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CASE OUTLINES (MISSOURI)

LANDLORD HAS VICARIOUS LIABILITY FOR FAILURE TO ABATE NUISANCE:

The city of Kansas City gave notice to a property owner that a tenant who parked a vehicle on the grass of the property and not on the driveway was in violation of the zoning ordinance and that the vehicle needed to be moved. After notice of the violation was given (with fifteen days to abate) to the owner and the condition remained unchanged, the landlord was convicted of failing to abate the nuisance. The landlord contended on appeal that the evidence did not support the conviction, it was against the weight of the evidence, and or resulted from an erroneous application of the law. The court examined the level of proof to hold a landlord vicariously liable for the act of a tenant. The court held the City is required to prove the existence of a nuisance on the property and that the property owner permitted the nuisance to remain after being notified about the condition. Although the City was missing elements necessary to prove its case these elements were provided by evidence presented by the landlord. [*City of Kansas City v. McGary*](#), (WD66338, 12/19/06).

Comment Howard: While on its face this case appears to be simple, it does offer information about the required notice and proof to establish vicarious liability for the landlord.

QUASI-JUDICIAL IMMUNITY PROVIDES ABSOLUTE SHIELD AGAINST DAMAGE CLAIM FOR OFFICIALS WHO TAKE DISCIPLINARY ACTION AS MEMBERS OF DISCIPLINARY BOARD:

State Board of Chiropractic Examiners (Board) brought disciplinary action against a doctor and disciplined him for using an improper device to treat his patients and practicing medicine without a license. The doctor brought a 1983 civil rights action against the members of the board. The circuit court dismissed the action on the grounds that the board is entitled to quasi-judicial immunity. On appeal, the Western District held that the board is entitled to quasi-judicial immunity. The doctrine of quasi-judicial immunity protects agency officials who are responsible for deciding whether or not to initiate proceedings from a suit for damages for their part in that decision. Quasi-judicial immunity provides absolute immunity from damages under section 1983. The court also discussed the difference between quasi-judicial immunity and official immunity that shields officials from damages for discretionary actions. [*Edwards v. Gerstein, et al*](#), (WD66678, 12/26/06).

FAILURE TO CALL IN ABSENCE IS VOLUNTARY TERMINATION OF EMPLOYMENT:

Employer had a policy that provided if an employee does not show up or call in, he/she will have been deemed to have abandoned their job and voluntarily terminated their employment. On day one, employee called in after his shift had started and told his supervisor that he would not be able to be at work due to legal difficulties with driving with a suspended license. Employee did not call on the next two days and was voluntarily terminated according to

the policy. Employee claimed he was terminated by employer and entitled to unemployment benefits. Unemployment law provides that if an employee voluntarily quits his/her job, he/she is not entitled to unemployment benefits. The commission denied benefits and the employee appealed. The Western District upheld the denial of benefits because the employee abandoned his job and voluntarily quit under the terms of employer policy. [Ayers v. Sylvia Thompson Residence Center, Division of Employment Security](#), (WD66971, 01/16/07).

Comment Howard: A policy like the one established by the employer in this case strikes me as a good way to avoid questions about when the employee has quit his or her job. This policy avoids having to send a letter that would be interpreted as the employer terminating the employee.

SUIT FOR PAY INVOLVING WORK WHILE PROMOTED, REMANDED: Employee for the city of St. Louis filed suit and alleged that he was entitled to additional compensation because he was “assigned and performed the duties of a lead painter” and was not paid additional compensation. Two weeks after the petition was filed he amended his petition alleging that he was temporarily appointed to the position of lead painter. City director of human resources filed an affidavit stating that the paperwork from the appointing authority had not been filed by the appointing authority and in order to be promoted under city ordinances the appointing authority must make the appointment. Employee filed counter affidavits alleging he was promoted citing a newspaper article and performance reviews that identified him as lead painter. City’s motion for summary judgment was sustained and employee appealed. Eastern District reversed on grounds that whether or not appointment was made is a fact question that is disputed. City’s affidavit did not show appointing authority failed to make promotion, only that the HR director did not have the paper work. City’s contention sustained by the circuit court that the claim is limited to five years from date of new petition also was reversed on grounds of relation back since both claims grew out of same basic facts. [Muehleausler v. City of St. Louis](#), (ED87998, 01/09/07).

