SC 95283

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel
CITY OF GRANDVIEW, MISSOURI,
Relator,

vs.

THE HONORABLE JACK R. GRATE,
Judge for the Sixteenth Judicial Circuit of Missouri
Respondent.

RESPONDENT'S BRIEF

TURNER & SWEENY

John E. Turner - MO – 26218
[turner-sweeny@msn.com]
Christopher P. Sweeny – MO 44838
[csweeny@turnersweeny.com]
Marty W. Seaton – MO -58815
[mseaton@turnersweeny.com]
10401 Holmes Road, Ste. 450
Kansas City, Missouri 64131
(816) 942-5100; [Fax: (816) 942-5104]
ATTORNEYS FOR PLAINTIFFS

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I. The trial court did not err in denying Defendant Grandview's Motion for Summary because Grandview failed to sustain its burden of proving the indisputable right to judgment as a matter of law in that:

a) Grandview failed to provide the trial court with the insurance policy that was in effect at the time Plaintiffs were stopped and arrested by Grandview police officers: November 2012;

b) Even if this Court considers the 2013-2014 policy attached to Grandview's Motion and Writ, the policy specifically provides a "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, for Government Risks**" which covers Grandview for its governmental tort liability arising out of law enforcement wrongful acts;

c) The policy endorsement upon which Grandview relies only preserves Grandview's immunity from liability for damages above the policy's limit of coverage for Grandview's law enforcement liability; at best, the policy is ambiguous and must be construed in favor of coverage.

STATEMENT OF FACTS

I. The Policy Upon Which Defendant Grandview Relies Was Not In Effect At The Time The Plaintiffs Were Stopped And Arrested.

The policy attached to Grandview's Writ, and its Motion for Summary Judgment in the trial court, is not the policy that was in effect at the time of the Plaintiffs' injuries. As reflected in Plaintiff's Petition for Damages, and ¶13 of Grandview's Petition for Writ of Prohibition, this lawsuit arises out of the traffic stop, arrest, and battery of the Plaintiffs on November 21, *2012*. (See Plaintiff's Petition for Damages, Relator's Exhibit A at p. 21, and Grandview's Writ of Prohibition at p. 5, ¶13). The "Certified Policy" attached to Defendant's Motion for Summary Judgment and its Writ of Prohibition was in effect from July 1, *2013* to July 1, *2014* (Relator's Exhibit D1 at p. 31[1]). Defendant Grandview advocated to the Trail Court, and is advocating here, that the language of this 2013-2014 policy dictates the coverage available for a 2012 occurrence. The coverage available to the City of Grandview for the 2012 occurrence is dictated by the policy in force from July 1, 2012 to July 1, 2013. Grandview did not present that policy to the Trial Court or to this Court.

Plaintiffs regret that they did not notice, until preparing this brief, that Defendant Grandview has been urging a defense based on a policy that was not in effect at the time the Plaintiffs were stopped, arrested, and battered. Just in case they have misread or

[1] The page numbers cited in all cites to the record are too the Index page numbers in the bottom right corner of Relator's exhibits.

misunderstood the policy's declarations page which states that the policy period is from "July 01, 2013 to July 01, 2014", Plaintiffs provide this full response to Defendant Grandview's brief.

II. The Policy Attached To Grandview's Writ Covers Grandview's Law Enforcement Liability.

In its Motion for Summary Judgment, Grandview admitted, "The City of Grandview is insured under a policy of insurance issued by the Atlantic Specialty Insurance Company (part of the OneBeacon Insurance Group, LLC) which provides law enforcement liability coverage." (Grandview's Amended Statement of Uncontroverted Material Fact No. 1, Relator's Exhibit D). Thus, the policy admittedly provides "the City of Grandview" with coverage for "law enforcement liability."

Defendant Grandview's "uncontroverted material fact" is supported by the language of the policy. The policy identifies The City of Grandview, Missouri, as the named insured, and describes Grandview as a "governmental entity" and a "MO City". (Relator's Exhibit D1 at p. 31) The policy provided multiple coverages including, but not limited to, "Liability Coverages" for a premium of $78,751.00; "Automobile Coverages" for a premium $119,995.00, and "Professional Liability Coverages" were provided for a premium of $96,360.00. (Relator's Exhibit D1 at p. 33).

The "Professional Liability Coverages" included coverage for "public officials, errors and omissions"; "public officials employment practices"; "public officials employee benefits administration"; and "**law enforcement liability**." (Relator's Exhibit

D1 at p. 128)(emphasis added). The "Law Enforcement Liability" coverage has a stated limit of "$2,000,000.00 each wrongful act." (*Id*).

"Law enforcement liability" coverage is provided in a part of the policy titled: "**LAW ENFORCEMENT LIABILITY COVERAGE FORM for Government Risks**" (Relator's Exhibit D3 at p. 320)(all caps, bold and underline original). This coverage form has a section setting forth "who is an insured". It states that: "If you are designated in the Declarations as a governmental unit, you are an insured." The City of Grandview is designated in the Declarations as a governmental entity. (See Relator's Exhibits D1 at p. 31 and D3 at p. 323).

Attached to the "**LAW ENFORCEMENT LIABILITY COVERAGE FORM for Government Risks**" is an endorsement that contains the language upon which Defendant Grandview relies:

> The following is added to **Section VI - Conditions**.
>
> > The policy and any coverages associated therewith does not constitute, nor reflect an intent by you, to waive or forego any defenses of sovereign immunity available to any insured, whether based upon statute(s), common law or otherwise, including Missouri Revised Statute Section 537.610 or any amendments or Missouri Revised Statute Section 71.185 or any amendments.

(Relator's Exhibit D4 at p. 335).

