LEXSEE 381 NE2D 897

Ernst & Ernst v. Underwriters National Assurance Company, et al., and Charles M. Beardsley, Booke and Company, et al.

No. 2-977A365

Court of Appeals of Indiana

178 Ind. App. 77; 381 N.E.2d 897; 1978 Ind. App. LEXIS 1066

October 23, 1978, Filed

SUBSEQUENT HISTORY: [***1]

Rehearing Denied December 7, 1978. Transfer Denied April 4, 1979.

PRIOR HISTORY:

Appeal from a trial court order granting discovery of documents in the possession of an accountant.

From the Hamilton Superior Court, *V. Sue Shields*, Judge.

DISPOSITION:

Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee client filed a suit against appellant accounting partnership for breach of contract and negligence. The client and another party requested production of documents. The accounting partnership invoked the accountant-client privilege of § 23 (Ind. Code Ann. § 25-2-1-23 (1971)) of the Public Accountancy Act of 1969 (Act). The Hamilton Superior Court (Indiana) issued an order granting discovery. The accounting partnership filed an appeal.

OVERVIEW: The accounting partnership argued that the accountant-client privilege provided for by § 23 of the Act belonged to the accountant. The court rejected the accounting partnership's construction of the statute. It held that the purpose for which testimonial privileges existed, the factual setting of the accountant-client relationship, and the rules of professional conduct of the accounting profession all mandated the conclusion that the accountant-client privilege of § 23 be construed as belonging to the client, not the accountant. The court stated that the privilege urged by the accounting partnership would insulate accountants from responsibility to their clients and foster incompetence and irresponsibility on the part of the accounting profession. The court concluded that the privilege created by § 23 was unavailable when the services of the accountant were contested. It drew analogies to the attorney-client and physician-patient privileges, which also were inapplicable when the professional services or competency of the attorney or physician were contested.

OUTCOME: The court affirmed the trial court's discovery order in the client's suit against the accounting partnership for breach of contract and negligence.

LexisNexis(R) Headnotes

Evidence > Privileges > Accountant-Client Privilege
[HN1] See Ind. Code Ann. § 25-2-1-23 (1971).

Governments > Legislation > Interpretation
[HN2] In arriving at the meaning of a statute it must be considered as an entirety, each part being considered with reference to all other parts.

Governments > Legislation > Interpretation
[HN3] The general office of a proviso is to qualify or limit the plain meaning of another portion of a statute.

Evidence > Privileges > Accountant-Client Privilege

[HN4] The accountant-client privilege created by Ind. Code Ann. § 25-2-1-23 (1971) belongs to the client, not the accountant.

Evidence > Procedural Considerations > Rule Application & Interpretation
[HN5] A fundamental principle of the system of adversary justice is that the public has a right to every person's evidence. Ind. Code Ann. § 34-1-14-1 (1971). Every person has a general duty to give what testimony he is capable of giving and any exemptions from that obligation are distinct exceptions to the positive general rule. This general principle, however, is subject to two broad exemptions: rules of exclusion and rules of privilege.

Evidence > Procedural Considerations > Rule Application & Interpretation
Evidence > Privileges > Accountant-Client Privilege
[HN6] A rule of exclusion, such as incompetency, facilitates the ascertainment of truth by excluding all evidence that is unreliable or is calculated to prejudice or mislead. Unlike rules of exclusion, rules of privilege, such as the accountant-client privilege, do not aid in the ascertainment of truth; instead, they frustrate the fact finding process by shutting out material and relevant information. Their sole justification is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.

Evidence > Procedural Considerations > Rule Application & Interpretation
Evidence > Privileges > Accountant-Client Privilege
[HN7] Evidentiary privileges are generally looked upon with disfavor. Certain specific privileges such as the accountant-client privilege, which were unknown at common law, are particularly disfavored, and are therefore strictly construed in order to limit their application.

Evidence > Procedural Considerations > Rule Application & Interpretation
Evidence > Privileges
[HN8] Four basic conditions of social policy must be satisfied before the burdens imposed on the judicial process by a privilege can be justified: (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Torts > Malpractice Liability > Professional Services
[HN9] See Ind. Code Ann. § 25-2-1-22 (1971).

Torts > Malpractice Liability > Professional Services
[HN10] Code of Ethics (Code) R. 301 (American Inst. of Certified Pub. Accountants) states: A member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client. The Code has been adopted by the Indiana Board of Public Accountancy as the rules of professional conduct of the Indiana accounting profession. Ind. Admin. R. & Reg. § (25-2-1-13)-1.

Evidence > Privileges > Accountant-Client Privilege
Evidence > Privileges > Attorney-Client Privilege
Evidence > Privileges > Doctor-Patient Privilege
[HN11] The privilege created by § 23 (Ind. Code Ann. § 25-2-1-23 (1971)) of the Public Accountancy Act of 1969 is unavailable when the services of the accountant are contested. The attorney-client privilege cannot be asserted in a suit which contests the attorney's professional services or otherwise attacks the professional competency of an attorney. Under similar circumstances, the physician-patient privilege is inapplicable.

COUNSEL:

James A. McDermott, James A. Strain, Michael R. Fruehwald, Barnes, Hickam, Pantzer & Boyd, of Indianapolis, *Christian, Waltz, White, Klotz & Free*, of Noblesville, for appellant.

William C. Barnard, James K. Sommer, Eric R. Johnson, Sommer, Barnard, Freiberger & Scopelitis, of Indianapolis, for appellee Underwriters National Assurance Co., et al. *Samuel A. Haubold, Lawrence P. Bemis, Russell J. Rotter; Kirkland & Ellis*, of Chicago; *Smith, Pearce, Barr & Howard*, of Noblesville, *Womble, Carlyle, Sandridge & Rice*, of Winston-Salem, North Carolina for appellees Charles M. Beardsley, Booke and Co., et al.

JUDGES:

Young, J. Lybrook, P.J., Concurs (Sitting by designation). Lowdermilk, J., Concurs (Sitting by designation).

OPINIONBY:

YOUNG

OPINION:

[*78] [**898] The issue presented for review is whether the order of the trial court granting discovery of documents in the possession of an accountant was proper in [***2] view of the provisions of IC 1971, 25-2-1-23 (Burns Code Ed.) (Section 23).

Ernst & Ernst (E & E), appellant-defendant, is a partnership engaged in the practice of certified public accounting. E & E was engaged to audit [*79] financial statements of Underwriters National Assurance Company (UNAC) for the year ended December 31, 1969. As a consequence of this audit, E & E expressed an opinion in the conventional form of an auditor's report. The auditor's report was addressed to UNAC's Board of Directors. The auditor's report and the accompanying financial statements were subsequently printed and distributed by UNAC to its shareholders and were included in its annual report to the applicable federal regulatory agency.

On December 21, 1970, all of UNAC's outstanding shares were exchanged for shares of UNAC International Corporation (International) and UNAC thereupon became a wholly-owned subsidiary of International. UNAC's shareholders became the shareholders of International and International became the corporate parent of UNAC.

E & E was subsequently engaged to audit International's consolidated financial statements for the years ending December 31, 1970, 1971, 1972 and [***3] 1973. The same audit services were performed for International as for UNAC. As a consequence of the audits of International's consolidated financial statements for the years ending December 31, 1970 and 1971, E & E also expressed separate opinions with respect to the financial statements of UNAC for the same years. These opinions were contained in separate auditor's reports which were addressed to International, UNAC's sole shareholder.

E & E's professional services in connection with these audit engagements are contested in this litigation. UNAC has alleged that "E & E's audits were not proper, workmanlike, thorough or skillfull" and that E & E is in breach of contract and guilty of negligence in connection with its audits of UNAC and International.

The documents sought by UNAC and Charles M. Beardsley and Booke and Company (Beardsley and Booke), appellees and co-defendants, relate primarily to these audit engagements. As more specifically described in the requests for production, UNAC seeks production of:

> Any and all documents produced, prepared, received, obtained, utilized or relied upon by E & E in the course of preparing:
>
> a. The 1969 Financial Statement
> b. [***4] The 1970 Financial Statement
> [*80] c. The 1971 Financial Statement
> d. The 1972 Financial Statement
> e. The 1973 Financial Statement

and Beardsley and Booke seek production of:

> [**899] All documents relating to audits of UNAC and the preparation [of] audited financial statements or other financial information for the following years:

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a. 1969
b. 1970
c. 1971
d. 1972
e. 1973
f. 1974

UNAC and Beardsley and Booke have also requested documents evidencing any communications relating to UNAC which E & E had with various third parties. The documents, which E & E has not produced and to the production of which E & E has objected on the basis of Section 23, consist principally of its work papers relating to its audits of the financial statements of UNAC and International.

Rather than being contained as an amendment to IC 1971, 34-1-14-5 (Burns Code Ed.) (Acts of 1881 [Spec. Sess.], ch. 38, § 275, p. 240, our witness incompetency statute, n1 Section 23 is one of twenty-six (26) sections of the "Public Accountancy Act of 1969," a legislative scheme designed to "regulate the practicing accountancy." The Act provides a broad range of [***5] control of accountants of every description; creates [*81] an "Indiana State Board of Accountancy" with

enunciated powers and duties including the power to confer the approbation of state approved licensure upon various degrees of bookkeepers such as the appellant-defendant E & E.

> n1 IC 1971, 34-1-14-5 (Burns Code Ed.) [Acts 1881 (Spec. Sess.), ch. 38, § 275, p. 240.]
>
> The following persons shall not be competent witnesses:
>
> First. Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not.
>
> Second. Children under ten [10] years of age, unless it appears that they understand the nature and obligation of an oath.
>
> Third. Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.
>
> Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.
>
> Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.
>
> Sixth. Husband and wife, as to communications made to each other.

[***6]

Preferred professional standards are described with attendant limitations. The Act is particularly concerned with the certification of the various occupations within the accounting family. It is a statutory design to regulate those who deal in books and figures, profit and loss statements, balance sheets, audits and the entire prolithera of numbers.

Deep within the recesses of this comprehensive legislation lies the section which concerns us now. [HN1] IC 1971, 25-2-1-23 (Burns Code Ed.) states:

> A certified public accountant or a public accountant or an accounting practitioner, or any employee, shall not be required to disclose or divulge information of which he may have become possessed, relative to and in connection with any professional service as a certified public accountant or a public accountant or accounting practitioner. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, That nothing herein shall be construed as prohibiting a certified public accountant or a public accountant from disclosing any data required to be disclosed by the standards of the profession in rendering an opinion on the [***7] presentation of financial statements, or in making disclosure where said financial statements, or *the professional services of the accountant pertaining thereto are contested*. (Emphasis added.)

The trial court held that Section 23 creates a privilege personal to the client and the privilege has been waived by the client. Moreover, the court held that the statutory proviso applies to the privilege and therefore, irrespective of who holds the privilege, E & E cannot invoke the privilege because its professional services are contested. We agree and affirm the order of discovery.

E & E argues that Section 23 should not be read in its entirety, but rather as containing two separate and distinct rules: one dealing with compelled disclosure of information, and the [**900] other dealing with voluntary disclosure of information. E & E's interpretation, in fact, consists of reading the first sentence of Section 23 without reference to the remaining portion of the section. As properly construed by the trial court, [*82] however, all portions of Section 23 must be treated as an integrated whole. The trial court's construction of Section 23 is consistent not only with the [***8] underlying purpose of the accountant-client privilege and other analogous testimonial privileges, but is also compelled by the application of settled rules of statutory construction.

In *Walgreen Co. v. Gross Income Tax Division (1947), 225 Ind. 418, 75 N.E.2d 784, 785,* the Supreme Court of Indiana stated that [HN2] "in arriving at the meaning of a statute it must be considered as an entirety, each part being considered with reference to all other parts." This principle was recognized and applied by the lower court in its construction of Section 23. Section 23 cannot be divided into separate watertight compartments.