REVENUE BONDS FOR POWER PLANT UNDER ARTICLE VI, SECTION 27(b) NOT REQUIRED TO BE APPROVED BY THE VOTERS: [STOPAQUILA.ORG](#) (plaintiff) brought suit challenging the validity of revenue bonds issued by the city of Peculiar (City) for a power plant under provisions of Article VI, Section 27(b) of the Missouri Constitution that authorizes by simple majority vote of the City Council issuance of revenue bonds by the City. Plaintiff contends that Article VI, Section 27 of the Missouri Constitution is the controlling section and requires a majority vote of the electorate in order to issue revenue bonds for a power plant; both of those sections were adopted by the voters at the same time. The first question is whether or not section 27(b) is broad enough to include a power plant. To answer this question the court looked to the meaning of the word “commercial” and concluded that the word includes any operation that “has financial profits as its primary aim” therefore section 27(b) is sufficiently broad to include within the word “commercial” a power plant operated by Aquila. Under section 27, the City operates and maintains the plant while under section 27(b) the City leases or otherwise disposes of the plant to a private person to operate and maintain the power plant; therefore the City under section 27 retains some risk even though the bonds are not general obligation bonds. Under section 27(b), the City does not have a similar risk. The court goes into considerable detail reconciling these two sections of the Constitution. [STOPAQUILA.ORG et al. v. City of Peculiar](#), (SC87302, 12/19/06),

Comment Howard: This decision gives local government the power to issue revenue bonds for a power plant under section 27(b) or just about anything related to commercial development when it is leased to a third party without a vote of the electorate. The city has no risk under 27(b) since the purchasers of the bonds rely on the revenues from the bonds and perhaps other credit enhancements that might be required of the lessee in order to issue the bonds. There is a pending case in the Western District relating to the PSC order allowing the plant to be built.

CHAIN LINK FENCE IS NOT A BUILDING AND IS WITHIN EXCEPTION FOR SOLID FENCE: Property owner (owner) in the city of Elsberry constructed a chain link fence on the property line that was objectionable to adjacent property owner (neighbor). Neighbor sought to have the fence removed and after failing to get the city involved the neighbor brought suit in circuit court. The circuit court found for neighbor. The case was appealed to the Eastern District. The issue is whether or not a chain link fence is a “building” as that term is defined in the zoning ordinance. Buildings must be set back from the property line seven and one-half feet. The zoning ordinance also makes an exception from the set back requirement for solid fences. On appeal, the Eastern District held that a chain link fence is not a building as that term is used in the zoning ordinance and held that a chain link fence is a type of a solid fence. It noted that limitations on the right to use your property are in derogation of common law and are strictly construed against limiting the use of property. [Crenshaw v. Maguire](#), (ED87223, 12/12/06).

MODOT HAS SOVERIGN IMMUNITY FOR INJURY TO PRISONER WHO WAS INJURED BY FALLING TREE: Prisoner was assigned to a three-person work crew to assist with the cutting of trees on state right-of-way that was supervised by a MODOT employee. The crew was cutting a tree when the chain came off the chain saw. Prisoner walked back to the portable restroom when the tree fell and injured her. She sued MODOT and got a judgment of \$550,000 that was reduced to \$305,021. On appeal, MODOT claims that the tree was not a dangerous condition and that they were protected by sovereign immunity. The tree was not a dangerous condition because the danger was created by the intervening act of a third person, the prisoner who cut the tree. Prisoner also failed to prove she was an agent of MODOT. Case was reversed on grounds that MODOT was protected by sovereign immunity. [Hortese v. Missouri Highway and Transportation Commission](#), (ED87092, 12/12/06).

Comment Howard: For those who are interested, the court reviews cases involving the act of intervening third parties.

