhaust administrative remedies for non-contested cases.*

Petitioner, Bryan Travis Robinson, was a licensed bail bond agent. The Department of Insurance, Financial Institutions, and Professional Registration denied his application for renewal of his license based on various outstanding unsatisfied judgments. The rejection letter from the department stated that Robinson had a right to file a complaint with the Administrative Hearing Commission pursuant to § 621.120 RSMo. if he wanted to appeal the decision. Instead, petitioner

chose to petition the circuit court of Cole County for mandamus, claiming that the director denied his renewal application without giving proper notice or an opportunity to be heard.

HELD: In overruling *Strozewski v. Springfield,* 875 S.W.2d 905, 907 (Mo. Bac 1994) (holding § 536.150 had no requirement to exhaust administrative remedies in uncontested cases), the court held that § 536.150.1 RSMo. provides a right for judicial review "when an agency decision is 'not subject to administrative review.'" Therefore, by the statute's plain language, exhaustion of administrative remedies before judicial review is required for non-contested cases the "government agency decision is not 'subject to administrative review."' However, because the overruling of *Strozewski* results in a change "to the 'method provided by law for aiding and protecting defined legal rights,'" the change is a procedural change that can only be applied prospectively. Further, the court held that Petitioner was not entitled to mandamus because he had failed to demonstrate a "clearly established right entitling him to mandamus relief." Petitioner alleged §§ 374.730 and 374.750 provide him the right to have his bail bond agent license renewed. However, the court stated that the mandatory language contained in the statute, "shall," is directed towards petitioner and not the department. Petitioner "shall" renew his license every two years, but the department "may" deny such renewal. Due to petitioner's outstanding judgments, the department properly exercised discretion in refusing renewal.

***ANTIOCH COMMUNITY CHURCH v. BOARD OF ZONING ADJUSTMENT OF THE CITY OF KANSAS CITY, MISSOURI*, 543 S.W.3d 28 (Mo. banc 2018)** – *Standard of review for all types of variances is whether decision supported by substantial and competent evidence; church's reasoning for variance insufficient to meet practical difficulties standard.*

Antioch Community Church ("Church") updated its existing monument sign to a sign with digital display lettering, impermissible under the City of Kansas City's ("City") zoning code. After the City issued the Church a citation for the violation, the Church applied for a non-use variance from the City's Board of Zoning Adjustment ("BZA"), stating that they had invested a lot of money in the new sign, the old sign was inconvenient to change, and the new sign better allowed the Church to convey its message. The BZA found that the change in the sign changed the sign's type, and the City's code did not allow for the BZA to hear variance requests changing sign types. Nevertheless, the BZA stated even if they were permitted to hear this variance request, the Church's reasons for the variance were not sufficient to meet the practical difficulties standard. The Church appealed to the circuit court which overturned the BZA's decision.

HELD: The court started by stating that the standard of review for all types of variance requests is the substantial and competent evidence standard. To the extent that previous cases suggested an abuse of discretion standard applied to use variances, the court advised they should no longer be followed.

Next, the court held that the change in the sign did not constitute a change in sign type as there was no language regarding the permitted lettering type in the definition of monument sign under the City's code, therefore the update to digital lettering did not make the sign fall out of the defined "monument sign" category. Accordingly, the BZA had authority to hear the request for a variance.

Finally, the court held that the Church failed to meet its obligation under the "practical difficulties" test applied to non-use variances. The practical difficulties test requires one to show that the property cannot be used for the desired permitted use without coming into conflict with certain zoning code restrictions. The Church's reasons for needing a variance were that: (1) the lack of a digital display sign made it harder to effectively convey the church's messages, (2) church members tasked with changing the monument sign cup letters had difficulty doing so, and (3) the Church had already invested $11,000 in updating the sign to a digital display. Recognizing that the practical difficulties test is only "slightly less rigorous" than the unnecessary hardship test (applied in considering "use variances"), the court agreed with the BZA that the Church could not meet the practical difficulties test. The court explained that variances are not intended to prevent against "mere inconvenience," which was essentially the sole basis for the Church's variance request.

