
ED 109422

In the Missouri Court of Appeals for the Eastern District

Christopher Zang, Appellant

v.

City of Saint Charles, Missouri, Respondent

**Appeal from the Circuit Court of Saint Charles County, Missouri
11th Judicial Circuit
The Honorable Daniel G. Pelikan**

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF FACTS.....	2
POINTS RELIED ON.....	5
STANDARD OF REVIEW.....	6
ARGUMENT.....	7
I. The Trial Court erred in granting Defendant City of St. Charles’ Motion to Dismiss Count II of Plaintiff’s First Amended Petition because Plaintiff was not required to give notice of his claim as prescribed in § 12.33 of City of St. Charles’ charter because said charter provision is limited, denied and in conflict with state law, notably Mo. Rev. Stat. § 537.600.1 (1), Mo. Rev. Stat. § 537.600.1 (2), Mo. Rev. Stat. § 82.210, and Mo. Rev. Stat. § 516.120.....	7
CONCLUSION.....	23
Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements.....	25
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Asaro v. Cardinal Glennon Mem’l Hosp.</i> , 799 S.W.2d 595 (Mo. banc 1990).....	6
<i>Bachtel v. Miller County Nursing Home Dist.</i> , 110 S.W.3d 799 (Mo. 2003).....	14
<i>Benoit v. Missouri Highway</i> , 33 S.W.3d 663 (Mo. App. S.D. 2000).....	12
<i>Cape Motor Lodge, Inc. v. City of Cape Girardeau</i> , 706 S.W.2d 208 (Mo. banc 1986).....	15, 21
<i>Cedar County Memorial Hosp. v. Nevada City Hosp.</i> , 987 S.W.2d 422 (Mo. App. 1999).....	8
<i>City of Springfield v. Goff</i> , 918 S.W.2d 785 (Mo. banc 1996).....	15
<i>City of Kansas City v. Carlson</i> , 292 S.W.3d 368 (Mo. App. W.D. 2009).....	8
<i>Cole v. City of St. Joseph</i> , 50 S.W.2d 623 (Mo. 1932).....	19
<i>Findley v. City of Kansas City</i> , 782 S.W.2d 393 (Mo. 1990).....	12
<i>Gates v. City of Springfield</i> , 744 S.W.2d 487 (Mo. App. W.D. 1988).....	5, 10, 11, 17, 18, 19
<i>Heater v. Burt</i> , 769 S.W.2d 127 (Mo. 1989).....	5, 20, 21
<i>Jones v. State Highway Commission</i> , 557 S.W.2d 225 (Mo. banc 1977).....	8

Koontz v. City of St. Louis,
89 S.W.2d 586 (Mo. App. 1936).....19

Lynch v. Lynch,
260 S.W.3d 834 (Mo. banc 2008).....6

Schulze v. Haile,
840 S.W.2d 263 (Mo. App. 1992).....12

Schumer v. City of Perryville,
667 S.W.2d 414 (Mo. banc 1984).....20

Six Flags Theme Parks, Inc. v. Dir. Of Revenue,
179 S.W.3d 266 (Mo. banc 2005).....11

State ex rel. Hannah v. City of St. Charles,
676 S.W.2d 508 (Mo. banc 1984).....15

Ste. Genevieve Sch. Dist. R-II, et al. v. Bd. Of Alderman of Ste. Genevieve, et al.,
66 S.W.3d 6 (Mo. banc 2002).....6

Waisblum v. City of St. Joseph,
928 S.W.2d 414 (Mo. App. W.D. 1996).....5, 13, 14

Winston v. Reorganized School District R-2,
636 S.W.2d 324 (Mo. banc 1982).....12

Statutes

Article VI, Section 19(a) of the Missouri Constitution.....5, 7, 8, 21

Mo. Rev. Stat. § 537.600.1 (1).....5, 7, 9, 16, 19, 23

Mo. Rev. Stat. § 537.600.1 (2)1, 2, 5, 7, 8, 9, 10, 12, 15, 23

Mo. Rev. Stat. § 77.600.....3, 10, 11

Mo. Rev. Stat. § 79.480.....3, 10, 11

Mo. Rev. Stat. § 81.060.....3, 10, 11

Mo. Rev. Stat. § 82.210.....3, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 17, 18, 23

