Missouri Law Review

Volume 58
Issue 3 *Summer 1993*

Article 3

Summer 1993

Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities

Mary S. Hack

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

 Part of the Law Commons

Recommended Citation

Mary S. Hack, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 Mo. L. Rev. (1993)
Available at: https://scholarship.law.missouri.edu/mlr/vol58/iss3/3

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Note

Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities

Stacy v. Truman Medical Center[1]

I. INTRODUCTION

In the last fifteen years, the doctrine of sovereign immunity[2] in Missouri has been abrogated,[3] reestablished,[4] amended[5] and clarified.[6] The recent Missouri Supreme Court decision of *Stacy v. Truman Medical Center*[7] falls within the last category.

Stacy addressed the undefined term "public entity" as found in the Missouri sovereign immunity statute, particularly as it is applied to a "hybrid entity."[8] A hybrid entity is an entity which is not easily classified as public or private.[9] The court attempted to provide much needed guidelines in the

---

1. 836 S.W.2d 911 (Mo. 1992).

2. Sovereign or governmental immunity generally refers to the concept that the state, its agencies, and local units of government are not subject to actions in tort except when the state has consented to be sued. Though beyond the scope of this Note, the terms governmental immunity and sovereign immunity are not necessarily synonymous. 57 AM. JUR. 2D *Municipal, County, School and State Tort Liability* § 3 (1988). However, for clarity, the terms will be used interchangeably.

3. Jones v. State Highway Comm'n, 557 S.W.2d 225, 230 (Mo. 1977).

4. MO. REV. STAT. §§ 537.600-.650 (1978) (Amended 1985).

5. MO. REV. STAT. §§ 537.600.1, .600.2 (1986).

6. *See* Bartley v. Special School Dist. of St. Louis County, 649 S.W.2d 864, 868 (Mo. 1983) (holding that since its reinstatement, sovereign immunity has been the rule for all public entities unless a certain prescribed exception is applicable); Winston v. Reorganized School Dist. R-2, Lawrence County, 636 S.W.2d 324, 328 (Mo. 1982) (holding that statutes which allow claims for some injuries, but not others, do not violate equal protection theories); McCrory v. Missouri Highway and Transp. Comm'n, 756 S.W.2d 575, 577 (Mo. Ct. App. 1988) (holding that Missouri Revised Statute § 537.610 was repealed to the extent it would apply to the provisions of §§ 537.600.1(1) and (2)).

7. 836 S.W.2d 911 (Mo. 1992).

8. *Stacy*, 836 S.W.2d at 917.

9. State *ex. rel.* Bd. of Trustees v. Russell, 843 S.W.2d 353, 358 (Mo. 1992).

determination of what is considered a public entity for sovereign immunity purposes. This Note will review the status of the sovereign immunity doctrine and will examine the impact of the *Stacy* decision.

II. FACTS AND HOLDING

On December 30, 1986, Stephen Stacy and Dale Wheeler were patients in room 327 at Truman Medical Center (hereinafter "TMC") in Kansas City, Missouri.[10] With the permission of one of the nurses, Stephen Stacy was sitting in a chair smoking.[11] While visiting her brother, Cheryl Stacy also was smoking and did not see an ashtray in the hospital room, so she used a juice cup and a plastic soup tray for her ashes.[12] Later, a nurse came in and restrained Stephen in his chair.[13] Before leaving, Cheryl lit a cigarette and, after letting her brother inhale, she extinguished it in the soup tray.[14] Within minutes of her departure, a fire started in the wastebasket of the room.[15] Upon discovering the fire, the nurse in charge unsuccessfully attempted to untie Stephen and put out the fire.[16] With the help of other nurses who responded to her call for help, Stephen was pulled into the hallway.[17] Wheeler, in the bed farthest from the door, could not be removed in time and died from smoke inhalation.[18] Stephen Stacy died later as a result of complications from burns suffered in the fire.[19]

In a consolidated suit, Stacy's and Wheeler's families brought wrongful death actions before a jury against TMC and one of its nurses, Michelle Taylor.[20] The jury returned verdicts against TMC on both claims,[21] but

---

10. Stacy v. Truman Medical Center, 836 S.W.2d 911, 914 (Mo. 1992).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 915.
15. *Id.* Cheryl testified she may or may not have put the soup tray in the wastebasket. She also testified she believed the soup tray was on the bedside table. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 914.
21. The jury verdicts were in the amounts of $500,000 for the Wheeler plaintiffs and $278,927.98 for the Stacy plaintiffs. *Id.* at 927. However, the Supreme Court remanded the case to the trial court to enter the judgment against TMC for $188,000 in favor of the Wheeler plaintiffs and $278,927.98 for the Stacy plaintiffs, both with interest and costs. *Id.* at 929.

found in favor of defendant Taylor.[22] However, based on its finding that TMC was a "public entity" entitled to sovereign immunity,[23] the trial court granted TMC's motion for judgment notwithstanding the verdict.[24] Both plaintiffs appealed, and the Missouri Court of Appeals, Western District, reversed on the sovereign immunity issue.[25] The case was transferred to the Missouri Supreme Court,[26] with TMC appealing various issues.[27] This Note will examine only TMC's appeal of the court of appeal's sovereign immunity holding.

The supreme court "tediously" examined TMC's organization and operation in its decision.[28] The predecessor of TMC, Kansas City General Hospital and Medical Center (KCGHMC),[29] was formed in 1962 as a not-for-profit corporation[30] pursuant to Missouri Revised Statutes Chapter 355.[31] In 1970 and 1971, KCGHMC entered into agreements to build new facilities.[32] Upon completion of the new facilities in 1976, KCGHMC

---

22. *Id.*

23. The trial court held that TMC is a "public entity" within the meaning of Missouri Revised Statute § 537.600. *Id.* at 916.

24. *Id.* When the trial court granted TMC's motion for JNOV, it also reduced the Wheeler verdict by finding that the original verdict for future non-economic damages was sufficient, reducing the verdict to $188,000. *Id.* at 929.

25. *Id.* at 914.

26. *Id.*

27. The other grounds on which TMC appealed included: (1) public duty doctrine bars plaintiffs' claims; (2) no evidence to prove causal connection; (3) verdict in favor of Defendant Taylor exonerates TMC; (4) disjunctive nature of the verdict directors; (5) improper jury instructions; and (6) prejudicial evidentiary rulings. The court denied each point presented on appeal by TMC, including the sovereign immunity appeal. *Id.* at 921-27.

28. *Id.* at 915-16.

29. Prior to 1962, Kansas City owned and operated a hospital called Kansas City General Hospital. *Id.* at 915.

30. KCGHMC was formed for charitable and scientific purposes, including services to the indigent. The incorporation was an attempt by Kansas City to access federal and private funds not available to the hospital as a department of the city, to alleviate political interference, and to reduce administrative problems. Truman Medical Ctr., Inc. v. NLRB, 641 F.2d 570, 572 (8th Cir. 1981).

31. MO. REV. STAT. ch. 355 (Supp. 1953).

32. In 1970, KCGHMC entered into a cooperation agreement, authorized by MO. REV. STAT. § 70.220 (1959), with Kansas City, the Board of Trustees of the Jackson County Public Hospital, and Jackson County for a new facility for indigent citizens of the city and county. In 1971, the same parties, including the Curators of the University of Missouri, entered another cooperation agreement for a new facility for the University of Missouri-Kansas City School of Medicine. *Stacy*, 836 S.W.2d at 916.

continued as a not-for-profit corporation and changed its name to Truman Medical Center, Inc.[33] TMC receives funds from the state, private organizations, Jackson County, Kansas City, and its patients.[34] TMC is operated by a self-governing board of directors, which decides the training and qualifications of the staff.[35]

The Missouri Supreme Court reversed the trial court's order granting TMC's motion for JNOV and reinstated the judgment.[36] The court held that TMC was not a "public entity" and consequently was not entitled to sovereign immunity under Missouri Revised Statute section 537.600.[37]

III. LEGAL BACKGROUND

A. The History of Sovereign Immunity

The doctrine of sovereign immunity generally precludes a litigant from asserting what might otherwise be a meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to the suit.[38] While its origin is not fully understood,[39] the doctrine of sovereign immunity is based on the English common law maxim that the "King can do no wrong . . . [and] no private citizen could sue the Sovereign . . . without his consent."[40] Although the doctrine of sovereign immunity was conceived solely to protect the King, it was soon applied to all levels of government.[41] Interestingly, this same rationale formed the basis of the doctrine of sovereign immunity as applied to the state and federal governments

---

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 929. The Missouri Supreme Court reinstated the Wheeler verdict, but reduced it in accordance with the trial court's ruling. *See supra* notes 21, 24.