***BRITTON v. CITY OF ST. LOUIS*, No. ED105973, Mo E.D. (May 22, 2018)** – *Bus stop located in "close proximity" to road sufficient evidence to successfully plead dangerous condition exception to sovereign immunity.*

Plaintiff, Judith Britton filed a wrongful death claim against the City of St. Louis after her husband was killed by a driver that ran a red light, lost control of the vehicle, and hit the husband while he was standing at a bus stop. The city filed a motion to dismiss for failure to state a claim for relief, arguing that sovereign immunity barred the suit and that plaintiff could not show a dangerous condition on the city's property or that the alleged dangerous condition caused the husband's death. The circuit court granted the city's motion to dismiss. plaintiff appealed.

HELD: The court reversed and remanded the decision of the circuit court stating that plaintiff sufficiently plead a claim of a dangerous condition. The court held that because the bus stop was close to oncoming traffic, there was no designated area to sit or stand, there was no shelter of any kind, and there was no warning to pedestrians about the "danger of passing vehicles," the bus stop might constitute a dangerous condition, and the court found it foreseeable that a car would break traffic laws and strike a pedestrian given those conditions. As there is an exception to sovereign immunity where dangerous conditions exist, the court reversed the dismissal and is allowing the case to proceed beyond the motion to dismiss stage.

***STATE EX REL. BLUE SPRINGS SCHOOL DISTRICT v. GRATE*, 2018 WL 2012127, No. WD81197 (Ct. App. May 1, 2018)** – *Insurance policy only possibly waives sovereign immunity in the areas policy covers, not a blanket waiver.*

In the lawsuit that gave rise to this case, a former kindergarten student B.Z. sued the Blue Springs School District ("School District") and three named individuals for discrimination in public accommodation, negligent supervision, and breach of fiduciary duty. The Respondent, Hon. Jake R. Grate, denied the School District's request for summary judgment and in response, the School District filed a petition for a writ of prohibition. The court then entered a preliminary writ of prohibition and decided the matter further.

HELD: A political subdivision, does not constitute a person as applied to § 213.065.2 and defined in § 213.010(14), and, therefore, the School District cannot be held liable for discrimination in public accommodation. Additionally, the School District is not necessarily implicated by § 213.065.2 as the intention to implicate the state and state agencies is not clearly manifest and not necessary to give meaning to the rights afforded by the statute. However, the writ of prohibition is an extraordinary legal remedy and provides litigants with abundant opportunity to circumvent normal appellant process. The court does not think the facts in this decision warrant that type of preventative action. As a result, the court refuses to make the temporary writ of prohibition permanent as it pertains to Count I. Finally, the insurance policy held by the School District under MOPERM does not constitute waiver of sovereign immunity generally but rather only for those purposes covered by the insurance policy. In this case, the insurance does not cover the claims in Counts II and III of the underlying lawsuit and, therefore, the temporary writ of prohibition is made permanent.

***COUNTY OF BOONE v. REYNOLDS*, 2018 WL 1597632, No. WD80846 (Ct. App. Apr. 3, 2018)** – *Permanent and continuous occupation of a right of way is enough to constitute harm for injunction purposes.*

Prior to June 21, 2013, Reynolds began construction on a garage attached to his home for which he received a building permit. After receiving a permit, Reynolds was notified by a county land-use planner that he would need to apply for a variance as the garage was located too close to the road. After receiving no response to this initial email, the County sent two more emails and received no response. In 2015, Reynolds applied for a variance, but was denied by the Board. After Reynolds refused to bring his property into compliance with zoning and right of way regulations, the County filed a petition for a permanent injunction mandating that Reynolds make his property comply with certain zoning regulations. The trial court found for the County and stated that Reynolds violated county ordinances and encroached on the setback area and the right of way. Reynolds appeals this finding.

HELD: The court finds that the trial court did not abuse its discretion when granting the permanent injunction against Reynolds. On appeal, Reynolds arguments focus on his contention that the County suffered no harm to public safety or health and, therefore, was not entitled to an injunction. He also contended that the existence of criminal penalties constituted an adequate remedy and, therefore, an injunction was improper. The Court found that Reynolds garage interfered with the County's property interest in the right of way in a manner that was permanent and continuous. This was enough of an injury to constitute harm for the purpose of an injunction.

***J.M. v. LEE'S SUMMIT SCHOOL DIST.*, 545 S.W.3d 363, (Mo. App. 2018)** – *Softball field not a dangerous condition of property; volunteer's decision to allow child not to wear protective equipment failure to perform ministerial act, not entitled to official immunity.*

J.M. ("Plaintiff") was injured during a softball game at a district led afterschool program. Plaintiff's injuries resulted after DeMarco, the district volunteer for the group, instructed Plaintiff

to play the catchers position without the required protective facemask because the facemask did not fit Plaintiff. Plaintiff was then struck in the face with a bat. Plaintiff filed a negligence claim against the school district and DeMarco. The district and DeMarco filed motions for summary judgment on the grounds that the negligence claim was barred by sovereign immunity and official immunity. The trial court granted summary judgment in favor of the district and DeMarco.