Mo. Rev. Stat. § 516.120.....5, 7, 19, 20, 21, 22, 23

Section 12.33 of the City of St. Charles Charter.....5, 7, 8, 23

Secondary Sources

State-Local Conflicts Under the New Missouri Home Rule Amendment,
37 Mo. L.Rev. 677 (1972).....8

Missouri Roster, Classification of Municipalities,
<https://www.sos.mo.gov/CMSImages/Publications/municipalities07.pdf>9, 14

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under Article V, Section 3 of the Missouri Constitution because this case does not fall within the enumerated categories of cases in which the Missouri Supreme Court has exclusive jurisdiction, and territorial appellate jurisdiction under Mo. Rev. Stat. § 477.050 because this appeal arises from an action before the Circuit Court of St. Charles County, 11th Judicial Circuit, which is a circuit within the appellate territory of this Court.

Appellant Christopher Zang appeals from an Order and Judgment granting Respondent City of St. Charles, Missouri's Motion to Dismiss Count II of Appellant's First Amended Petition for personal injuries arising out of the dangerous condition of Respondent's property pursuant to Mo. Rev. Stat. § 537.600.1 (2). The Circuit Court of St. Charles County, Missouri (Hon. Daniel G. Pelikan) granted Defendant City of St. Charles' Motion to Dismiss on January 19, 2021 and entered its Final Order and Judgment on the same date. Plaintiff filed his Notice of Appeal on January 25, 2021.

STATEMENT OF FACTS

Plaintiff-Appellant Christopher Zang was injured on or about June 12, 2019 while riding his bicycle in City of St. Charles, Missouri on Barter Street between Granger Boulevard and Tarn Street.

The section of Barter Street that Plaintiff was injured on is an open-grate, metal bridge across a portion of New Town Lake (hereinafter, “Barter Street Bridge” of “Bridge”). Plaintiff has alleged that the open-grate, metal bridge is unreasonably dangerous in that its coefficient of friction is considerably lower than pavement thereby increasing the risk of harm to individuals riding bicycles thereon.

As alleged, Plaintiff’s injury occurred shortly after a rainfall. The rainwater soaked the Barter Street Bridge and further dropped its coefficient of friction. Thus, while attempting to cross the Bridge, the tire(s) of Plaintiff’s bicycle slipped out and caused him to fall onto the metal grate. Plaintiff sustained serious and permanent injury to his head, face, left shoulder, left hand and right hand in the fall. Plaintiff has undergone multiple surgeries to treat the injuries sustained in the fall on the Barter Street Bridge.

The Missouri legislature has waived sovereign immunity for incidents like Plaintiff’s. Pursuant to Mo. Rev. Stat. § 537.600.1 (2), the legislature expressly permits actions for negligence against cities for:

[i]njuries caused by the condition of a public entity’s property if the plaintiff establishes that the property was in dangerous

condition at the time of the injury, that the injury directly resulted from the dangerous condition, and the condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

The Missouri legislature has also enacted notice-of-claim statutes for every class of cities to which the sovereign immunity waiver applies. Mo. Rev. Stat. § 77.600 applies to third-class cities, Mo. Rev. Stat. § 79.480 applies to fourth-class cities, Mo. Rev. Stat. § 81.060 applies to special charter cities and Mo. Rev. Stat. § 82.210 applies to constitutional charter cities.

City of St. Charles, Missouri is a constitutional charter city. Accordingly, Mo. Rev. Stat. § 82.210 must be examined, and provides:

[n]o action shall be maintained against any city of this state which now has or may hereafter attain a population of one hundred thousand inhabitants, on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city, until notice shall first have been given in writing to the mayor of said city, within ninety days of the occurrence for which damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and the person so injured will claim damages therefor from such city.

On March 23, 2020, Plaintiff filed his lawsuit against St. Charles County, Missouri. On April 22, 2020, Plaintiff filed a first amended petition and named City of St. Charles, Missouri as a defendant along with St. Charles County, Missouri.