37. *Stacy*, 836 S.W.2d at 921.

38. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

39. Scholars have stated that the oldest rationale of sovereign immunity, "the King can do no wrong," has been historically distorted. Anthony G. Hall, *Sovereign Immunity and Re-Emergence of the Governmental-Proprietary Distinction: A Setback in Idaho's Governmental Liability Law*, 20 IDAHO L. REV. 197, 199-200 (1984). *See generally* Edwin M. Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1 (1926); William S. Holdsworth, *The History of Remedies Against the Crown*, 38 LAW Q. REV. 141 (1922).

40. RICHARD A. EPSTEIN ET AL., CASES AND MATERIALS ON TORTS 853 (4th ed. 1984).

41. *Id.*

in America, according to one author.[42] The 1788 English case *Russell v. Men of Devon*[43] was the first to enunciate the doctrine of sovereign immunity as applied to local government.[44] In the United States, the Supreme Court in *Chisholm v. Georgia*[45] precipitated a small national crisis when it ruled citizens could sue a state government in the federal courts.[46] The adoption of the Eleventh Amendment to the United States Constitution overturned the narrow holding of *Chisholm*. The amendment, however, did not affect the power of the federal courts to define state governmental liability.[47]

As the doctrine of sovereign immunity spread across the country, it developed with significant differences between the states, particularly in the application of immunity to different units of government.[48] While states and

---

42. OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 671 (1982).

It has been observed that there is an irony in the application in this country of the maxim that "the King can do no wrong" since the country was founded due to the belief that the King had done wrong. *Id.* (citing Herbert R. Baer, *Suing Uncle Sam in Tort*, 26 N.C. L. REV. 119 (1948)). In an early case, the United States Supreme Court found sovereign immunity inconsistent with our system of popular sovereignty. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). But before long, the Court adopted sovereign immunity. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

43. 2 Term Rep. 667, 100 Eng. Rep. 359 (1788).

44. In this leading case, the county was held not liable in tort, chiefly because it was not a corporation proper, but only a "quasi-corporation" and had no funds for the payment of the judgment. James D. Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250, 264 (1937).

45. 2 U.S. (2 Dall.) 419 (1793). The Court was presented with the issue of whether the federal courts' power over controversies "between a State and Citizens of another State" meant that a state could be sued without its consent. Four of the five justices held that it did. HALL, *supra* note 39, at 202. For a discussion of *Chisholm* and its significance in the development of the sovereign immunity doctrine, see David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 7-12 (1972).

46. Philip A. Harley & Bruce E. Wasinger, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L. J. 12, 15 (1976).

47. HALL, *supra* note 39, at 202. The Eleventh Amendment provided no justification for the expansion of state and federal government liability in their own courts. *Id. See also* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. PA. L. REV. 515 (1977).

48. Some jurisdictions originally drew distinctions between sovereign immunity and governmental immunity. Sovereign immunity is sometimes deemed a specific term limited in its application to the states and its departments—only the state is sovereign, except to the extent it has delegated sovereignty. Governmental immunity is described as a court-made rule derived by extending the immunity of the state to

MISSOURI LAW REVIEW, Vol. 58, Iss. 3 [1993], Art. 3

their subdivisions enjoyed sovereign immunity, some jurisdictions found that local political subdivisions, municipalities, and municipal corporations were subject to suit and liability in tort.[49] Still other jurisdictions maintained immunity for those same political subdivisions as for the state, absent waiver or estoppel.[50] The majority of jurisdictions, however, did not have complete immunity for local political subdivisions, municipalities, and municipal corporations, but qualified the doctrine by applying the immunity only when a municipality performed its governmental functions, not its proprietary ones.[51]

In those jurisdictions applying the proprietary-governmental distinction, municipalities and some municipal corporations were held liable in tort as any private person or corporation[52] for those acts or functions determined to be proprietary in nature.[53] Though there are variances in the application of the distinction, some generalizations can be drawn: "[G]overnmental activities are normally undertaken for the good of the general public."[54] Proprietary activities, on the other hand, are undertaken for the financial profit of the municipality and are considered business-like in nature and not connected with the governing functions.[55] The reasoning behind the distinction seems to be that when a local government unit or political subdivision acts like a private business, or performs functions customarily performed by such businesses, it should be treated like a private enterprise.[56] Classifying an activity or

---

local governments or the inferior divisions of government, including towns, school districts, cities, counties, and limiting governmental immunity to such political subdivisions of the state. 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 3 (1988).

49. *Id.* at § 6.

50. *Id.*

51. REYNOLDS, *supra* note 42, at 673. The distinction is usually traced to *Bailey v. City of New York*, 3 Hill 531 (1842). Until then, it had usually been assumed that municipalities would be liable for their torts like private corporations were. REYNOLDS, *supra* note 42, at 673 n.9.

52. Today, the application of the governmental-proprietary distinction to municipal corporations or local political subdivisions has been supplanted by other tests or distinctions to determine the limits of governmental liability: the discretionary-ministerial test; the general duty-special duty test; the no analogous private liability test; the planning level-operation level test, and others. *See* Gail A. McCarthy, *The Varying Standards of Governmental Immunity: A Proposal to Make Such Standards Easier to Apply*, 24 NEW ENG. L. REV. 991 (1990).

53. 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 5 (1988).

54. REYNOLDS, *supra* note 42, at 674.

55. *Id.*

56. *Id.*

function of a local government unit or political subdivision as governmental or proprietary has proven to be difficult, with contrary results between and within jurisdictions.[57]

B. Development of Sovereign Immunity Law in Missouri

Under the common law prior to 1977, the state of Missouri and its political subdivisions were immune from suit in tort under the doctrine of sovereign immunity.[58] When the courts qualified the doctrine, a municipal corporation, distinct from the state and its political subdivisions, was deemed to exercise proprietary as well as governmental functions, and therefore was immune only when functioning in a governmental capacity.[59]

In Missouri, characterization of a governmental unit would determine the necessity of applying the governmental-proprietary distinction or whether that unit enjoyed complete sovereign immunity. Implicit in the historical development of Missouri's doctrine of sovereign immunity is the distinction of governmental immunity and sovereign immunity.[60] That is, the state and its political subdivisions enjoy immunity because the state is sovereign. As the Court in *State ex rel. Regional Justice Information Service Commission v. Saitz (REJIS)* described it:

> Any entity, apart from a municipality, which "operates under the police power of the state in the interest of the public health, safety and . . . welfare is in effect an arm of the state exercising exclusively governmental functions . . . and is therefore immune

57. For a detailed look and categorization of various activities of local government units or municipal corporations, see, REYNOLDS, *supra* note 42, at § 193.

58. Wood v. County of Jackson, 463 S.W.2d 834, 835 (Mo. 1971).

59. Cullor v. Jackson Township, 249 S.W.2d 393, 395 (Mo. 1952).

60. *See supra* note 48 and accompanying text.

