

MUNICIPAL ATTORNEYS NEWSLETTER
Missouri Municipal Attorneys Association
1727 Southridge Drive, Jefferson City, MO 65109
573-635-9134, Fax 573-635-9009

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Editor Howard C. Wright
Asst. Editor Ragan Wright

NOTES AND SEMINARS

ROLLIN MOERSHEL RIP: We regret to report the recent passing of Rollin Moershel who helped form the MMAA and who received the Lou Czech Award in 1997. He was a good friend of the MML and MMAA.

2008 SUMMER SEMINAR DATES: The 2008 MMAA Summer Seminar will be held at Tan-Tar-A on July 18-20.

COLLECTIVE BARGAINING SEMINARS: The MML and the St. Louis County Municipal League will sponsor seminars on the recent Missouri Supreme Court decision on public employee collective bargaining and its impact on municipalities. The seminars will be appropriate for elected officials, city attorneys, city administrators/managers, human resource staff, etc. The seminar will be held in North Kansas City on August 29 and in Creve Coeur on August 30. Registration form and additional information are available on the MML Web site at www.mocities.com.

CASE OUTLINES (MISSOURI)

DOWNED STOP SIGN IS NOT NEGLIGENT DESIGN: Douglas a passenger in an automobile (Passenger) was injured when the vehicle was hit by another vehicle after entering an intersection heading northbound on Stillhouse Road in Jackson County. Passenger sued alleging dangerous condition and the jury returned a verdict for Passenger. Jackson County appealed and the case was transferred to the Missouri Supreme Court. The Jackson County Public Works Department (Public Works) is charged with inspecting, repairing, and replacing traffic signs and it regularly patrols the roads and reports damaged or downed traffic signs. The investigator of the traffic accident reported to Public Works that the stop sign was not standing at the time of the accident. Jackson County presented evidence that neither the investigating deputy nor employees of Public Works knew the stop sign was down or leaning prior to the accident. They further testified that if they had seen the sign they would have reported it to Public Works and that Public Works would have replaced the sign within five (5) hours of the report. Two citizens who live near the intersection testified that the stop sign had been leaning at a 45 degree angle for about a month and that it had fallen down on Friday the morning of August 29, 2002, two days before the accident. Even though Public Works was closed over Labor Day weekend there was an employee on call. Jackson County asserts that it can be sued for injuries caused by a downed stop sign only on a theory of negligent design citing *Donahue*. It further argued that Passenger failed to prove the intersection was a dangerous condition and Passenger failed to prove the four elements showing a waiver of sovereign immunity. After examining the history of the sovereign immunity statute, the Supreme Court held that *Donahue* decided in 1988 was not correctly decided even though it reached the correct result. The Court held that nothing in the 1978 version of the statute or the 1985 amendment suggests that liability did not extend to cases involving design defects in roads and other conditions of public property. The Court concluded that negligent design has no application to the facts in this case and that the "state of the art" defense available in negligent design cases has no place in other dangerous condition cases. Having distinguished and overruled *Donahue* the Court examined whether or not Passenger made a submissible

case under Section 537.600.2(2) RSMo. Under this section, the plaintiff must prove that the property was in a dangerous condition at the time of the injury; that the injury resulted from the dangerous condition (proximate cause); that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury that occurred; and that the public entity had actual or constructive notice of the dangerous condition in sufficient time to have taken measures to protect against the dangerous condition. Even though the driver of the car, in which the Passenger was traveling, was speeding and should have yielded to the car on the right, the law does not require the dangerous condition to be the sole cause so long as it is one of the efficient causes from which the accident occurred. There was sufficient evidence to show that one of the causes was the downed stop sign, that the sign was down at the time of the accident and there was sufficient notice of the downed stop sign for the jury to infer that Jackson County had time to replace the stop sign. Judgment affirmed. [*Hensley v. Jackson County*](#), (SC88176, 07/06/07)

Comment Howard: Obviously this is a must read case. Overruling *Donahue* should clarify what has become a very confusing area of the law; nevertheless, this case does not seem to, in any way, help with the defense of dangerous condition claims by local government.

LOT LOCATED IN TWO SUBDIVISIONS OKAY: Developer purchased lot B, a lot that had already been platted in the adjoining subdivision. Developer included this lot in the preliminary plat for a new subdivision. The Jefferson County Planning and Zoning Commission approved the preliminary plat for the new subdivision and property owners in the adjoining subdivision brought suit to block the plat of the developer. The circuit court ruled that the inclusion of lot B in the new subdivision was improper because lot B was a buffer or common ground and must be vacated prior to preliminary approval of the new subdivision. On appeal to the Eastern District, the court held that lot B was not a buffer or common ground and that the developer had meet all of the requirements to plat the property as a matter of law, reversing the circuit court decision. [*Benton v. Dismuke*](#), (ED88757, 06/26/07).