Plaintiff's first amended petition had two counts against each defendant. Count 1 was for negligence. Count 2 was for premises liability.

City of St. Charles has a population of approximately 62,302. Thus, on its face, Mo. Rev. Stat. § 82.210 does not require Plaintiff to provide notice of claim of his injuries. Nonetheless, at the time Plaintiff filed his first amended petition, Defendant City of St. Charles, Missouri had the following provision in its charter:

Section 12.3 NOTICE OF SUITS.

No action shall be maintained against the city for or on account of any injury growing out of alleged negligence of the city unless notice shall first have been given in writing to the mayor within ninety days of the occurrence for which said damage is claimed, stating the place, time, character and circumstances of the injury, and that the person so injured will claim damages therefor from the city.

Plaintiff did not provide written notice to the mayor for City of St. Charles, Missouri within 90 days of his occurrence or even before filing his lawsuit. After being served the first amended petition, Defendant-Respondent filed a Motion to Dismiss Count 2 – premises liability, arguing that Plaintiff was barred because Plaintiff did not comply with Section 12.3 of City of St. Charles' charter. Defendant's Motion to Dismiss Count 2 was granted. This appeal followed.

POINTS RELIED ON

II. The Trial Court erred in granting Defendant City of St. Charles' Motion to Dismiss Count II of Plaintiff's First Amended Petition because Plaintiff was not required to give notice of his claim as prescribed in § 12.33 of City of St. Charles' charter because said charter provision is limited, denied and in conflict with state law, notably Mo. Rev. Stat. § 537.600.1 (1), Mo. Rev. Stat. § 537.600.1 (2), Mo. Rev. Stat. § 82.210, and Mo. Rev. Stat. § 516.120.

Heater v. Burt, 769 S.W.2d 127 (Mo. banc 1989)

Waisblum v. City of St. Joseph, 928 S.W.2d 414 (Mo. App. W.D. 1996)

Gates v. City of Springfield, 744 S.W.2d 487, 488 (Mo. App. S.D.)

Missouri Constitution, Art. VI, § 19(a)

Mo. Rev. Stat. § 537.600.1 (1)

Mo. Rev. Stat. § 537.600.1 (2)

Mo. Rev. Stat. § 82.210

Mo. Rev. Stat. § 516.120

STANDARD OF REVIEW

The standard of review for a trial court's grant of a motion to dismiss is *de novo*. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. *Lynch* at 836; citing *Ste. Genevieve Sch. Dist. R-II, et al. v. Bd. Of Alderman of Ste. Genevieve, et al.*, 66 S.W.3d 6, 11 (Mo. banc 2002). If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim. *Id.* Plaintiff's petition states a cause of action if "its averments invoke principles of substantive law that may entitle the plaintiff to relief. *Lynch* at 836; citing *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 597 (Mo. banc 1990).

ARGUMENT

- I. The Trial Court erred in granting Defendant City of St. Charles' Motion to Dismiss Count II of Plaintiff's First Amended Petition because Plaintiff was not required to give notice of his claim as prescribed in § 12.33 of City of St. Charles' charter because said charter provision is limited, denied and in conflict with state law, notably Mo. Rev. Stat. § 537.600.1 (1), Mo. Rev. Stat. § 537.600.1 (2), Mo. Rev. Stat. § 82.210, and Mo. Rev. Stat. § 516.120.**

In its Order and Judgment of January 19, 2021, the trial court improperly granted Defendant's Motion to Dismiss Count 2 of Plaintiff's first amended petition. The trial court incorrectly held that Defendant "enjoyed sovereign immunity from the claims of plaintiff due to an alleged dangerous condition on its property" and "[n]otice must be given and is a condition precedent to the bringing of a cause of action against the Defendant."

The trial court erred in granting Defendant's Motion to Dismiss Count 2 of Plaintiff's first amended petition because Plaintiff was not required to give notice of his claim as prescribed in § 12.33 of City of St. Charles' charter because said charter provision is limited, denied and in conflict with state law, notably Mo. Rev. Stat. § 537.600.1 (1), Mo. Rev. Stat. § 537.600.1 (2), Mo. Rev. Stat. § 82.210, and Mo. Rev. Stat. § 516.120.