Immediately following the endorsement relied on by Grandview is another endorsement to the "**LAW ENFORCEMENT LIABILITY COVERAGE FORM <u>for Government Risks</u>**". That endorsement provides in part:

> The following is added to **Section V - Limits Of Insurance**:
>
> > Any "claim" for "damages" limited by Missouri statutory caps or damages as contained in Missouri Revised Statutes 537.610 or any amendments thereto, for governmental tort liability are subject to the following Limits of Liability:
> >
> > Missouri Statutory Cap Limit: $2,000,000
> >
> > Missouri Each Claimant Limit: $300,000
> >
> > The limits listed above shall adjust and conform to the schedule outlined in Missouri Revised Statute Section 537.610 or any amendments thereto, when applicable.

(See Relator's Exhibit D4 at p. 336).

III. The Trial Court Denied Grandview's Motion for Summary Judgment.

Defendant Grandview moved for summary judgment, and set forth two alleged uncontroverted facts:

1. The City of Grandview, Missouri is insured under a Policy of Insurance issued by the Atlantic Specialty Insurance Company (part of the OneBeacon Insurance Group, LLC) which provides law enforcement liability coverage. *See Atlantic Specialty Insurance Company Policy Number 791-00-03-36-0002 ("the Policy"), a certified copy of which is attached hereto as Exhibit A.*

2. The Policy contains the following endorsement language:

MISSOURI CHANGES – PROTECTION OF IMMUNITY

***

This policy and any of the coverages associated therewith does not constitute, nor reflect an intent by you to waive or forego any defenses of sovereign immunity and governmental immunity available to any insured, whether based upon statute(s), common law or otherwise, including Missouri Revised Statute Section 537.610 or any amendments; or Missouri Revised Statute Section 71.185 or any amendments.

(Relator's Exhibit C). Contrary to Grandview's statement that a certified copy of the policy was attached, Grandview only provided the Trial Court with a part of the policy which was not certified. Grandview subsequently filed an amended statement of facts which set forth the same two facts, but Grandview attached a "certified copy" of the entire policy. (Relator's Exhibit D). Neither policy provided by Grandview to the Trial Court was the policy in effect at the time Plaintiffs were arrested and battered by Grandview's employees. (Relator's Exhibit D1 at p. 31).

After conducting a hearing on Defendant Grandview's Motion, the Trial Court entered its Order denying the motion. Grandview then filed its writ of prohibition. (Relator's Exhibit M).

ARGUMENT

I. The trial court did not err in denying Defendant Grandview's Motion for Summary because Grandview failed to sustain its burden of proving the indisputable right to judgment as a matter of law in that:

a) Grandview failed to provide the trial court with the insurance policy that was in effect at the time Plaintiffs were stopped and arrested by Grandview police officers: November 2012;

b) Even if this Court considers the 2013-2014 policy attached to Grandview's Motion and Writ, the policy specifically provides a "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, for Government Risks**" which covers Grandview for its governmental tort liability arising out of law enforcement wrongful acts;

c) The policy endorsement upon which Grandview relies only preserves Grandview's immunity from liability for damages above the policy's limit of coverage for Grandview's law enforcement liability; at best, the policy is ambiguous and must be construed in favor of coverage.

A. Standard Of Review

In a prohibition proceeding the burden is on the petitioning party, here Grandview, to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption that the trial court's ruling was correct. *State ex rel. Chance v. Sweeney, 70 S.W.3d 664, 668 (Mo.App. 2002)* (citations omitted). Furthermore, review is limited to the record made in the court below. *Id*. (citation omitted).

Here, Defendant Grandview moved for summary judgment based on its claim that it did not have liability coverage for the claims asserted by the Plaintiffs by reason of an endorsement attached to a policy that was not if force at the time Plaintiffs were arrested. Defendant cited only two facts in support of its motion, and both of those facts relied upon a "Certified Copy" of an insurance policy that was in effect from July 1, 2013 to July 1, 2014. This lawsuit arises out of the stop, arrest and battery of Plaintiffs that occurred in November 2012. Because the language from a policy in force from July 1, 2013 to July 1, 2014 cannot demonstrate that Grandview had no coverage in 2012, the City cannot overcome the presumption that the trial court's ruling was correct. Thus, Plaintiffs respectfully request that this Court quash its preliminary writ of prohibition.

B. The Coverage Afforded By The Policy Must Be Construed Broadly; While Statutory Provisions Waiving Sovereign Immunity Are Construed Narrowly.

In the event this Court decides to examine the policy attached to Grandview's Motion for Summary Judgment, and its Writ, Plaintiffs provide this full argument in response to Grandview's brief.

On page 11 of its Brief, Grandview states, "**a waiver of sovereign immunity must be narrowly construed.**" (emphasis original). In support of this claim, the City cites *Brennan v. Curators of the University of Missouri, 942 S.W.2d 432, 434 (Mo.App. 1997)*. While the City accurately quotes the statement from the *Brennan* court, it does not accurately or precisely set forth the law. The *Brennan* court cited *Fantasma v. Kansas City Board of Police Commissioners, 913 S.W.2d 388, 391 (Mo.App. 1996)*, and that court cited *Spotts v. Kansas City, 728 S.W.2d 242, 246 (Mo.App. 1987)*. The *Spotts* court

stated, "Initially we note that any waiver of sovereign immunity should be construed strictly", and cited *Kanagawav State by and through Freeman, 685 S.W.2d 831, 834 (Mo. banc 1985)*. Contrary to the statement in all of these Court of Appeals cases, this Court did not state that "any waiver" must be strictly construed; rather, the Court stated, "the *statutory provisions* that waive sovereign immunity must be strictly construed." *Id. at 834* citing *Bartley v. Special School District of St. Louis County, 869 S.W.2d 864, 867 (Mo. banc 1983)* and *Beiser v. Parkway School District, 589 S.W.2d 277, 280 (Mo. banc 1979)*(emphasis added).

