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Sovereign Immunity For Non-Tort Claims: Application And Limits

Sovereign immunity prevents lawsuits against the government without its consent. Prior to 1977, sovereign immunity existed for all claims – tort and non-tort. A tort is a wrongful act, other than a breach of contract, that injures another and for which the law imposes civil liability. Claims for personal injuries are tort claims. Torts can be intentional (such as civil battery, assault, trespass, or false imprisonment) or they can arise from negligent behavior (for example, many slip and fall cases). Other examples of torts include defamation, certain types of misrepresentations, and interference with business relations. Non-torts include statutory, breach of contract and equitable claims.

However, in *Jones v. State Highway Commission*, the Missouri Supreme Court began distinguishing sovereign immunity for tort and non-tort claims and did away with sovereign immunity for tort liability. 557 S.W.2d 225, 230 (Mo. banc 1977). The Court noted that its opinion dealt "with immunity from tort liability" only and that there "remains the matter of immunity from suit." *Id.* Therefore, although *Jones* abolished sovereign immunity for torts, it did not eliminate or diminish sovereign immunity for non-tort claims. This distinction is frequently overlooked and has led to the common misconception that sovereign immunity applies only to torts.

In 1978, the legislature revived sovereign immunity for tort liability. Section 537.600 RSMo was enacted to overrule *Jones* and to reinstate sovereign immunity in tort in Missouri as it had existed prior to *Jones*, with two exceptions: (1) injuries directly resulting from public employees' negligent operation of motor vehicles; and (2) injuries caused by dangerous conditions of a public entity's property. See § 537.600 RSMo. The legislature also enacted a statutory "cap" on the amount of liability that political subdivisions are subject to for claims covered by those two exceptions. See § 537.610 RSMo. This amount has changed over time, but the limit is currently $2,000,000 for all claims arising out of a single accident or occurrence and $300,000 for any one person in a single accident or occurrence (except for workers' compensation claims).

The statute further prohibits awards of punitive damages against public entities for such claims.

These laws had nothing to do with sovereign immunity for non-tort claims. Unfortunately, however, the enactment of § 537.600 RSMo lead to even more confusion regarding the viability of sovereign immunity in non-tort cases. Some courts even interpreted the statute to mean that *Jones* had gotten rid of sovereign immunity entirely.

In 2004, the Missouri Supreme Court attempted to set the record straight regarding tort and non-tort sovereign immunity. In *Kubley v. Brooks*, the Supreme Court recognized that there is "a fundamental, but not uncommon, confusion of the doctrine of sovereign immunity from liability in tort with a separate, but related, doctrine that the sovereign cannot be sued without its consent." 141 S.W.3d 21, 29 (Mo. banc 2004). The Court noted that "Section 537.600 expressly states it applies *only* to suits in tort," the statute "did not negate" the general rule that the sovereign may not be sued without its consent; therefore, the statute "does not address or govern the liability of the state under non-tort theories of recovery." *Id.* Thus, despite the common misconception that sovereign immunity applies only to tort claims, there can be no question that sovereign immunity is not just about torts – it applies to tort and non-tort claims alike.

Today, as it was prior to 1977, sovereign immunity is the rule, not the exception. In the absence of a recognized common law (i.e., court-made), exception or an express exception in a statute (e.g., § 537.600 for torts), sovereign immunity applies to all suits against public entities. Moreover, all waivers of sovereign immunity are strictly construed, meaning that courts will narrowly interpret any alleged waiver. With only a single common law exception for breach of contract, Missouri cities should enjoy robust immunity from non-tort claims. Regrettably, the Missouri Supreme Court in *Kubley* incorrectly interpreted the enabling authority for many Missouri cities to be a waiver of sovereign immunity for those non-tort claims.

Kubley, relying on *Jones*, held that sovereign immunity is waived for non-tort actions if the statute creating a public entity or describing the entity's powers (an enabling statute) states that the entity can "sue and be sued." As a result, Missouri cities of the third and fourth class may be deemed to have waived their sovereign immunity for non-tort claims. See § 77.010 RSMo. ("Any city of the third class … may sue and be sued, implead and be impleaded, defend and be defended in all courts of law and equity, and in all actions whatever…."); § 79.010 RSMo. ("Any city of the fourth class … may sue and be sued, implead and be impleaded, defend and be defended in all courts of law and equity …."). Likewise, any charter city that includes similar language in its charter presumably makes the same waiver of sovereign immunity. However, this result is untenable. Enabling statutes and charter language should not inadvertently define the contours of an entity's sovereign immunity. Rather, enabling statutes and charters that provide that a government can "sue and be sued" merely allow a government to be a party in a proper court action.

Kubley's finding of a broad immunity waiver resulting from enabling statutes is wrong for at least two reasons. First, *Kubley* ignores the "fundamental maxim that statutory provisions that purport to waive sovereign immunity must be strictly construed." *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 186 (Mo. banc 1985); *Kleban*, 247 S.W.2d at 837 ("[S]tatutes waiving the immunity of the sovereign from suit are strictly construed."). *Kubley*, and *Jones* on which *Kubley* relies, provide no analysis of why they interpret enabling statutes to be waivers of sovereign immunity from non-tort claims. *Jones* only states, and *Kubley* merely repeats, that following *Jones*' abrogation of sovereign immunity in tort,

> *. . . there is no reason to give the words "sue and be sued" any meaning other than the usual and ordinary one conveyed by the language used, which is that the entity in question may sue and be sued, without restriction as to kind of liability sought to be imposed.*

Jones, 557 S.W.2d at 230, quoted in *Kubley*, 141 S.W.3d at 30.

No reason? What happened to strict construction of sovereign immunity waivers? Those cases do not consider at all whether strict construction of the supposed waiver language in enabling statutes is a reason to find that the legislature only meant to allow public entities to participate in appropriate legal proceedings when it established that they could sue and be sued.

Second, *Kubley* ignores cases that specifically and correctly construe enabling statutes to not be waivers of sovereign immunity, but only authorizations for governments to participate in court actions. For example, in Pratt, which *Kubley* acknowledges, the court concluded that "[t]he reasonable explanation of the legislature's intent in using the 'may sue and be sued' language is that it intended thereby merely to empower creditors and other proper claimants to sue the hospital district in its own name," not to waive sovereign immunity. 687 S.W.2d at 187; *Kubley*, 141 S.W.3d at 34, n.11. Similarly, in *State ex rel. St. Louis Housing Authority v. Gaertner*, 695 S.W.2d 460 (Mo. banc 1985), the court held that although the statute provided that the St. Louis Housing Authority could sue and be sued, the statute "d[id] not waive sovereign immunity." *Id.* at 462.

Other states confronting this issue disagree on the effect of the statutory language "sue and be sued." Some states hold that such phrasing merely signifies the entity's ability to enter court on proper cases, while other states conclude that this language is a waiver of sovereign immunity. The better reasoned cases are the former. Just as the *Kubley* decision failed to provide any analysis of why it construed an enabling statute to be a waiver of sovereign immunity in non-tort cases, other courts that have reached the same conclusion have similarly provided no analysis.

In *Kubley*'s wake, Missouri cities are left with the tantalizing prospect of being shielded by sovereign immunity from most non-tort claims. But, *Kubley* takes away almost as much as it gives by wrongly construing the enabling authorities of many cities to be a waiver of that immunity. Charter cities could overcome *Kubley* and maximize their immunity by not including or eliminating the "be sued" language from their charters. Cities of the third and fourth class, however, will have to wait for a solution from the Supreme Court or the legislature.

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