AFTER INITIAL STOP COMPLETED FURTHER DETENTION WITHOUT A SUSPICION OF CRIMINAL ACTIVITY IS ILLEGAL: Highway patrolman noticed that a car veered slightly over the white lane line on I-44 and pulled the car over. After making sure the driver was not intoxicated or falling asleep and after checking for outstanding warrants and driver’s license the officer issued the driver a warning ticket and told her to be careful. He then asked her if she would open the trunk of the car and when permission was not given he told her she would be detained for another 40 minutes while a drug sniffing dog was brought to check the car. She then consented to the search and he found 70 pounds of marijuana. She was charged with drug trafficking in the second degree and was convicted. On appeal, the Missouri Supreme Court reversed holding that the detention was unlawful and that the court should have sustained the motions to suppress the evidence. The Missouri Supreme Court noted that the officer after completing the initial stop and giving the driver a warning ticket should have allowed the driver to proceed unimpeded. The officer at that time did not have a reasonable suspicion that the driver was involved in criminal activity. Under the totality of the circumstances, the officer did not have any reason to further detain the driver and the evidence was discovered as the direct result of the illegal detention. [State of Missouri v. Sund](#), (SC87747, 01/09/07).

FAILURE TO OBSERVE DRIVER CONTINUOUSLY NOT FATAL TO LICENSE REVOCATION: Driver was arrested for driving while intoxicated and breathalyzer test was administered showing the driver tested .101 percent. At circuit court hearing the court determined that the officer did not watch the driver the entire 15 minutes and rules that the driver’s license should be restored. On appeal, the Western District held that once director of revenue makes prima facie case proof as in this case, that failure of the officer to not watch the

driver the entire 15 minutes is not alone sufficient to rebut the prima facie case. The driver must present evidence that he smoked, vomited, or orally took other materials during this period or some other evidence showing that it affected the validity of the blood alcohol test results. Since the circuit court made it very clear that this ruling was based on the officer not watching the entire 15 minutes, the decision of the circuit court is reversed. With respect to driver's alleged chewing of gum the court of appeals defers to the circuit court's determination as trier of fact that driver did not chew gum during the 15 minute observation period. [*Gholson v. Director of Revenue*](#), (WD64901, 01/16/07).

TAX LIABILITY IS QUESTIONED DUE TO NOTICE BY CERTIFIED MAIL BEING RETURNED AS UNCLAIMED: Missouri statute provides that notice of tax liability is to be sent by certified mail. Department of Revenue sends certified mail to tax payer by certified mail, which is returned unclaimed. The Western District transferred the case to the Missouri Supreme Court to review the challenge as to the adequacy of notice under recent United States Supreme Court decision in *Jones v. Flowers*. We will be watching this case. [*State of Missouri v. Elliott*](#), (WD65782, 12/26/06).

TITLE TO BILL DID NOT REFLECT PURPOSE OF AMENDMENTS MAKING AMENDMENTS INVALID: When H.B. 972 was first introduced, the title showed it was to repeal three and enact four new sections related to "intoxication-related traffic offenses." The second version of the bill appeared on May 2, 2006, when the House passed the bill provided that it would repeal two sections and enact three sections related to "intoxication-related traffic offenses." The third version of the bill that was passed out of the Senate Committee was to repeal four sections and enact four sections related to "alcohol-related offense." On May 12, 2006, the day before the session ended, the bill was amended a fourth time again to repeal six sections and enact 13 new sections relating to "crime." Of the new sections, only six originated from the original bill while the others were unrelated to traffic or alcohol offenses, three of which purported to regulate the adult entertainment industry. The Missouri Association of Club Executives (association) challenged the three sections relating to adult entertainment in H.B. 972 on a number of grounds, one of which included violation of Article III, Section 21 of the Missouri Constitution that provides that no bill shall be amended in its passage to change its original purpose. Article III, Section 23 provides that no bill shall contain more than one subject which shall be clearly expressed in its title. The court describes the three sections added on the next to last day of the session relating to adult entertainment as not remotely within the original purpose and constituted a "textbook example of the legislative log-rolling that section 21 was intended to prevent." [*Missouri Association of Club Executives et al., v. State of Missouri*](#), (SC87154, 12/19/06).