In *Bartley*, this Court stated, "We are bound to hold that *statutory provisions* that waive sovereign immunity must be strictly construed." *Id*. at 868 citing *Beiser, 589 S.W.2d at 280*(emphasis added). Similarly in *Beiser*, this Court stated, "we recently stated the rule of construction that *statutory provisions* that waive sovereign immunity are construed strictly." *Id. at 280* citing *Charles v. Spradling, 524 S.W.2d 820 (Mo. banc 1975)* (emphasis added). In *Charles*, this Court stated, "*statute*s such as those applicable which waive the immunity of the sovereign from suit are strictly construed." *524 S.W.2d at 823* (emphasis added) (citing *Kleban v. Morris, 247 S.W.2d 832, 836-837 (Mo. 1952)*. In *Kleban*, this Court stated, "the majority rule is that *statutes* waiving the immunity of the sovereign from suit are strictly construed." *247 S.W.2d at 837*(emphasis added). The *Kleban* court cited *State ex rel. State Highway Commission v. Bates, 296 S.W. 418, 423 (Mo. banc 1927)*.

The interpretation of statutory provisions that waive sovereign immunity is not the issue here. It is undisputed that both §71.185 and §537.610 RSMo provide that if a

sovereign purchases insurance, it waives immunity to the extent of and for the specific purposes of the insurance purchased. In *Beiser*, this Court strictly construed §71.185, the statute at issue here, and found that the statute "undoubtedly waives the sovereign immunity of a municipality for torts committed while exercising a governmental function if and to the extent the municipality carries liability insurance." *589 S.W.2d at 280.* Likewise, in *State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621, 623 (Mo. banc 1990)*, this Court strictly construed the "*statutory provisions*" of §537.610, and concluded that the statute "provides an independent basis for waiving sovereign immunity—a basis cemented in the existence of coverage for the damage or injury at issue under the language of the insurance policy." *Id.* at 624.

Thus, the issue here is not the construction of statutory provisions that waive sovereign immunity, but the construction of an insurance policy that Grandview purchased which specifically provides coverage to Grandview for law enforcement liability. The narrow or strict construction that applies to "statutory provisions that waive sovereign immunity" does not apply to the construction of the policy. Rather, the rules of construction applicable to insurance policies are the rules applicable to the issue before this Court. And, if after construing the language of the insurance policy this Court determines that Grandview is covered by the policy for law enforcement liability, then under the strict/narrow construction of §537.610 and 71.185, immunity is waived.

The rules for interpreting the insurance contact at issue here are not altered because Grandview is a sovereign. See, *V.S. DiCarlo Construction Co., Inc. v. State of Missouri, 485 S.W.2d 52, 55 (Mo. banc 1972)* where this Court reversed a Trial Court

order dismissing plaintiff's claims on the basis of sovereign immunity and held that the doctrine of sovereign immunity did not change the rights and obligations of the State of Missouri under a construction contract to which the State was a party. In reaching its holding, this Court cited a Georgia case which summarized the principle as follows:

> In entering into the contract [the sovereign] laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contact. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into a business contract.

Id. (citing *Carr v. State ex rel. Coetlosquet, 26 N.E. 778, 779 (Ga. 1891)*).

Interpreting Grandview's policy/contract just as it would be interpreted if it was the policy/contract of an individual requires that every effort be made to interpret the policy so as to afford coverage, not defeat it. *Weathers v. Royal Indemnity Co., 577 S.W.2d 623, 626 (Mo. banc 1979)*. "[I]nsurance policies are designed to provide protection and will be liberally interpreted to grant, rather than deny, coverage." *Poage v. State Farm Fire & Cas. Co., 203 S.W.3d 781, 783 (Mo. App. 2006)*(citation omitted). Furthermore, "Provisions restricting coverage are particularly construed most strongly against the insurer." *Alea London Ltd. v. Bono-Soltysiak Enters., 186 S.W.3d 403, 412 (Mo. App. 2006)* (citing *Meyer Jewelry Co. v. General Ins. Co. of America, 422 S.W.2d 617, 623 (Mo. 1968)* and see, *Southern General Ins. Co., v. WEB Associates/Electronics, Inc., 879 S.W.2d 780, 782 (Mo.App. 1994)* (citation omitted). Finally, if the policy is ambiguous, it is to be construed against the insurer, and in favor of coverage. *Peters v.*

Employers Mut. Cas. Co., 853 S.W.2d 300, 302 (Mo. banc 1993) and *Ritchie v. Allied Property & Cas. Ins. Co., 307 S.W.3d 132, 134 (Mo. banc 2009)*.

C. The Policy Covers Grandview's Law Enforcement Liability.

The City's sole argument is that it has sovereign immunity. But, if a public entity purchases insurance, it has waived its immunity "to the extent of and for the specific purposes of the insurance purchased." *Fantasma v. Kansas City Board of Police Commissioners, 913 S.W.2d 388, 321 (Mo. App. 1996)*. Here, it is undisputed that Grandview purchased insurance which provided Grandview with coverage for law enforcement liability. (Grandview's Amended Statement of Uncontroverted Material Fact No. 1, Relator's Exhibit D). Thus, Defendant Grandview waived its sovereign immunity from law enforcement liability.

The named insured on the policy is the City of Grandview, Missouri. The City is described on the declaration page as a Governmental Entity. (See Relator's Exhibit D1 at p. 31). Grandview paid a $96,360.00 premium for "Professional Liability" coverage which included four different kinds of coverage: "Public Officials Errors And Omissions"; "Public Officials Employment "Practices"; "Public Officials Employee Benefits Administration"; and "*Law Enforcement Liability*". (See Relator's Exhibits D1 at 33 and D2 at p. 128). (emphasis added).

Notably, the law enforcement liability coverage is provided by a part of the policy titled: "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, for Government Risks**" (See Relator's Exhibit D3 at p. 320)(bold, all caps, and underline orginal). The title plainly indicates that the coverage includes "government risks." The insuring clause

of this coverage form states, "We will pay those sums that the insured becomes legally obligated to pay as 'damages' resulting from a 'law enforcement wrongful act' to which this insurance applies." "Insured" is defined by section IV of the coverage form to include Defendant Grandview. (Relator's Exhibits D1 at p. 31 and D3 at p. 323).