A constitutional charter city derives its charter powers from article VI, section 19(a) of the Missouri Constitution, which states in part:

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of

the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.

Thus, a constitutional charter city “possesses all powers which are not limited or denied by the constitution, by statute or by the charter itself.” *Cedar County Memorial Hosp. v. Nevada City Hosp.*, 987 S.W.2d 422, 425 (Mo. App. 1999). The intent behind section 19(a) was to “insure the supremacy of the legislature while at the same time putting only minimal and necessary limitations on the power of municipalities.” *City of Kansas City v. Carlson*, 292 S.W.3d 368, 371 (Mo. App. W.D. 2009); citing Thomas N. Sterchi, *State-Local Conflicts Under the New Missouri Home Rule Amendment*, 37 Mo. L.Rev. 677, 689 (1972).

As discussed below, § 12.33 of City of St. Charles’ charter cannot be enforced against Plaintiff Christopher Zang because the charter provision is limited, denied and in conflict with state statutes on the issue of sovereign immunity and requisite notice.

A. The City of St. Charles charter provision at issue conflicts with Mo. Rev. Stat. § 537.600.1 (2) and Mo. Rev. Stat. § 82.210.

In *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. banc 1977), the Missouri Supreme Court abrogated the doctrine of sovereign immunity prospectively as to all claims arising on or after August 15, 1978. In response, the Missouri legislature immediately reinstated 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.” See Mo. Rev. Stat. § 537.600.1 (2005). In the same session, the Missouri legislature established two waivers of sovereign immunity. The first was for injuries directly resulting from the negligent operation of a motor vehicle by a public employee during the course of employment. See Mo. Rev. Stat. § 537.600.1 (1) (2005). The second was for injuries caused by the condition of a public entity’s property. See Mo. Rev. Stat. § 537.600.1 (2) (2005).

Pursuant to Mo. Rev. Stat. § 537.600.1 (2), the legislature expressly permitted actions for negligence against cities for:

[i]njuries caused by the condition of a public entity’s property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, and the condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

According to the Missouri Secretary of State, there are approximately 601 cities in Missouri.¹ Among the 601 cities, there are only four different classes of

¹ <https://www.sos.mo.gov/CMSImages/Publications/municipalities07.pdf>

cities permitted: (1) 3rd Class; (2) 4th Class; (3) Special Charter; and (4) Constitutional Charter. The number of cities, by class, is as follows:

Class of City	Total Number of Cities in Class
3rd Class	57
4th Class	500 (approximately)
Special Charter	8
Constitutional Charter	36

The legislature has enacted four separate statutes, relating to the different classes of cities in Missouri, which limits the sovereign immunity waiver of Mo. Rev. Stat. § 537.600.1 (2) by requiring notice of claims against a city. See §§ 77.600 (applicable to third-class cities), 79.480 (applicable to fourth-class cities), 81.060 (applicable to special charter cities with a population of 500 to 3,000), and 82.210 (applicable to constitutional charter cities of 100,000 population).

This statutory scheme,

require[s] a notice of any claim arising out of the defective or unsafe condition of a city ‘bridge, boulevard, street, sidewalk or thoroughfare.’ Each of the statutes identifies the person upon whom the notice is to be served, the time period within which the notice must be served after the occurrence of any injury, and the information that must be included in the notice.

Gates v. City of Springfield, 744 S.W.2d 487, 489 (Mo. App. W.D. 1988).

With the four statutes, the legislature has enacted statutes covering every class of city in Missouri. There is no class of city excepted. Two of the statutes provide a population requirement to its applicability: (1) § 81.060, special charter cities; and

(2) § 82.210, constitutional charter cities. The other two statutes provide for universal application to the designated class. Thus, the statutes apply as follows:

Class of City	Total Number of Cities in Class	Total Number of Cities in Class to Which Statute Applies
3rd Class	57	57
4th Class	500 (approximately)	500 (approximately)
Special Charter	8	2
Constitutional Charter	36	4

In sum, the four statutes require injured persons to provide a notice of claim in 563 of Missouri's approximately 601 cities, or approximately 93.7% of all Missouri cities.