Comment Howard: This practice is very common. With access to the bill tracking system on the Web site of the General Assembly it is very easy to track changes to the bill. Many bills follow a pattern very similar to the one described in this case.

CITY MUST PROVE CAUSATION IN PUBLIC NUISANCE CASE: City of St. Louis (City) sues paint companies (companies) who sold lead based paint to recover its costs for lead base paint abatement. Circuit court grants companies motion for summary judgment on grounds that City can not identify the paint from Company that was required to abate. On appeal, to the Eastern District the City argues that damages should be based on a market allocation theory and provides legal authority based on exception in Restatement of Torts in support for its theory to allocate costs in public nuisance cases. The court of appeals, after examining the current status of the law in Missouri, rules against the City but transfers the case to the Missouri Supreme Court suggesting that current case law may need to be reexamined. [*City of St. Louis v. Benjamin Moore et al.*](#), (ED87702, 12/26/06).

SPECIAL LEGISLATION ANALYSIS: Questions have been raised about the application of the three part test articulated in [*Jefferson County Fire Protection Districts Associations, et al., v. Blunt and Kinder et al.*](#), (SC87239, 11/21/06), and its application discussed in the December Newsletter. In *Jefferson County*, the court stated after applying the three part test “Because of the General Assembly's possible reliance on previous cases not articulating this presumption, only statutes passed after the date of this opinion are subject to this analysis.” Prior to *Jefferson County* population based statutes were presumed to be open-ended and constitutional. Confusion is created by the court applying the three part test in the companion case, [*Jackson County v. State of Missouri*](#), (SC87405, 11/21/06), to a statute passed prior to the Court’s ruling on November 21, 2006. In *Jackson County* the Court states, “As discussed in *Jefferson County*, that opinion's exception applies only to the statute at issue in that opinion and all statutes passed after the date of that opinion.” Even if the analysis in *Jefferson County* was applied to section 67.2555, it would still be found constitutional. The court was only trying to make its point by applying the test to show that the statute passed the test, nevertheless the two cases are clear that the test is prospective and should only be applied to future population based legislation.

CASE OUTLINES (FEDERAL)

WORK TOLERANCE SCREEN WAS DISCRIMINATORY BECAUSE IT HAD DISPARATE IMPACT ON FEMALE EMPLOYEES: Dial is a large international company with a plant in Fort Madison, Iowa. The company instituted a Work Tolerance Screen (WTS) to reduce the number of work related injuries to employees due to lifting 35 pound bars of sausage approximately 30” to 60” above the floor. The WTS had a dramatic impact on the number of new female employees by reducing qualified females 15 percent. Dial attempted to justify the WTS on the grounds of business necessity. The jury returned verdict against Dial finding that it engaged in a pattern or practice of intentional discrimination based on the disparate impact the WTS had on the employment of females. The 8th Circuit upheld the verdict holding that discrimination can be inferred from statistics and antidotal evidence to establish a pattern or practice of regular and purposeful discrimination. Dial failed to establish that the WTS was a business necessity. [*Equal Employment Opportunity Commission v. Dial Corporation*](#), (8th Circuit, 05-4183/4311, 11/17/06).

LEAVE DONATION PROGRAM THAT EXCLUDED PERSON OVER THE AGE OF 60 CONSTITUTED AGE DISCRIMINATION: City of Independence has a “Leave Donation Program” where employees may donate up to 40 hours of vacation, personal-business, and sick leave to other employees who have a medical condition preventing them from working and have exhausted all paid leave. Qualified employees may receive up to six months of donated leave. There were six eligibility requirements one of which provided that the employee must not be eligible for regular retirement which is defined as being age 60 and vested in the City’s pension plan. Before the adoption of the program, the City’s administrative specialist informed the personnel board that, “Including this appears to be a form of age discrimination.” Employee began work for the City in 1994 and was hospitalized and diagnosed with a form of heart disease in 2002 that required the employee to stay home for six months. City employees donated leave time to the employee pursuant to the program. When conferring with the employee, the HR director stated that she initially was not aware that the employee was that old. She then stated that since he was 60 years of age, he was not eligible for the program. When the leave time of the employee ran out, he was given a number of options one of which included retirement. Employee took the retirement option but filed statement that this was coerced. EEOC filed suit and employee intervenes alleging age discrimination and constructive discharge. The district court sustains the City’s motion for summary judgment and EEOC and employee appeal to the