Furthermore, an endorsement to the "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, for Government Risks**" specifically sets for the limits of coverage for Defendant Grandview at a per claimant amount that is different than the limits of coverage for Grandview's insured employees. (Relator's Exhibit D4 at p. 336). The policy states that the Law Enforcement Liability limit is $2,000,000.00 for each wrongful act; however, an endorsement to the Law Enforcement Liability Coverage Form reduces the coverage for Grandview, as opposed to its employees, to $300,000.00 per claimant and $2,000,000.00 per occurrence. (Relator's Ex. D2 at p. 128 and D4 at p.336). Thus, Defendant Grandview indisputably has coverage for law enforcement wrongful acts under the policy albeit at lower limits than those applicable to its employees.

D. The Policy Language Upon Which Grandview Relies Does Not Preserve the City's Immunity Under §537.600; At Best, The Language Is Ambiguous And Must Be Construed In Favor Of Coverage.

Despite having paid a $96,360.00 premium for "Professional Liability Coverages" which included coverage titled "**LAW ENFORCEMENT LIABILITY COVERAGE FORM for Government Risks**", Grandview argues that it has not waived the statutory sovereign immunity it had under *§537.600*. The only policy provision upon which Defendant relies in support of its argument does not even cite §537.600. Grandview's

interpretation of the policy provision is contrary to its plain language and contrary to the fact that the policy provides coverage limits for Grandview's "governmental tort liability" under the "Law Enforcement Liability Coverage Form". At a minimum, the policy is ambiguous, and therefore, must be construed against the insurer and in favor of coverage. *Peters, 853 S.W.2d at 302)*and *Ritchie, 307 S.W.3d at 134*.

1. The Policy Provision is Uncertain and Indistinct.

In support of its argument, Grandview relies on the following policy language:

> This policy and any of the coverages associated therewith does not constitute, nor reflect an intent by you, to waive or forego any defenses of sovereign immunity and governmental immunity available to any insured, whether based upon statute(s), common law or otherwise, ***including*** Missouri Revised Statute ***Section 537.610*** or any amendments; or Missouri Revised Statute ***Section 71.185*** or any amendments.

(Grandview's Brief at 6-7 and 14)(bold and italics added).

This provision begins by stating that the policy "does not constitute…", but it never explains what the policy "does not constitute". Rather, the sentence gets sidetracked by a subordinate clause leaving the entire sentence indistinct and uncertain, i.e. ambiguous. An insurance policy is ambiguous if "there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy." *Merlyn Vandervort Investments, LLC v. Essex Ins. Co., Inc., 309 S.W.3d 333, 336 (Mo.App.2010)*(quoting *Seeck v. Geico Gen. Ins. Co., 212 S.W.3d 129, 132 (Mo. banc 2007)*). The uncertainty

created by the language chosen by the insurer is construed against the insurer, and in favor of coverage. *Peters, 853 S.W.2d at 302)*and *Ritchie, 307 S.W.3d at 134*.

2. If the Provision Preserves Any Immunity, it is Only the Immunity in §§537.610 and 71.185

The language of the provision refers to sovereign immunity based upon "statute, common law or otherwise"; sovereign immunity in Missouri exists only pursuant to statute. The common law doctrine of sovereign immunity was abolished by this Court in *Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. banc 1977)*. In response to *Jones*, the state legislature enacted legislation extending sovereign immunity to "public entities." See, §537.600 RSMo and *State ex rel. Metropolitan St. Louis Sewer District v. Sanders, 807 S.W.2d 87, 89 (Mo. banc 1991)*. Section 537.600 RSMo., provides complete immunity, with some limited exceptions. Sections 537.610 and 71.185 RSMo provide immunity from liability for damages above the amount of any insurance purchased by a municipality or public entity.

The provision relied upon by Grandview does not cite §537.600; rather, it cites only §§537.610 and 71.185. The provision ends with the phrase "including … Section 537.610 or … 71.185. This Court has found that the word "including" is susceptible to more than one meaning. In *State on Inf. Huffman v. Sho-Me Power Co-op, 191 S.W.2d 971, 976 (Mo. 1946),* the Court explained that the word "including" could either be a restriction upon, or enlargement of, the general language which precedes it…" In determining the meaning of "including", this Court noted that the United States Supreme Court "has said that in its ordinary sense 'including' is not a term of enlargement but such

'is its exceptional sense'…" *Id*. (citation omitted). The Court further found, "the term [including] has 'various shades of meaning, sometimes a restriction and sometimes an enlargement.'" *Id*. (citation omitted).

In other words, the term is reasonably susceptible to more than one meaning. Thus, the term is ambiguous.[2] See, *Burns v. Smith, 303 S.W.3d 505, 509 (Mo. banc 2010)* where the Court stated, "Language is ambiguous if it is reasonably open to different constructions." The ambiguity must be resolved against the insurer, and in favor of coverage. *Peters, 853 S.W.2d at 302* and *Ritchie, 307 S.W.3d at 134*.

In *City of Columbia v. Henderson, 399 S.W.3d 493, 496 (Mo.App. 2013)*, the Western District was called on to interpret the word "includes" as it appeared in a statute. The Court found that the word "includes" "is often ambiguous." *399 S.W.3d at 496*. In the language at issue in that case, the word "includes" was followed by an enumerated list, and the Court found the applicable rule of construction to be "*expressio unius est exclusio alterius:* the express mention of one thing implies the exclusion of another." (italics original)(citation omitted). Likewise, here, the express mention of §§537.610 and 71.185 implies the exclusion of §537.600.

[2] Plaintiffs acknowledge that there are cases interpreting the word "including" as a term of enlargement or as suggesting an illustrative example, but these cases merely demonstrate that "including" is reasonably open to different constructions. In other words, they demonstrate that the word is ambiguous.