“When legislative enactments have established a general statutory scheme for presenting claims for injury against municipalities... it has been held that with respect to the subjects covered, the statutes occupy the entire field and, by implication, conflict with charter provisions imposing more onerous conditions.” *Gates v. City of Springfield*, 744 S.W.2d 487, 488 (Mo. App. S.D.); citing with approval to *Eastlick v. City of Los Angeles*, 177 P.2d 558, 562 (Ca. 1947).

Here, in enacting See §§ 77.600, 79.480, 81.060, and 82.210, the legislature has established a general statutory scheme for presenting claims for injury against municipalities arising from the dangerous condition of its property, including bridges.

City of St. Charles is a Constitutional Charter city. Consequently, City of St. Charles is governed by Mo. Rev. Stat. § 82.210, which provides,

[n]o action shall be maintained against any city of this state which now has or may hereafter attain a population of one hundred thousand inhabitants, on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city, until notice shall first have been given in writing to the mayor of said city, within ninety days of the occurrence for which damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and the person so injured will claim damages therefor from such city.

Importantly, the decision to waive immunity, and to what extent it is waived, lies within the legislature’s purview. *Findley v. City of Kansas City*, 782 S.W.2d 393, 396 (Mo. 1990); citing *Winston v. Reorganized School District R-2*, 636 S.W.2d 324, 328 (Mo. banc 1982). It being constitutionally permissible for the legislature to cloak municipalities with immunity by statute, it necessarily follows that any waiver of immunity granted is subject to the limits imposed in the waiver. *Findley at 328*.

Moreover, when enacting Mo. Rev. Stat. § 537.600.1 (2), the legislature is presumed to have been aware of Mo. Rev. Stat. § 82.210. See *Benoit v. Missouri Highway*, 33 S.W.3d 663 (Mo. App. S.D. 2000); citing *Schulze v. Haile*, 840 S.W.2d 263, 266 (Mo. App. 1992) (the “legislature is presumed to be aware of existing declarations of law when it enacts statutes pertaining to the same subject”). Thus,

by leaving the population requirement in Mo. Rev. Stat. § 82.210, the legislature is presumed to have done so purposefully.

By the plain language of § 82.210, persons injured in Constitutional Charter cities with a population of “one hundred thousand” are required to give notice, while persons injured in Constitutional Charter cities with a population less than “one hundred thousand” are not required to give notice.

In *Waisblum v. City of St. Joseph*, 928 S.W.2d 414 (Mo. App. W.D. 1996), the Western District held that the “notice requirement set forth in § 82.210 applies only to constitutional charter cities that have a population of 100,000 or more.” *Id.* at 415.

The plaintiff in *Waisblum* alleged injury arising from the City of St. Joseph’s negligent failure to maintain its sidewalks. The plaintiff did not provide notice before filing his lawsuit. The City of St. Joseph had a population of 71,852 and did not have a notice provision in its charter. The City of St. Joseph argued that the legislature intended to “eliminate the population requirement of § 82.210 so the notice requirement applies to all constitutional charter cities.” *Waisblum* at 417.

The *Waisblum* court disagreed with City of St. Joseph, ruling that:

[t]he language of § 82.210 is plain and unambiguous. As such, we cannot disregard the population requirement as the City would have us do. The notice requirement contained in § 82.210, by its own terms, applies only to constitutional charter cities with populations of 100,000 or more. (citations omitted). Since the City of St. Joseph has fewer than 100,000 inhabitants, §

82.210 does not apply to it and [the plaintiff] was not required to give the City notice of the occurrence he alleged caused him injury.

Waisblum at 417.

City of St. Charles has a population of 62,302.² By the plain language of Mo. Rev. Stat. § 82.210, the legislature clearly expressed an intent to restrict the ninety-day notice requirement to constitutional charter cities with 100,000 inhabitants. With statutory interpretation, the expression of one thing implies the exclusion of others. See *Six Flags Theme Parks, Inc. v. Dir. Of Revenue*, 179 S.W.3d 266, 269-70 (Mo. banc 2005). Accordingly, the notice requirement of § 82.210 does not apply to claims made against City of St. Charles. See *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 805 (Mo. 2003) (“[t]he legislature is presumed not to have enacted a meaningless provision.”).