> from liability for neglect in the performance of those functions.[61]

Characterization of a unit as a municipality, municipal corporation,[62] political subdivision, or some other designation has proven to be a continual subject for judicial decision.[63] A "municipal corporation" is a broad term that includes sewer or hospital districts and counties, which are entitled to the full protection of sovereign immunity, as well as municipalities that have traditionally enjoyed only partial sovereign immunity.[64] Municipalities are immune from suit for torts arising from their governmental functions, but not from torts arising from their proprietary functions.[65] In the context of sovereign immunity analysis, "municipalities" include only cities, towns or villages that are incorporated and are only partially protected by sovereign immunity.[66] The term quasi-public corporation has also been used to denote municipal corporations or special state instrumentalities functioning in a governmental capacity and therefore immune from tort liability.[67] After the abrogation and restoration of sovereign immunity,[68] these characterizations and the application of the governmental-proprietary distinction have become blurred.

Because the traditional rule in Missouri[69] applied the governmental/proprietary distinction only to municipalities,[70] the "liability

---

61. State *ex rel.* Regional Justice Info. Serv. Comm'n (REJIS) v. Saitz, 798 S.W.2d 705, 707 (Mo. 1990), (citing State *ex rel.* New Liberty Hosp. Dist. v. Pratt, 687 S.W.2d 184, 186 (Mo. 1985)).

62. Whether "municipality" and "municipal corporation" are synonymous depends on their use. Taylor v. Klund, 739 S.W.2d 592, 593 n.1 (Mo. Ct. App. 1987). For example, for the purposes of cooperation agreements, they are synonymous. *See* St. Louis Hous. Auth. v. City of St. Louis, 239 S.W.2d 289, 294-99 (Mo. 1951). For purposes of exemption from taxation, they are synonymous. *See* Caldwell v. Little River Drainage Dist., 236 S.W. 15, 16-17 (Mo. 1921).

63. *See, e.g.*, Page v. Metropolitan St. Louis Sewer Dist., 377 S.W.2d 348, 352-53 (Mo. 1964) (holding that a sewer district was a municipal corporation and entitled to full protection of sovereign immunity).

64. *REJIS*, 798 S.W.2d at 707. *See, e.g., Metro. St. Louis Sewer Dist.*, 377 S.W.2d at 352 and *New Liberty Hosp. Dist.*, 687 S.W.2d at 186. *Compare* St. Joseph Light and Power Co. v. Kaw Valley Tunneling, Inc., 589 S.W.2d 260 (Mo. 1979).

65. State *ex rel.* Trimble v. Ryan, 745 S.W.2d 672, 673-77 (Mo. 1988).

66. Beiser v. Parkway School Dist., 589 S.W.2d 277, 280 (Mo. 1979).

67. *See, e.g.*, Cullor v. Jackson Township, 249 S.W.2d 393, 395 (Mo. 1952); Taylor v. Klund, 739 S.W.2d 592, 593 (Mo. Ct. App. 1987).

68. *See infra* notes 79-81 and accompanying text.

69. *See supra* notes 58-60 and accompanying text.

70. *See Cullor*, 249 S.W.2d at 395; *Metro. St. Louis Sewer Dist.*, 377 S.W.2d at

or non-liability of a municipality for its torts [came] to depend upon the character of the act performed, not the nature of the tort."[71] Furthermore, it appears that the application of immunity as it existed before *Jones v. State Highway Commission*[72] rested on the character of the function of the entity being sued, rather than on the nature of the entity itself.[73]

In 1977, the Missouri Supreme Court reversed 100 years of decisions and prospectively abolished sovereign immunity in Missouri.[74] In *Jones v. State Highway Commission*,[75] the court abrogated the doctrine, stating that, as a result of the "'governmental-proprietary dichotomy' . . . '[a] maze of inconsistency' has developed in suits against cities, producing 'uneven and unequal results which defy understanding.'"[76] Responding to *Jones*, the Missouri General Assembly enacted Sections 537.600 and 537.610 of the Missouri Revised Statutes,[77] which reinstated sovereign immunity, though modified by two exceptions.[78] The Missouri Supreme Court held in *Bartley v. Special School District of St. Louis County*[79] that the "legislature intended to reestablish the doctrine as it existed prior to *Jones*."[80] "The conclusion reached is that the legislative intent was not to carve out legislative exceptions to what under *Jones* became a judicial abrogation of sovereign immunity, but was, rather, to overrule *Jones* and to carve out limited exceptions to a general rule of immunity."[81]

352-53.

71. *Jones*, 557 S.W.2d at 229.

72. 557 S.W.2d 225 (Mo. 1977).

73. "Thus a court must look to the nature of the activity performed to determine in which capacity the city has acted." St. Joseph Light and Power Co. v. Kaw Valley Tunneling, Inc., 589 S.W.2d at 260, 267 (Mo. 1979).

74. Prior to 1977, the state and other governmental agencies, such as school districts, townships and sewer districts were immune from tort liability. Wartick v. Teel, 737 S.W.2d 258, 260 (Mo. Ct. App. 1987) (citing 2 MO. LOCAL GOVERNMENT LAW, § 9.4 (Mo. Bar 2d ed. 1986)).

75. 557 S.W.2d 225 (Mo. 1977).

76. *Id.* at 229.

77. MO. REV. STAT. §§ 537.600, 537.610 (1978) (Amended 1985).

78. The statute waived immunity for public entities under certain circumstances in two areas: (1) negligent operation of motor vehicles; and (2) negligently created dangerous conditions of property. MO. REV. STAT. § 537.600(1)-(2) (Supp. 1992).

79. 649 S.W.2d 864 (Mo. 1983).

80. *Id.* at 870.

81. *Id.* at 868.

As a result, courts must again examine the "maze of inconsistencies"[82] generated by the governmental-proprietary dichotomy.[83] As the court held in 1987, the "distinction is still viable and must be applied."[84] Despite the return to the common law as it existed prior to *Jones*, changes have taken place. For instance, in addition to the application of the governmental-proprietary distinction to municipalities, some courts have now required application to school districts and other quasi-public corporations.[85] However, since the restoration, the Missouri Supreme Court has applied the governmental-proprietary distinction to school districts.[86]

Other changes that have occurred since the doctrine of sovereign immunity was codified include modifications of the statute itself in response to decisions by the Missouri Supreme Court. In *Bartley*, the court held that the express waiver exceptions in the statute depended upon the acquisition of insurance and also concluded that the statute preserved the governmental-proprietary distinction for these exceptions.[87] In response, the legislature amended the statute in 1985 by adding a section stating that the waivers apply regardless of the governmental-proprietary distinction or coverage by insurance.[88] Later, in *State ex rel. Trimble v. Ryan*,[89] the court held that Bi-State Development Agency, as a public entity, was entitled to sovereign immunity and was not a municipality subject to the governmental-proprietary test.[90] In apparent response,[91] the legislature enacted new subsections of the

---

82. O'Dell v. School Dist. of Independence, 521 S.W.2d 403, 417 (Mo. 1975) (citing *Jones*, 557 S.W.2d at 229).

83. 2 MO. LOCAL GOVERNMENT LAW, *supra* note 74, at § 9.6.

84. *Wartick*, 737 S.W.2d at 260.

85. This aplication has occurred despite the court's recognition that "[t]he legislature, . . . has mandated the restoration of sovereign immunity as it existed prior to our decision in *Jones* . . . . We are precluded by the recent legislation from making extensions." State *ex rel.* Missouri Dep't. of Agric. v. McHenry, 687 S.W.2d 178, 182 (Mo. 1985).

86. *See* State *ex rel.* Allen v. Barker, 581 S.W.2d 818, 825 (Mo. 1979).

87. *Bartley*, 649 S.W.2d at 868-70.

88. The 1985 amendment to the statute added subsection 2:

> The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.

MO. REV. STAT. § 537.600.2 (Supp. 1992).

89. 745 S.W.2d 672 (Mo. 1988).

90. *Id.* at 675.