Giving the term "including" a meaning that restricts the general language which preceded it, the language upon which Defendant relies includes only §§537.610 and 71.185 RSMo; it does not include §537.600. In other words, pursuant to the provision cited by Grandview, only the immunity provided in §§537.610 and 71.185 is preserved. And because the language in the provision does not include §537.600, the immunity in that statute is waived. Interpreting the ambiguous term "including" in this manner is supported by the cases cited above, and is the interpretation most favorable to a finding of coverage. Thus, it is the interpretation that must be followed. *Ritchie, 307 S.W.3d at 134*.

Reading the term "including" as restricting the general language that preceded it is supported not only by the case law, but also by the language of the policy as a whole. Our Courts have consistently held that a policy must be construed as whole, and the language cited by Grandview is not to be read in isolation. See, *Shelter Mut. Ins. Co. v. Ballew, 203 S.W.3d 789, 794 (Mo.App. 2006)*. In other provisions throughout the policy the insurer repeatedly uses the phrase "including but not limited to", but in the language at issue here, the insurer used only the term "including".[3] In the multiple instances where the insurer used the phrase "including but not limited to", it made it unambiguously clear to the reader that it was using the term "including" in the sense of enlarging or providing an example of the language that preceded it. Nonetheless, the insurer elected not to use the phrase in the provision at issue here. "[W]here a term is used in one phrase of a policy,

[3] See, e.g., Relator's Exhibits D1 at pgs. 114 and 116; D2 at pgs. 181, 182, 186, and 190; D3 at pgs. 262, 264, 267, 268, 297, 317 and 322; and D4 at p. 362.

its absence in another phrase is significant." *Reese v. U.S. Fire Ins. Co., 173 S.W.3d 287, 299 (Mo.App. 2005)*.

In other instances where the insurer sought only to set forth an illustrative example, as opposed to providing a restrictive list, the insurer used the phrase "such as." (Relator's Exs. D2 at p. 144 and D3 at p. 348). In yet another place in the policy, the insurer specifically stated that it was only providing "examples" and that the examples given were not "all inclusive." (Relator's Ex. D3 at p. 269). The insurer chose not to use this unambiguous language in the provision relied upon by Grandview. Rather, it simply used the word "including." This difference in language is significant and demonstrates that the insurer intended to have the word "including", as used in the provision cited by Grandview, interpreted in a manner that restricted the general language that preceded it, i.e., the reference to sovereign immunity is restricted to the immunity in §§537.610 and 71.185. See, generally *Id*. and *Drury Co. v. Missouri United School Ins. Counsel, 455 S.W.3d 30, 37-38 (Mo. App. 2014)* where the Court of Appeals found that the use of concurrent cause language in one exclusion, and its absence in another supported the finding that the exclusion without the concurrent clause language did not exclude coverage for damages concurrently caused by both an included risk and an excluded risk.

Like our Missouri Courts, out of state courts have found that "including" is susceptible to two shades of meaning: "(1) that the thing which is stated is the only thing intended; or (2) that the thing which is stated constitutes only one of the things intended." See, *CUNA v. Florida Fire Com'rs, 200 A.2d 313, 320 (N.J. 1964)*, and *Schluckebier v. Arlington Mutual Fire Ins. Co., 99 N.W.2d 705, 707 (Wis. 1959)*. As discussed above,

when read as a whole, it is apparent that the term "including", as used in the provision at issue here, meant that the things which were stated, i.e, §537.610 and §71.185, were the only things intended. Thus, under the provision upon which Grandview relies, only the immunity provided by §§537.610 and 71.185 is preserved. At a minimum, the policy is ambiguous, and must be construed against the insurer and in favor of coverage. *Peters, 853 S.W.2d at 302* and *Ritchie, 307 S.W.3d at 134*.

3. Defendant's Interpretation of the Provision Renders the Law Enforcement Liability Coverage for Grandview's Governmental Tort Liability Illusory.

Immediately following the endorsement upon which Grandview relies is another endorsement to the Law Enforcement Liability Coverage Form which sets out the specific limits that the policy will pay for "'damages' for "**governmental tort liability**" limited by §537.610. (Defendant's Ex. A at 373). The only "governmental tort liability" limited by §537.610 is the liability of the public entity – in this case, Grandview. See *Cottey v. Schmitter, 24 S.W.3d 126, 128-29 (Mo.App. 2000)* where the Court explained that the damage caps set forth in §537.610 apply only to sovereigns, and not to the sovereigns' employees.

If, as Grandview claims, it has no coverage under the Law Enforcement Liability Cover Form, then it would be wholly unnecessary for the policy to set forth what the limits of that non-existent coverage are. But the policy specifically provides a "Missouri Statutory Cap Limit" of $300,000.00 per claimant for damages for governmental liability under the Law Enforcement Liability Coverage Form. Thus, there must in fact be

coverage for Grandview's governmental liability for law enforcement activity. Consequently, sovereign immunity has been waived, and Plaintiffs respectfully request that this Court affirm the Trial Court's judgment.

Section 71.185 RSMo. provides that a municipality "shall be liable as in other cases of torts for property damage and personal injuries", and that the Court is to reduce any verdict rendered "to the amount of the insurance coverage for the claim." Reading the policy language relied upon by Grandview in the context of the statutes cited therein, it is reasonable to interpret the policy as covering those damages entered against the City of Grandview up to the cap of the endorsement: $300,000.00 per claimant. But that the City is not waiving its immunity from liability for damages above that amount even though the policy provides Grandview's employees coverage in the amount of $2,000,000.00 per wrongful act. Interpreting the policy in this manner gives meaning to all parts of the policy. Whereas Grandview's interpretation renders the coverage provided by the policy's Law Enforcement Liability Coverage Form" completely illusory as to the named insured: Defendant Grandview. This Court has consistently held that such a construction "should not be indulged in." See, e.g., *Rice v. Shelter Mut. Ins. Co.*, *301 S.W.3d 43, 46 (Mo. banc 2009)*.

