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threatened with large damage suits. Section 1983 suits and disciplinary proceedings are other options available to indigents who wish to pursue judicial remedies against their court-appointed attorneys, but these options present difficulties which lessen their attractiveness when compared with malpractice suits. The floodgates may have been opened, but the dam stands firm.

ALEXANDER D. TOMASZCZUK

## SOVEREIGN IMMUNITY: APPLICATION OF MISSOURI'S 1978 SOVEREIGN IMMUNITY LEGISLATION TO SCHOOL DISTRICTS

### *Beiser v. Parkway School District*<sup>1</sup>

On May 28, 1976, Beiser, a student attending Parkway South Junior High School, lost his right eye as the result of an accident in an industrial arts class. As a fellow student attempted to insert a drill bit into a drill press, the drill bit flew from the press and struck Beiser in the eye. Beiser sued the school district,<sup>2</sup> which had a liability insurance policy that apparently covered the accident, alleging that his injuries were the result of the school district's negligence.

The circuit court granted the school district's motion to dismiss on the ground of the sovereign immunity doctrine.<sup>3</sup> In affirming the circuit court's dismissal of the suit,<sup>4</sup> the Missouri Supreme Court held that a

1. 589 S.W.2d 277 (Mo. En Banc 1979).

2. A school district is a public corporation and service of process thereon is provided for by RSMo § 506.150(5) (1978). The opinion does not specify what plaintiff's theory of negligence would have been had he survived the motion for summary judgment.

3. 589 S.W.2d at 278. Sovereign immunity is that protection afforded state and local governmental bodies from responsibility for their tortious conduct. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971); Borchar, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924); Borchar, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926); Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954); Comment, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective*, 78 DICK. L. REV. 365 (1973). The general rule in Missouri and in this country was that a school district was not, in the absence of a statute imposing it, subject to liability for injuries to pupils suffered in connection with their attendance at public schools, since the district in maintaining schools acts as an agent for the state and performs a purely public or governmental function imposed on it by law for the benefit of the public. See *Gold v. Mayor of Baltimore*, 137 Md. 335, 335, 112 A. 588, 588 (1921); *Todd v. Curators of Univ. of Mo.*, 347 Mo. 460, 461, 147 S.W.2d 1063, 1064 (1940); Annot., 9 A.L.R. 911, 911 (1920).

4. This case was transferred to the Missouri Supreme Court by the St. Louis Court of Appeals pursuant to Mo. R. Civ. P. 83.02 and Mo. CONST. art. V, § 10 (1945, amended 1976).

school district is not a municipality within the meaning of Missouri Revised Statutes section 71.185, which provides that a municipality waives its defense of sovereign immunity for torts committed while exercising a governmental function if and to the extent the municipality carries liability insurance.<sup>5</sup>

The decision in *Beiser*, although labeled a resolution of an apparent conflict in the decisions of the Missouri Supreme Court concerning the meaning to be given the term "municipality,"<sup>6</sup> was not unpredictable. The *Beiser* court conceded, as do substantially all jurisdictions and contemporary writers,<sup>7</sup> that in the ordinarily accepted sense the term "municipality" now has a broader meaning than merely a city or town. For some purposes the term includes bodies that are public or essentially governmental in character and function.<sup>8</sup> Indeed, school districts have been referred to as municipalities,<sup>9</sup> municipal corporations,<sup>10</sup> public corporations,<sup>11</sup> or quasi corporations.<sup>12</sup>

The *Beiser* court noted, however, that the meaning to be given a word or phrase in a particular statute ultimately depends upon the ascertained intent of the legislature.<sup>13</sup> This intent is often expressly provided in statutes,<sup>14</sup> but where it is not, as with section 71.185, it must be deter-

5. 589 S.W.2d at 281. RSMo § 71.185.1 (1978) provides:

Any municipality engaged in the exercise of governmental functions may carry liability insurance and pay the premiums therefor to insure such municipality . . . against claims or causes of actions for . . . personal injuries, . . . caused while in the exercise of the governmental functions, and shall be liable as in other cases of torts for . . . personal injuries . . . suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.

6. 589 S.W.2d at 278.

7. See 1 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 2.03-03b (3d ed. 1971); Noel, *Municipal Tort Immunity in Police Misconduct Litigation: The Case for Judicial Abrogation in Missouri*, 18 ST. LOUIS U.L.J. 602, 605 (1974); 62 C.J.S. *Municipal Corporations* § 1, at 64 (1949).

8. See St. Louis Hous. Auth. v. City of St. Louis, 361 Mo. 1170, 1178, 239 S.W.2d 289, 294 (1951) (statute authorizing municipalities to cooperate with each other in planning public improvements also encompasses Housing Authority); Cochran v. Wilson, 287 Mo. 210, 218-19, 229 S.W. 1050, 1052 (1921) (maintaining free public schools is a governmental function).

9. See *Curry v. District Township*, 62 Iowa 102, 104, 17 N.W. 191, 192 (1883) (school district was a municipality for purpose of issuing bonds).

10. *Graham v. Worthington*, 259 Iowa 845, 853, 146 N.W.2d 626, 633 (1966).

11. *Prewitt v. Parkway School Dist.*, 557 S.W.2d 232, 232 (Mo. En Banc 1977); *State ex rel. Consolidated School Dist. v. Powell*, 359 Mo. 321, 323, 221 S.W.2d 508, 509 (1949); *United Accounts, Inc. v. Dachtler*, 100 N.W.2d 93, 94 (N.D. 1959).