91. Johnson v. Bi-State Dev. Agency, 793 S.W.2d 864, 866 (Mo. 1990).

statute providing that sovereign immunity is waived for the proprietary functions of multi-state agencies, such as Bi-State.[92]

As the courts continued to apply the statute to determine questions of immunity,[93] they were presented with a new issue spawned by the statute itself; the statute introduced the phrase "public entity" without defining it.[94] Missouri Revised Statute section 537.600.1 provides, in pertinent part, as follows:

> Such sovereign or governmental tort immunity as existed at common law in this state . . . 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 . . . .[95]

The task of defining "public entity" has thus been left to the courts.[96]

In *State ex rel. Regional Justice Information Service Commision v. Saitz* (*REJIS*), the Missouri Supreme Court found that "[b]ecause § 537.600 mandates restoration of sovereign immunity as it existed prior to September 12, 1977, and because *'public entity' was not a term of art prior to that time*, the Court must first determine whether REJIS is an entity of the sovereign."[97] The court concluded that REJIS was a "unique creature to have emerged from

---

92. MO. REV. STAT. § 537.600.3-.4 (Supp. 1992).

93. *See, e.g.*, State *ex. rel.* St. Louis Hous. Auth. v. Gaertner, 695 S.W.2d 460 (Mo. 1985).

94. MO. REV. STAT. § 537.600.3 (Supp. 1992) contains a partial definition regarding a multi-state compact agency, which is not of assistance to the present issue. "The term '*public entity*' as used in this section shall include any multi-state compact agency created by a compact formed between this state and any other state which has been approved by the Congress of the United States." *Id. See supra* notes 89-92 and accompanying text for the significance of this subsection of the statute.

95. MO. REV. STAT. § 537.600.1 (Supp. 1992) (emphasis added).

96. In *State ex rel. Regional Justice Info. Service Comm'n v. Saitz,* (*REJIS*), the Supreme Court stated: "For clarification, the Court notes that the legislature's passage of § 537.600 . . . introduced the phrase 'public entity' to the lexicon of this area of jurisprudence. Not statutorily defined, the phrase has engendered confusion . . . in an area already riddled by pitfalls of terminology." *REJIS*, 798 S.W.2d 705, 706 (Mo. 1990) (citations omitted). The court cites two examples of "pitfalls of terminology." First, "'municipality' versus 'municipal corporation.'" (citing State *ex rel.* St. Louis Hous. Auth. v. Gaertner, 695 S.W.2d 460, 462-63 (Mo. 1985)). Second, "'governmental' versus 'proprietary function.'" (citing Counts v. Morrison-Knudsen, Inc., 663 S.W.2d 357, 362 n.3 (Mo. Ct. App. 1983)).

97. *REJIS*, 798 S.W.2d at 706 (emphasis added).

the legislature's primordial soup"[98] As a result, to determine that REJIS was an entity of the sovereign (i.e., a public entity), the court examined the genesis of REJIS, its statutory basis, and its character.[99]

As *REJIS* illustrates, not all entities fit within the traditional categories of the state, its political subdivisions, municipalities, or municipal corporations, which were used to determine sovereign immunity prior to 1977. Entities are being created by the legislature that defy categorization within the traditional concepts, but which still may be characterized as public entities.[100] The courts have not automatically denied immunity to entities not specifically considered "public entities" prior to 1977.[101] The question of whether these "hybrid entities"[102] are public entities entitled to sovereign immunity has thus far been decided on a case-by-case basis.[103]

IV. THE INSTANT DECISION

The court first addressed the statutory construction of Missouri Revised Statute section 537.600, and found the term "public entity" to be undefined by the statute.[104] Based on the legislative history, however, the court held that "public entities" that enjoyed immunity before *Jones* are likewise immune under the statute.[105] Relying on the definition of "public entity" in Missouri Revised Statute section 537.700.2(3), (regarding public entity risk management) to provide clarification, the court concluded that TMC, a private, not-for-profit corporation,[106] was not a "public entity" under the sovereign immunity statute.[107] However, the court rearticulated the issue by stating

---

98. *Id.*

99. *Id.* at 706-08.

100. *See, e.g., REJIS*, 798 S.W.2d at 707-08; State *ex rel.* Trimble v. Ryan, 745 S.W.2d 672, 673-74 (Mo. 1988).

101. *See, e.g., REJIS*, 798 S.W.2d at 706; State *ex rel.* Cass Medical Ctr. v. Mason, 796 S.W.2d 621, 622-23 (Mo. 1990); State *ex rel.* Trimble, 745 S.W.2d at 675.

102. The Missouri Supreme Court in *Stacy* has called entities not specifically listed in section 537.700.2(3) but immune by case law before 1977 "hybrid entities." *Stacy*, 836 S.W.2d at 917. The issue to be determined is whether the "hybrid entity is enough like a public entity that it is entitled to sovereign immunity under section 537.600." *Id.*

103. *See, e.g., REJIS*, 798 S.W.2d at 706; *State ex rel. Cass Medical Ctr.*, 796 S.W.2d at 622-23; *State ex rel. Trimble*, 745 S.W.2d at 675.

104. *Stacy*, 836 S.W.2d at 917.

105. *Id.*

106. Organized pursuant to MO. REV. STAT. ch. 355 (Supp. 1953).

107. *Stacy*, 836 S.W.2d at 916-17. This court had found the Kansas City General Hospital, a predecessor of TMC, to be entitled to sovereign immunity. *See* Zummo

that hybrid entities have been protected in recent decisions and questioned whether TMC was enough like a public entity to be protected.[108]

Drawing on three recent Missouri wrongful death cases, the *Stacy* court outlined the requirements for determining whether a hybrid entity should be considered a "public entity." In each of the cases relied on, the Missouri Supreme Court had examined the hybrid entities and their organization, and concluded that they were entitled to immunity. Each of these cases involved a different type of hybrid entity. First, in *State ex rel. Regional Justice Information Service Commission v. Saitz, (REJIS)*[109] an agreement between the City of St. Louis and St. Louis County created the joint commission, REJIS, to provide a regional criminal database.[110] Second, in *State ex rel. Trimble v. Ryan*,[111] a 1949 agreement between Missouri and Illinois created the Bi-State Development Agency, which was responsible for coordinating and operating transportation, water and sewage systems.[112] Finally, *State ex rel. Cass Medical Center v. Mason*[113] involved a county hospital that was operated by elected trustees who reported to the county commission.[114]

---

v. Kansas City, 225 S.W. 934 (Mo. 1920). However, the court in *Stacy* stated that *Zummo* was of little or no precedential value in the instant case.

108. The court in *Stacy* cited a federal court decision which decided that TMC was not a political subdivision for purposes of whether the National Labor Relations Board had jurisdiction over TMC. Truman Medical Ctr., Inc. v. NLRB, 641 F.2d 570 (8th Cir. 1981). The *Stacy* court noted that the factors stressed by the Eighth Circuit have also been considered important in several public entity cases in Missouri. *Stacy*, 836 S.W.2d 917-18. Those factors were outlined by the *Stacy* court: "[A]n entity is considered a political subdivision of the state only if it is either created directly by the state, so as to constitute a department or administrative arm of the government, or is administered by individuals who are responsible to public officials or to the general public." *Id.* at 917.

109. 798 S.W.2d 705 (Mo. 1990).

110. The agreement was entered into pursuant to MO. REV. STAT. § 70.220 (1986). REJIS, the joint commission, replaced "REJIS, Inc.," a Missouri Revised Statutes Chapter 355 not-for-profit corporation. *Stacy*, 836 S.W.2d at 918 (citing *REJIS*, 798 S.W.2d at 706).

111. 745 S.W.2d 672 (Mo. 1988).

112. The agreement and the agency's operation was established according to MO. REV. STAT. § 70.370 (1986). According to Section 70.360, ten commissioners, five from each state are appointed by the governor with the consent of the senate. The commissioners must report the agency's operations to each governor. *Stacy*, 836 S.W.2d at 918 (citing *Trimble*, 745 S.W.2d at 674).

113. 796 S.W.2d 621 (Mo. 1990).