On page 20 of its Brief, Grandview argues that even under its interpretation, the policy's Law Enforcement Liability Coverage Form would provide coverage "for the City on claims in the two instances where immunity is waived by statute…and provides coverage for law enforcement Insureds who are not vested with sovereign or other

official governmental immunity." The City's argument highlights the rationale behind this Court's requirement that policies be interpreted as a whole.

In addition to paying a premium for "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, for Government Risks**", Grandview paid a separate premium of $119,995.00 to insure its liability arising out of the negligent use of a motor vehicle, and another premium of $78,751.00 to insure its liability arising out of the condition of its property. (See "Business Auto Coverage Form" in Relator's Ex. D4 at p. 342 and "Commercial General Liability Coverage Form, for Government Risks" in Relator's Ex. D3 at p. 274). Thus, coverage for liability arising under the two exceptions to sovereign immunity is provided by the "Business Auto Coverage Form", and the "Commercial General Liability Form for Government Risks". The "Law Enforcement Liability Coverage Form for Government Risks", on the other hand, specifically provides coverage for "law enforcement wrongful acts", and it specifically excludes coverage for injuries arising out of the operation of a motor vehicle. (Realtor's Ex. D3 at p. 321). The stop, arrest and battery of the Plaintiffs were law enforcement wrongful acts, and therefore, Grandview's liability for those acts is covered.

If the Law Enforcement Liability Coverage Form only covered claims arising out of the two exceptions set forth in§537.600, then the coverage provided to Grandview under the coverage form would be duplicitous of other coverage Grandview bought and paid for. A duplicitous policy is ambiguous. See, *Seeck v. Geico Gen. Ins. Co., 212 S.W.3d 129, 132 (Mo. banc 2007)*.

Finally, Grandview argues that its policy provides coverage for its employees who are not protected by sovereign or governmental immunity. Plaintiffs do not disagree. This fact, however, does not explain why the "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, <u>for Government Risks</u>**" specifically includes the City as an insured if the coverage form does not in fact provide coverage to the City "for Government Risks" as the title so plainly states. What's more, if the coverage form was only meant to cover the City's employees, the form could have clearly indicated in its "Who Is An Insured" section that only the City's employee's are insureds for the coverage provided by that form. But, there is no such language in the Law Enforcement Liability Coverage Form or any endorsements thereto. And, as discussed above, an endorsement to the coverage form actually sets forth the limits of Grandview's liability "for governmental tort liability". (Relator's Ex. D4 at p. 336). A limit that is different than the limit applicable to the City's employees. Thus, the law enforcement liability coverage is not limited to just the City's employees.

The "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, <u>for Government Risks</u>**" plainly states that it covers "government risks" for law enforcement wrongful acts. An endorsement to the coverage form sets forth the limit of coverage for Grandview's "governmental tort liability" – a limit different than that applicable to Grandview's employees. When read together with the rest of the policy, the provision upon which Grandview relies can only be reasonably interpreted as preserving Grandview's immunity for damages above the limits of liability applicable to the City. In other words, even though the liability limits of the Law Enforcement Liability Coverage

Form is stated as "$2,000,000.00 per wrongful act", Grandview is not waiving its immunity up to that amount; rather, it is only waiving its immunity up to the caps applicable to the City's "governmental tort liability". Any other interpretation would render the coverage for "governmental tort liability" arising out of law enforcement wrongful acts meaningless. Thus, Respondent respectfully requests that this Court quash its preliminary writ of prohibition.

4. Even if the Language Relied upon by Grandview Unambiguously Took Away "Law Enforcement Liability" Coverage for Grandview, the Policy is Ambiguous because it Promises Coverage at One Place, and Takes it Away at Another.

This Court has repeatedly recognized, "If a contract promises something at one point and takes it away at another, there is an ambiguity." *Jones,* 287 S.W. 3d at 690 (citing *Seeck, 212 S.W.3d at 133*); see also *Ritchie, 307 S.W.3d at 140*. The title of the coverage specifically states that it is for "government risks." The coverage form states that Grandview is an insured. Thus, the coverage form unambiguously promises to provide coverage to the City of Grandview for its liability arising out of law enforcement wrongful acts. So even if the sentence upon which Grandview relies eliminated this promised coverage, it does nothing more than create an ambiguity. What's more the coverage allegedly eliminated by the endorsement upon by Grandview relies is promptly promised again in an endorsement that prescribes the liability limits of the law enforcement liability coverage for Grandview's governmental tort liability. This is the

very kind of giving-and-then-taking-away that our Courts have found results in an ambiguity that must be construed against the insurer and in favor of coverage. See

In *Ritchie*, this Court interpreted a policy providing underinsured motorist coverage on three vehicles. One provision of the policy could reasonably be "interpreted to permit stacking of underinsured motorist coverages…." Another provision of the policy, however, unambiguously prohibited stacking of the underinsured motorist coverage. *307 S.W.3d at 137-38*. This Court held that the policy was, at best, ambiguous because it promised excess coverage at one point but attempted to prohibit such excess coverage at another. The Court concluded that, "under settled law", such ambiguity "must be resolved in favor of coverage." *Id. at 134*.

The Court of Appeals reached the same conclusion in *Chamness v. Am. Family Mut. Ins. Co., 226 S.W.3d 199, 207-08 (Mo.App. 2007)*. The policy at issue in *Chamness* had two anti-stacking provisions: one in the "limits of liability" section of the policy, and another in a section titled "Two or More Cars Insured." *Id*. at 201-02. American Family argued that its policy, with two anti-stacking provisions, eliminated any ambiguity in the policy. *Id*. at 207. The Court of Appeals disagreed holding that even though those two provisions precluded stacking, the "second sentence of the other insurance clause appears to provide coverage over and above any other applicable coverage", and therefore, the policy is ambiguous. *Id*. at 207-08.

Likewise, here, if the endorsement Grandview relies upon can be read to preclude law enforcement liability coverage for Grandview, the policy, at best, is ambiguous because it promises law enforcement liability coverage for Grandview in the declarations

pages, the "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, for Government Risks**", and the endorsement to that coverage form. As explained by this Court, such ambiguity must be resolved in favor of coverage. *Ritchie, 307 S.W.3d at 134*.