12. *Community Fire Protection Dist. v. Board of Educ.*, 315 S.W.2d 873, 877 (Mo. App., St. L. 1958).

13. 589 S.W.2d at 280. See *State ex rel. Conservation Comm'n v. LePage*, 566 S.W.2d 208, 212 (Mo. En Banc 1978) (court interpreting a state sales tax provision).

14. The Missouri General Assembly specifically expressed that school districts are included in the scope of RSMo § 70.210(2) (1978) (allowing political subdivisions to contract and cooperate with each other for production, acquisition, or operation of public facilities or for common service). The Missouri General

mined from the context in which the word or phrase is used.<sup>15</sup> Section 71.185 provides for a limited waiver of a municipality's immunity from tort liability. Statutes waiving the immunity of the sovereign, however, have been required by the Missouri Supreme Court to be construed strictly.<sup>16</sup> Therefore, the court in *Beiser* declared that it was compelled to follow *City of Olivette v. Graeler*,<sup>17</sup> a 1960 decision holding that in its strict and primary sense the term "municipality" applies only to incorporated cities, towns, and villages having subordinate and local powers of legislation.<sup>18</sup>

The significance of *Beiser* is not the manner in which the Missouri Supreme Court interpreted and applied section 71.185, but rather its implications regarding future school district immunity in tort under Missouri's 1978 sovereign immunity legislation.<sup>19</sup> Although not applicable to the facts in *Beiser*,<sup>20</sup> the 1978 legislation reinstated the common law doctrine of sovereign immunity in which, with only a few limited exceptions, public entities<sup>21</sup> and political subdivisions<sup>22</sup> would be liable in tort.

A future interpretation of the sovereign immunity legislation could

Assembly has specifically excluded school districts from the reach of RSMo § 70.600(19) (1978) (dealing with retiring or pensioning of officers or employees of political subdivisions).

15. Although not expressly provided, school districts have been included in RSMo §§ 70.120(3) (1978) (rural resettlement or rehabilitation agreements) and 506.150(5) (1978) (commencement of suit and service process). See *State ex rel. Consolidated School Dist. v. Powell*, 359 Mo. 321, 324, 221 S.W.2d 508, 510 (1949) (school district's funds belonging to teachers' fund constituted trust fund for purposes provided by statute).

16. See *Charles v. Spradling*, 524 S.W.2d 820, 823 (Mo. En Banc 1975); *Kleban v. Morris*, 363 Mo. 7, 15, 247 S.W.2d 832, 837 (1952). Both were actions against the state for tax refunds. Such suits cannot be maintained without the state's permission, and statutes thus waiving sovereign immunity are strictly construed.

17. 338 S.W.2d 827 (Mo. 1960).

18. The City of Olivette was held to be included within an annexation statute because it had legislative powers. *Id.* at 835. See also *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348, 352 (Mo. 1964) (sewer district did not possess the requisite powers of a municipality so as to permit suit in negligence against it); *Heller v. Stremmel*, 52 Mo. 309, 311 (1873) (school district not a municipality within nepotism statute).

This conclusion is further bolstered by the fact that the provision waiving sovereign immunity in *Beiser*, RSMo § 71.185 (1969) (now RSMo § 71.185 (1978)), appears in a chapter of the Missouri statutes dealing specifically with cities, towns, and villages. RSMo ch. 71 (1969) (now RSMo ch. 71 (1978)).

19. Missouri's General Assembly enacted a comprehensive sovereign immunity statute in RSMo §§ 537.600-.650 (1978).

20. The cause of action in *Beiser* arose in 1976; the new sovereign immunity legislation went into effect in 1978.

21. See notes 45-49 and accompanying text *infra*. The level of responsibility placed on governmental entities in Missouri for their torts is more restrictive than in a majority of the jurisdictions in the United States. See *Harly & Wasinger, Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L.J. 12 (1976); *Kerwin, Tort Liability for Illinois Schools Under Section 9-103 of the Illinois Tort Immunity Act*, 25 DE PAUL L. REV. 441 (1976); RESTATEMENT (SECOND) OF TORTS §§ 20-21 (1966).

22. See notes 53-55 and accompanying text *infra*.

repeat the *Beiser* result. Applying the *Beiser* analysis to the statute suggests the possibility that a plaintiff injured by a school district that has a liability insurance policy, as provided in the statute, may be denied recovery because the tortfeasor school district might not have waived its sovereign immunity by carrying insurance. Contrary to the *Beiser* analysis, the weight of authority in Missouri and in the majority of jurisdictions would support a decision to apply the immunity and all the exceptions of this legislation to school districts, *i.e.*, a school district would waive its sovereign immunity status to the extent of its liability insurance coverage.

To appreciate *Beiser's* impact on the doctrine of sovereign immunity as it exists today in Missouri Revised Statutes section 537.600,<sup>23</sup> one must first consider the adoption, evolution,<sup>24</sup> and implementation of the doctrine in Missouri.<sup>25</sup> Decisions of the Missouri Supreme Court afforded municipalities,<sup>26</sup> as well as school districts,<sup>27</sup> immunity from tort suits.