Comment Howard: This is a very strange case in that lot B is now shown in two separate subdivisions. The court takes a very narrow view by concluding that this is a problem for the developer and that the subdivision regulations did not prohibit platting in two separate subdivisions. The developer having met all of the requirements is entitled to plat the land even if part of it is already platted in another subdivision. Planning and zoning approved the plat and only the neighbors were objecting, so this looks like a bunch of NIMBY's.

PBT RESULTS NOT ADMISSIBLE: The driver of a motor vehicle was engaged in an altercation with another driver who called 911. Upon the arrival of the state trooper, the driver was administered six field sobriety tests one of which was the portable breathalyzer test (PBT). The driver failed five of the tests including the PBT and was charged with driving while intoxicated. The case was tried to a jury and the prosecutor introduced the results of the PBT to the jury over the objection of the defense. In the closing argument the prosecutor stated that the driver failed the PBT. State law provides that the results of the PBT shall not be admissible as evidence of blood alcohol content to prove intoxication. The PBT is simply a preliminary test to determine if alcohol is present. The jury convicted and the defendant was sentenced to 270 days in jail. Defendant appealed to the Southern District which reversed the conviction based on the improper use of the PBT results. Use of the PBT results created an inference that the defendant was intoxicated in light of the other evidence. Without this evidence there was a reasonable probability that the jury might have reached a different verdict. Conviction reversed. [*State of Missouri v. Morgenroth*](#), (27686, 06/20/07).

CLAIM NOT BARRED IF FILED PRIOR TO EXPUNGEMENT: Dr. Brown was accused by Harrah's Casino of cheating in the casino and was banned from the casino. Harrah's issued a report of the incident to the Missouri Gaming Commission and the Clay County prosecutor applied for an arrest of Dr. Brown. Ten months later, Dr. Brown spoke with the manager of the casino regarding the incident. After the investigation Harrah's wrote Dr. Brown a letter of apology stating that the "situation could have been handled in a better manner." Harrah's however did not send a copy of the letter to the Missouri Gaming Commission or to the Clay County prosecutor. About a year later while on vacation in Miami, Florida, Dr. Brown was arrested on the outstanding warrant and transported to the Dade County jail where he was

held for three and one-half days before his release. He was released after he produced a copy of the apology letter from Harrah's. While in jail Dr. Brown was beaten by a fellow inmate, humiliated, and suffered emotional distress. Dr. Brown thereafter sued Harrah's alleging various torts as a result of his arrest. While the litigation was pending, Dr. Brown brought an action to expunge the arrest which was granted. Harrah's moved for summary judgment on the grounds that Section 610.126 RSMo precluded a lawsuit "subsequent to the expungement" of the arrest record. The trial court granted Harrah's motion for summary judgment. The Missouri Supreme Court held that the lawsuit was brought prior to the expungement determining that the word "brought" means "when the petition was filed" reversing the trial court. [*Brown v. Harrah's North Kansas City, L.L.C.*](#), (SC88298, 06/26/07).

OVERARCHING SUBJECT IN TITLE OF BILL HELPS VALIDATION: The Jackson County Sports Authority (Authority) brought a suit to invalidate a section in H.B. 58 and S.B. 210 that required the Authority to competitively bid any expenditure of money over \$5,000 because the bills were changed from their original purpose after introduction and the titles in both bills were unclear in violation of Article III, Sections 21 and 23 of the Missouri Constitution. The case was stipulated on the facts as to the legislative process and the circuit court ruled for the Authority finding the sections on competitive bidding invalid. S.B. 210 started out as a bill relating to county government but was changed to "a bill relating to political subdivision" on April 20, which was the title of the bill when finally passed. H.B. 58 started as a bill that "affected the duties of county commissions procuring supplies ..." but after numerous amendments the title was changed to "relating to political subdivision." The Missouri Supreme Court reversed holding that case law allows new matters to be added if germane. What is prohibited by the Constitution are amendments that are not relevant to or closely allied to the bill's original purpose. The general purpose of a bill is often interpreted as an overarching purpose, not necessarily limited by specific statutes referred to in the bill's original text. With respect to Article III, Section 23, this section has two distinct but related procedural requirements, a single subject rule and a clear title requirement. Only if the title is under-inclusive or too broad and amorphous to be meaningful, is the clear title requirement violated. In addition, bills may have multiple and diverse topics within a single, overarching subject that may be clearly expressed by stating some broad umbrella category that includes all of the topics within its cover. [*Jackson County Sports Complex Authority, State of Missouri, et al.*](#), (SC87934, 06/26/07)

Comment Howard: We have now seen enough cases to provide a fairly clear understanding of these rules. This case provides some pretty good guidelines for the General Assembly making it easier for the drafters to avoid the types of challenges that in the past had been successful. Before considering a challenge to a statute on the grounds that the title was not sufficient or the purpose changed, you should read this case.