E. The Cases Relied Upon By The City Involve Different Policy Language, And Therefore, Are Not Dispositive.

Missouri Courts have consistently held that decisions interpreting policy provisions are not dispositive in the absence of identical policy language. See, e.g., *Kennedy v. Safeco Ins. Co. of Illinois, 413 S.W.3d 14, 17 (Mo.App. 2013)*. Here, the policy language relied upon by Grandview is not identical to the language at issue in the cases cited by Grandview. For example, Grandview relies on *Conway v. St. Louis County, 254 S.W.3d 159, 167 (Mo.App. 2008)*. But the languages at issue in that case is not even similar, much less identical to the language Grandview relies upon. The policy language at issue in *Conway* provided:

> The coverage provided by this protected self-insurance plan *does not apply to any claim or suit which is barred by the doctrines of sovereign immunity* or official immunity although defense of such actions shall be provided. *No provision of this condition of coverage, or the coverage outlying in which it is included, shall constitute a waiver of…any protected self insured to assert a defense based on the doctrines of sovereign immunity or official immunity.*

(emphasis added).

Grandview also relies on *State ex rel. Board of Trustees of North Kansas City Hospital v. Russell, 843 S.W.2d 353, 360 (Mo. banc 1992)*. Again, the language at issue in that case is not identical or even similar to the language at issue here. The policy in that case stated in part:

> *NOTHING CONTAINED IN THIS POLICY (OR THIS ENDORSEMENT THERETO) SHALL CONSTITUTE ANY WAIVER OF WHATEVER KIND OF THESE DEFENSES OF SOVEREIGN IMMUNITY OR OFFICAL [SIC] IMMUNITY FOR ANY MONETARY AMOUNT WHATSOEVER.*

Id. at 360 (italics and all caps original). Neither case cited by Grandview involved language which specifically referenced the immunity in §537.610 and §71.185 as the language at issue here does. Nor do either of the cases cited by Grandview discuss the existence of an additional endorsement which sets specific policy limits for claims against a governmental entity which demonstrates that there is in fact coverage. Again, the language upon which Grandview relies cannot be interpreted in isolation; rather, the policy must be interpreted as a whole. See, *Ballew, 203 S.W.3d at 794*.

Defendant string cites a number of cases on page 18 of its brief. None of those cases have language identical to the policy at issue here. In *Hendricks v. Curators of University of Missouri, 308 S.W.3d 740, 744 (Mo.App. 2010)*, the policy stated in part: "Nothing in the plan shall be construed as a waiver of any governmental immunity of the employer, the Board of Curators of the University of Missouri nor any of its employees in the course of their official duties." In *Topps v. City of Country Club Hills, 272 S.W.3d 409, 417-18 (Mo.App. 2008)*, the Court first found that the policy at issue was "devoid of

affirmative language indicating [the Plaintiff's] claim is covered…" *Id*. at 417. The Court then went on to note, "the policy expressly includes disclaimer language that reserves the City's sovereign immunity. Section 1 of the 'Memorandum of Coverage' clearly states that the policy should not be construed to broaden the liability of the City beyond the sovereign immunity provisions of Sections 537.600 to 537.610, nor 'to abolish or waive any defense at law which might otherwise be available' to the City." The policy specifically referenced §537.600. Here, there is no such reference.

In *Parish v. Novus Equities Co., 231 S.W.3d 236, 246 (Mo.App. 2007)*, the policy provided in part:

> We'll apply this agreement to the tort liability of any protected person *only if the protected person isn't immune from such liability under Missouri law.*

The policy here explicitly provides protection for the City who would otherwise be immune, and in fact sets forth specific policy limits for Granview. (Relator's Exhibits D3 at p. 320 and D4 at p. 336).

The policy at issue in Parish also stated:

> Your purchase of this policy isn't a waiver under:
>
> Missouri Revised Statute Section 537.610 or any of its amendments; or
>
> Missouri Revised Statute Section 71.185 or any of its amendments; of sovereign or governmental immunity of any protected person for tort liability.

Defendant highlights the fact that the policy language in *Parish* specifically referenced §537.610 and §71.185, like the policy at issue here. The reference to the statutes is where

the similarity in the language between the two policies ends. Sections 537.610 and 71.185 do two things: 1) waive a sovereign's immunity when a sovereign purchases insurance and 2) preserve a sovereign's immunity from liability for damages above the policy limits of the policy. The policy in *Parish* explained that the *waiver of sovereign immunity* that can occur under 537.610 and 71.185 did not occur as a result of the policy. A position reinforced by the policy language that the policy did not apply to those with immunity. *Id*. at 246.

The language at issue here, on the other hand, attempts to explain that the *immunity preserved in §§537.610 and 71.185* is not waived. A position reinforced by the fact that the Law Enforcement Coverage Form specifically set forth what Grandview's limit of liability is under that coverage. A limit that is different than that applicable to Grandview's employees.

In *State ex rel. Ripley County v. Garrett, 18 S.W.3d 504, 508 (Mo.App. 2000)*, the policy provided in part:

> The purpose of this insurance does not include coverage for any liability or suit for damages which is barred by the doctrines of sovereign or governmental immunity by whatever name, as set forth in §537.600 *et. seq;*
>
> This policy is not intended to act as a waiver nor is it a waiver of any defense…available to the insured by statute or a common law…

This policy language specifically referenced the immunity provided by §537.600 as opposed to the language at issue here which references the immunity provided under §537.610 or §71.185.

Grandview's reliance on *Casey v. Chung, 989 S.W.2d 592, 593* (Mo.App. 1998) is also misplaced. The policy at issue in that case provided in part:

> This insurance does not apply to any claim or 'suit' which is barred by the doctrines of sovereign immunity or official immunity but we will have the right and duty to defend any such 'suit'. No provision of this endorsement or of the policy to which it is attached, shall constitute a waiver of our right, or the right of any insured, to assert a defense based on the doctrines of sovereign immunity or official immunity.