23. RSMo § 537.600 (1978) provides:

Such sovereign . . . immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances: (1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operations of motor vehicles within the course of their employment; (2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition . . . , that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm . . . , and that either a negligent or wrongful act or omission of an employee of the public entity . . . created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition . . . .

24. Sovereign immunity of federal and state governments traces its origins to two maxims of English common law: (1) the King cannot be sued in his own courts, a procedural bar; and (2) the King can do no wrong, a substantive bar. See generally Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956). These principles were applied to local governments and governmental units in England. *Russel v. Men of Devon*, 2 Term Rep. 667, 668, 100 Eng. Rep. 359, 360 (1778) (action not allowed against an unincorporated county for negligent maintenance of bridge). In 1812 municipalities in the United States were afforded this protection for the first time. *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 249 (1812) (no liability for municipality's negligent maintenance of public road).

25. For a detailed analysis of the development of this doctrine in Missouri and elsewhere, see Lauer, *Municipal Law in Missouri*, 28 MO. L. REV. 555, 572-75 (1963); Littlefield, *Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity*, 9 ST. LOUIS U.L.J. 56, 60-75 (1964); Comment, *Torts—Municipal Corporations—Municipal "Governmental" Tort Immunity Doctrine in Missouri*, 27 MO. L. REV. 224, 225-27 (1962).

26. *Reardon v. St. Louis County*, 36 Mo. 555, 562 (1865) (county afforded protection of sovereign immunity); *City of St. Louis v. Gurno*, 12 Mo. 414, 423 (1849) (city afforded protection of sovereign immunity).

27. *Cochran v. Wilson*, 287 Mo. 210, 219, 229 S.W. 1050, 1053-54 (1921) (school districts when engaged in the performance of governmental functions are instrumentalities of the state and thus subject to the same rules of immunity for negligence as the state).

Criticism and dissatisfaction with the doctrine developed, and the numerous justifications proffered in its support did little to quash the growing dissatisfaction.<sup>28</sup> The result has been a contemporary trend throughout the United States to modify or abolish sovereign immunity.<sup>29</sup> Despite this trend, the Missouri Supreme Court pronounced in 1972 that "[t]he Missouri Constitution and statutes are silent on the matter of sovereign immunity but the judicial decisions of this court have declared in no uncertain terms that this doctrine is the public policy of this state."<sup>30</sup> The court further suggested that the imposition of tort liability upon governmental entities such as school districts, heretofore unknown to the laws of this state, must be a creation of the legislature.<sup>31</sup>

*O'Dell v. School District*<sup>32</sup> was the last case that judicially retained sovereign immunity in Missouri. There the supreme court determined that sovereign immunity was a legislatively made doctrine<sup>33</sup> in Missouri.<sup>34</sup> Further, the court saw the legislature's activity regarding sovereign immunity as showing an intent to retain the doctrine.<sup>35</sup> Thus, the Missouri

28. See Littlefield, *supra* note 25, at 81; Noel, *supra* note 7, at 606; Comment, *The State as a Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland*, 36 Md. L. Rev. 653 (1977). The Missouri Supreme Court even indicated its dissatisfaction with the doctrine. In *Cullor v. Jackson Township*, 249 S.W.2d 393 (Mo. 1952), the court recognized and agreed with the reforms to sovereign immunity that were occurring in the United States, but refused to judicially alter or abolish it. *Id.* at 397.

29. This has been accomplished by judicial action in 33 states. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 25.00-11 (2d ed. Supp. 1978); Harly & Wasinger, *supra* note 21. Some of the more notable cases exemplifying this action are *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Flournoy v. School Dist. No. 1*, 174 Colo. 110, 482 P.2d 966 (1971); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Johnson v. Municipal Univ.*, 184 Neb. 512, 169 N.W.2d 286 (1969).

30. *Payne v. County of Jackson*, 484 S.W.2d 483, 484 (Mo. 1972) (wrongful death action against county dismissed because of defendant's sovereign immunity). For similar holdings, see *Wood v. County of Jackson*, 463 S.W.2d 834, 835 (Mo. 1971); *Clark v. Adair County*, 79 Mo. 536, 537 (1883).

31. *Payne v. County of Jackson*, 484 S.W.2d 483, 486 (Mo. 1972). The Missouri Supreme Court has steadfastly refused to re-examine or modify the doctrine of sovereign immunity. See *Watson v. Kansas City*, 499 S.W.2d 515, 518 (Mo. En Banc 1973). See generally articles cited note 25 *supra*.

32. 521 S.W.2d 403 (Mo. En Banc) (action against school district by student for injuries sustained while practicing wrestling), *cert. denied*, 423 U.S. 865 (1975).

33. Only a minority of jurisdictions have found sovereign immunity to be a legislatively made doctrine. See Harly & Wasinger, *supra* note 21, at 43; Comment, *supra* note 3, at 369.

34. *O'Dell v. School Dist.*, 521 S.W.2d 403, 407 (Mo. En Banc), *cert. denied*, 423 U.S. 865 (1975). This was true, the court reasoned, because the Missouri legislature enacted RSMo § 1.010 (1978), which adopted the English common law, including the sovereign immunity doctrine.

35. On several occasions the Missouri legislature had acted to limit the doctrine of sovereign immunity in specific areas without abolishing the doctrine en-

Supreme Court reaffirmed its position of refusing to judicially modify or abolish sovereign immunity.