Section 23 contains two sentences. The first sentence basically states that a "certified public accountant . . . shall not be required to disclose or divulge information of which he may have become possessed, relative to and in connection with any professional service as a certified public accountant . . . ." The second sentence then amplifies and expands upon

the first sentence in two ways. First, it provides that the information which is the subject of the section shall be regarded as both "confidential and privileged." In this statement the General Assembly has recognized [***9] a most basic rule: granting a privilege to the source of information requires that a correlative duty of confidentiality be placed on the recipient. Second, it qualifies and limits the scope and application of the prohibition against compelled disclosure. The prohibition does not apply where, as here, the accountant's professional services are contested.

E & E argues that the meaning of the first sentence must be insulated and distinguished from the meaning of the second sentence. E & E thereby assumes that the first sentence must be read without reference to the second. This assumption, however, is directly contrary to the rule of statutory construction stated in *Walgreen*.

In making its argument, E & E urges that it is simply giving the words in Section 23 their plain and ordinary meaning. But *Walgreen* states an equally important rule of statutory construction. These two rules are by no means inconsistent and both must be considered in construing a statute. *See Department of Treasury v. Reinking (1941), 109 Ind.App. 63,* [*83] *32 N.E.2d 741.* It is urged that the proviso does not qualify the plain meaning of the first sentence. We reject this argument for [***10] two reasons. First, [HN3] the general office of a proviso is to qualify or limit the plain meaning of another portion of a statute. *See State v. Shrode (1949), 119 Ind.App. 57, 83 N.E.2d 900, 902.* Second, the case cited by E & E to support its assertion, *State v. Shanks (1912), 178 Ind. 330, 99 N.E. 481,* instead supports the statutory construction process which was adopted by the lower court. The Supreme Court of Indiana clearly stated in *State v. Shanks* that, in the first instance, an effort must be made "to harmonize all the provisions of the statute by construing *all parts together* . . . ." *99 N.E. at 482* (emphasis added).

Thus, Section 23 contains several interrelated principles concerning the privileged and confidential status of certain accounting information, with the proviso in the second sentence qualifying and limiting the meaning of the first sentence. Section 23 cannot be properly construed as containing two separate and distinct rules.

Read in its entirety, Section 23 provides that certain accounting information is privileged and confidential. As the trial court correctly held, the accountant-client privilege created by Section 23 belongs to the client. [***11] This is the clear import of the language of Section 23.

[**901] By using the phrase "nothing herein shall be construed as prohibiting a certified public accountant . . . from disclosing" in the proviso portion of Section 23, the General Assembly has clearly indicated that it intended a privilege personal to the client. If the General Assembly had intended a privilege personal to the accountant, it would have used words other than "prohibiting . . . from disclosing" since the person to whom a privilege belongs always has the right to voluntarily disclose privileged information.

Whether, as argued by E & E, the proviso contained in Section 23 applies only to the accountant's duty of confidentiality, the use by the General Assembly of the word "herein," rather than a more restrictive phrase, indicates that the proviso applies both to the accountant's duty of confidentiality and to the client's privilege.

Thus, the words used by the General Assembly indicate that [HN4] the accountant-client privilege created by Section 23 belongs to the client, not the accountant. In granting a privilege to the client, the General [*84] Assembly has placed the correlative duty of confidentiality [***12] on the accountant. These conclusions are supported not only by the existing case law concerning testimonial privileges in both Indiana and other jurisdictions, but also by the rules of professional conduct of the Indiana accounting profession.

[HN5] A fundamental principle of our system of adversary justice is that the public has a right to every person's evidence. n2 Every person has a general duty to give what testimony he is capable of giving and any exemptions from that obligation are distinct exceptions to the positive general rule. 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton Rev. 1961); *see Collins v. Bair (1971), 256 Ind. 230, 268 N.E.2d 95, 98.*

n2 IC 1971, 34-1-14-1 (Burns Code Ed.) [Acts 1881 (Spec. Sess.), ch. 38, § 265, p. 240].

This general principle, however, is subject to two broad exemptions: rules of exclusion and rules of privilege. [HN6] A rule of exclusion, such as incompetency, facilitates the ascertainment of truth by excluding all evidence that is unreliable or is "calculated to prejudice [***13] or mislead." C. McCORMICK, EVIDENCE § 74, at 152 (2d ed. 1972); Note, *Testimonial Privilege and Competency in Indiana*, *27 IND. L.J. 256, 257 (1952).*

Unlike rules of exclusion, rules of privilege, such as the accountant-client privilege, do not aid in the ascertainment of truth; instead, they frustrate the fact finding process by shutting out material and relevant information. Their sole justification is the "protection of interests and relationships which, rightly or wrongly, are

regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." C. McCORMICK, *supra; see Collins v. Bair, supra; see generally* 8 J. WIGMORE, *supra*, § 2285.

The common law recognizes no privilege for confidential communications between accountants and their clients. *Falsone v. United States (5th Cir. 1953), 205 F.2d 734, 739, cert. denied* (1953), *346 U.S. 864.* No privilege exists under federal law, and no state created privilege has been recognized in the federal courts. *Couch v. United States (1972), 409 U.S. 322, 335.* Indiana, however, is one of 17 [*85] states that have enacted statutes creating [***14] a privilege for confidential communications between accountants and their clients. Note, *Privileged Communications: The Federal Rules of Evidence and Indiana Law; Who's Got a Secret?*, *9 IND. L. REV. 645, 667 (1976).* [HN7] Evidentiary privileges are generally looked upon with disfavor by the courts and commentators. Moreover, certain specific privileges such as the accountant-client privilege, which were unknown at common law, are particularly disfavored, and are therefore strictly construed in order to limit their application. *United States v. Bowman (3rd Cir. 1966), 358 F.2d 421, 423; United States v. Jaskiewicz (E.D. Pa. 1968), 278 F.Supp. 525, 530;* and *Rubin v. Katz (E.D. Pa. 1972), 347 F.Supp. 322, 324. See also*, Note, *Privileged Communications -- Accountants and Accounting*, *66 MICH. L. REV.* [**902] *1264, 1266 and 1268 (1968);* Note, *The Accountant-Client Privilege Under the New Federal Rules of Evidence -- New Stature and New Problems*, *28 OKLA. L. REV. 637, 641 (1975);* and Note, *Privileged Communications*, *9 IND. L. REV. 645, 668 (1975), supra*.

It is generally recognized that Wigmore's [HN8] four basic conditions of social policy must be satisfied [***15] before the burdens imposed on the judicial process by a privilege can be justified:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 J. WIGMORE, EVIDENCE, § 2285 (McNaughton rev. ed. 1961) (emphasis omitted).

An examination of the privilege urged by E & E demonstrates that it does not satisfy any of Wigmore's four basic conditions. The construction of Section 23 urged by E & E has nothing whatever to do with the confidentiality of communications or the fostering of any relationship. There is no showing to support a privilege belonging to the accountant.

The privilege urged by E & E would tend to insulate accountants from [*86] their responsibility to their clients. Such a privilege could only foster incompetence [***16] and irresponsibility on the part of the accounting profession. The General Assembly obviously did not intend such a result.

These rules of statutory construction have been followed by numerous Indiana decisions interpreting privileges created by statutes, and by other states that have enacted similar accountant-client privilege statutes. *See, e.g., Collins v. Bair, supra*, at 97; *Stayner v. Nye (1949), 227 Ind. 231, 85 N.E.2d 496, 499;* see *Pattie Lea, Inc. v. District Court (1967), 161 Colo. 493, 423 P.2d 27.*

Thus privileges do not exist in a vacuum. They are enacted to foster some relationship or protect some interest that is believed to be of sufficient social importance to justify the sacrifice of relevant evidence to the fact finding process. In analyzing the nature and scope of any statutorily created privilege, the first step is to determine the specific interest or relationship that the privilege seeks to foster. Only by doing this can a specific claim of privilege be evaluated against the principle that the public is entitled to every person's evidence.

The purpose of the accountant-client privilege was well stated by the Supreme Court of Georgia in *Gearhart* [***17] *v. Etheridge (1974), 232 Ga. 638, 208 S.E.2d 460, 461:*

> The purpose of the accountant-client privilege is to insure an atmosphere wherein the client will transmit all relevant information to his accountant without fear of any future disclosure in subsequent litigation. Without an atmosphere of confidentiality the client might withhold facts he considers

> unfavorable to this situation thus rendering the accountant powerless to adequately perform the services he renders.

Stated another way, the legislature has made a judgment that the welfare of the client will be best served if matters communicated between client and accountant are subject to a zone of privacy controlled by the client.

Thus, for the accountant-client privilege created by Section 23 to be consistent with its purpose, it must be personal to the client. The fundamental purpose of the privilege provides no basis for a contention that the privilege was designed to permit accountants to unilaterally suppress evidence to the detriment of their [*87] clients. Indeed, it is unreasonable to suggest that the General Assembly intended to give accountants special privileges over the clients they are paid to [***18] serve.

[**903] E & E expressly offers no justification for permitting it to act contrary to its clients' interests. E & E does, however, appear to imply that the privilege created by Section 23 must belong to it because Section 23 covers information received not only from the client, but also from third parties. This argument is meritless. Any third-party communications an accountant receives in the course of an audit emanates from and is directly concerned with the financial condition of the client.

The audit process has been described as follows. An audit begins with learning a client's accounting system, internal controls, accounting principles, operations, management policies and practices, business environment, and legal restraints. This information is gained through interviews with high level management, as well as the client personnel who are knowledgeable about the client's accounting systems and controls. Once an auditor understands a client, he will devise a preliminary evaluation program to determine the reliability of the client's systems, and thereby determine what the audit must check as well as what it need not check. Based on all this information gathered [***19] from the client, the auditor will draft an audit program detailing the steps to be performed during the audit examination.

Next, the auditor will normally conduct a number of functional tests to determine whether the client's internal controls are operating. For example, a functional test of the client's accounts payable system might involve determining whether only legitimate and appropriate transactions are processed. To determine this an auditor might test the client's authorization system to see if it would detect inappropriate transactions. Once these controls are verified, the auditor may revise the audit program and possibly make some constructive comments to management. Armed with all this information from the client, the auditor will then validate the balance sheet accounts, and perform any other substantive tests believed necessary. After this is completed, the financial statements are reviewed with management and ultimately an opinion is issued. *See generally*, R. MONTGOMERY, MONTGOMERY'S AUDITING (9th ed. 1975).

[*88] The foregoing review of what might be called the audit cycle reveals the depth of the sensitive business information learned about a client's [***20] operations. This information must be provided *by the client*, not third parties. Any third-party information which an accountant receives in the course of an audit is generally just a validation or confirmation of the client's accounts. Plainly, the person or entity concerned with non-disclosure is the client, and as such the accountant-client privilege must belong to the client.

The provision of IC 1971, 25-2-1-22 (Burns Code Ed.) (Section 22) requiring client consent prior to the transfer and sale of an accountant's working papers further supports and reinforces the fact that the privilege created by Section 23 belongs to the client. n3 By prohibiting the sale or transfer of working papers without the consent of the client, the General Assembly in Section 22 has indicated that the client has the predominant legal interest regarding the disclosure or non-disclosure of the accounting information contained in the accountant's working papers.

> n3 [HN9] All statements, records, schedules, working papers and memoranda made by a certified public accountant or public accountant or accounting practitioner incident to or in the course of professional service to clients by such accountant, except reports submitted by a certified public accountant or public accountant or accounting practitioner to a client, shall be and remain the property of such accountant, in the absence of an express agreement between such accountant and client to the contrary. No such statement, record, schedule, working paper or memorandum shall be sold, transferred, or bequeathed, *without the consent of the client* or his personal representative or assignee, to anyone other than one or more surviving partners or new partners of such accountant. (emphasis added.)
>
> IC 1971, 25-2-1-22 (Burns Code Ed.)