Thus, a person injured in City of St. Charles is not required by statute to provide notice before bringing his or her action “on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city.”

Nonetheless, City of St. Charles has attempted to override the legislative intent by enacting a notice of claim provision in its charter. As provided by the charter,

² <https://www.sos.mo.gov/CMSImages/Publications/municipalities07.pdf>

Section 12.3 NOTICE OF SUITS.

No action shall be maintained against the city for or on account of any injury growing out of alleged negligence of the city unless notice shall first have been given in writing to the mayor within ninety days of the occurrence for which said damage is claimed, stating the place, time, character and circumstances of the injury, and that the person so injured will claim damages therefor from the city.

A charter provision that conflicts with a state statute is void. *City of Springfield v. Goff*, 918 S.W.2d 785, 789 (Mo. banc 1996); citing *State ex rel. Hannah v. City of St. Charles*, 676 S.W.2d 508, 513 (Mo. banc 1984). A conflict exists where a charter “permits what the statute prohibits” or “prohibits what the statute permits.” *City of Springfield* at 789; citing *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986) (“once a determination of conflict between a constitutional or statutory provision and a charter provision is made, the state law provision controls.”).

Here, the City of St. Charles charter provision conflicts with Mo. Rev. Stat. § 537.600.1 (2) and Mo. Rev. Stat. § 82.210. The conflict is that the City of St. Charles charter provision prohibits what the statutes permit. Specifically, the statutes permit a cause of action for “injuries caused by the condition of a public entity’s property” to be “maintained against any city of this state” without first giving notice. The City of St. Charles charter provision, however, prohibits such actions without first

receiving such notice within 90 days of the incident. Thus, the City of St. Charles charter provision is void as a matter of law.

B. The City of St. Charles charter provision at issue conflicts with Mo. Rev. Stat. § 537.600.1 (1).

Pursuant to Mo. Rev. Stat. § 537.600.1 (1), the legislature expressly permitted actions for negligence against cities for:

[i]njuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment

Unlike for actions maintained on account of injuries due to the condition of a public entity's property, the legislature has not enacted any statutory requirement for notice to any class of city for injuries directly resulting from the negligent operation of a motor vehicle by a public employee during the course of employment.

Once again, the "Notice of Suits" provision in the City of St. Charles charter is in conflict with state law in that it prohibits with state law permits. Specifically, the charter provision prohibits actions to be maintained against City of St. Charles "for or on account of any injury growing out of alleged negligence of the city unless notice shall first have been given in writing to the mayor within ninety days of the occurrence." The legislature, however, in enacting Mo. Rev. Stat. § 537.600.1 (1), permits actions against the city for "injuries directly resulting from the negligent acts

or omissions by public employees arising out of the operation of motor vehicles within the course of their employment” without requiring notice.

The conflict between Section 12.3 of City of St. Charles’ charter and state law is similar to the conflict found in *Gates v. City of Springfield*. In *Gates*, the plaintiff was involved in a motor vehicle crash with a City of Springfield employee. At the time of the crash, the City of Springfield had enacted a charter provision that required written notice to the city within ninety days of any occurrence of negligence, including car crashes. *Gates* at 487-88. The plaintiff in *Gates* filed his lawsuit six months after the crash without giving the required ninety day written notice. *Gates* at 487.

The City of Springfield filed a motion to dismiss the plaintiff’s petition alleging that the plaintiff failed to comply with the city charter provision requiring written notice within ninety days. The motion to dismiss was granted by the trial court and the plaintiff appealed. *Gates* at 488.

On appeal, the plaintiff argued that the subject matter of the city charter provision was preempted by the legislature and inconsistent with Mo. Rev. Stat. § 82.210. The City of Springfield argued that there was no conflict because “the charter provision neither permits what the statute prohibits nor prohibits what the statute permits” and “charter provisions, not being expressly limited by statute, should prevail.” *Gates* at 488.