In 1977 the Missouri Supreme Court overruled its longstanding position on sovereign immunity. In *Jones v. State Highway Commission*,<sup>36</sup> the court held that sovereign immunity from tort liability was no longer to be<sup>37</sup> a bar to claims against various instrumentalities of the state.<sup>38</sup> A companion case specifically applied this holding to school districts.<sup>39</sup> The court completely rejected the justifications previously offered in support of the doctrine<sup>40</sup> and chose not to follow extensive judicial precedent which had deferred the responsibility to act in this area to the legislature.<sup>41</sup> Further, the *Jones* court found no legislative intent favoring the retention of this doctrine expressed in any legislation concerning sovereign immunity.<sup>42</sup>

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tirely. See RSMo §§ 34.260-275 (1978) (authorizing the purchase of liability insurance for state motor vehicles); RSMo § 71.185 (1978) (providing for suits against a municipality obtaining liability insurance); RSMo §§ 105.800-850 (1978) (extending liability to provisions of workmen's compensation); RSMo § 226.092 (1978) (authorizing state highway commission to provide insurance for their employees' potential liability). All these except for § 71.185 specifically include provisions that caution against construing the statute as a waiver of sovereign immunity.

36. 557 S.W.2d 225 (Mo. En Banc 1977) (driver sought damages for personal injuries suffered from accident on public highway).

37. Most judicial modifications or abrogations of the doctrine of sovereign immunity have been prospective. This allows for legislative and public reaction and adjustment to such a declaration. See *Torts—Abrogation of Sovereign Immunity—Scope of Retained Immunity*, 43 Mo. L. Rev. 387, 389 n.14 (1978).

38. *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 229 (Mo. En Banc 1977).

39. *Prewitt v. Parkway School Dist.*, 557 S.W.2d 232, 232 (Mo. En Banc 1977) (allowed suit against school district for negligent maintenance of hallway floors).

40. The court in *Jones* adopted the position advocated by Judge Finch in his dissenting opinion in *O'Dell v. School Dist.*, 521 S.W.2d 403, 409 (Mo. En Banc) (Finch, J., dissenting), *cert. denied*, 423 U.S. 865 (1975). In so doing, six justifications for sovereign immunity were specifically rejected. First, the court discounted the argument that a suit against the government would result in confusion and inconvenience since no funds would be available to satisfy a judgment. Second, it totally rejected the idea that it was better for the private individual to bear the loss than for the public to absorb it. Third, the English maxim that the King could do no wrong is inapplicable to present governmental entities. Fourth, the court noted that there existed no empirical support for the argument that *respondeat superior* would allow for the dissipation of public funds. Fifth, the trust fund theory was found to rest on illogical grounds. Sixth, the crippling expense argument lacked empirical support and notwithstanding this, it was proper for the government to pay for its torts. *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 228-29 (Mo. En Banc 1977). For other jurisdictions rejecting similar policy justifications, see Comment, *supra* note 28, at 658-68.

41. See *Smith v. Consolidated School Dist. No. 2*, 408 S.W.2d 50, 54 (Mo. En Banc 1966) (action against school district for personal injuries barred because of district's sovereign immunity).

42. The court noted that no comprehensive legislation dealing with sovereign immunity had been enacted. This lack of legislative initiative was viewed by the court as a legislative recognition of the desirability of providing some relief from the hardships and inequities of the doctrine. 557 S.W.2d at 229.

Therefore, with regard to governmental immunity, *Jones* decided that the rule in Missouri is liability; the exception is immunity.<sup>43</sup>

The legislative response that quickly followed *Jones* clearly indicated that the Missouri Supreme Court had misperceived the legislature's position on sovereign immunity. As was done in a number of jurisdictions subsequent to an initial judicial abolition of the doctrine,<sup>44</sup> the Missouri legislature specifically and completely reinstated sovereign immunity "as it existed at common law" prior to *Jones*.<sup>45</sup> Thus, once again school districts, as instrumentalities created by the legislature for the purpose of and engaged in the performance of governmental functions, appeared to be protected from liability for negligence just as the state was.<sup>46</sup>

Missouri's sovereign immunity legislation adds two limited exceptions (areas of liability) to its general grant of immunity to "public entities."<sup>47</sup> The first exception imposes liability on all "public entities" in the state for the negligent operation of motor vehicles by public employees within the scope of their employment.<sup>48</sup> The second exception makes all "public entities" liable for "injuries caused by the dangerous conditions of a public entity's property" if the plaintiff establishes certain specific requirements.<sup>49</sup>

43. *Id.* at 230. A nearly identical rule was declared in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618, 625 (1962) (court allowed action for personal injuries from loose water meter trap door in park). *Jones* did, however, reserve some immunity for governmental entities. This decision was not meant to impose liability upon the state or any of its agencies for acts or omissions constituting the exercise of legislative, judicial, or executive functions. 557 S.W.2d at 230.

44. Many state legislatures subsequently reinstated some altered or modified form of sovereign immunity after such judicial action. The following are some illustrative examples: ARK. STAT. ANN. § 12-2901 (1974); COLO. REV. STAT. § 24-10-108 (1973); ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (Smith-Hurd 1966 & Supp. Pamphlet 1980-1981); KAN. STAT. ANN. §§ 72-8401 to -8417 (1972); MICH. COMP. LAWS ANN. §§ 691.1401-1415 (1968 & Cum. Supp. 1980-1981); NEB. REV. STAT. § 23-2401 (1977). Some legislatures chose to follow the judicial lead and abrogate governmental immunity statutorily. See FLA. STAT. ANN. § 768.28 (West Supp. 1976). For further discussion and citations, see generally Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919; Harly & Wasinger, *supra* note 21.