[***21]

Finally, if Section 23 is given the construction argued by E & E, the result would be an all pervasive privilege personal to the [**904] accountant which could be used in derogation of his clients' best interests. This privilege would extend far beyond the scope of any other common law or statutory privilege. In the absence of a clear expression in Section 23 to this effect, it is difficult to believe that the General Assembly intended to create so dramatic a departure from prior law and to invest this class of citizens with such a unique super-privilege.

It is similarly difficult to believe that the General Assembly intended [*89] Section 23 to be a dramatic departure from the code of ethics of the American Institute of Certified Public Accountants (AICPA). n4 [HN10] Rule 301 of the AICPA's code states: A member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client. Any refusal by E & E to disclose client information when the client has consented to disclosure would thus be in direct violation of the clear intent of Rule 301.

> n4 The AICPA's Code has been adopted by the Indiana Board of Public Accountancy as the rules of professional conduct of the Indiana accounting profession. IND. ADMIN. R. & REG. § (25-2-1-13)-1 (Burns Code Ed.)

[***22]

In summary, therefore, the purpose for which testimonial privileges exist, the factual setting of the accountant-client relationship, and the rules of professional conduct of the Indiana accounting profession all mandate the conclusion that the accountant-client privilege created by Section 23 be construed as belonging to the client, not to the accountant.

There are several decisions from other jurisdictions interpreting accountant-client privilege statutes, which we may look to in construing Section 23. *See State ex rel. Murray v. Estate of Riggens (1975), 164 Ind.App. 314, 328 N.E.2d 248, 252.* These decisions are consistent with the holding of the trial court that the privilege created by Section 23 belongs to the client, not the accountant.

E & E has urged that the case law from other states concerning accountant-client privilege statutes is divided into two categories: cases from states whose statutes have "client consent" provisions and cases from states which do not. This characterization is erroneous. Other states have construed their accountant-client privilege statutes as creating a privilege personal to the client irrespective of whether the statute contained a [***23] client consent provision.

The most thoughtful analysis of any accountant-client statute is found in *Gearhart v. Etheridge, supra,* in which the Supreme Court of Georgia concluded that the state's statutory accountant-client privilege belonged solely to the client. The Georgia statute, analyzed by the court in *Gearhart*, GA. CODE ANN. § 84-216 (1975) now repealed and replaced with a statute GA. CODE ANN. § 84-220 (1975) more like the one we are now construing, states:

> [*90] Any communications to any practicing certified public accountant transmitted to such accountant in anticipation of, or pending, the employment of such accountant shall be treated as confidential and not disclosed nor divulged by said accountant in any proceedings of any nature whatsoever. This rule shall not exclude the accountant as a witness to any facts which may transpire in connection with his employment.

It contains no client consent provision. Nevertheless, after analyzing the purpose of the statute, the court held that one joint venturer could not prohibit the accountant of the joint account from testifying as to communications between himself and the other principal because, [***24] although all communications between the joint clients and their accountant are privileged as to all outside parties, the privilege does not exist between the principals.

The Illinois accountant-client privilege statute, which contains no client consent provision, was construed in *Kunin v. Forman Realty Corp. (1959), 21 Ill.App. 2d 221, 157 N.E.2d 785, appeal dismissed* (1959), *17 Ill.2d 543, 162 N.E.2d 401.* The Illinois statute, ILL. REV. STAT. ch. 110-1/2, § 51 (1975), renumbered at ILL. ANN. STAT. ch. 111, § 5533 (Smith-Hurd) reads in its entirety:

> A public accountant shall not be required by any court to divulge information or [**905] evidence which has been obtained by him in his confidential capacity as a public accountant.

In *Kunin* the director of a corporation sued the corporation to obtain copies of the corporation's audit reports for two years. The plaintiff subpoenaed the corporation's auditor to produce the audit reports and to

testify about them at trial. The trial court quashed the subpoena and refused to permit the auditor to testify at trial. The appellate court reversed, holding that a director of a corporation was entitled to a copy [***25] of the corporation's audit report and that the audit report was not protected by a privilege belonging to the accountant. In doing so, the court stated:

> It is argued that under the existing Illinois statute, a report is privileged. Privileged for whom? Not the accountant. *It is privileged for his client*.

157 N.E.2d at 788. (emphasis added).

In *Savino v. Luciano (Fla. 1957), 92 So.2d 817,* the Supreme Court of [*91] Florida concluded that the Florida accountant-client privilege was personal to the client and therefore could be waived by the client. E & E implies that this decision is irrelevant to an interpretation of Section 23 because the Florida statute contains a consent provision. The fallacy of the argument is twofold. First, the court did not rely on the consent portion of the statute. And second, the court's holding was based on the nature of the privilege itself.

> As in the case of all personal privileges, the accountant-client privilege may be waived by the client. And, as in all confidential and privileged communications, "[t]he justification for the privilege lies not in the fact of communication, but in the interest of the persons [***26] concerned that the subject matter should not become public."

92 So.2d at 819 (citation omitted). *Savino* thus supports our conclusion that, when analyzed from the perspective of its nature and purpose, the privilege created by Section 23 belongs to the client.

The Supreme Court of Colorado in *Weck v. District Court (1966), 158 Colo. 521, 408 P.2d 987,* construing a statute containing a client consent provision concluded that "[t]he privilege created by the Colorado statute is not the privilege of the accountant but that of the client . . .," *408 P.2d at 992,* without specific reference to the statute's client consent provision. This conclusion is entirely consistent with the purpose of the privilege here.

Consistent with the conclusions reached by the courts in *Gearhart, Kunin, Savino* and *Weck*, commentators have uniformly concluded that the accountant-client privilege belongs to the client. Comment, *Evidence: The Accountant-Client Privilege Under the New Federal Rules of Evidence -- New Stature and New Problems*, *28 OKLA. L. REV. 637, 640 (1975);* Jentz, *Accountant Privileged Communications: Is It a Dying Concept Under the New Federal Rules of Evidence?* [***27] , *11 AM. BUS. L.J. 149, 152-53 (1973);* Note, *Privileged Communications -- Accountants and Accounting*, *66 MICH. L. REV. 1264, 1269 (1968).*

In summary, the majority of jurisdictions n5 that have considered the question have concluded that the accountant-client privilege is personal [*92] to the client. This conclusion is not based on artificial distinctions in the wording of particular statutes, but upon an analysis of the nature and purpose of the privilege itself.

> n5 In addition to Georgia, Illinois, Florida, and Colorado, Louisiana has by implication concluded that the accountant-client privilege belongs to the client. *Mercantile Credit Corp. v. Engstrom's of Alexandria, Inc. (La. App. 1969), 223 So.2d 428.*

E & E relies on one New Mexico decision construing a later repealed statute and several federal decisions which refer to the Illinois statute in support of its position that Section 23 creates a privilege in its favor. n6 In none of the cases, however, was [**906] an accountant permitted [***28] to withhold information concerning the client when the client had requested disclosure of the information.

> n6 In *United States v. Balistrieri (7th Cir. 1968), 403 F.2d 472, vacated on other grounds* (1969), *395 U.S. 710* the court reasoned that in a federal criminal tax prosecution federal law applied and no accountant-client privilege exists in federal law. In *F.T.C. v. St. Regis Paper Co. (7th Cir. 1962), 304 F.2d 731* the court stated the system of rules of evidence in force for trials by judges or in courts of equity is not applicable to inquiries of fact determined by administrative tribunals or officers. Therefore the privilege was not available. Such was the case in *Dorfman v. Rombs (N.D. Ill. 1963), 218 F.Supp. 905*. In *Baylor v. Mading-Dugan Drug Co. (N.D. Ill. 1972), 57 F.R.D. 509,* the court held the Illinois statutory privilege not applicable in a federal case. The statutory privilege was held waived by failing to raise any objection during testimony in *Ash v. H. G. Reiter Co. (1967), 78 N.M. 194, 429 P.2d 653.* In all of these cases then the statutory privilege, albeit discussed, was not a controlling

factor. In both *Palmer v. Fisher (7th Cir. 1955), 228 F.2d 603, cert. denied (1956) 351 U.S. 965, overruled on other grounds* (1968), *360 F.2d 868, 872* and *Radiant Burners, Inc. v. American Gas Ass'n. (N.D. Ill. 1962), 209 F.Supp. 321, rev'd. on other grounds* (7th Cir. 1963), *320 F.2d 314, cert. denied* (1963), *375 U.S. 929* which relied on Palmer in discussing the accountant-client privilege, federal courts are interpreting a state statute. The state court in *Kunin, supra,* construes the statute as granting the client the privilege. In such a situation the federal court's interpretation is not controlling. *See Tennessee Enamel Mfg. Co. v. Stoves, Inc. (6th Cir. 1951), 192 F.2d 863, cert. denied* (1952), *342 U.S. 946* and *Chaffin v. Nicosia (1974), 261 Ind. 698, 310 N.E.2d 867.*

[***29]

Indiana decisions interpreting the state's attorney-client and physician-patient privilege also support the conclusion that the privilege created by Section 23 belongs to the client. Both privileges are designed to encourage full disclosure to the physician or attorney in order that the fullest measure of professional services can be provided to the client or patient. Accordingly, our courts have held that each privilege is personal to the client or patient and can be waived only by that person. *See, e.g., Collins v. Bair, supra; Key v. State (1956), 235 Ind. 172, 132 N.E.2d 143, 145.*

In *Collins v. Bair, supra,* the Supreme Court of Indiana held that the [*93] physician-patient privilege is waived when a patient places his mental or physical condition in issue by way of claim or defense. In so holding, the Court explained the purpose of the physician-patient privilege as follows:

> The privilege has been justified on the basis that its recognition encourages free communications and frank disclosure between patient and physician which, in turn, provide assistance in proper diagnosis and appropriate treatment. To deny the privilege, it was thought, would destroy [***30] the confidential nature of the physician-patient relationship and possibly cause one suffering a particular ailment to withhold pertinent information of an embarrassing or otherwise confidential nature for fear of being publicly exposed.

268 N.E.2d at 98. The same justification applies to the accountant-client privilege. It has been created to encourage communications between an accountant and his client, and therefore must be deemed personal to the client.

In *Key v. State, supra,* the trial court's exclusion of testimony of an attorney was reversed by the Supreme Court of Indiana on the basis of its finding of an implied waiver of the attorney-client privilege. In reaching its conclusion, the Supreme Court stated:

> It is well settled, however, that the confidential relationship of attorney and client is not absolute for all purposes, but is a privilege which belongs to the client, and the client alone, to claim or to waive; and where the client himself testifies concerning the privileged matter, he then waives the privilege.

132 N.E.2d at 145. This statement is entirely consistent with the universally recognized justification for the attorney-client privilege, [***31] "namely, that of encouraging full disclosure by the client for the furtherance of the administration of justice . . . ." C. McCORMICK, *supra*, § 89, at 182. Again, the same justification applies to the accountant-client privilege.

Analogies to the attorney-client and physician-patient privilege also support the conclusion that [HN11] the privilege created by Section 23 is unavailable when the services of the accountant are contested.

[**907] It has long been established that the attorney-client privilege cannot be asserted in a suit which contests the attorney's professional services [*94] or otherwise attacks the professional competency of an attorney. *Nave v. Baird (1859), 12 Ind. 318; Moore v. State (1953), 231 Ind. 690, 111 N.E.2d 47.* Under similar circumstances, the physician-patient privilege is inapplicable. *Lane v. Boicourt (1891), 128 Ind. 420, 27 N.E. 1111; Becknell v. Hosier (1894), 10 Ind.App. 5, 37 N.E. 580.*

While the privilege created by Section 23 is closely analogous to the two most recognized personal privileges, attorney-client and physician-patient, E & E contends that the accountant-client privilege is more closely analogous to the Indiana [***32] newsman's privilege. Upon close examination of the nature and purpose of this privilege, however, it is clear that it is not analogous to the accountant-client privilege.