114. Cass Medical Center was organized and is operated pursuant to MO. REV. STAT. §§ 205.160-205.379 (1986). *Cass Medical Ctr.*, 796 S.W.2d at 621. The *Stacy* court stated that "[t]he application of sovereign immunity to a county hospital organized pursuant to section 205.160 is well settled." *Stacy*, 836 S.W.2d at 918,

Based on the common features of these three cases,[115] the court articulated the following requirements for sovereign immunity. Under the first requirement, each entity must perform a service traditionally performed by the government.[116] As examples of meeting this requirement, the court identified the creation of a criminal database in *REJIS*, city transportation in *Trimble*, and medical care in *Cass Medical Center*.[117] The court avoided the governmental-proprietary distinction by holding it to be too limiting and confusing for analyzing this requirement.[118]

Under the second requirement, which the court indicated was the most critical, the entities must be "controlled by and directly answerable to, the public or public officials or public entities."[119] In each of the three cases analyzed by the court, the entities fulfilled this requirement.[120]

The final requirement centered on the creation of the entity. This requirement examined how the entity was formed and who formed it.[121] Regarding new governmental agencies or political subdivisions, the court indicated that they "are formed by [the] government itself or by the voters. We do not expect a group of individuals to be able to form their own governmental body."[122]

Applying, the three "public entity" requirements to TMC, the court held that TMC was not a "public entity." The court recognized that providing medical care to indigent residents is a service traditionally performed by the government,[123] thus satisfying the first requirement.[124] However, the operation of the hospital failed the second requirement of control and

---

citing Gavan v. Madison Memorial Hosp., 700 S.W.2d 124 (Mo. Ct. App. 1985); Gabbett v. Pike County Memorial Hosp., 675 S.W.2d 950, 951 (Mo. Ct. App. 1984).

115. The court found that the three common features of these cases were also relied upon in Truman Medical Ctr. v. NLRB, 641 F.2d 570 (8th Cir. 1981). *Stacy*, 836 S.W.2d at 919.

116. *Stacy*, 836 S.W.2d at 919.

117. *Id.*

118. The court states, "[T]his requirement is much broader because we are asking whether this entity does what government has typically done in the past; because government performs both governmental and proprietary functions, activities fitting within either of those categories should satisfy this requirement." *Id.*

119. *Id.*

120. In *REJIS*, the commission is responsible to the city and county. In *Trimble*, the governor selects the commissioners who must report their operations to the governors. In *Cass Medical Center*, the elected trustees must report to the county commission. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

accountability.[125] TMC is not controlled by the city or county; a private board of directors took control when TMC was organized under Missouri Revised Statutes Chapter 355 as a not-for-profit corporation.[126] Though the board consists of some directors associated with or appointed by governmental entities, the majority of the directors are not government related and the board is not answerable to any government entity.[127] As a result of this analysis, the court ruled that TMC could not meet the second requirement, and therefore was not a public entity.[128]

As to the third requirement concerning the creation of the entity, the court stated that because TMC did not satisfy the second requirement, it would not determine the "precise features" of the third, nor whether TMC would meet such a requirement.[129] Despite this assertion, the court went on to analyze this requirement by evaluating the statute under which REJIS was organized, Missouri Revised Statutes section 70.220, and comparing that to TMC's organization under Chapter 355.[130] The court stated that under Section 70.220, a governmental body can enter into a joint venture with a private person, firm or corporation, but that does not make the private entity a governmental one.[131] Similarly, incorporation under Chapter 355 will not make public a private entity.[132] The court stated that policy reasons do not allow such an extension of immunity.[133]

In further analysis of the third requirement, the court posed the theoretical supposition that organization under Chapter 355 should not automatically be fatal to an entity seeking immunity.[134] The court felt that it was significant[135] that REJIS, a dissolved Chapter 355 entity that qualified for immunity,[136] used the joint commission created under section 70.260 as both

---

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 921.
130. *Id.* at 919-21.
131. *Id.*
132. *Id.* at 920.
133. The court stated that if a public entity could extend its immunity to private entities without statutory authorization, such an extension would be at the expense of the victims injured by private entities which enjoy immunity by association. "We question whether the legislature contemplated the casual kind of proliferation of sovereign immunity that would result from such a broad interpretation . . . ." *Id.*
134. *Id.* at 920-21.
135. *Id.*
136. *See REJIS*, 798 S.W.2d at 706-07.

its operating entity and controlling board.[137] Again, the court concluded that because Chapter 355 organization is not significant to an entity's operation and control, the entity's continued existence under Chapter 355 should not be fatal to its qualification for sovereign immunity.[138] The court chose not to determine this issue in either the broader analysis of the third requirement, or in the application to TMC.[139]

After failing to meet the requirements as outlined by the court, particularly for the lack of public control or accountability, the court held that TMC was not a "public entity" for the purposes of the sovereign immunity statute[140] and therefore not protected from liability.

In a concurring opinion, Judge Blackmar agreed with the approach and analysis of the majority opinion, but offered additional observations.[141] He stated that the court is serving the legislature's purpose when it extends sovereign immunity to public hospitals as in *Cass Medical Center*.[142] Furthermore, a consortium among state entities to provide health care "should likewise be immune."[143] However, in the case of TMC, Judge Blackmar recognized the circumstances that differentiated TMC from the public entities found in *Cass Medical Center* and *Trimble*. First, when control of TMC was surrendered to the trustees, the result was that TMC resembled the charitable model more than the sovereign one.[144] Second, organization under Chapter 355 should not be determinative; the essential issue is public control of the entity.[145] Third, TMC was created "to alleviate political interference,"[146] with the effect of changing TMC to a charitable type entity rather than a sovereign one.[147] Finally, concerned for those governmental entities which

137. *Stacy*, 836 S.W.2d at 920.

138. *Id.* at 920-21.

139. *Id.* at 921. *See supra* note 129 and accompanying text.

140. *Stacy*, 836 S.W.2d at 921.

141. *Id.* at 929-30 (Blackmar, J., concurring).

142. *Id.* at 929

143. *Id.*

144. *Id.*

145. *Id.* at 930. "[*REJIS*] shows that public agencies may use Chapter 355, if the element of control is present." *Id.*

146. *Id.* "An agency that is free from politics is not a public entity." *Id.*

147. *Id.* Judge Blackmar goes on to address the federal case involving TMC, Truman Medical Ctr., Inc. v. NLRB, 641 F.2d 570 (8th Cir. 1981). He states that though the decision is sound, it is not dispositive on the state's decisions regarding sovereign immunity. The NLRB exists for a special purpose, and its determination to accept jurisdiction does not control regarding sovereign immunity. *Stacy*, 836 S.W.2d at 930.

do solicit and receive contributions from the public, Judge Blackmar indicated that receiving private contributions should not bar sovereign immunity.[148]

V. COMMENT

In this section, several questions and issues must be addressed to realize the importance of the *Stacy v. Truman Medical Center* decision to the doctrine of sovereign immunity. First, the requirements developed in *Stacy* will generally be examined to better understand their purpose. The focus in the second section will be on the application of the *Stacy* requirements. Finally, the utility of *Stacy* will be outlined, identifying the need for the *Stacy* requirements and their effectiveness.

A. Test Analyzed

The *Stacy* decision provides guidelines for defining and interpreting the nebulous term "public entity" included in the Missouri sovereign immunity statute.[149] Prior to the *Jones* abrogation, whether an entity was a public entity was not an issue.[150] The courts, when deciding whether a municipality was protected by immunity, utilized the governmental-proprietary distinction.[151] Since 1978 and the enactment of the sovereign immunity statute, that distinction remains viable[152] and is not called into question by the instant case.[153] The issue in the instant case was the meaning and scope of the term "public entity."

---

148. *Stacy*, 836 S.W.2d at 930.

149. MO. REV. STAT. § 537.600 (Supp. 1992).

150. This Note relies on the absence of any cases prior to *Jones*, where this was an issue, to support this statement.

151. *See supra* notes 51-73 and accompanying text.