45. The statute's relevant portions are set out in note 23 *supra*. The statute's clear and succinct language on reinstatement leaves little question as to the legislative position regarding this doctrine. The legislative actions here, however, do not affect RSMo § 71.185 (1978). This statute is still good law, although its importance is significantly lessened by the enactment of Missouri's broader 1978 sovereign immunity legislation.

46. See *Rennie v. Belleview School Dist.*, 521 S.W.2d 423, 424 (Mo. En Banc 1975) (action against school district for the death of student who was killed on playground while playing on swing barred because of sovereign immunity); *Dick v. Board of Educ.*, 238 S.W. 1073, 1074 (Mo. 1922) (school district not liable for injuries to pupil from its motor truck).

47. RSMo § 537.600 (1978). Most states enacting sovereign immunity legislation provide exceptions, but these differ specifically from state to state. See, e.g., statutes cited note 44 *supra*.

48. RSMo § 537.600(1) (1978).

49. RSMo § 537.600(2) (1978).



There is no foreseeable bar to a claimant maintaining a negligence suit against a school district after establishing the prerequisite conditions of these exceptions because it is universally agreed that the term "public entity" includes school districts.<sup>50</sup> These exceptions, however, contain a number of detailed conditions that a claimant must establish before he may recover from a public entity,<sup>51</sup> *i.e.*, school district. Thus, these exceptions are not readily available to claimants like the plaintiff in *Beiser*. Additionally, but of no import in a factual situation similar to *Beiser*, these exceptions to the entity's immunity are expressly limited to "negligent acts or omissions," apparently excluding intentional torts.<sup>52</sup>

Missouri's sovereign immunity legislation also provides in Missouri Revised Statutes section 537.610.1<sup>53</sup> that each "political subdivision" may purchase liability insurance to cover tort claims made against it. A number of states authorize such discretionary protection from potential claims.<sup>54</sup> Under these statutes, it is generally found that where the political subdivision elects to insure itself against liability in tort, that subdivision waives its immunity to the extent of any insurance purchased and to that extent places itself on the same basis as all other tort defendants.<sup>55</sup> The Missouri legislature apparently intended to provide machinery by which a "political subdivision" could protect itself from tort judgments. This is true in those cases where the subdivision may now be liable, *i.e.*, section 537.600, and where immunity was retained but waived for the purposes and amounts of liability insurance purchased pursuant to section 537.610.1.

50. See Annot., 35 A.L.R.3d 758 (1971); Annot., 33 A.L.R.3d 703 (1970).

51. RSMo § 537.600 (1978). The burden on a plaintiff here is especially demanding. The plaintiff has to establish the statutorily required condition(s), act(s), knowledge, and notice before sovereign immunity will be waived.

52. RSMo § 537.610.2 (1978), also applies to injuries resulting from public properties, as a result of "a negligent or wrongful act or omission."

53. RSMo § 537.610.1 (1978), provides in part:

[T]he governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed eight hundred thousand dollars for all claims arising out of a single occurrence and shall not exceed one hundred thousand dollars for any one person in a single accident or occurrence . . . and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section . . . .

54. For extensive citations, see Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161 (1963); Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J.L. & EDUC. 109, 113 n.34 (1972). For a discussion and citations on the constitutionality of statutes authorizing governmental units to procure liability insurance, see Annot., 71 A.L.R.3d 6, 21 (1976).

55. This is found either expressly, as RSMo § 537.610.1 (1978) provides, or by judicial interpretation, as in *Sullivan v. Midlothian Park Dist.*, 51 Ill. 2d 274, 281-82, 281 N.E.2d 659, 664 (1972) (immunity granted by statute waived by operation of law when liability insurance purchased pursuant to statute).

Most jurisdictions include school districts within the term "political subdivision."<sup>56</sup> Further, most legislation in other states concerning sovereign immunity, and the waiver of it, use this term and either expressly or by judicial interpretation include school districts.<sup>57</sup> Case law in Missouri has generally adhered to this position,<sup>58</sup> and some Missouri legislation expressly states it.<sup>59</sup> Indeed, the Missouri Supreme Court has on a number of occasions refused to impose liability in tort on school districts by asserting the doctrine of sovereign immunity for these "political subdivisions."<sup>60</sup>

These authorities, however, are not completely dispositive on the question of a school district's inclusion in the term "political subdivision" for the purpose of section 537.610.1. These Missouri decisions directly decided only whether the common law doctrine of sovereign immunity applied to school districts; they did not decide whether school districts were in fact "political subdivisions" of the state. In addition, Missouri courts often have held specifically that school districts are not "political subdivisions" of the state for the purpose of various articles of the Missouri Constitution.<sup>61</sup> The significance of this distinction is that, when considered together with the language of the section and the principles of statutory construction *Beiser* employs, it is quite possible that school districts may be excluded from the scope of this section.