The Indiana newsman's privilege is personal to the newsman. This was recognized by the Supreme Court of Indiana in *Hestand v. State (1971), 257 Ind. 191, 273*

N.E.2d 282 and *Lipps v. State (1970), 254 Ind. 141, 258 N.E.2d 622.* In *Branzburg v. Hayes (1972), 408 U.S. 665, 695, 726,* Justice Stewart, in dissent, employed reasoning applicable to our construction of the Indiana newsman's privilege saying:

> As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.
>
> "The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient [***33] relationships. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed [*95] by news sources can reach public attention." Note, *80 Yale L.J. 317, 343 (1970).*

408 U.S. at 726 n. 2.

Thus analyzed, the newsman's privilege is properly lodged in the reporter in order to protect society's interest in the free flow of information. But as Justice Stewart observed, the interests served by other personal privileges, such as the accountant-client privilege, are fundamentally different; they are designed to protect the personal interests of the patient or client by creating [***34] assurances of confidentiality.

Section 23 clearly creates a privilege personal to client. This conclusion is supported both by the fundamental purpose for which the accountant-client privilege was created and established rules of statutory construction. It is also consistent with decisions from other jurisdictions which have construed accountant-client privilege statutes.

Accordingly, we affirm the discovery order entered by the trial court on September 9, 1977.

Order affirmed.

Lybrook, P.J., Concurs (Sitting by designation).

Lowdermilk, J., Concurs (Sitting by designation).

2004 WL 615344, State ex rel. Nixon v. QuikTrip Corp., (Mo. 2004)

*615344 Only the Westlaw citation is currently available.

Supreme Court of Missouri,
En Banc.

STATE ex rel. Jeremiah W. (Jay) NIXON, Attorney General, Respondent,
v.
QUIKTRIP CORPORATION, Appellant.

No. SC 85399.
March 30, 2004.

Background: State brought an enforcement action against gasoline retailer, alleging that retailer violated the Motor Fuel Marketing Act when it sold motor fuel below cost because effect of sale was to unfairly divert trade from a competitor or otherwise to injure a competitor. The Circuit Court, Jefferson County, Timothy J. Patterson, J., entered summary judgment for State. Retailer appealed.

Holdings: The Supreme Court, Michael A. Wolff, J., held that:

(1) fact that competitor's profits were diminished by retailer's sales of motor fuel below cost was insufficient to make viable claim under the Act, and

(2) genuine issues of material fact existed as to whether retailer's sale of motor fuel below cost unfairly diverted trade from its competitors and whether such underpricing caused injury to competitors.

Reversed and remanded.

Limbaugh, Stephen N., Jr., J., dissented in separate opinion filed, in which Benton and Stith, JJ., concurred.

[1] Trade Regulation k893

382 ----

382II Statutory Unfair Trade Practices
382II(B) Other Statutes, Liabilities and Remedies Under
382II(B)2 Price Cutting and Sales Below Cost
382k893 Intent and Purpose of Seller; Effect of Sales.

Fact that competitor's profits were diminished by gasoline retailer's sale of motor fuel below cost was insufficient to make a

viable claim that retailer unfairly diverted trade or caused "injury" to a competitor under the Motor Fuel Marketing Act. V.A.M.S. ss 416.600 et seq, 416.615.

[2] Trade Regulation k897

382 ----

382II Statutory Unfair Trade Practices
382II(B) Other Statutes, Liabilities and Remedies Under
382II(B)2 Price Cutting and Sales Below Cost
382k895 Actions and Administrative Proceedings
382k897 Evidence.

Motor Fuel Marketing Act shifts the evidentiary burden to the defendant when the state or the private plaintiff first makes a prima facie showing that defendant's below-cost sales of motor fuel had effect of either injuring a competitor or of unfairly diverting trade from a competitor. V.A.M.S. ss 416.615, 416.640.

[3] Appeal and Error k893(1)

30 ----

30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In General.

The Supreme Court's review of a grant of summary judgment is essentially de novo.

[4] Appeal and Error k863

30 ----

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

The propriety of summary judgment is an issue of law, and the criteria for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially.

[5] Appeal and Error k934(1)

30 ----

30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In General.

When considering appeals from summary judgments, the Supreme Court reviews the record in the light most favorable to the party against whom judgment was entered and will accord the non-movant the benefit of all reasonable inferences from the record.

[6] Trade Regulation k895.1

382 ----

382II Statutory Unfair Trade Practices
382II(B) Other Statutes, Liabilities and Remedies Under
382II(B)2 Price Cutting and Sales Below Cost
382k895 Actions and Administrative Proceedings
382k895.1 In General.

Genuine issue of material fact existed as to whether gasoline retailer's sale of motor fuel below cost unfairly diverted trade from its competitors because the competitors were unable to lower prices to compete with retailer's pricing, precluding summary

judgment in action filed by State that alleged retailer violated the Motor Fuel Marketing Act. V.A.M.S. s 416.615.

[7] Statutes k181(1)

361 ----

361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) In General.

[See headnote text below]

[7] Statutes k188

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 In General.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.

[8] Statutes k184

361 ----

361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 Policy and Purpose of Act.

When construing a statute, the Court considers the object the legislature seeks to accomplish and aims to resolve the problems addressed therein.

[9] Statutes k188

361 ----

361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 In General.

For purposes of statutory construction, the plain and ordinary meaning of a word is derived from the dictionary.

[10] Trade Regulation k895.1

382 ----

382II Statutory Unfair Trade Practices
382II(B) Other Statutes, Liabilities and Remedies Under
382II(B)2 Price Cutting and Sales Below Cost
382k895 Actions and Administrative Proceedings
382k895.1 In General.

Genuine issue of material fact existed as to whether gasoline retailer's sale of motor fuel below cost caused "injury" to its competitors' overall operations, in light of finding that no competing gas station exited market during period of retailer's underpricing, precluding summary judgment in action filed by State that alleged retailer violated the Motor Fuel Marketing Act. V.A.M.S. s 416.615.

[11] Trade Regulation k893

382 ----

382II Statutory Unfair Trade Practices
382II(B) Other Statutes, Liabilities and Remedies Under
382II(B)2 Price Cutting and Sales Below Cost
382k893 Intent and Purpose of Seller; Effect of Sales.

For purposes of the Motor Fuel Marketing Act, the concept of injury should be confined to the action of lowering posted prices to injure a competitor by forcing the competitor to sell below its cost; that kind of injury, if sustained over a period of time, would drive the competitor out of business, thus eliminating competition, and resulting ultimately in higher prices to the consuming public. V.A.M.S. s 416.615.

Appeal from the Circuit Court of Jefferson County, Timothy J. Patterson, Judge.

MICHAEL A. WOLFF, Judge.

Introduction

**1 Does Missouri's Motor Fuel Marketing Act protect gas stations from competition, which may raise prices to consumers, or

does the act only protect these businesses from injurious competition?

The state brought an action against QuikTrip for pricing its retail gasoline sales below its wholesale cost at its Herculaneum store on 23 days, alleging that QuikTrip violated the act. On stipulated facts, the circuit court granted summary judgment in favor of the state and assessed penalties of $3,000 per day.

On appeal, QuikTrip challenges the constitutionality of the statute and, alternatively, argues that the circuit court has misconstrued the statute by holding QuikTrip liable for selling gas to the public at less than its wholesale cost. Because of the challenge to the validity of the statute, this Court has exclusive appellate jurisdiction. Mo. Const. art. V, sec. 3.

[1] The Motor Fuel Marketing Act, (FN1) in section 416.615, makes it unlawful for QuikTrip to sell gas below its cost if the intent or effect of the sale or offer is (1) "to injure competition;" or (2) "to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor." The state's case rests on the theory that QuikTrip's gas pricing unfairly diverted trade from a competitor or otherwise "injured" a competitor. The state does not contend that there was an injury to competition.

What does it mean to "unfairly divert trade from a competitor, or otherwise to injure a competitor?" The circuit court's decision seems to be premised on the theory that a competitor suffers "injury" from QuikTrip's below-cost fuel pricing when the competitor lowers its prices and makes a smaller profit on its fuel sales. The statute, however, speaks simply of "a competitor," and these gas stations compete not just in fuel sales but in sales of many other items, the customer traffic for which may be generated by fuel sales. The statute, moreover, does not define "injure."

When QuikTrip prices its fuels below cost, and if a competitor must price its fuels below cost to meet this competition, the competitor has two choices: (1) the competitor can resist lowering its prices below its costs, in which case a court could find that the intent or effect of QuikTrip's below-cost pricing unfairly diverts trade from the competitor; or (2) the competitor can lower its prices below its costs and thus be "injured" by having to sell its fuels below cost, which may threaten its survival in the marketplace unless sales of other items keep the business profitable.

The circuit court's decision is premised on the theory that QuikTrip's sales of motor fuels below cost apparently diminished the competitor's profits. This is not sufficient to make a viable claim for unfairly diverting trade or causing "injury" to a competitor. The state's claim is, thus, unsupported by evidence of unfair diversion of trade or of injury to a competitor. The circuit court's judgment is reversed, and the case is remanded.

Facts and Decision of the Circuit Court

**2 The Attorney General brought an enforcement action against QuikTrip in 1999 alleging that QuikTrip had violated the act when it sold motor fuel below cost where the effect of that sale was to unfairly divert trade from a competitor or otherwise to injure a competitor. The state claimed that QuikTrip's below-cost sales at its Herculaneum, Missouri, store required its competitors either to lower their own prices or lose customers; thus, such sales unfairly diverted trade from competitors or otherwise injured them. The Attorney General sought injunctive relief and the imposition of a civil penalty.

QuikTrip argued that the use of the term "unfair" in the act means that there must be predation; therefore, the state must show predatory effect by either demonstrating the intent to destroy competition or actual destruction of competition. QuikTrip also claimed that the act violates the due process guaranty of the constitution because (1) the act is not reasonably related to the problems it seeks to address, and (2) it is impossible for QuikTrip to comply with the act's terms.

Both parties filed motions for summary judgment. The state initially alleged sales of motor fuel below cost on 76 days. At trial, the parties limited the motion for partial summary judgment to address only 23 days from March 16, 1997, to July 19, 1999, during which QuikTrip store number 611 in Herculaneum, Missouri, sold motor fuel below its costs and below the prices of its competitors. (FN2) QuikTrip concedes that on 22 days over the 33 months in question, it sold diesel fuel below cost and was not then matching a competitor's price. On one day, it sold unleaded gasoline below cost.

[2] The circuit court granted partial summary judgment in favor of the state. The court ruled that the act satisfied substantive due process and that the state had made its prima facie showing that QuikTrip had made below-cost sales with the effect of either injuring a competitor or of unfairly diverting trade from a competitor. (FN3) Following QuikTrip's motion for rehearing and the state's dismissal of its other allegations based on other dates of selling below cost, the circuit court entered judgment in favor of the state, finding 23 violations of the act and assessing civil penalties against QuikTrip.

The circuit court found that there were no material facts in dispute regarding QuikTrip's liability for the 23 dates "considering that the statute is constitutional without a predation requirement." The court stated, "On every day where QuikTrip priced below cost without a valid statutory defense, there is no dispute that such pricing caused injury to competitors."

[3][4][5] The state may recover civil penalties of $1,000 up to $5,000 per violation of section 416.615. The circuit court ordered QuikTrip to pay the state $75,000, claiming to assess a $3,000 penalty for each day of the 23 days QuikTrip violated the Act. (FN4) QuikTrip appeals. (FN5)

"To Unfairly Divert Trade" or "Otherwise to Injure a Competitor"

**3 [6] Section 416.615 makes it unlawful for QuikTrip to sell motor fuel below cost if, as the state contends in this case, "the intent or effect of the sale is ... to unfairly divert trade from a competitor, or otherwise to injure a competitor."