The *Gates* court reversed the trial court, finding that the charter provision was in conflict with the legislature’s statutory scheme regarding sovereign immunity waivers and notice requirements, specifically:

[t]he effects of § 82.210 is to prescribe for both claimants and cities the kinds of claims which require notice and the conditions precedent to establish such claims. Just as the statute places obstacles in the way of one having a claim against the city, it limits the obstacles a city may impose upon a claimant. A charter provision which would impede the fundamental right of a citizen to seek redress for injuries resulting from negligent conduct by the city is in direct and irreconcilable conflict with a statute which places similar, but less onerous, impediments on the citizen.

Gates at 489.

The *Gates* court further decided that the conflict was to be resolved against enforcement of the charter provision and in favor of the statutory scheme because the charter provision was “limited by statute.” *Gates* at 490. In its holding, the *Gates* court found that a city charter provision that expands “the circumstances under which notice of claims is required as a condition precedent” or “[imposes] different conditions precedent” is “void.” *Gates* at 490. The *Gates* court noted that its ruling did not matter whether the city charter provision was analyzed against Mo. Const. art. VI, § 19 as provided when the city charter was adopted or under the present reading of Mo. Const. art. VI, § 19. *Gates* at 490.

Here, like in *Gates*, the challenged “Notice of Suits” provision in the City of St. Charles Charter should be declared void. As stated above, Mo. Rev. Stat. §

537.600.1 (1) permits suits against government entities like City of St. Charles for injuries resulting from motor vehicle crashes with public employees without first requiring that notice be given. The City of St. Charles' charter provision, however, restricts such suits by requiring notice within 90 days of the crash. By enacting the charter provision, the City of St. Charles expanded the circumstances under which notice of claims were required as a condition precedent. In doing so, based on the holding in *Gates*, Section 12.3 of City of St. Charles' charter must be declared void.

C. The City of St. Charles charter provision at issue conflicts with Mo. Rev. Stat. § 516.120.

Pursuant to Mo. Rev. Stat. § 1.010, the common law has been adopted as the law of Missouri. Under Missouri common law, a person injured due to a defective condition of any bridge, boulevard, street, sidewalk or thoroughfare in a Missouri city may bring a negligence action against the city for damages caused by the defective condition. *Cole v. City of St. Joseph*, 50 S.W.2d 623, 627 (Mo. 1932). The cause of action against the city is “valid... at common law as soon as [the person] was injured.” *Koontz v. City of St. Louis*, 89 S.W.2d 586 (Mo. App. 1936). Moreover, giving notice to the city is “not essential” to the cause of action at common law. *Id.* Instead, notice “goes to the remedy rather than the right.” *Id.*

Because Mo. Rev. Stat. § 82.21 does not apply to claims against City of St. Charles due to its population, the only principle of law that would bar Appellant's claim is the relevant statute of limitation. Pursuant to statute, a common law action

for personal injury resulting from the dangerous condition of property must be commenced within five years after the cause of action accrued. See Mo. Rev. Stat. §§ 516.100 and 516.120. Accordingly, Appellant is permitted to bring his lawsuit against City of St. Charles until June 12, 2024.

Importantly, courts have determined there is “no distinction” between a “notice-of-claim provision and a statute of limitation.” *Heater v. Burt*, 769 S.W.2d 127, 129-30 (Mo. 1989); citing *Schumer v. City of Perryville*, 667 S.W.2d 414 (Mo. banc 1984). The reason being, the “effect on the injured parties is the same whether their claim is denied by the statute of limitations or a notice-of-claim provision.” *Heater* at 130.

In *Heater*, the plaintiff filed suit to recover damages sustained as a result of falling on the sidewalk in City of Florissant, Missouri. *Heater* at 128. The plaintiff’s petition alleged that the City’s sidewalk was in a dangerous condition which caused her fall. *Id.* At the time of her fall, Florissant had a provision in its charter providing:

No action shall be maintained against the city for or on account of an injury growing out of alleged negligence of the city unless notice shall first have been given... within ninety (90) days of the occurrence for which said damage is claimed, and it shall state the place, time, character and circumstances of the injury and that the person so injured will claim damages therefor from the city.