152. *See* Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. 1992) ("The common law governmental/proprietary test retains vitality only in suits against municipal corporations that do not involve the express waivers contained in § 537.600.")

> "When . . . the defendant is a municipality, the analysis focuses on the activity giving rise to the injury to determine whether the activity was an exercise of a governmental or proprietary function. The question is significant because, before September 12, 1977, municipalities did not enjoy complete sovereign immunity. Rather, they were immune from liability arising from their governmental activities but were not immune from liability arising from their proprietary activities."

State *ex rel.* Board of Trustees v. Russell, 834 S.W.2d 353, 358 (Mo. 1992); *see also* State *ex rel.* Wartick v. Teel, 737 S.W.2d 258, 260 (Mo. Ct. App. 1987).

153. *Stacy*, 836 S.W.2d at 919.

Though the primary focus of the Missouri Supreme Court in *Stacy* was the determination of when a hybrid entity enjoys sovereign immunity, the court also addressed the broader question of what constitutes a public entity under Missouri Revised Statute section 537.600. In its analysis, the court developed three approaches to that question: sovereign immunity of a public entity based on (1) history; (2) a statutory definition; and (3) factors test. First, the *Stacy* court noted that an entity will be considered a public entity for the purposes of sovereign immunity if that entity historically enjoyed immunity. The court stated that "based on legislative history, this statute protects 'public entities' that were protected under the sovereign immunity cases prior to September 12, 1977."[154]

Second, the court identified another approach that can be taken in the determination of what is a public entity. If the entity is one of the specific entities listed in Missouri Revised Statute section 537.700.2(3), it will be considered a public entity for sovereign immunity purposes. The court found it significant that the legislature in 1989 partially defined the term "public entity" in section 537.700.2(3), the statute relating to risk management for public entities.[155] This fact "signifie[d] that this term is intended to encompass the entities that will be protected under the statute."[156] The court determined that because Missouri Revised Statute section 537.745.1 "provides that the liability of public entities under sections 537.700 to 537.755 shall be the same as liability of public entities under the sovereign immunity statute,"[157] the definition in section 537.700.2(3) "may be helpful in determining the scope of 'public entities'" under the sovereign immunity statute.[158] When the court applied this approach to TMC, it found that TMC was not one of the listed entities in the definition.

The third approach developed by the court to determine whether an entity is a public entity is the factors test. Though the *Stacy* court did not use the term "test" when referring to the public entity requirements it outlined, courts

---

154. *Id.* at 917.

155. *Id.* The court is referring to MO. REV. STAT. § 537.700.2(3) (1986), the statute on "Public Entity Risk Management" which specifically defines "public entity" for purposes of MO. REV. STAT. §§ 537.700 - 537.755 (1986 and Supp. 1992).

156. *Stacy*, 836 S.W.2d at 917.

157. MO. REV. STAT. §537.745.1 (1986).

158. *Id.* The definition of "public entity," in § 537.700.2(3), that the court uses as a foundation for the term "public entity" for sovereign immunity purposes, provides as follows:

"(3) 'Public entity', any city, county, township, village, town municipal corporation, school district, special purpose or taxing district, or any other local public body created by the general assembly."
MO. REV. STAT. §532.700.2(3) (1986).

applying it in the future will likely refer to it as such.[159] The test was developed as a result of the unique nature of Truman Medical Center. The court found that TMC failed in meeting the two approaches previously discussed, but that the issue remained "whether a hybrid entity is enough like a public entity that it's entitled to sovereign immunity . . . ."[160]

The court relied on the common features of recent cases to determine if TMC, as a hybrid entity, was a public entity.[161] The *Stacy* court synthesized these common features and presented them as a three-pronged threshold test for determining whether an entity is a public entity for the purposes of sovereign immunity.

The first prong of the test, requiring that the entity perform a service traditionally performed by the government,[162] is rooted in the essential reason for having sovereign immunity: governmental activities are normally undertaken for the good of the general public and not for profit, and entities performing them should not be held liable in tort.[163] By requiring an entity to perform a traditional government service, the court preserved the purpose of continuing sovereign immunity. This first requirement is also rooted in a fundamental policy reason for having sovereign immunity: more money is available for the public purpose if immunity is granted.[164] If protection from tort liability is not given to services traditionally performed by the government, the money for those services will be sacrificed not only to compensate those injured, but also to pay the lawyers, insurance companies, and others who would stand to profit. Thus, requiring that hybrid entities provide traditional government services insures that the allocation of money saved goes to purposes that have broad public interest and support.

---

159. *See, e.g.*, Dorlon v. City of Springfield, 843 S.W.2d 934, 940 (Mo. Ct. App. 1992) ("The three tests elaborately spelled out in *Stacy* for determining whether an entity is a public entity, . . . convinces [sic] us the City of Springfield is a public entity . . ."); Balderree v. Beeman, 837 S.W.2d 309, 317 (Mo. Ct. App. 1992) ("[W]e have studied *Stacy* . . . [and] the three tests spelled out there for determining whether an entity is a public entity . . . strengthen our conclusion that LOCLG is one."). However, in State *ex rel.* Board of Trustees v. Russell, 843 S.W.2d 353, 358 (Mo. 1992), the Missouri Supreme Court identified *Stacy* as "discussing certain factors for determining status of 'hybrid' entities." *Id.* at 358.

160. *Stacy*, 836 S.W.2d at 917.

161. *See supra* note 99.

162. *Stacy*, 836 S.W.2d at 919.

163. REYNOLDS, *supra* note 42, at 674.

164. "It is readily apparent the legislature intended to balance the need for protection of governmental funds against a desire to allow redress for claimants injured in limited classes of accidents." Winston v. Reorganized School Dist. R-2, Lawrence County, 636 S.W.2d 324, 328 (Mo. 1982).

The court called the second prong of the test the most critical: the entity must be controlled by and directly answerable to public officials, entities or the public itself.[165] It is not enough that the service performed is governmental; there must be a direct connection between the entity and the government. Furthermore, this requirement goes further than listing the directors of the entity. The requirement demands a deeper analysis of the nature of the control of the entity by requiring accountability to the public and/or the government. Without this requirement, there is the danger that an entity, though actually private in nature, would claim to be public for the benefit of immunity.[166]

The policy inherent in this requirement is that if hybrid entities are afforded protection in order to insure that resources go to public needs, it is important to require accountability to the public or those selected by the public. This ensures that the money provided by the state or local government or saved as a result of sovereign immunity will be used in a way acceptable to and for the best benefit of the public.

The third prong of the test focuses on the creation of the entity, and how and by whom the entity was formed.[167] Again, the policy of accountability to the public is furthered because private individuals are not able to form a governmental entity and avail themselves of the benefits of sovereign immunity. Only the government itself or the voters in the aggregate are able to form governmental entities.

It is tempting to believe that the analysis for the third prong is fairly straightforward because the court suggested a statutory construction approach. The difficulty, however, is posed by the court when it addressed the possibility that statutory construction is not an automatic bar to qualification for sovereign immunity nor is it a guarantee.[168] The court seems to be suggesting that it would be wise to remember "substance over form." Because the court chose not to address the implications of its supposition, the guidelines for the third requirement are not complete.[169]

---

165. *Stacy*, 836 S.W.2d at 919.

166. This idea was suggested by the discussion in *Stacy*, although the context in the opinion was regarding the third requirement. *Stacy*, 836 S.W.2d at 920.

167. *Id.* at 919.

168. *Id.* at 919-21. The court noted that an entity's existence or organization under chapter 355 as a not-for-profit organization is not necessarily fatal to its qualification for sovereign immunity. What is significant is who operates and controls the entity. *Id.* at 920-21. On the other hand, a cooperation agreement between a municipality or a political subdivision and a private firm or corporation does not convert the private organization into a public one. *Id.* at 920.