If the legislature intended that all governmental units be covered by section 537.610, its utility would be hampered by the language used in it. *Beiser* stands for the proposition that each phrase of a statute should be interpreted within the context of the specific law and that those statutes waiving the immunity of the sovereign should be construed strictly.<sup>62</sup> Other cases have suggested that statutes which would modify so fundamental a rule of common law as sovereign immunity must be clear in their expres-

56. For cases holding that school districts were political subdivisions, see *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 8, 178 S.E.2d 868, 874 (1970); *Laing v. School Dist. No. 10*, 190 Or. 358, 375, 224 P.2d 923, 930 (1950).

57. See statutes cited note 44 *supra*. See also *Mancke, supra* note 54, at 114.

58. For Missouri cases holding that school districts were political subdivisions, see *O'Dell v. School Dist.*, 521 S.W.2d 403, 404 (Mo. En Banc), *cert. denied*, 423 U.S. 865 (1975); *Smith v. Consolidated School Dist. No. 2*, 408 S.W.2d 50, 54 (Mo. En Banc 1966); *State ex rel. McKittrock v. Whittle*, 333 Mo. 705, 709, 63 S.W.2d 100, 102 (En Banc 1933).

59. A definitional section in RSMo § 70.210(2) (1978), expressly provides that school districts are political subdivisions, while a definitional section in RSMo § 70.600(19) (1978), expressly provides that school districts are not political subdivisions for the purposes of its provisions.

60. See cases cited note 58 *supra*.

61. *Lakewood Park Cemetery Ass'n v. Metropolitan St. Louis Sewer Dist.*, 396 S.W.2d 744, 745 (Mo. App., St. L. 1965) (school district not a political subdivision of the state within Mo. CONST. art. V, § 3 (1945, amended 1976)); *State ex rel. Dahm v. Goodin*, 295 S.W.2d 600, 603 (Mo. App., K.C. 1956) (school district not a political subdivision of the state within Mo. CONST. art. V, § 4 (1945, amended 1976)).

62. 589 S.W.2d at 280. See also 24 Mo. Att'y Gen. Op. 394 (Nov. 2, 1967).

sion of such intent.<sup>63</sup> No intention to modify the rule can be supported by mere implication; if ambiguous, the statute must be construed against modification of the rule.<sup>64</sup> If this reasoning is followed, school districts would be precluded from utilizing section 537.610.1 because the courts would not infer a waiver of sovereign immunity.

Proponents of a more contemporary line of reasoning, however, assert that despite the strict construction requirement, statutes waiving sovereign immunity must not be interpreted so as to lead to absurd results.<sup>65</sup> The Missouri Supreme Court itself stated that the limits of sovereign immunity for torts should be confined within reasonable grounds.<sup>66</sup> A result in which a plaintiff's recovery is barred despite liability insurance purchased by a political subdivision, *i.e.*, a school district, which has the authority and desire to collect and spend public monies for such insurance is clearly absurd. A legislature enacting a comprehensive sovereign immunity statute surely would not intend such a result.

*Beiser* indicates that the Missouri Supreme Court may not follow this contemporary line of reasoning. In rejecting a reasonably supportable position that the term "municipality" did include school districts for the purpose of section 71.185,<sup>67</sup> the court in *Beiser* took a definite position against making broad inferences on legislative intent concerning sovereign immunity. This policy of construction was reflected by the court's reasoning that because school districts had not been expressly provided for in the language of section 71.185 and because existing case law had not unequivocally held that school districts were municipalities, this statute could not

63. See, *e.g.*, *Hummer v. School City*, 124 Ind. App. 30, 48-49, 112 N.E.2d 891, 900 (1953). In this case, the school district had purchased liability insurance pursuant to a statute similar to RSMo §§ 71.185, 537.610.1 (1978). It was held that the school district had not waived its sovereign immunity by purchasing liability insurance pursuant to statute. It was further held that the statute was too vague to allow a modification of a common law principle. This holding was overruled in *Flowers v. Board of Comm'rs*, 240 Ind. 668, 676, 168 N.E.2d 224, 227-28 (1960), where the court determined that the statute was sufficiently clear to allow the modification.

64. *Hummer v. School City*, 124 Ind. App. 30, 48-49, 112 N.E.2d 891, 900 (1953).

65. See *Phelps v. Department of State Highways*, 75 Mich. App. 442, 445, 254 N.W.2d 923, 925 (1977) (plaintiff not barred from maintaining negligence suit simply because defendant did not receive notice within 120 days).

66. *Dallas v. City of St. Louis*, 338 S.W.2d 39, 44 (Mo. 1960) (wrongful death action against city-owned garage allowed because this was not governmental function). Additionally, statutes affecting the organizations, functions, and powers of school district organizations are to be construed liberally. *Reorganized School Dist. No. R-IV v. Williams*, 289 S.W.2d 126, 132 (Mo. App., K.C. 1956).

67. See notes 7-12 and accompanying text *supra*. Chief Justice Bardgett's dissenting opinion in *Beiser* accepted the position that a school district, being a municipal corporation, could utilize RSMo § 71.185 (1978), and thereby waive its sovereign immunity. He opined that a broad interpretation should be given to the statute so that the school district and the public would get the full benefit of expenditures of the public funds for insurance. He argued that treating the school district as a municipality would not impose liability which was not foreseen and agreed to by the district. 589 S.W.2d at 281 (Bardgett, C.J., dissenting).

modify the common law doctrine of sovereign immunity relating to them. If this reasoning is applied to a future interpretation of section 537.610.1, the results again may be that school districts will have wasted expenditures on liability insurance that can never be called upon for payment, insurers will have been allowed this windfall, and plaintiffs will be denied recovery under these policies because the school district was not authorized to waive its sovereign immunity in this manner. A school district's only liability would be that provided in section 537.600.