Id. Florissant answered plaintiff’s petition, raising as an affirmative defense the plaintiff’s failure to notify the Mayor of the claim within 90 days of the occurrence

as required by the City's charter. Subsequently, Florissant moved for and was granted summary judgment on this ground. *Id.*

Plaintiff argued on appeal that the 90-day notice of claim provision in the charter was "inconsistent" with Mo. Rev. Stat. § 516.120, the 5-year statute of limitations otherwise applicable to the plaintiff's actions, and therefore in violation of Missouri Constitution article VI, section 19. *Id.* After the appellate court upheld the trial court, the Missouri Supreme Court reversed and remanded back to the trial court for further proceedings. *Id.* at 130.

The *Heater* court held that the Florissant charter provision requiring notice within 90 days of an occurrence "was not consistent with the statute of limitations." *Id.* at 129. The *Heater* court based its holding on the rationale that the "charter provision places a condition precedent for bringing an action of negligence which was not present at common law." *Id.*

While the notice-of-claim provision in *Heater* was judged against a different version of article VI, section 19, the outcome would still have been the same. Now, under section 19(a) as it is presently written, the emphasis no longer is whether the city "has the authority to exercise the power involved," instead the emphasis is "whether the exercise of that power conflicts with the Missouri Constitution, state statutes or the charter itself." *Cape Motor Lodge, Inc.* at 211. Once a determination of conflict between a constitutional or statutory provision and a charter or ordinance

provision is made, the state law provision controls. *Id.* The test for determining if a conflict exists is whether the municipal law “permits what the statute prohibits or prohibits what the statute permits.” *Id.*

Here, the charter provision at issue conflicts with Mo. Rev. Stat. § 516.120 and the common law. Without the charter provision, the only time limitation on Plaintiff’s claim for personal injuries was the 5-year statute of limitation contained in Mo. Rev. Stat. § 516.120. With the charter provision, however, Plaintiff also had a 90-day time limitation to take action. This undoubtedly creates a conflict in that the charter provision prohibits lawsuits filed within the otherwise 5-year statutory period that do not also meet the notice-of-claim time limit. The exact situation presented to this Court for review.

Accordingly, Plaintiff Christopher Zang requests that the Court of Appeals reverses the trial court’s order granting Defendant City of St. Charles, Missouri’s motion to dismiss Count 2 of Plaintiff’s first amended petition and remand this matter to the trial court for entry of an order denying Defendant’s Motion to Dismiss; and for all other relief this Court deems just and proper.

CONCLUSION

The trial court erred in granting Defendant City of St. Charles' Motion to Dismiss Count II of Plaintiff's First Amended Petition because Plaintiff was not required to give notice of his claim as prescribed in § 12.33 of City of St. Charles' charter because said charter provision is limited, denied and in conflict with state law, notably Mo. Rev. Stat. § 537.600.1 (1), Mo. Rev. Stat. § 537.600.1 (2), Mo. Rev. Stat. § 82.210, and Mo. Rev. Stat. § 516.120.

Based on precedents set forth by the Missouri Supreme Court, Plaintiff's action is not barred by City of St. Charles, Missouri's notice-of-claim provision. Plaintiff has established the City's notice-of-claim provision conflicts with various state law. In such situations, the state law controls, and the municipal law abates. Therefore, the premises liability claim pursued by Plaintiff is permitted.

Accordingly, Plaintiff requests the Court of Appeals reverse the trial court's order granting Defendant's motion to dismiss Count 2 of Plaintiff's first amended petition and remand this matter to the trial court for entry of an order denying Defendant's Motion to Dismiss; and for all other relief this Court deems just and proper.

Respectfully submitted,

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The undersigned hereby certifies that this brief complies with the formatting and typeface requirements of Mo. Sup. Ct. R. 84.06 and Local Rule 360 because this document has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font, Times New Roman, and that it complies with the word limit set forth in these based on a word count under Microsoft Office Word 2010, including all footnotes, contains 5,397 words, which is less than the 15,500 word limit. The undersigned further certifies that he signed the original, in compliance with Mo. Sup. Ct. R. 55.03(a).

/s/ Andrew Martin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was filed with the Court's electronic filing system, on May 25, 2021, which will send notice pursuant to Mo. Sup. Ct. R. 103.08 to all parties of record.

/s/ Andrew Martin