HELD: The softball field was not a dangerous condition under 537.600.1(2) because there was no allegation that the field was defective or inherently dangerous. The court stated that the district was using the field for its intended purpose, which cannot create a dangerous condition unless the field had been altered or modified to become dangerous. Further, the fact that the facemask provided did not fit Plaintiff also did not constitute a dangerous condition of the softball field, as there was no allegation that the mask was defective or altered.

Regarding DeMarco's official immunity, the court held that DeMarco failed to perform a ministerial ac, and, therefore, was not entitled to official immunity. The school district's policy stated that volunteers are under "direct control of district staff." The policy further provided that protective equipment is required to be used when it is provided, and because DeMarco's supervisor gave specific instructions to require all children to wear the protective equipment when playing the catchers position, DeMarco did not have discretion to advise Plaintiff otherwise. By failing to require Plaintiff to wear the facemask, DeMarco failed to perform a ministerial act. DeMarco's grant of summary judgment was reversed.

***CITY OF KANSAS CITY v. COSIC*, 540 S.W.3d 461 (Mo. App 2018)** – *State courts cannot take judicial notice of municipal ordinances and such must be contained in the record.*

The City of Kansas City, Missouri ("City") filed suit against Cosic for unpaid earnings taxes for the years 2011-2014. The City requested prejudgment interest pursuant to a local ordinance, number 68-394(a), in its petition. At trial, discussion of the interest ordinance was gathered through testimony, but the ordinance was never marked as an exhibit at trial. The trial court entered judgment against Cosic, but the award contained no penalties or prejudgment interest. The City filed a motion to reconsider the judgment, which the trial court denied. The City timely appealed.

HELD: The court reiterated that courts may not take judicial notice of municipal ordinances and "must be proven like every other fact." Even though the City believed that ordinance 68-394(a) was contained in an exhibit that was admitted at trial, the transcript reflected no reference to the specific ordinance. Further, the testimony discussing the interest provision of the ordinance contained no specific reference to ordinance 68-394(a) and, therefore, did not constitute proof of the ordinance's contents. Accordingly, the City's appeal could not be evaluated properly, as it relied on ordinance 68-394(a), and was dismissed.

***HOWARD COUNTY AMBULANCE DIST. v. CITY OF FAYETTE*, 2018 WL 941800 (Mo. App. Feb. 20, 2018)** – *City not liable for ambulance services provided to detained citizen where no written agreement existed pursuant to § 432.070.*

A reserve police officer for the City of Fayette ("City") was dispatched to a scene where a man was very intoxicated. The officer was concerned, so he called for EMS. The Howard County Ambulance District (the "District") was dispatched and transported the man to the hospital. The District, after seeking payment from the man's mother, filed a petition naming the City as a defendant. The trial court entered judgment in favor of the City on the basis that no written agreement in conformance with § 432.070 existed between the City the District. The District appealed based on the fact that the District's Ordinance No. 2 gives the District the power to charge a fee to the City, and that even if no written contract exists between the City and the District in conformance with § 432.070, "exceptional circumstances exists in this case to relieve the contractual requirements" of the statute.

HELD: The court reiterated that the requirements of § 432.070 are mandatory and exist to "preclude parties who have performed services for a municipality or county or other governmental entity without entering into a contract from subsequently recovering the value of those services based upon an implied contract." Further, the fact that a municipality has received the benefit of performance by a party "does not make the municipality liable either on the theory of ratification, estoppel, or implied contract if the requirements of § 432.070 are not met." The court stated that while the District's Ordinance No. 2 may give them the authority to charge law enforcement entities for fees incurred for care of individuals detained, § 432.070 limits those provisions, and the ordinance cannot be considered a contract under the statute. The court further held that no "exceptional circumstances" existed to relieve the requirements of § 432.070 because any agreements not in conformance with the statute are void and, therefore, equitable estoppel cannot relieve those requirements.