INSUFFICIENT EVIDENCE TO MAKE ARREST: Highway patrolman (Officer) gets a call from dispatch that they had received a call about a "possible intoxicated driver traveling west towards Sedalia on Highway 50." The tip included a description of the car and a license plate number. Officer positioned his car so he could see east bound traffic. After the car passed, Officer proceeded to follow the car at a distance observing that its passenger side tires crossed the fog line twice, although none of the surrounding traffic took evasive action as a result of the driving. The driver proceeded to a Ramada Inn and walked into the inn. Due to the traffic, the Officer arrived after the driver entered the inn. The Officer went into the inn and located the driver at the bar and asked him to come outside. The driver asked for an explanation and the Officer again asked the driver to come outside which he did. After going outside, the Officer administered a set of field sobriety tests and arrested the driver. The driver filed a motion to suppress the evidence asserting that the arresting officer did not have probable cause or reasonable grounds to initiate the contact or investigate. Motion was overruled and grounds for the motion was preserved during trial and the driver was found guilty and sentenced to 270 days in jail. On appeal to the Western District, the court held that the officer did not have a reasonable suspicion to make the initial stop and arrest (ordering the driver to come outside), violating the driver's Fourth Amendment rights under the United States Constitution. At the time of the arrest, the only relevant fact offered by the state was – crossing over the fog line. The driver's car did not go over onto the shoulder nor did any other cars take evasive action. Despite crossing the fog line the Officer did not take action to immediately stop the

driver, but waited. Based on all of the evidence, the Officer lacked reasonable suspicion to make the initial arrest. *State of Missouri v. Roark*, (WD67135, 06/12/07).

CASE OUTLINES (FEDERAL)

PASSENGER SEIZED WHEN CAR IS STOPPED: When a police officer makes a traffic stop he seizes the driver and the passengers; therefore the passengers may challenge the constitutionality of the stop. *Brendlin v. California*, (No. 06-8120, 06/18/07).

TRAINING BACKFIRES: Lindsey was the director of public works in the city of Orrick. His duties included maintaining the city parks, water systems, streets, and sewers. One of his duties required him to attend City Council meetings. Taylor, the mayor, was Lindsey's supervisor. In 2003, the City sent Lindsey to an all-day training seminar that included two hours of training on the Sunshine Law. After the meeting, Lindsey became convinced the City was violating the Sunshine Law by meeting in executive session. Lindsey reported on his meeting suggesting that the City adopt a written policy on the Sunshine Law. According to the minutes of City Council meetings, Lindsey raised the issue of violation of the Sunshine Law at four separate meetings. The city attorney advised Lindsey that he believed that none of the meetings violated the Sunshine Law. A city councilmember advised Lindsey that the councilmembers were mad at him for raising these questions and advised him that "the best thing you could do is shut up." Lindsey continued to point out what he believed were violations some 15 times. Lindsey then told the mayor that he was going to meet with the Attorney General and that he had called the Attorney General on several occasions. One month later Lindsey was fired. Prior to being fired, Lindsey was shown for the first time, two handwritten critiques of his work showing deficiencies. The mayor gave Lindsey a second critique that listed specific complaints that he had attacked the council at meetings by telling them they were not handling business or ordinances properly. Lindsey attempted to discuss the critique at a City Council meeting for accuracy but was not allowed to speak. The next day, he was fired and thereafter he filed a suit against the City and the mayor under 42 U. S.C. 1983, claiming his speech was constitutionally protected. The district court denied the supervisor's motion for summary judgment on the claim of qualified immunity and she appealed. Generally, a government official is entitled to qualified immunity under Section 1983 when executing discretionary functions unless the official violates clearly established law. The supervisor argued that Lindsey was not acting as a citizen and was not speaking about matters of public concern. In this case, it is clear that Lindsey's duties did not include anything about compliance with the Sunshine Law therefore his statements were not connected to his job duties. In addition, whether or not the City Council was complying with the Sunshine Law was a matter of public concern. The 8th Circuit declined to engage in a balancing test since the defendants did not meet their burden showing that Lindsey's statements disrupted the workplace. *Lindsey v. City of Orrick and Taylor*, (8th Cir., No 06-3299, 06/27/07).

Comment Howard: This case establishes that compliance with the Sunshine Law is a matter of public concern and employees who complain are protected under the First Amendment.