The policy at issue in *Casey*, like the other cases relied upon by Grandview, does not limit itself to the immunity provided under §§537.610 and 71.185.

Grandview also relies on *Brennan by and through Brennan v. Curators of the University of Missouri, 942 S.W.2d 432 (Mo. App. 1997)*. That Court did not even reach the issue of any insurance policy language because the Plaintiff in that case did not plead a waiver of sovereign immunity, and therefore, the Petition was dismissed. *Id*. at 435-436. In fact, the Court stated, "we note that it is not necessary for us to reach the issue of whether the General Liability Plan would have in fact waived the curators' sovereign immunity." *Id*. at 437. Likewise, there is no discussion of any policy language in *Fantasma v. Kansas City Board of Police Commisioners, 913 S.W.2d 388 (Mo.App. 1996)*. In that case, the Court of Appeals specifically found that the Defendant "did not purchase liability insurance within the meaning of §537.610." *Id*. at 391. Thus, the Court did not analyze any policy language at all.

Finally, Grandview cites *Epps v. City of Pine Lawn, 353 F.3d 588 (8th Cir. 2003)*. The policy at issue in that case did not cover Plaintiff's claim in the first instance, and even if it did, it specifically referenced §537.600 and explained that the insured's liability is not broadened beyond that statute. *Id*.

None of the cases cited by Grandview involved policy language identical to the language at issue here. What's more, none of the cases cited by Grandview indicated that there was any policy language, like here, that specifically set forth a policy limit for the governmental entity that was different than the policy limit applicable to the entity's employees. Thus, cases cited by Grandview are inapposite.

CONCLUSION

Defendant Grandview asks this Court for the extraordinary remedy of a writ of prohibition. But, Defendant has not given this Court, nor did it give the Trial Court, the policy of insurance that was in effect at the time Plaintiffs were stopped and arrested by Grandview police officers. Thus, neither this Court nor the Trial Court had before it a record upon which it could find that Defendant Grandview is entitled to the undisputed right to judgment as a matter of law. The Trial Court properly denied Defendant Grandview's Motion for Summary Judgment, and Plaintiffs respectfully request that this Court quash its preliminary writ of prohibition.

Even if this Court considers the policy attached to Defendant's Writ, Defendant has failed to overcome the presumption that the Trial Court's ruling was correct. Our Courts have consistently held that sovereign immunity is waived for the specific purposes of any insurance purchased by the sovereign. Here, Grandview purchased insurance that

included a coverage form titled: "Law Enforcement Liability Coverage Form for Government Risks." In fact, Defendant Grandview has admitted that this insurance provided it law enforcement liability coverage. Thus, any alleged immunity for law enforcement liability has been waived.

Even though Defendant admits it had insurance coverage for law enforcement liability, and even though the policy provides specific coverage limits for Grandview's "governmental tort liability" different than the policy limits for Grandview's employees, Grandview claims that there is no coverage for its governmental tort liability. Defendant's argument is contrary to its admitted fact and the plain language of the policy. At a minimum, the policy language upon which Defendant relies is ambiguous in that it is indistinct, uncertain, and duplicitous. What's more the language is open to more than one construction. Pursuant to this Court's pronouncement that every effort should be made to interpret a policy of insurance so as to afford coverage, not defeat it, the construction most favorable to coverage must be used.

Finally, if, as Defendant claims, the language upon which it relies is so broad as eliminate Defendant Grandview's law enforcement liability coverage, then Grandview is paying a premium for coverage titled "**LAW ENFORCEMENT LIABILITY COVERAGE FORM, <u>for Government Risks</u>**" that actually provides it with no coverage at all. Defendant reads the alleged exclusion so broadly so as to render the coverage for Grandview illusory. This Court has held that such a construction should not be indulged in. Furthermore, a policy that promises coverage at one point and takes it away at another is ambiguous, and must be construed in favor of coverage.

For the foregoing reasons, Respondent respectfully request that this Court affirm the Trial Court's judgment and quash its preliminary writ of prohibition.

TURNER & SWEENY

/S/ John E. Turner
John E. Turner - MO – 26218
[turner-sweeny@msn.com]
Christopher P. Sweeny - MO-44838/KS 16868
[csweeny@turnersweeny.com]
Marty W. Seaton - MO - 58815/KS 23059
[mseaton@turnersweeny.com]
10401 Holmes Road, Ste. 450
Kansas City, Missouri 64131
(816) 942-5100; [FAX: (816) 942-5104]
ATTORNEYS FOR RESPONDENT

RULE 84.06(c) CERTIFICATION

I hereby certify that this Brief:

1. Complies with the limitations contained in Rule 84.06(b)

2. According Microsoft Word's word count, this Brief contains 8994 words.

TURNER & SWEENY

/S/ John E. Turner
John E. Turner - MO – 26218
[turner-sweeny@msn.com]
Christopher P. Sweeny - MO-44838/KS 16868
[csweeny@turnersweeny.com]
Marty W. Seaton - MO - 58815/KS 23059
[mseaton@turnersweeny.com]
10401 Holmes Road, Ste. 450
Kansas City, Missouri 64131
(816) 942-5100
[FAX: (816) 942-5104]
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this brief with the Missouri Supreme Court by using the CM/ECF system and that a copy of this brief was emailed on January 12, 2016, to:

Mr. Steven F. Coronado
[steve@coronadokatz.com]
Mr. Christopher L. Heigele
[chris@coronadokatz.com]
4 W. Third Street, Suite 200
Kansas City, Missouri 64105
ATTORNEY FOR RELATOR

The Honorable Jack Grate
Judge, Circuit Court of Jackson County
Division 17
308 W. Kansas, 2nd Floor
Independence, Missouri 64050
[div17.cir16@courts.mo.gov]
RESPONDENT

/S/ John E. Turner
John E. Turner