***NEUNER ET AL., v. CITY OF ST. LOUIS*, 536 S.W.3d 750 (Mo. App. 2017)** – *Rejecting taxpayer challenge to city payroll tax.*

Plaintiffs, a resident of the City of St. Louis ("City") who operates a sole proprietorship and a small corporation in the City, filed a petition for declaratory judgment and injunctive relief challenging the constitutionality of the City's payroll tax and certain ordinances that allow cooperation agreements between the City and various businesses. The City's payroll tax imposes a one-half of one percent tax of the total compensation earned by employers' employees on businesses that provide services or work in whole or in part within the City limits. Cooperation agreements between the City and various businesses allow the businesses to redevelop substandard buildings in the City in exchange for reimbursement of those project costs, up to 50% of the increased payroll tax from the project areas. The cooperation agreements are designed to help ensure that the businesses stay within the City and help revitalize the area.

HELD: The court rejected the argument that the payroll tax was unconstitutional because the City had no authority to enact the payroll tax, recognizing that the City's Charter authorized the tax and

Article VI, Section 19(a) of the Missouri Constitution grants Charter cities all of the power that the General Assembly "could" grant to a city. The court also rejected the challenge that the cooperation agreements are unconstitutional because they serve only a private purpose, holding that the agreements served a public purpose, specifically citing the Board of Aldermen's findings that stated redevelopment of the "substandard" areas would improve employment and stimulate the economy. The court further stated that a public purpose is not "deprived of its public character," simply because it also benefits private individuals.

***STATE EX REL. YOEST v. McEVOY*, 529 S.W.3D 383 (Mo. App. 2017)** – *County collector does not possess the authority or discretion to unilaterally exclude potential bidders from tax sales.*

The Clay County Collector of Revenue, ("McEvoy"), notified the plaintiffs that she was "permanently banning" them from participating in tax sales in Clay County as the result of an "ongoing investigation" against plaintiffs which showed they did not have a right to be a bidder at tax sales. Plaintiffs filed for a writ of mandamus to command McEvoy to lift any such ban. The trial court dismissed plaintiffs' petition on the grounds that they "failed to establish a clear, unequivocal right" to be bidders at the County tax sale.

HELD: The court held that the trial court erred in ruling mandamus did not lie because it was demonstrated by plaintiffs that McEvoy had a ministerial duty to allow participation in the tax sale. The court stated that the purpose of § 140.170.3 is to provide public notice to potential buyers of potential land that will be available at public auction and allows all members of the public to participate. Further, state statute, § 140.190.2, is clear that only two categories of people may be excluded from tax sales: (1) those who are delinquent on any tax payments and (2) those who are not Missouri residents or have not consented to the county court's jurisdiction in writing. Because plaintiffs did not fit either of those two categories, they had "a clear and unequivocal right to participate in the tax sale," and McEvoy had no authority to exclude them.

***DENNIS ET AL. v. RIEZMAN BERGER, P.C., ET AL.*, 529 S.W.3d 318 (Mo. Banc 2017)** – *Post judgment interest for non-tort actions awarded as a matter of law and automatically accrues regardless of an express statement in the judgment.*

Plaintiffs appeal the dismissal of their case against Riezman Berger and Mercy Hospital Jefferson ("Defendants") asserting that Defendants violated the Fair Debt Collection Practices Act and the Missouri Merchandising Practices Act because the judgments obtained by Defendants against plaintiffs in previous litigation (litigation brought by Mercy for collection of debt owed for services rendered) did not expressly award post-judgment interest and, therefore, Defendants were not entitled to such.

HELD: The court affirmed the dismissal of plaintiffs' petition, stating that the clear intent of § 408.040.1 provides for automatic accrual of interest in non-tort actions. The language of that section of the statute provides that: "judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts and all other

judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid." The court stated that since the statute does not require any finding by the circuit court for a non-tort judgment to bear interest, the interest accrues automatically. Therefore, it is not necessary that the award of post judgment interest be explicitly stated in the judgment.

***BENNETT v. ST. LOUIS COUNTY*, 542 S.W.3d 392 (Mo. App. 2017)** – *County ordinance prohibiting interference with police upheld as constitutional.*

St. Louis County enacted an ordinance making it unlawful for "any person to interfere in any manner with a police officer. . .in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty." County police officers arrested protestors at an anti-police-brutality protest outside of the Ferguson Police Department. The protestors were charged with violating the above-mentioned ordinance. Plaintiffs filed suit against the county on the grounds that the ordinance was unconstitutionally vague and overbroad and violated their free speech rights.