LEGISLATION, NEWS, AND OTHER MATTERS

REMINDER TO READOPT ANNUAL FINANCIAL DISCLOSURE ORDINANCES: When the General Assembly adopted the ethics/personal financial disclosure law in 1991, MML supported an amendment, that allowed municipal officials to adopt their own simplified personal financial disclosure requirements by ordinance. This law affects only municipalities with an annual operating budget in excess of \$1 million. The General Assembly requires each political subdivision to readopt the ordinance every two years. However, in order to avoid the significant consequences of the failure to readopt the ordinance, **we urge each municipality with an annual operating budget over \$1 million to adopt the personal financial disclosure ordinance by September 15, 2007 and forward a copy of the ordinance to the Missouri Ethics Commission, PO Box 1370, Jefferson City, MO 65102.**

NOTES FROM IMLA: A great new Web site, OpenCongress, a joint project of the Sunlight Foundation and the Participatory Politics Foundation, relies on several sources to provide a view of "the real story behind what's happening in Congress." Among other things, the site allows access to official legislative information, bills, committees, issues (including "Issues by Popularity"), "Find Your Member of Congress," and lists "Most Viewed Bills." It has a "Track What's Hot" feature, and allows users to target other issues for tracking. See <http://www.opencongress.org/>.

CABLE FRANCHISING UPDATE: Proposed rules from the FCC to aid phone companies going into the cable business (for states that have not done this by recent legislation) are still on hold until the forms to accomplish this have been approved. Municipal groups have filed for a stay against the rules going into effect. The FCC continues to plow ahead on how to extend the rules to incumbent cable companies, but regardless of this, cable companies are likely to argue that the FCC decision applies in all states. (Thank you **John Pestle** for this update).

CITY ATTORNEYS ON RETAINER – EMPLOYEES VS. INDEPENDENT CONTRACTORS: Last year, in a matter involving the city attorney of Henderson, Texas, an IRS Examiner determined that the city attorney, who is in private practice and works for the City on retainer, was an "employee" of the City based on its interpretation of the Internal Revenue Code. The result was that the City was liable for FICA taxes and/or federal income tax withholding. One of the factors taken into account by the IRS was a code provision defining "employee" as including an "officer" or elected official in a state or political subdivision. The examiner concluded that the city attorney was a "public official" for income tax withholding purposes. (A copy of the ruling and the underlying documents are available at the Texas Municipal League's Web site at http://www.tml.org/legal_pdf/ContractCityAttorneysIncomeTax.pdf). The matter is scheduled to proceed to an appeal hearing. IMLA, together with the International Public Management Association for Human Resources (IPMA-HR), has submitted material in support of the city attorney for consideration at the appeal hearing. Stay tuned for further updates.

BOOKS

Eminent Domain Use and Abuse: Kelo in Context, Dwight H. Merriam and Mary Massaron Ross: An in-depth examination and analysis of the uses of eminent domain with perspectives from those who represent both the property owner and the government. Product Code: 5330090, \$114.95 regular price; \$89.95 State and Local Government Law Section member. For more information or to order this book, click on <http://www.abanet.org/abastore/productpage/5330090> or call the ABA Service Center at 1-800-285-2221.

Managing and Litigating the Complex Surety Case, Second Edition:

There is no more a complex area of legal practice than the litigation of the "mega" construction surety case. Few other areas of law offer the panoply of factual and legal issues underlying the rights and obligations of the multiple parties involved in any major construction project. This completely updated and revised second edition of *Managing and Litigating the Complex Surety Case*, offers an extensive exploration of practical issues confronting the 21st century fields of suretyship and construction contracting. Truly a complete resource on the subject, everything is covered from evaluating a surety's performance bond exposure, right up through trial proceedings and post hearing motions and appeals. This book is a must for all surety claims officers and surety trial lawyers. Product Code: 5190406, Phone Orders: 1-800-285-2221.

ABCs of Arbitrage: Tax Rules For Investment of Bond Proceeds by Municipalities, Frederic L. Ballard, Jr:

Available at <http://www.abanet.org/abastore/productpage/5330094>. If you deal with municipal bonds, this new edition of an ABA best-seller will help you master both the most basic and complicated aspects of this subject by translating the complex issues of arbitrage into concise, practical language. This book will help you gain a clearer understanding of the rules of arbitrage, the relevant IRS code sections, and the

regulations and technical terms used in this practice. Product code: 5330094, \$134.95 regular price but \$120.00 State & Local Government Law section members.

HOW TO OBTAIN OPINIONS

The material contained in this *Newsletter* is summarized as a service to MMAA members. Almost everything cited in the *Newsletter* can be found on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for searches. If you have questions or comments please feel free to email me at howardcwright@mchsi.com.

Missouri: <http://www.courts.mo.gov/courts/pubopinions.nsf>.,

Federal: <http://www.ca8.uscourts.gov/onestop.html>.

Supreme Court: <http://www.supremecourtus.gov/>

Other sources: www.findlaw.com and <http://www.molawyersweekly.com/>.

The opinions cited in this Newsletter may be subject to revision or withdrawal prior to publication.