Missouri, along with most other jurisdictions, imposes a statutory limit on recovery when a claimant establishes liability<sup>68</sup> under any sovereign immunity exception.<sup>69</sup> In Missouri, this is true whether the exception is statutorily provided in section 537.600 or as a result of purchasing liability insurance pursuant to section 537.610.1. Missouri's limit is eight hundred thousand dollars for all claims<sup>70</sup> arising out of a single accident or occurrence and one hundred thousand dollars for any one person in a single accident or occurrence.<sup>71</sup> This limit is applied whether or not liability insurance is present and regardless of whether coverage exceeds the statutory ceiling. Additionally, the school district probably could assert this limit after a verdict was rendered to have the court reduce any award to a sum equal to the limit.<sup>72</sup> There would be, therefore, no incentive or rationale for a school district to purchase liability coverage above this amount; any expenditures for additional coverage would waste public funds.

Unless the facts of a particular case fit within the exceptions to immunity mandated by section 537.600, a school district that does not purchase liability insurance retains its immunity from suits in tort. The clear effect of merely authorizing a "political subdivision" to purchase liability

68. A plaintiff must still establish liability in every state allowing suit against governmental entities and school districts. This usually consists of proving negligence and proximate cause, and successfully overcoming any defenses asserted by the school district. *See Morris v. Ortiz*, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968) (negligence action by student against school district for injuries sustained in auto mechanics class); *Ford v. Riverside City School Dist.*, 121 Cal. App. 2d 554, 561-63, 263 P.2d 626, 631 (1953) (negligence against school district for student personal injuries from thorn bush). *See generally* Mancke, *supra* note 54.

69. *See, e.g.*, COLO. REV. STAT. § 24-10-114 (Cum. Supp. 1979) (\$400,000 for a single occurrence; \$150,000 per person); TEX. REV. CIV. STAT. ANN. art. 6592-19 (Vernon Cum. Supp. 1980) (\$300,000 for a single occurrence; \$100,000 per person).

70. This legislation denies a plaintiff punitive damages. *See RSMo* § 537.610.3 (1978). The same result obtains under HAWAII REV. STAT. § 662-2 (1976); TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon Cum. Supp. 1980).

71. RSMo § 537.610.2 (1978). The liability of the state and its public entities on claims within the scope of RSMo §§ 537.600-650 (1978), shall not exceed these amounts.

72. *See* *Moreno v. Aldrich*, 113 So. 2d 406, 410 (Fla. Dist. Ct. App. 1959) (personal injury action against Game Commission). Some courts have held that it is the governmental unit's responsibility to plead and prove any maximum limits of liability set forth in statutes. *See City of Terre Haute v. Deckard*, 243 Ind. 289, 295-96, 183 N.E.2d 815, 818 (1962) (negligence action against a city for injuries arising out of an automobile accident).

insurance and thereby waive its sovereign immunity is to discourage the purchase of such insurance: why buy insurance when its only possible effect would be to create a liability that did not previously exist?<sup>73</sup> Alternatively, if the school district chose to purchase liability insurance pursuant to section 537.610.1, its immunity from suits is waived only to the amount of and for the purposes provided in the policy.<sup>74</sup> Therefore, the determination of whether the school district would be liable and to what extent rests solely in the discretion of the district itself. Recovering under this section of Missouri's sovereign immunity legislation, consequently depends upon whether the tortfeasor entity had taken the initiative and purchased adequate liability insurance.

Other jurisdictions foresaw an injustice in this approach. After considering a public policy argument that injured persons should be allowed to recover for the negligent acts or omissions of school districts, many legislatures *required* school districts to procure a specified level of liability insurance.<sup>75</sup> Since school districts in Missouri are not *required* to procure liability insurance, they can safely ignore section 537.610.1, all the time cognizant of the fact that by doing so they retain their immunity at no cost or penalty.

One important aspect of Missouri's sovereign immunity legislation is clear: it is now possible for a school district to incur tort liability and be required to pay compensatory damages out of its own coffers. This could result if the plaintiff's injuries occurred within the exceptions to immunity set out in section 537.600 and the school district had not availed itself of the protection of liability insurance through section 537.610.1. Further, section 537.600 liability is not limited to the terms of any insurance purchased pursuant to section 537.610.1. Therefore, it would behoove a school district to purchase liability insurance up to the statutory maximum recovery for section 537.600 exceptions to immunity.

There are Missouri cases saying that a school district is a political subdivision, but these cases did not arise under the new sovereign immunity statute.<sup>76</sup> There were no Missouri cases holding that a school district

73. One may think that good public relations would require that school districts carry liability insurance, especially since they handle our youth on a daily basis. This argument weakens, however, as soon as a result such as *Beiser* is allowed. Any good public relations gained from carrying such insurance would be lost immediately.

74. See note 52 and accompanying text *supra*.

75. For extensive citations of such statutes, see Linn, *Tort Liability and the Schools*, 43 N.D.L. REV. 765 (1967). The effect of failing to buy liability insurance when required to do so by statute has been to place the political subdivision in the position of a self-insurer. See *Sturdivant v. City of Farmington*, 255 Ark. 415, 417-18, 500 S.W.2d 769, 771 (1973) (suit in tort against municipality for resulting death from collision with municipality's agent). Failure to buy this required insurance may result in individual liability for those who were responsible for its procurement. See *Gilbert v. Harlan County Bd. of Educ.*, 309 S.W.2d 771, 772 (Ky. 1958) (personal injury action resulting from defendant's employee's gross negligence in driving truck).