The question is whether the statute protects the QuikTrip competitor from the effects of competition or, more narrowly, protects only against competition that injures a competitor or that unfairly diverts trade from its business.

[7][8] "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1998). When construing a statute, the Court considers the object the legislature seeks to accomplish and aims to resolve the problems addressed therein. Gott v. Director of Revenue, 5 S.W.3d 155, 159 (Mo. banc 1999).

[9] The statute does not define "competitor." Is a "competitor" of QuikTrip simply another business that sells motor fuel, or is a "competitor" one who sells motor fuel and the other things that are sold in gas stations or truck stops, including soda, snacks, and other merchandise commonly purchased by travelers? "The plain and ordinary meaning of a word is derived from the dictionary." Hemeyer v. KRCG-TV, 6 S.W.3d 880, 881 (Mo. banc 1999). The dictionary definition of "competitor" is "one that is engaged in selling or buying goods or services in the same market as another." (FN6) Webster's Third New International Dictionary 464 (1993). If "competitors" are viewed as businesses that compete in fuel and the other items sold to travelers, then the record does not disclose the extent to which QuikTrip's below-cost pricing, on the days involved, may or may not have affected total sales at a business location on those days.

The argument before the circuit court solely concerned the sale of fuel. However, competition in the sale of motor fuel by the posting of fuel prices presumably is intended to generate customer traffic so that other items, such as snacks and travel supplies, can be sold from the location. The record in this case provides only scant information about the businesses' competition in the sale of items other than motor fuel. The record includes financial statements from a Mr. Fuel station in Herculaneum, which sells diesel and unleaded fuel, and from a Citgo station in Imperial, which does not sell diesel fuel. Financial statements from Arogas' Mr. Fuel indicate that the sale of merchandise during 1997 through 2000 accounted for approximately $90,000 of its gross profit each year. The sale of merchandise in each of these years was 13.4 percent to 19 percent of the total gross profits. In over-all volume it appears that the sales of items other than fuels is a fairly small part of these businesses' gross receipts, but the profit margins may be much higher than for the sale of fuels.

**4 When QuikTrip posts lower fuel prices, the two choices faced by a QuikTrip competitor are, as stated, to (1) resist lowering its prices because to do so would threaten its financial viability; or (2) lower its fuel prices to a point that its over-all financial viability is threatened. The first option would lead to the conclusion that QuikTrip had lowered its prices below costs unfairly to divert trade from its competitor. The competitor's second option is to lower its prices below its costs and thereby suffer an injury. (FN7)

The record does not disclose whether QuikTrip's actions unfairly diverted trade from its competitors because the competitors were unable to lower prices to compete with QuikTrip's pricing. This is a question that can be explored on remand.

Was There "Injury?"

[10][11] The other theory, also to be explored on remand, is whether QuikTrip's competitors suffered "injury." The statute does not say what it means to act with the intent or effect "to injure a competitor." The concept of "injury" is not defined.

The statute's use of the common word "injury" (FN8) allows for two plausible interpretations:

(1) "To injure a competitor" could mean simply a diminution of motor fuel sales by the competitor because of a posted lower price at the QuikTrip store. Under this interpretation, any diminution of sales volume in dollars, even though the competitor is still earning a profit, would be an "injury" because the competitor was not making as much as it would have made in the absence of the lower price at QuikTrip.

(2) The competitor could be deemed to suffer an injury only if it is forced, by virtue of the lower QuikTrip prices, to price its fuel product below its cost. In this interpretation, an "injury" only occurs when the competitor is in effect forced to operate its over-all business at a loss.

If (1) constitutes an "injury to a competitor," the statute shields the competitor from the ordinary effects of competition. One would assume that in a competitive market, a lowering of price by a competitor is intended to divert business from the competitor to one's self. In this interpretation, competition itself is injurious.

To interpret the statute in this way would be to assume that the general assembly intended by the statute greatly to diminish or eliminate competition in the sales of motor fuel and, thus, to create a state-enforced cartel of motor fuel sellers. Such an interpretation of the statute's concept of injury would result in injury to the public's interest in competition, with consumers thereby having to pay higher fuel prices at retail.

In the absence of a statutory definition, the concept of injury should be confined to the action of lowering posted prices to injure a competitor by forcing the competitor to sell below its cost. That kind of injury, if sustained over a period of time, would drive the competitor out of business, thus eliminating competition, and resulting ultimately in higher prices to the consuming public. If the public interest is the interest to be protected by the statute, the interpretation in (2) is the correct one.

Comparison to Missouri's Unfair Milk Sales Practices Act

**5 QuikTrip claims that the word "unfairly" in section 416.615.1(2) modifies both "divert trade" and "otherwise to injure a competitor," asserting that only those below-cost sales that unfairly divert trade or unfairly injure competitors are illegal. A reading of the statute demonstrates that the word "unfairly" only applies to "divert trade from a competitor."

QuikTrip relies on cases interpreting the Unfair Milk Sales Practices Act, sections 416.410 to 416.560, to argue that the state must show that QuikTrip unfairly injured a competitor. QuikTrip claims that State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287 (Mo.1968), and State ex rel. Thomason v. Adams Dairy Co. ., 379 S.W.2d 553 (Mo.1964), hold that "unfairly" modifies both "diverting trade" and "otherwise injuring a competitor." Instead, these cases address the prohibition against "unfairly diverting trade" and do not suggest that "unfairly" modifies the provision involving injury to a competitor. QuikTrip correctly asserts that cases interpreting the milk statute hold that a below-cost sale or free distribution of milk is not illegal unless the intent or effect is unfairly to divert such trade. Davis, 432 S.W.2d at 291; Thomason, 379 S.W.2d at 556.

While the act uses language similar to Missouri's Unfair Milk Sales Practices Act, passed in 1959, (FN9) these statutes differ in important ways. First, the milk statute does not prohibit the use of loss leaders--the pricing of one product in order to induce the customer to buy other products--while the use of motor fuel as a loss leader is expressly forbidden by section 416.615.1(2). Second, the milk statute specifically allows pricing below cost when sales are made in an isolated transaction and not in the usual course of business. Section 416.445(1).

The State Must Show That QuikTrip's Posted Prices Unfairly Diverted Trade or Injured a Competitor's Over-all Operations

The state argues that below-cost sales injure QuikTrip's competitors because competitors must either lower their prices or lose customers. While every below-cost sale produces this kind of "injury," not every below-cost sale is illegal. The parties agree that the act does not prohibit all below-cost sales of motor fuel. The legislature included subdivisions (1) and (2), which make it unlawful to sell or offer to sell motor fuel below cost with the intent or effect of injuring competition, inducing the purchase

of other merchandise, unfairly diverting trade from a competitor, or otherwise injuring a competitor. The statute, therefore, allows below-cost sales that do not fit the criteria of subdivisions (1) and (2) that make such sales illegal.

Some of the sales of which the state complains are violations that are one-hundredth or one-thousandth of a cent per gallon below cost. For example, the state alleged that, on March 14 and 15, 1999, QuikTrip violated the act by charging one-thousandth of a cent per gallon below its costs. Because the only pricing information available to competitors is the price posted on the pump or advertised outside of the gas station, competitors are only aware of the price QuikTrip charges to one-tenth of a cent per gallon. Violations below one-tenth of a cent, therefore, presumably would not affect competitors' pricing decisions.

**6 QuikTrip claims that in almost every case, the cause of the below-cost sale was an increase in QuikTrip's costs, rather than a reduction in price that would cause competitors to lower their prices. According to QuikTrip, on only five of the 76 days on which the state alleged QuikTrip sold below cost did QuikTrip reduce the price it charged to consumers. On three of those days, QuikTrip sold above cost, and on a fourth it was matching the price a competitor, Mr. Fuel, charged.

The state has not demonstrated that QuikTrip's occasional below-cost sales had an adverse effect on QuikTrip's competitors. Between March 1997 and August 1999, there were at least 11 stores within three miles of Herculaneum that competed with QuikTrip's store number 611. According to the record, no competing gas station exited the market during that period and one new entrant joined it.

QuikTrip's nearest competitors are Midwest Petroleum, which operates a Citgo station in Imperial, but does not sell diesel fuel at this station, and Arogas, which operates a Mr. Fuel in Herculaneum. The Citgo station had a gross margin of 5.8 percent in 1998 and 6.4 percent in 1999 on its gasoline sales, earning a profit every year. The Mr. Fuel station earned gross margins of 5.3 percent in 1997, 7.6 percent in 1998, 6.6 percent in 1999, and 6.8 percent in 2000 on its motor fuel operations. No station appears to have been in danger of going out of business.

Conclusion

This Court concludes that, under the act, the state must show that QuikTrip posted prices, when lower than its costs, caused an unfair diversion of trade or an injury to a competitor's over-all operations. Otherwise, the effect of the statute is to increase the profits of already healthy private businesses at the expense of consumers. There is no need, with this interpretation of the statute, to consider QuikTrip's due process arguments.

The circuit court's decision is not supported by evidence of unfair diversion of trade or of injury to a competitor as this Court interprets the act. The judgment is reversed, and the case is remanded.

WHITE, C.J., PRICE and TEITELMAN, JJ., concur.

LIMBAUGH, J., dissents in separate opinion filed.

BENTON and STITH, JJ., concur in opinion of LIMBAUGH, J.

STEPHEN N. LIMBAUGH, JR., Judge.

DISSENTING OPINION

I respectfully dissent.

Section 416.615.2 states that it is illegal to sell motor fuel below cost if "... 2) the intent or effect of the sale or offer is to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor." Although the General Assembly did not define the phrase "or otherwise to injure a competitor," it is clearly a catchall provision. Thus, any sale of motor fuel below costs that injures a competitor in any way other than by "induc[ing] the purchase of other merchandise" or by "unfairly divert[ing] trade from a competitor" is also unlawful under the act.

**7. What, then, is an injury to a competitor? This is the focus of the majority opinion, which correctly begins its analysis by noting that a competitor of QuikTrip has two choices when QuikTrip posts lower fuel prices: 1) to resist lowering its prices; or 2) to lower its prices. In my view, both choices injure the competitor. If a competitor resists lowering its prices, it will be injured by losing business to QuikTrip, which is a claim that falls under the clause "to unfairly divert trade." On the other hand, if a competitor lowers its prices in response to QuikTrip, the competitor will lose profits and in that way is otherwise injured. In this case, it is undisputed that QuikTrip's competitors have routinely and immediately reduced their own fuel prices to correspond to QuikTrip's below cost pricing, and I would hold that each corresponding reduction is sufficient proof of injury.

As I understand the majority opinion, the clause "or otherwise injure a competitor" can only be invoked where a competitor is forced to lower its fuel price below its own costs so that "the competitor is in effect forced to operate its over-all business at a loss." This interpretation is based not on the plain meaning of the word "injure," but the majority's own policy determination that if "injure" were broadly interpreted, the statute could "greatly diminish or eliminate the competition in the sale of motor fuel and, thus, create a state-enforced cartel of motor fuel sellers ." If we are to consider policy, however, the real policy behind the Act, as this Court noted in Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. banc 2001), is to prevent predatory pricing, which otherwise would drive competitors from the market and allow the formation of monopolies, which results in higher prices in the long run. Conversely, the majority policy analysis would encourage price wars among competitors, which only

result in lower prices in the short run.

In any event, I would base the opinion on the fact that the clause "or otherwise injure a competitor" is all-inclusive and necessarily addresses all injuries suffered, to whatever extent. As such, the clause covers not only those instances where a competitor is forced to lower its fuel prices below its own costs, but also those instances where a competitor is forced to lower its fuel prices to any degree. Even where a competitor lowers its prices to a level that does not fall below its own costs, there still is an injury due to a reduction in profits.