HELD: The court held that the ordinance was not overbroad and the "mere possibility" that the ordinance might prohibit constitutionally-protected speech did not render it unconstitutional. The court also rejected the argument that the phrases "interfere in any manner" and "obstruct in any way whatsoever" were impermissibly vague, because an "ordinary person of common intelligence has sufficient. . . notice of what conduct is prohibited by the Ordinance: physically interfering with or obstructing a police officer in their official duties." The court noted that given the "wide variety of circumstances and physical conduct which confront law enforcement," the county likely could not have drafted more limiting language than it had.

***THE TROPHY ROOM v. CITY OF ST. LOUIS*, 534 S.W.3d 340 (Mo. App. 2017)** – *City smoking ban upheld.*

St. Louis City (the "City') enacted an ordinance that bans smoking in all "enclosed public places." The ordinance applies to bars and restaurants, among other public places, with limited exceptions. The ordinance contained an exemption for small 21+ bars, but the exemption expired in 2016. The Trophy Room, a bar located in the City, had always permitted smoking and qualified under that exemption. In anticipation of the expiration of the exemption, the Trophy Room sought to qualify as a "casino gaming area," another type of exempt property. To do so, the Trophy Room obtained a license from the Missouri State Lottery Commission to operate Club Keno machines. The bar then filed suit to establish its rights to continue to permit smoking and to challenge the constitutionality of the smoking ban ordinance.

HELD: The court held that merely possessing a license from the Missouri State Lottery Commission did not qualify the bar as a casino, because keno is not regulated by the Gaming Commission, which regulates "state-licensed gambling facili[ties]." The court also rejected the Trophy Room's argument that the smoking ban was an unconstitutional special law and that it was unlawfully vague. The court held that even if the "casino gaming area exemption" was

unconstitutional as the Trophy Room claims, the ordinance contained a severability clause, and, thus, the ordinance in its entirety would not be found unlawful and would still subject the Trophy Room to regulation. Furthermore, as the City had not yet enforced the ordinance against the Trophy Room, the court held that the Trophy Room's suit was premature and properly dismissed.

***GLICKERT v. LOOP TROLLEY TRANSPORTATION DEVELOPMENT DISTRICT*, 542 S.W.3d 383 (Mo. App. 2018)** – *Transportation authority permitted to construct and operate project beyond boundaries of district.*

In 2007, University City (the "City") passed a resolution establishing a joint transportation development district with St. Louis City, The Loop Trolley Transportation Development District (the "District"). The District was formed for the purpose of "funding, promoting, planning, designing, constructing, improving, maintaining, and operating" a trolley-car rail system within the City. The formation petition filed with the circuit court included a map of District boundaries along with a description of the trolley-car project, which stated the approximate project locations within the City. Following voter approval, the circuit court issued a formation judgment which authorized the details laid out in the formation petition and also gave the District broad authority to "construct improvements necessary and convenient for the proposed trolley-car system." In 2012, the trolley company working with the District for the project submitted an application for a conditional use permit with the City to build the trolley-car project, which included a proposed route that extended beyond the District boundary by approximately 535 feet. In 2013, Sarandos filed suit in district court for declaratory judgment and injunctive relief against the District, claiming that the District lacked authority to build the trolley-car system outside the District boundaries. The district court granted summary judgment on behalf of the District. Sarandos appealed, and the Eighth Circuit affirmed. Sarandos then filed his suit in state court alleging the same claims. The District again moved for summary judgment, this time on the theory of laches and because the TDD Act and formation judgment did not "limit the location of project improvements." The trial court granted summary judgment.

HELD: The court affirmed the judgment of the trial court, first finding that laches applied. The court stated that based on the record, Sarandos knew or "could easily ascertain" the District's plan to extend the trolley route beyond District boundaries since 2010, and, therefore, the District would be prejudiced if Sarandos' relief was granted as construction beyond District boundaries had already occurred. Further, the court held that the plain language of the TDD Act provides for flexibility in project design, authorizing change as may be "necessary or convenient" to "fund, promote, plan, design, construct, improve, maintain, and operate" projects. No language contained in the Act limits project improvements. Further, the court stated that the formation petition and judgment both contained the "approximate location" of the trolley-car project, which was consistent with state statute, § 238.207.5(3)(d) and (e), that only requires a description of "proposed district boundaries" and "approximate location of each project." Such language shows that the legislature intended to give local transportation authorities design and implementation flexibility and not to prohibit a "slight deviation beyond district boundaries."

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