8th Circuit. The 8th Circuit reversed the district courts granting of summary judgment on the age discrimination claim but sustained City's motion that the employee had not been constructively discharged. Statements by the HR director were direct evidence of discrimination; therefore, the City's motion for summary judgment should not have been granted. [*United States Equal Employment Opportunity Commission and Hopkins v. City of Independence*](#), (8th Circuit, 05-4489, 12/22/06).

LEGISLATION

SUIT OVER MINIMUM WAGE: Kevin O'Keefe filed suit for the MML, the Missouri Association of Fire Protection Districts, St. Louis County, the cities of Springfield, Olivette, Hazelwood, Brentwood, Chesterfield, Maryland Heights, Monarch Fire Protection Districts, and a number of individuals in Cole County against the state of Missouri. The suit challenges Proposition B, the new minimum wage law approved by the voters in November of 2006. As you know, there has been a lot of confusion over whether or not this law applies to local government. Clearly there needs to be a court decision in order to clarify this matter. In addition, the MML and others are asking for the General Assembly to pass legislation to clarify this matter. See S.B. 279 sponsored by Senator Greisheimer. Even if such legislation passes, it is doubtful the General Assembly can forgive wages earned by employees prior to the effective date of any remedial legislation. The emphasis in the lawsuit is the potential impact on fire departments since most departments have a work week longer than 40 hours. While some local government entities will see wages impacted in other areas, the reality is that with most other sectors paying higher wages, cities will have to pay the minimum wage in order to attract employees.

CONFERENCES, ETC ...

MML LEGISLATIVE CONFERENCE: MML will hold its Annual Legislative Conference on February 21-22 in Jefferson City at the Capitol Plaza Hotel. For more information contact MML or visit the MML Web site at www.mocities.com.

MO-NOTOA CONFERENCE: Mo-NOTOA will hold a conference in Jefferson City at the Capitol Plaza Hotel, February 21 starting at 9:30 a.m., ending after lunch. This immediately precedes the MML Conference and offers an opportunity for those who are interested in cable, video, and other related issues to get the latest information in more detail. For those who are members and interested in the twists and turns of cable and related topics please consider attending this Conference. Cost is \$25 which includes lunch. Please contact Susan Littlefield by phone at 314-552-2900, fax: 314-552-2985 or by mail: 4971 Oakland Avenue, St. Louis, Mo 63110.

The Midwest Summit on the Sustainable Development of Contaminated Properties will be held in Springfield, Missouri, on March 6-9. This will be a practical, hands on Conference that will focus on development techniques that are applicable to Brownfield's and other contaminated site development techniques such as green buildings, low impact storm water management, smart growth, and new urbanism. Cost is \$175. Registration and other information can be found at <http://www.drury.edu/midwestsummit> or you may contact David Doyle at 913-551-7667.

Washington University has created a free electronic database containing a large body of resources on civil rights called the *Civil Rights Litigation Clearinghouse* at: <http://clearinghouse.wustl.edu>.

The IMLA Mid-Year Seminar is scheduled for April 22-24, in Washington, D.C. More information may be found at <http://www.imla.org/seminars>.

Chicago-Kent College of Law is offering its 24th Annual Section 1983 Civil Rights Litigation Conference, April 26-27, 2007. This is a comprehensive update on liability arising out of §1983, presented by leading experts and eminent legal scholars for municipal and state attorneys, plaintiffs' attorneys, and criminal defense attorneys. The Conference will be held at Chicago-Kent College of Law. For additional information, please visit <http://www.kentlaw.edu/depts/cle>, call the Office of Continuing Legal and Professional Education at 312-906-5090, or send an e-mail to clestaff@kentlaw.edu

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>.

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.