That said, I agree that not every below cost sale violates the Act. For example, if, as the majority asserts, prices were publicly posted only to the nearest one-tenth of a cent per gallon, then price reductions below one-tenth of a cent per gallon do not injure a competitor because there is no need for the competitor to make a corresponding reduction in price. In this case, however, the record does not clearly indicate which of the 23 below cost prices in question were posted to one-tenth of a cent per gallon or more. For that reason, I, too, would reverse the judgment, but only to remand for further fact-findings.

(FN1.) Sections 416.600 to 416.640. All statutory citations are to RSMo 2000 unless otherwise indicated.

The correct text of section 416.615 provides:

1. It is unlawful for any person engaged in commerce within this state to sell or offer to sell motor fuel below cost as defined in subdivision (2) of section 416.605, if:

(1) The intent or effect of the sale or offer is to injure competition; or

(2) The intent or effect of the sale or offer is to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor.

2. It is unlawful for any person engaged in commerce within this state to sell or offer to sell motor fuel at a price lower than the seller charges other persons at the same time and on the same level of distribution, if the intent or effect of the sale or offer is to injure competition.

3. It is unlawful for a person engaged in commerce in this state to sell or transfer motor fuel to itself or an affiliate for

resale in this state on a different marketing level of distribution at a transfer price lower than the price it charges a person who purchases for resale at the same time and on the same level of distribution, if the intent or effect of the sale or transfer is to injure competition.

The statute was amended in 1995 to remove the words "or effect." That amendment was invalid under Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994). The same conclusion was reached by the trial court in this case and by the Circuit Court of Cole County in Missouri Petroleum Marketers Assoc. v. State of Missouri, No. CV 195-989 CC, which was not appealed.

(FN2.) Section 416.620 excepts certain types of transactions from being found to violate 416.615. Section 416.620.3 provides for a "meeting competition" defense, which excepts below-cost sales when the seller is making a "good faith effort to meet an equally low price of a competitor." The "meeting competition" defense is not relevant to the 23 days at issue.

(FN3.) Section 416.640 shifts the evidentiary burden to the defendant when the state or the private plaintiff first makes a prima facie showing of a violation under 416.615.

(FN4.) Penalties of $3,000 per day for 23 days would amount to $69,000, not $75,000. There is no explanation for the discrepancy.

**7_ (FN5.) This Court's review of a grant of summary judgment is essentially de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The propriety of summary judgment is an issue of law and the criteria for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially. Id. When considering appeals from summary judgments, the Court reviews the record in the light most favorable to the party against whom judgment was entered and will accord the non-movant the benefit of all reasonable inferences from the record. Id.

(FN6.) There is also nothing in the statute to determine what a relevant "market" is for the purpose of determining who the competitors are. The record shows that there are at least 11 gas stations within three miles of the Herculaneum QuikTrip.

(FN7.) There is a third possibility, but whether it existed cannot be discerned from this record: When QuikTrip's fuel prices are set at below its costs, a competitor with lower costs might lower its prices to QuikTrip's level or below without falling below profitability.

(FN8.) The dictionary definition of "injury" is "an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm: wrong; a violation of another's rights for which the law allows an action to recover damages or specific

property or both: an actionable wrong." Webster's Third New International Dictionary 1164 (1993).

(FN9.) Section 416.415.1 provides:

No processor or distributor shall, with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise, offer to sell or sell within the state of Missouri, at wholesale or retail, any milk product for less than cost to the processor or distributor.

31 S.W.2d 67, 325 Mo. 1217, Public Service Com'n v. Kansas City Power & Light Co., (Mo. 1930)

*67 31 S.W.2d 67

325 Mo. 1217

Supreme Court of Missouri, En Banc.

PUBLIC SERVICE COMMISSION
v.
KANSAS CITY POWER & LIGHI CO.

No. 30518.
Sept. 3, 1930.

Appeal from Circuit Court, Cole County; H. J. Westhues, Judge.

Action by the Public Service Commission of Missouri against the Kansas City Power & Light Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

West Headnotes

[1] Statutes k208

361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 Context and Related Clauses.

Statute requiring permission of Public Service Commission before electrical plant may be constructed must be construed with other sections of act to determine whether permission to build extension to existing transmission line is necessary. V.A.M.S. s 393.170.

[2] Electricity k9(2)

145 ----
145k9 Transmission Facilities
145k9(2) Permit or Consent by Public Authorities.

Public Service Commission has authority to determine whether furnishing electricity to community is public necessity. V.A.M.S. s 393.170.

[3] Electricity k9(2)

145 ----
145k9 Transmission Facilities

145k9(2) Permit or Consent by Public Authorities.

County franchise does not authorize electrical utility to operate without authority from Public Service Commission. V.A.M.S. s 393.170.

[4] Appeal and Error k837(4)

30 ----

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k837 Matters or Evidence Considered in Determining Question
30k837(4) Pleadings and Rulings Thereon.

Where case is appealed on order sustaining demurrer to petition, sufficiency of petition must be determined from facts alleged therein.

[5] Pleading k214(1)

302 ----
302V Demurrer or Exception
302k214 Admissions by Demurrer
302k214(1) In General.

A demurrer admits truth of facts stated in the petition.

[6] Electricity k9(2)

145 ----
145k9 Transmission Facilities
145k9(2) Permit or Consent by Public Authorities.

Electrical utility operating under authority of commission cannot extend its lines to new territory without permission of Public Service Commission. V.A.M.S. s 393.170.

[7] Electricity k9(2)

145 ----
145k9 Transmission Facilities
145k9(2) Permit or Consent by Public Authorities.

Public Service Commission could require electrical line to be constructed in accordance with certain standards to prevent anticipated electrical interference with telephone line. V.A.M.S. s 393.170.

[8] Constitutional Law k80(2)

92 ----
92III Distribution of Governmental Powers and Functions
92III(C) Executive Powers and Functions
92k78 Encroachment on Judiciary
92k80 Powers, Duties, and Acts Under Legislative Authority
92k80(2) Of Boards and Commissioners.

Public Service Commission does not have jurisdiction to determine judicial questions.

[9] Constitutional Law k80(2)

92 ----
92III Distribution of Governmental Powers and Functions
92III(C) Executive Powers and Functions
92k78 Encroachment on Judiciary
92k80 Powers, Duties, and Acts Under Legislative Authority
92k80(2) Of Boards and Commissioners.

Determination of how electrical line should be built so as not to unreasonably interfere with telephone service is not judicial

question, but one for Public Service Commission. V.A.M.S. s 393.170.

[325 Mo. 1218] Johnson, Lucas, Landon & Graves, William C. Lucas, and Ludwick Graves, all of Kansas City, for appellant.

[325 Mo. 1219] D. D. McDonald and J. P. Painter, both of Jefferson City, for respondent.

[325 Mo. 1220] FRANK, J.

The Public Service Commission, plaintiff below. brought this action in the circuit court of Cole county to enjoin the Kansas City Power & Light Company from rendering electric service to the public over a six-mile extension of said company's transmission line, which was constructed without authority from the Public Service Commission, and for which no certificate of convenience and necessity was issued by said commission.

Defendant's demurrer to plaintiff's petition was overruled, and, defendant declining to further plead, judgment was renered enjoining defendant from the operation or use of said transmission line until such time as it applied for and received from the commission a certificate of convenience and necessity therefor and authority from said commission to furnish electric service over said line. Defendant appealed.

The petition, omitting caption and formal parts, is as follows:

"That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and is the owner and operator of electric plants located in Kansas City, Missouri, and serves the community of Kansas City and surrounding territory with electrical energy from its generating plants at Kansas City, Missouri; that the defendant did obtain from this Commission a permission and approval for the construction and operation of its electrical plants, and a certificate of convenience and necessity there *68 for, as required by section 10481, R. S. Mo. 1919, and has secured permissions, approvals and certificates of convenience and necessity for all of its transmission lines and extensions thereof except the extension here in controversy.

Plaintiff states that by the provisions of said Public Service Commission Law it is given jurisdiction and supervision over the rates, service and electric plants and distribution system of said defendant, with power and authority to supervise and regulate said rates and charges and to require said defendant to render safe, adequate and sufficient service.

"Plaintiff states that by the provisions of said Public Service Commission Law, it is given jurisdiction, supervision, power and authority over the rates, charges and service, with power and authority to supervise and regulate the rates and service of telephone and telegraph companies or corporations, and jurisdiction, supervision, power and authority to regulate the service over their lines and systems in the State of Missouri, and to require said telephone and telegraph companies to render safe, adequate and sufficient service.

"Plaintiff states that by the provisions of said Public Service Commission Law, it is given jurisdiction, supervision and authority to require of electrical corporations in the construction of electrical transmission lines that they be built according to certain standards, depending on the voltage of electricity so transported, in order to [325 Mo. 1221] prevent the destruction of telephonic and telegraphic communication by inductive interference.

"Plaintiff states that certain telephone lines and systems will be injuriously affected by inductive interference from the said extension of transmission line herein complained of, so that adequate service cannot be had over the telephone lines and systems so interfered with when electrical energy is being transported over the transmission line herein complained of.

"Plaintiff further states that under the provisions of the Public Service Commission Law, it is the duty of all electric corporation ing and operating electric plants or systems to apply to the Public Service Commission of Missouri for a certificate of convenience and necessity, permission and approval, to extend its transmission lines and electric service by any additions and

extensions not covered by previous certificates of convenience and necessity, but plaintiff says that the defendant in violation of its duty as aforesaid and in violation of the provisions of law of the Public Service Commission Act has extended its transmission lines and service beyond the permission it has heretofore received and is now supplying, or threatening to supply, electric energy over transmission lines that have not been authorized by the Public Service Commission and no certificate therefor has been issued by said Commission. Said transmission line extending from Fairville in the County of Saline to Miami in the County of Saline, all in the State of Missouri; the said transmission line being an extension of an existing transmission line which was duly authorized by plaintiff Commission.

"Plaintiff further states that it has no adequate remedy at law and institutes this proceeding under the provision of the Public Service Commission Law and more particularly the provision of section 10493, R. S. Mo. 1919."

The parties stipulated that, as "electrical interference" was an issue in the case, and is not a subject of general knowledge, the court, in determining the demurrer to the petition, might consider the following as defining "inductive interference" and the methods of eradicating it:

"A telephone circuit requires a complete path for the flow of the message current. The path may be two metallic wires, one for the flow of the current as it goes out and the other for the return of the message current, or the path may be made up of a metallic wire for the current as it goes out and the use of the earth for the other path for the returning current.

"If the wires which comprise one or both paths of the telephone circuit parallel a power circuit in comparatively close proximity, the electricity in the power circuit through the magnetic field caused by the electricity in the power circuit may produce in the telephone wires a flow of electricity. The flow of this electricity in the telephone wires [325 Mo. 1222] will be in one and the same direction. If the telephone circuit is a metallic circuit, that is has two wires, the current flowing in each wire will tend to neutralize one another, in many instances causing no serious interference with the telephone service. If the two telephone wires parallel the power circuit a long distance, the electricity caused to flow in the nearer wire may be greater than the electricity flowing in the other so that the result is that there is an interference with the telephone service. This interference is known as inductive interference.

"If the telephone circuit is made up of one wire and the earth, the electricity in the power circuit will produce a greater flow of electricity in the telephone wire, due to its closer proximity to the power circuit, than in the earth thereby causing a greater amount of electricity in one part of the circuit than in the other and resulting in interference with the telephone service in the same manner as above. This in the same way is known as inductive interference. Since there can be no transposition of the wire

with that of the earth, there is no way to balance the current flowing in the wire with that of flowing in the earth, thereby removing the inductive interference. *69 To remove the inductive interference requires making the telephone circuit metallic and probably transposition of the two

wires at proper places as mentioned above.

"The manner in which inductive interference shows itself in telephonic communication is by a buzzing sound discernable when talking over a telephone circuit thus affected."