169. The court seems to indicate that "[i]f TMC [had met] the first requirement of performing a governmental activity . . . and if its board was organized to meet the second requirement concerning control," then whatever its original statutory creation,

B. *Application of* Stacy

The *Stacy* test was developed to determine whether TMC, a hybrid entity, was a public entity within the meaning of section 537.600 and hence whether it was entitled to sovereign immunity from tort liability.[170] This test will be used to determine this question in future cases involving hybrid entities. The *Stacy* test has already been recognized in three cases.[171]

However, the benefit of the *Stacy* decision is not only that it developed a thorough test for determining the status of hybrid entities, but the decision also satisfactorily addressed the underlying need for clarification of what is a public entity for sovereign immunity purposes. Prior to the decision in *Stacy*, the courts dealing with this issue did not articulate in specific terms how one generally can recognize a public entity. Rather, the cases were markedly dependent upon their individual circumstances and statutes.[172]

Since *State ex rel. Regional Justice Information Service Commission v. Saitz*[173] *(REJIS)* and *Stacy*, courts have recognized that the threshold question to the sovereign immunity issue is whether an entity is a public entity.[174] The Missouri Supreme Court in *State ex rel. Board of Trustees v. Russell*[175] recently confirmed that before courts can address the other issues of sovereign immunity, they must first make a ruling on the entity question.

In the future, because of the *Stacy* decision, entities seeking sovereign immunity because of public entity status appear to have three methods of opportunity to gain that status: if the entity historically enjoyed sovereign immunity status prior to the abrogation;[176] if the entity meets the statutory

---

it won't necessarily be barred from sovereign immunity. *Id.* at 920. That is to say, if the court had found that TMC had met the first two prongs, TMC would have met the third.

170. *Id.* at 916.

171. As of March 10, 1993 one Missouri Supreme Court decision and two Southern District Missouri Court of Appeals decisions have mentioned the *Stacy* test. *See* State *ex rel.* Bd. of Trustees v. Russell, 834 S.W.2d 353 (Mo. 1992); Balderree v. Beeman, 837 S.W.2d 309 (Mo. Ct. App. 1992); Dorlon v. City of Springfield, 843 S.W.2d 934 (Mo. Ct. App. 1992). However, their application of the test was minimal.

172. For instance, even the holdings of the three cases discussed at length by the *Stacy* court were of limited applicability beyond the facts and statutes of those cases. *See supra* notes 109-115 and accompanying text.

173. 798 S.W.2d 705 (Mo. 1990).

174. *See* State *ex rel.* Regional Justice Info. Service v. Saitz, 798 S.W.2d. 705, 706 (Mo. 1990) ("[T]he court must first determine whether REJIS is an entity of the sovereign."); *Stacy*, 836 S.W.2d at 916.

175. 843 S.W.2d 353 (Mo. 1992).

176. Assuming, also, that the entity's operation and control since that time still qualify it for public entity status. *See infra* note 184 and accompanying text.

definition of "public entity" as found in Missouri Revised Statute section 537.700.2(3); or if the entity can meet the three requirements of the *Stacy* test.

The crucial aspect of the *Stacy* decision, however, is the test the court developed for determining the status of hybrid entities. Several potential applications of the *Stacy* test can be identified. First, the *Stacy* test may become the threshold standard for all public entities seeking immunity under the statute, not just hybrid entities. Whether such a standard will simply act as a rubber stamp for traditional categories of public entities to pass the threshold question is unclear.

Dorlon v. City of Springfield[177] seems to indicate this type of rubber stamp application. After examining the statutory language and case precedent, the Missouri Court of Appeals, Southern District, concluded that the city of Springfield was a public entity entitled to the protection of section 537.610.2.[178] The court then stated: "Our view is fortified by *Stacy* . . . . The three tests elaborately spelled out in *Stacy* for determining whether an entity is a public entity convinces [sic] us the City of Springfield is a public entity as that term is used in § 537.610.2."[179] It is unclear why the court mentioned the test at all when the city can meet the first two approaches as set out by *Stacy*.

The *Stacy* decision itself introduced the potential rubber stamp application of the test. To develop the test for public entities, the court relied on three Missouri cases where the court held that the entity involved was a public entity.[180] Interestingly, one of the cases used as a basis for developing its test, *State ex rel. Cass Medical Center v. Mason*,[181] did not involve a hybrid entity, but rather, a county hospital that fell within a traditional category.[182] Because the court used this non-hybrid entity case to develop the public entity test, the court may be indicating that all public entities will possess the three requirements as common features and therefore all entities must be analyzed

177. 843 S.W.2d 934 (Mo. Ct. App. 1992).

178. *Id.* at 940.

179. *Id.*

180. State *ex rel.* Cass Medical Ctr. v. Mason, 796 S.W.2d 621, 622 (Mo. 1990); State *ex rel.* Regional Justice Info. Serv. Comm'n (REJIS) v. Saitz, 798 S.W.2d 705, 707 (Mo. 1990); State *ex rel.* Trimble v. Ryan, 745 S.W.2d 672, 674 (Mo. 1988).

181. 796 S.W.2d 621 (Mo. 1990).

182. The analysis of *Cass Medical Center* by the court in *Stacy* revealed that it was a county hospital created pursuant to MO. REV. STAT. ch. 205 (1986) and therefore entitled to sovereign immunity. *Stacy*, 836 S.W.2d at 918-919. "[T]he application of sovereign immunity to a county hospital pursuant to section 205.160 is well settled." *Id.* at 918, *citing* Gavan v. Madison Memorial Hosp., 700 S.W.2d 124, 127 (Mo. Ct. App. 1984).

under this test. This potential application may be reaching beyond the intent of the court.

The *Stacy* test will be valuable in determining the status of entities that have been created since the abrogation but which do not fall into any of the traditional categories. These entities may be hybrid entities created by the legislature with both private and governmental functions and characteristics. The best example of this type of hybrid entity is REJIS, the regional criminal database shared by the City of St. Louis and St. Louis County. In *REJIS*, the court called REJIS "a unique creature to have emerged from the legislature's primordial soup."[183]

The *Stacy* test also will apply in determining the entity status for those entities that may have been created as public entities, but which have since been privatized. This conclusion is based on the court's discussion of the third requirement of its test: if the entity passes the governmental activity and control requirements, its organization under a particular statute should not automatically bar it from status as a public entity. Reversing this logic, if an entity prior to 1977 enjoyed sovereign immunity, but no longer performs a governmental activity or is no longer subject to governmental control, it automatically will not be guaranteed sovereign immunity as a public entity. For example, in *Stacy*, when the court analyzed the second requirement of public control, it noted that Kansas City and Jackson County gave up control of TMC to a private board of directors when the not-for-profit corporation was organized in 1962.[184]

Even if the test is applied to any or all of the above situations, there are still questions as to how the *Stacy* test will be applied. If the courts only regard *Stacy* as a factors-type test, with a weighing and balancing effect, then the application of the test could have very different results from what the Missouri Supreme Court intended.

C. The Utility and Effectiveness of the Stacy *Test*

In this section the utility of *Stacy* test will be outlined, identifying the need for the test and its effectiveness. In considering the test's utility, it may be argued that the court in *Stacy* unnecessarily developed a test for public entities. Several arguments support this position.

First, it could be argued that there was no basis for the court to develop a test to determine public entities under the sovereign immunity statute. Section 537.600 states that the doctrine of sovereign immunity as it existed at common law in Missouri prior to September 12, 1977, except as modified,

183. *REJIS*, 798 S.W.2d at 706.