76. See notes 56-61 and accompanying text *supra*.

is a municipality. Thus, a plaintiff whose case is factually similar to *Beiser* is more apt to prevail under the new sovereign immunity legislation than he was under section 71.185. The school district would likely be considered a "political subdivision" of the state and therefore would have waived its sovereign immunity for the purposes and extent of the insurance it carried. A plaintiff establishing liability would be allowed recovery on this policy, but recovery would be limited to the amount of the policy. Alternatively, if the plaintiff could characterize the shop class as being in a dangerous condition, then his potential recovery would be limited only by the statutory ceiling. If the school district did not have liability insurance, this latter theory would be the only way a plaintiff, injured accidentally, could seek compensatory recovery.

It is important to note that neither *Beiser* nor Missouri's sovereign immunity legislation affected school districts' employees' personal liability for their negligent acts.<sup>77</sup> There has never been a general principle of law in Missouri clothing these employees<sup>78</sup> with immunity from liability for their negligent acts.<sup>79</sup> Specifically, teachers are obligated to exercise an ordinary degree of care in supervising their pupils.<sup>80</sup> It has also been suggested that where student activities are of a more dangerous nature, e.g., industrial arts classes, teachers are held to a more exacting standard that requires the exercise of reasonable care under these hazardous conditions.<sup>81</sup> Therefore, a plaintiff, with facts similar to those in *Beiser*, may, relying on this theory, be able to file suit and receive a judgment against the shop teacher personally.

The rule in Missouri regarding governmental responsibility in tort is clearly immunity. The statutorily provided exceptions to this rule are limited, and it is unclear to just what governmental entities they apply.

77. This legislation dealt solely with the governmental entity. For school employees' liability, see generally 78 C.J.S. *Schools and School Districts* §§ 320-321 (1952); Annot., 38 A.L.R.3d 830 (1971); Annot., 32 A.L.R.2d 1163 (1953).

78. Other states have even produced statutes that accommodate the doctrines of *respondeat superior* and sovereign immunity together. See, e.g., CAL. GOV'T CODE § 815.2 (West 1966); HAWAII REV. STAT. § 662-2 (1976); N.J. STAT. ANN. § 59:2-2 (West Cum. Supp. 1980-1981); OHIO REV. CODE ANN. § 2743.02 (Page Supp. 1979). See generally Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); *Sovereign Immunity in Missouri: The King Was Dead, Temporarily*, 47 U.M.K.C. L. REV. 230 (1978).

79. Kersey v. Harbin, 531 S.W.2d 76, 81 (Mo. App., Spr. 1975) (plaintiffs brought action against principal, teachers, and nurse of school district for death of their child in gym). See generally Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723 (1959).

80. Clark v. Furch, 567 S.W.2d 457, 458 (Mo. App., St. L. 1978) (guardian brought action against teacher for student injured in gym).

81. Courts have allowed negligence actions against the school districts for a teacher's lack of supervision and instruction regarding activities inherently dangerous at school. See *Mastrangelo v. West Side Union High School Dist.*, 2 Cal. 2d 540, 545-46, 42 P.2d 634, 636 (1935) (chemistry class); *Matteucci v. High School Dist. No. 208*, 4 Ill. App. 3d 710, 713-14, 281 N.E.2d 383, 386 (1972) (shop class); *Scott v. Independent School Dist. No. 709*, \_\_\_\_\_ Minn. \_\_\_\_\_, \_\_\_\_\_, 256 N.W.2d 485, 489 (1977) (industrial arts class).

*Beiser* suggested that the Missouri Supreme Court may be restrictive in its interpretation of this legislation. Section 537.610.1 may only place a moral burden upon a political subdivision by the knowledge that they could purchase insurance and compensate persons injured as a result of their negligence. Further, any political subdivision that chooses to meet this burden may ultimately find that it has wasted its money in purchasing liability insurance. To remedy these deficiencies the legislature should amend this statute to clarify exactly what governmental entities are to be included and excluded from its scope. This could be accomplished by the addition of a definitional section.<sup>82</sup> Unless a definitional section is added, confusion regarding the scope of section 537.610.1 will remain and there will be litigation that could easily be avoided if the legislature would take this simple step. Additionally, the purchase of liability insurance should be statutorily required. This legislation would then comport with the contemporary policy that the public, rather than the victim, should bear the loss of injuries caused by negligent acts of public employees since the public is the primary beneficiary of their services. Without such changes, uncertainty will continue and the usefulness of section 537.610.1 to injured persons will be insignificant.

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82. Comprehensive sovereign immunity legislation in other states has expressly provided in definitional sections that school districts are public entities of the state, COLO. REV. STAT. § 24-10-103(5) (1973) and ILL. ANN. STAT. ch. 85, § 1-206 (Smith-Hurd 1966), or that they are political subdivisions of the state, MICH. COMP. LAWS ANN. § 691.1401(b) (1968) and NEB. REV. STAT. § 23-2402(1) (1977). Because of the definitional sections, there is no question that school districts are within the scope of those statutes.