Defendant's demurrer to the petition is bottomed on the grounds, (1) that the petition does not state facts sufficient to constitute a cause of action; (2) that it appears from the face of the petition that defendant complied with section 10481, Rev. St. Mo. 1919, by obtaining a certificate of convenience and necessity for the construction of its electrical plant; (3) that the commission has no power or authority to require that electrical transmission lines be built according to certain standards in order to prevent anticipated inductive interference with telephone lines, or require a certificate of convenience and necessity for the extension of transmission lines in order to require that they be constructed so as to prevent such interference; and (4) that the question of damages to a telephone line caused by inductive interference from an electric transmission line is a judicial one of which the commission has no jurisdiction.

The petition alleges that appellant obtained from the commission permission and approval for the construction and operation of its electrical plants, and a certificate of convenience and necessity therefor as required by section 10481, Rev. St. 1919, and has secured permissions, approvals, and certificates of convenience and necessity for all of its transmission lines and extensions thereof except the extension here in controversy.

[325 Mo. 1223] Section 10481 of the statute provides that no electrical corporation shall begin construction of an electrical plant without first having obtained the permission and approval of the commission, and no such corporation shall exercise any right or privilege under any franchise hereafter granted, without first having obtained the permission and approval of the commission.

Appellant contends that neither section 10481 nor any other statute requires a certificate of convenience and necessity or permission from the commission to construct and operate an extension of an existing transmission line. Contention is also made that a proper construction of section 10481 of the statute demonstrates a clear intent on the part of the Legislature to require a certificate of public convenience and necessity only when an electrical corporation starts in business, or at most thereafter when it receives a new franchise from public authority to operate in entirely new territory.

[1] It is true that section 10481 does not, in express terms, require a certificate of convenience and necessity or permission and approval of the commission to construct and operate an extension to an existing electrical transmission line, but this section of the statute must be read and construed in connection with other pertinent provisions of the Public Service Commission Act, and,

if it reasonably appears from a fair interpretation of all the statutes touching this question that it was the intention of the Legislature to make such a requirement, that intention should govern.

Section 10412, Rev. St. Mo. 1919 provides that "a public service commission is hereby created and established, which said public service commission shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter." (Italics ours.)

The Public Service Commission Act provides a complete system for the regulation of public utilities by the commission. State ex inf. v. Gas Co., 254 Mo. 515, 534, 163 S. W. 854, 857; State ex rel. Public Service Commission v. Mo. Southern Ry. Co., 279 Mo. 455, 464, 214 S. W. 381, 384. Without lengthening this opinion with a summary of all statutes which vest authority in the Public Service Commission to regulate public utilities and their activities, we refer the reader to sections 10410 to 10434 and sections 10476 to 10494, Rev. St. Mo. 1919.

In the two cases above cited the Public Service Commission Act is reviewed and construed. In State ex inf. v. Gas Co. we said: "That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to wit: That a public utility * * * is in its nature a monopoly; that competition is inadequate to represent the public, and, if it exists, it is likely to become an economic waste; [325 Mo. 1224] that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and, to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock, or bond, or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust. Willy nilly."

In State ex rel. Public Service Commission v. Missouri Southern Ry. Co., supra, we said: *70 "The act adds to the powers expressly given to the commission all others necessary to the full and effectual exercise of those powers. All rates, fares, facilities, service, and equipment, and changes therein, fall within the authority of the commission. Adequate service and facilities are expressly required to be furnished. Questions relative to these things are to be determined by the commission."

We call attention to a few of the many powers given to the commission by the Public Service Commission Act. Subsection 2 of section 10478, Rev. St. Mo. 1919, authorizes the commission to investigate and ascertain, from time to time, the methods employed by corporations and persons in manufacturing, distributing, and supplying electricity for light, heat, or power and in transmitting

same; to order such reasonable improvements as will best promote the public interest, preserve the public health, and protect
those using electricity and those employed in the manufacture or distribution thereof, and to order reasonable improvements and

extensions of the works, wires, poles, pipe lines, conduits, ducts, and other reasonable devices, apparatus, and property of electrical corporations. Subsection 5 of the same section of the statute authorizes the commission to examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations, and property employed by them in the transaction of their business, determine and prescribe the rates to be charged by such utilities, and, whenever it is found necessary, determine and prescribe the safe, sufficient, and adequate property, equipment, and appliances thereafter to be used, maintained, and operated for the security and accommodation of the public and in compliance with the law and of their franchises and charters. Section 10481 provides that no electrical corporation shall begin the construction of an electric plant or exercise any of the privileges granted under any franchise without permission and approval of the commission. This section further provides that, if the commission determines that the exercise of such right, privilege, or franchise is necessary or convenient for the public service, it may grant permission for the exercise of such right upon such condition or conditions as it may deem reasonable and necessary. Other sections of the statute provide [325 Mo. 1225] a complete scheme for the supervision and regulation of all the activities of an electrical utility by the commission.

Additional powers are given the commission by section 10527, Rev. St. 1919. This section reads: "The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every person, corporation and public utility, to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block and other systems of signaling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand."

The act itself provides that it shall be liberally construed with a view to the public welfare, efficient facilities, and substantial justice between patrons and public utilities. Section 10538, Rev. St. 1919.

[2] A reasonable construction of the Public Service Commission Act forces the conclusion that it was the intention of the Legislature to clothe the commission with exclusive authority to determine whether or not the furnishing of electricity to a given town or community is a public necessity or necessary for public convenience, and, if so, to prescribe safe, efficient, and adequate property, equipment, and appliances in order to furnish adequate service at reasonable rates and at the same time safeguard the

lives and property of the general public, those using the electricity, and those engaged in the manufacture and distribution thereof.

If, as appellant contends, an electrical corporation which has a certificate of convenience and necessity to operate its plant in a given town or community might extend its lines to and furnish other communities with electricity without a certificate or authority from the commission, the purpose of the statute would be defeated. Under such a construction of the statute the commission would have no opportunity to determine whether or not public convenience and necessity demanded the use of electricity in the community to which the line was extended, and no opportunity to prescribe the safe and efficient construction of said extension or determine whether or not appellant was financially able to construct, equip, and operate such extension and furnish adequate service at reasonable rates in the new community, without crippling the service in the community where the commission had theretofore authorized it to operate.

[3][4][5] [325 Mo. 1226] Appellant, however, contends that there is no question of new territory or new franchise in this case; that it has had a franchise in Saline county for many years and has been operating there under authority of the commission. There is no merit in this contention. In the first place, a franchise in Saline county would not authorize appellant to operate there without authority from the *71 commission. Section 10481, Rev. St. Mo. 1919. In the next place, this case is here on a demurrer to the petition, and the sufficiency of the petition must be determined by the facts alleged therein. The petition does not allege that the commission authorized appellant to operate in Saline county, or authorized the construction of the line in question. On the contrary, the petition alleges that the line in question, which extends from Fairville to Miami in Saline county, was not authorized by the commission. Appellant's demurrer to the petition admits this fact to be true. We therefore rule this contention against appellant.

[6] Appellant relies on the case of Missouri Valley Realty Co. et al., 2 Public Service Commission Reports (Mo.) 1, in support of its contention that, where a utility is operating under authority from the commission, it may extend its lines without obtaining a certificate of convenience and necessity from the commission. The facts in that case were that the power company was lawfully authorized to operate its plant in the city of St. Louis. The question presented was whether or not the company could extend its lines within the limits of the city without authority from the commission so to do. In course of the report, the commission said:
"The law is prospective in its operation and the defendants being engaged in business and serving the public with a plant already constructed when the law went into effect were not required to obtain a certificate of permission and approval from the Commission, and where the utility is legally serving the public, whether under a certificate from this Commission, or being exempt from that requirement, as in the case of defendants, we do not think the law requires such a certificate for every extension of its lines

upon each street or alley where service may thereafter be desired. Consent of the municipality is always required as a condition precedent to the granting of a certificate of permission and approval by this Commission; but when a local board or officer is given authority by ordinance or franchise to control the location and placing of poles, conduits, wires, etc., on streets and alleys, and exercises such authority by granting a permit to the utility, the law does not contemplate that for every such permit a certificate shall be secured from this Commission."

We interpret the report as holding that the power company was lawfully authorized to operate its plant in the city of St. Louis and was not required to obtain additional certificates for extensions of its lines in the territory where it already had authority to operate. If this report should be construed as holding that a public utility which [325 Mo. 1227] is lawfully authorized to operate in a given territory may extend its operations beyond the limits of such territory without first obtaining authority from the commission so to do, it would not be good law and should not be followed.

[7] It is next contended that the commission has no authority to require that an electrical line be constructed in accordance with certain standards in order to prevent anticipated electrical interference with a telephone line.

By the terms of the Public Service Commission Act, the commission is given authority to supervise and regulate both electrical and telephone corporations and require each to render adequate and efficient service to the public. Where, as here, it is proposed that a high power electrical transmission line be constructed and operated in such close proximity to a telephone line as to injuriously affect its operation by inductive interference from the electrical line, it is for the commission in the first instance to determine whether or not the proposed electrical line is a public necessity, and, if so, whether it could, at reasonable expense, be constructed in such manner and at such distance from the telephone line as not to injuriously affect the telephone service, especially so in view of the authority given the commission by section 10481, Rev. St. Mo. 1919. That section provides that, when the commission grants a certificate of convenience and necessity to an electrical corporation, it may by its order impose such condition or conditions as it may deem reasonable and necessary. The commission of this state has granted permission to electrical companies to construct, operate, and maintain their lines in an adequate and safe manner so as not to reasonably interfere with the service furnished by any other public utility. In re Caruthersville & Kennett E. L. & P. Co., Public Service Commission Report, vol. 5.

Appellant's next and last contention is that the question of damages to telephone service by inductive interference and the cost of its eradication is a matter of assessment of damages and injunction of which the courts and not the commission has jurisdiction.

[8][9] True, the commission is not a court and does not have jurisdiction to determine judicial questions, but the determination of how and where an electrical line should be built so as not to unreasonably interfere with telephone service is not a judicial question. The statute commits the determination of that question to the commission by authorizing it to supervise and regulate the construction and operation of both telephone and electrical lines and empowering it to grant permission for the construction of such lines on such conditions as it may deem reasonable and necessary. If orders made by the commission in that behalf should be

unreasonable or unlawful, they would be subject to judicial review. It may be that, if an electrical utility *72. should, without authority of law, build a high-power transmission line in close proximity to a telephone line and thus destroy telephone service,[325 Mo. 1228] the telephone company could either sue for damages or enjoin the operation of the electrical line, but that is not the question in this case.

We find no reversible error in the record, and accordingly affirm the judgment.

All concur, except WALKER, J., absent.

741 S.W.2d 111, State ex rel. Schott v. Foley, (Mo.App. E.D. 1987)

*111 741 S.W.2d 111

Missouri Court of Appeals,
Eastern District,
Division Six.

STATE of Missouri ex rel. William R. SCHOTT and Schott and Company, Inc., Relators,
v.
The Honorable James N. FOLEY, Associate Circuit Judge, Respondent.

No. 53778.
Dec. 8, 1987.

Relators sought writ prohibiting enforcement of order which found accountant incompetent to testify in a professional negligence action against accounting firm. The Court of Appeals, Carl R. Gaertner, P.J., held that: (1) statute defining scope of accountant-client privilege excludes enforcement of privilege in any case against any accountant, and (2) testimony of prior accountant of plaintiffs was material to defenses asserted by accounting firm, and testimony was not barred by accountant-client privilege.

Preliminary order in prohibition made absolute.

West Headnotes

[1] Prohibition k5(2)

314 ----
314I Nature and Grounds
314k5 Acts and Proceedings of Courts, Judges, and Judicial Officers
314k5(2) Specific Acts.

Writ of prohibition is appropriate to prohibit trial judge from denying statutorily authorized discovery.