184. *Stacy*, 836 S.W.2d at 919.

abrogated, or waived by statute, remains in full force and effect.[185] One could argue that the legislature was only attempting to return to the doctrine as it existed prior to *Jones* with any exceptions to its status being provided in those sections enacted.[186] Furthermore, "[u]nder intrinsic principles of statutory construction, any treatment given by this court to the doctrine established by the legislature requires strict and narrow legal exegesis."[187]

This approach would advocate a type of "frozen in time" standard to be applied not only to the governmental-proprietary distinction,[188] but also to the municipality-municipal corporation question.[189] The same would be true for a public entity. If an entity maintained public entity status prior to *Jones*, the same should remain true after *Jones*.[190]

This rationale is flawed, however. Though the legislature reinstated the common law sovereign immunity doctrine, the common law itself is not

---

185. MO. REV. STAT. § 537.600.1 (Supp. 1992).

186. Bartley v. Special School Dist. of St. Louis County, 649 S.W.2d 864, 870 (Mo. 1983).

187. *Id.*

188. In State *ex rel.* New Liberty v. Pratt, 687 S.W.2d 184 (Mo. 1985), the court held that the traditional rule permits the application of the governmental-proprietary distinction only to municipalities and that powers granted to hospital districts are governmental, and therefore hospital districts are immune from liability. *Id.* at 186. Hence, a hospital district was considered governmental in function and immune pre-*Jones*, and remains immune post-*Jones*.

189. In State *ex rel.* St. Louis Housing Auth. v. Gaertner, 695 S.W.2d 460 (Mo. 1985), Judge Blackmar in his dissenting opinion advocates the position that prior determinations of whether an entity is a municipality or a municipal corporation should be controlling. *Id.* at. 463-464. In that case, the St. Louis Housing Authority had been determined a pre-*Jones* municipality for the purpose of cooperation agreements in St. Louis Housing Auth. v. City of St. Louis, 239 S.W.2d 289, 294 (Mo. 1951). Judge Blackmar stated, "[n]o reason is adduced as to why the Housing Authority should be held to be a municipality in 1951 for purposes of the corporation statutes, but should not be held to be a municipality in 1985 for purposes of the of the statutes authorizing procurement of insurance [for the application of waiver in sovereign immunity]." *Gaertner*, 695 S.W.2d at 463 (Blackmar, J., dissenting).

190. *Cf.* State *ex rel.* Trimble v. Ryan, 745 S.W.2d 672 (Mo. 1988), in which Judge Blackmar, in his dissenting opinion, attacks the majority's position that the basic task is to determine whether Bi-State is a "public entity." Judge Blackmar states:

> This approach is purely conceptualistic. The phrase, "public entity" . . . was introduced into this area of jurisprudence by § 537.600, which neither defines nor enlarges the perimeters of sovereign immunity, leaving to the courts the traditional function of determining the common law. Our courts are perfectly capable of deciding what the common law is, or was at a point in time, even in the absence of decisional authority.

Id. at 677. (Blackmar, J., dissenting).

frozen in time, but by its nature builds upon the foundations laid. Furthermore, different types of entities exist today that were not even in existence when the doctrine was abrogated. As the government takes on new functions in our increasingly complex society, new entities are created in response to public policy needs. To freeze a public entity determination to what existed fifteen years ago would be to potentially thwart the purpose of the sovereign immunity doctrine in Missouri; that is, to protect state funds.[191] Not allowing redetermination of entities after *Jones* would potentially allow new state entities to be liable in tort.

It might also be that the court in *Stacy*, in reading the sovereign immunity statute, gave too much weight to the term "public entity;" more perhaps than the legislature intended. Yet, even if the legislature did not intend for the term to acquire such importance, the courts could not properly apply the statute without defining the term "public entity."[192]

How effective this test will be remains to be seen. The effectiveness of the *Stacy* test will in part be dependent on the requirements themselves. In considering these requirements, the *Stacy* court allowed some flexibility. For example, the court avoided characterizing the first requirement as a governmental function requirement, which requires that the entity must perform a traditional government service. This requirement goes beyond the governmental-proprietary distinction, for the court stated that "activities fitting within either of those categories should satisfy this requirement."[193]

Finally, in considering the effectiveness of the *Stacy* test, it could be argued that a three-requirement, bright-line test may not be adequate to analyze hybrid entities for purposes of sovereign immunity. Focusing on the entity's origin, control, and traditional governmental service may be too narrow to make a fair determination of whether an entity is a sovereign entity. Perhaps by drawing a bright-line test, the court is defeating the very purpose for which the test was considered necessary—to be able to identify entities

---

191. "It is readily apparent the legislature intended to balance the need for protection of governmental funds against a desire to allow redress for claimants injured in limited classes of accidents." Winston v. Reorganized School Dist. R-2, Lawrence County, 636 S.W.2d 324, 328 (Mo. 1982).

192. "[I]t is presumed that the legislature does not enact meaningless provisions." Bartley v. Special School Dist. of St. Louis County, 649 S.W.2d 864, 867 (Mo. 1983) (citing City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 446 (Mo. 1980)).

193. *Stacy*, 836 S.W.2d at 919. "[T]his requirement is much broader [than the governmental-proprietary distinction] . . . because we are asking whether this entity does what government has typically done in the past . . . . In view of the broad range of activities in which the government is involved, it is difficult to envision a hybrid entity that meets the other requirements but would not meet this one." *Id.*

Missouri Law Review, Vol. 58, Iss. 3 [1993], Art. 3

that deserve sovereign immunity status even though they do not fall within a traditional category of governmental units.[194]

Whether the *Stacy* test for hybrid entities will be applied as a bright-line test or a facts and circumstances test remains to be seen. What is significant, however, is that the court has elucidated an issue which had previously been decided by a case by case determination. Furthermore, by developing a three-prong test for determining hybrid entities as public entities, the court has clearly indicated that sovereign immunity should be narrowly confined: it should be extended to hybrid entities only where justified by overriding considerations, as expressed by the three requirements. The three-prong *Stacy* test helps confine the grant of sovereign immunity.

VI. CONCLUSION

The *Stacy* decision clarified the approach Missouri courts should take when determining what entities are entitled to protection as public entities under the sovereign immunity statute. Whether an entity, in general, or a hybrid entity, in particular, is a "public entity" for the purposes of the statute can now be determined when one of three approaches is satisfied: first, if the entity historically enjoyed sovereign immunity status prior to the abrogation in 1977; second, if the entity meets the statutory definition of "public entity" as found in Missouri Revised Statute section 537.700.2(3); and third, if the entity can meet the three requirements of the *Stacy* test. This test, developed in *Stacy*, is directed in particular at the status of hybrid entities. For a hybrid entity to be entitled to sovereign immunity under the *Stacy* test, the entity

194. Judge Blackmar, in his concurring opinion, took a broader approach than the majority, arguing that the creation and control elements were the most important in determining the nature of an entity, and that the source of funding alone is not determinative of public entity status. *Id.* From these two points it can be seen that he is arguing against a bright-line test. Other jurisdictions have endorsed factors tests to determine the status of hybrid entities. *See, e.g.*, Shannon v. Shannon, 965 F.2d 542, 547-48 (7th Cir. 1992); Mendrala v. Crown Mortgage Co., 955 F.2d 1132, 1136 (7th Cir. 1992); Rodriguez-Garcia v. Davila, 904 F.2d 90, 97 (1st Cir. 1990); Wright v. Houston Indep. School Dist., 393 F. Supp. 1149, 1154 (S.D. Tex. 1975); Beck v. Claymont School Dist., 407 A.2d 226, 229-30 (Del. Super. Ct. 1979); Dep't of Community Affairs v. Massachusetts State College Bldg. Auth., 392 N.E.2d 1006, 1010-11 (Mass. 1979).

The analysis in Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 478-80 (6th Cir. 1990) bears a striking resemblance to that in *Stacy* in determining whether an entity is a public entity. Though the underlying purpose for the determination differed, the approach taken by these two courts was remarkably similar. Perhaps this indicates the validity and applicability of the *Stacy* test.

must (1) be performing a traditional government service; (2) be controlled by and answerable to the public or public entities; and (3) be formed by and through the government.

By applying the approaches outlined in *Stacy*, entities seeking sovereign immunity, as well as the courts, have firmer guidelines for determining which entities qualify for sovereign immunity from tort liability in Missouri. Courts and entities would do well to apply the crystallized approaches of *Stacy*: sovereign immunity public entity status, especially for hybrid entities, need no longer be a case-by-case, hit-or-miss determination.

MARY S. HACK