[2] Witnesses k196.2

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications

410k196 Fiduciary or Contract Relations in General
410k196.2 Accountant and Client.

Statute defining scope of accountant-client privilege excludes enforcement of the privilege in any case against any accountant.
V.A.M.S. s 326.151.

[3] Witnesses k196.2

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k196 Fiduciary or Contract Relations in General
410k196.2 Accountant and Client.

Where petition alleged that accounting firm was negligent, and firm asserted affirmative defenses including allegation that
plaintiffs were guilty of comparative negligence and assumption of risk by establishing and continuing certain practices after
being warned by prior accountants of the risks involved in such practices, testimony of prior accountant who might have given such
warnings was clearly material to the defenses and was not barred by accountant-client privilege.
V.A.M.S. s 326.151.

*112 Terrance J. Good, Jeffrey J. Lowe, Lashly, Baer & Hamel, P.C., St. Louis, for relators.

John L. Oliver, Jr., Oliver, Oliver, Waltz & Cook, P.C., Cape Girardeau, Albert C. Lowes, Lowes & Drusch, Cape Girardeau, for
respondent.

CARL R. GAERTNER, Presiding Judge.

Relators seek our writ prohibiting enforcement of the order which found accountant Robert Earley incompetent to testify in a professional negligence action against another accountant. The lower court based its order on the accountant-client privilege, s 326.151, RSMo.1986. We make our preliminary order absolute.

From 1960 to 1977, Robert Earley served as a tax accountant for Jerry Lipps, Ruth Lipps, and the Lippses' two companies, Jerry Lipps, Inc. and Astro Rentals, Inc. In June of 1977, the Lippses hired William Schott of Schott and Company, Inc. to prepare income tax returns and give tax advice. In 1984, the IRS audited the Lippses and their corporations and assessed substantial penalties. Subsequently the Lippses, individually and by their two corporations, filed suit against Schott and Schott's company. The fourteen count petition alleged professional negligence relating to improper income tax preparation and advice. Defendants asserted affirmative defenses including comparative negligence and assumption of the risk.

Defendants deposed Robert Earley, but at the deposition, plaintiffs asserted their rights under s 326.151. This precluded Earley from producing any records or testifying on any advice he gave to or conversations he had with the Lippses. On September 22, 1986, the trial judge found Early incompetent to testify pursuant to s 326.151. Defendants' subsequent motion for reconsideration of this issue was denied.

Defendants then filed this petition for a writ of prohibition. The petition alleges that the trial court had no discretion to take the above actions. Relators first claim that under the terms of the statute the accountant-client privilege does not exist in this case. Alternatively, they claim that plaintiffs waived the privilege by: (1) putting their accounting practices at issue in the pleadings and by naming a present and a former accountant as expert witnesses; (2) giving non-responsive answers during deposition; (3) producing, without objection, a transcript of Earley's testimony before the tax court.

[1] Although respondent questions the propriety of prohibition, "there is no question the writ may be used to test whether the trial court abused its discretion in denying *113 or granting discovery." State ex rel. Wohl v. Sprague, 711 S.W.2d 583, 585 (Mo.App.1986). "Prohibition is the proper remedy when a trial court abuses its discretion in a discovery order to the extent that

its act exceeds its jurisdiction." State ex rel. Whitacre v. Ladd, 717 S.W.2d 287, 287 (Mo.App.1986). "Prohibition is also appropriate where a trial judge seeks to permit discovery which is expressly forbidden by statute." State ex rel. Williams v. Mauer, 722 S.W.2d 296, 297 (Mo. banc 1986). We believe the writ is equally appropriate to prohibit a trial judge from denying statutorily authorized discovery.

[2] In the underlying action, the trial court ruled that Robert Earley was incompetent to testify pursuant to s 326.151, RSMo.1986, which provides:

> Communication of client to accountant or employee privileged--shall not be examined thereon without client's consent--A certified public accountant or a public accountant shall not be examined by judicial process or proceedings without the consent of his client as to any communication made by the client to him in person or through the media of books of account and financial records, or his advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of a certified public accountant, or a public accountant, be examined, without the consent of the client concerned, concerning any fact the knowledge of which he has acquired in his capacity. This privilege shall exist in all cases except when material to the defense of an action against an accountant.

Respondent would have us read the final sentence of this statute as eliminating the privilege only when the matter is material to the defense of an action against the accountant. In support of this contention he cites Missouri Evidence Restated, s 506.3 (Mo. Bar 1984). However, that simply is not what the statute says. We are not at liberty to construe clear, unambiguous statutory language; rather, we must be guided by what the legislature said, not what others may think it meant to say. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo.banc 1986). The statute clearly excludes enforcement of the privilege in any case against any accountant.

[3] Respondent attempts to support the order by arguing that Earley's testimony would not be "material to the defense" of the action. Plaintiffs' petition alleges Schott was negligent in the rendering of professional accounting services. Schott has asserted affirmative defenses including, among other allegations, that plaintiffs were guilty of comparative negligence and assumption of the risk by establishing and continuing certain practices "after being warned by prior accountants and defendants of

the risks involved in such practices." The testimony of a prior accountant who may have given such warnings is clearly material to these defenses.

The statutory exclusion from the accountant-client privilege when material to the defense of an action against an accountant is nothing more or less than a legislative pronouncement that the filing of such an action is an implicit waiver of the privilege. In similar fashion, the Supreme Court, in State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo.banc 1968), found that a plaintiff who puts his physical condition at issue implicitly waives the physician-patient privilege. The "material to the defense" requirement of s 326.151 is comparable to the McNutt caveat that the trial court is authorized "upon proper showing" to issue protective orders limiting discovery to medical treatment which has a bearing on the claimed injuries. Id. at 602. One who seeks to discover information is seldom in a position to establish the relevance or materiality of the information until it is disclosed. On the other hand, the possessor can demonstrate the absence of relevance or materiality of the information. Accordingly, the party seeking to avoid discovery bears the burden of making the "proper showing" warranting the issuance of a protective order. Rule

56.01(c). Plaintiffs in the underlying action have made no such showing.

*114. We need not address relators' additional contentions of waiver. Respondent exceeded his jurisdiction by denying
discovery authorized under s 326.151. We make the preliminary order in prohibition absolute.

DOWD, J., and SIMEONE, Senior Judge, concur.

754 S.W.2d 30, State ex rel. Southwestern Bell Publications v. Ryan, (Mo.App. E.D. 1988)

*30 754 S.W.2d 30

Missouri Court of Appeals,
Eastern District,
Division Five.

STATE of Missouri, ex rel., SOUTHWESTERN BELL PUBLICATIONS, Relators,
v.
Honorable Brendan RYAN, Respondent.

No. 54519.
July 26, 1988.

Mandamus proceeding was brought to review trial court's sustention of discovery objections. The Court of Appeals, Carl R.
Gaertner, J., held that client waived accountant-client privilege by instituting action in which it sought recovery of damages for
loss of profits.

Order accordingly.

West Headnotes

[1] Pretrial Procedure k185

307A ----
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)4 Scope of Examination
307Ak183 Privileged Matters
307Ak185 Waiver of Privilege.

Business waived its accountant-client privilege, with respect to request to depose its accountant, by filing lawsuit in which it
sought recovery of lost profits. V.A.M.S. s 326.151.

[2] Mandamus k32

250 ----
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 Proceedings in Civil Actions in General.

Mandamus is appropriate to review trial court's sustention of discovery objections because it is an abuse of discretion to refuse to permit discovery of matters which are relevant to lawsuit and reasonably calculated to lead to admissible evidence and which are neither work product nor privileged.

Raymond R. Fournie, Shepherd, Sandberg, & Phoenix, Debra Ann Carlson-Wood, Shepherd, Sandberg, & Phoenix, St. Louis, for appellant.

Thomas Jeffrey Horn, St. Louis, Richard K. Coffin, Michael R. Torrence, Phelps, Coffin & Andreatta, Clayton, for respondent.

CARL R. GAERTNER, Judge.

Relators seek a writ of mandamus ordering respondent to compel discovery from plaintiff's accountant. The trial court denied relators' motion to compel based on the accountant-client privilege, s 326.151 RSMo 1986. Our preliminary order in mandamus is hereby made permanent.

Plaintiff, Erker Brothers Optical Company, filed suit against Southwestern Bell Telephone Company, Southwestern Bell Publications Incorporated, and Ad-Vent Information Services Incorporated. Count I, a tort claim, alleged that defendants intentionally disclosed confidential information concerning plaintiff to plaintiff's competitors. Count II alleged that defendants breached their contract with plaintiff by disclosing confidential information about plaintiff's company to third parties. Erker seeks actual damages in the amount of *31 $3,000,000 and punitive damages in the amount of $10,000,000.

The allegations of Erker's fourth amended petition are devoid of any specifics regarding the nature of the claimed damages.
Rather than filing a motion for more definite statement, relators ascertained through pre-trial discovery that Erker's evidence of
actual damages would consist of an expert witness's calculations intended to show a loss of profits and a loss of Erker's share of
the market beginning in 1983 and extending into the 1990's. Erker was compelled by order of court to furnish relators with tax
returns, financial statements, and accountant's review reports which had been prepared by, or under the direction of, Hal Stone, a
partner of the accounting firm of Baird, Kurtz, and Dobson. When relators attempted to take Stone's deposition, Erker's attorney
instructed him not to answer any questions pertaining to its tax returns, financial reports, or financial condition. Pursuant to
section 326.151 RSMo 1986, the respondent judge overruled relators' motion to compel Erker's to instruct its accountant to testify
regarding its financial information and to produce documents related to or used in the preparation of tax returns and financial
statements. Relators then filed this petition for Writ of Mandamus and we issued our Preliminary Order.

Section 326.151 RSMo 1986 provides:

> Communications of client to accountant or employee privileged-shall not be examined thereon without client's consent -A certified
> public accountant or a public accountant shall not be examined by judicial process or proceedings without the consent of his
> client as to any communication made by the client to him in person or through the media of books of account and financial
> records, or his advice, reports or working papers given or made thereon in the course of professional employment, nor shall a
> secretary, stenographer, clerk or assistant of a certified public accountant, or a public accountant, be examined, without the
> consent of the client concerned, concerning any fact the knowledge of which he has acquired in his capacity. This privilege
> shall exist in all cases except when material to the defense of an action against an accountant. (Emphasis added)

Relators argue that, by seeking damages for loss of profits, Erker has voluntarily placed in issue its past, present, and future
financial condition thereby implicitly waiving the statutory privilege in the same fashion as a personal injury plaintiff is held
to have waived the physician-patient privilege. State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo. banc 1968). On behalf of

respondent, Erker contends that the McNutt principle is inapplicable to the accountant's privilege statute because it provides for
waiver of the privilege exclusively in actions against an accountant. We reject Erker's contention as we perceive it to be
predicated upon a misreading of the statute and because the construction plaintiff places upon the statutory exception runs
contrary to the established policy of full and open pre-trial discovery in a spirit of fundamental fairness.

[1] No accountant-client privilege existed at common law. In Missouri the privilege was created by the 1967 legislative
enactment of section 326.151. A claim of privilege, because it presents an exception to the usual rules of evidence and may
constitute an impediment to the discovery of truth, is subject to careful scrutiny. State ex rel. Chandra v. Sprinkle, 678 S.W.2d
804, 807 (Mo. banc 1984). When viewed with careful scrutiny, it is apparent that Erker's argument fails to distinguish between a
statutory exception and a waiver of privilege. Section 326.151 provides for both: waiver by "consent of his client" and exception
"when material to the defense of an action against an accountant." The exception is invoked by the nature of the litigation and
is entirely independent of the client's conduct. If the communication of information between the accountant and the client is
material to the defense of an action against an accountant, it matters not whether the client is a party to or has an interest in
the action; the privilege simply does not exist and it is irrelevant whether *32 the client gives or withholds consent to the
disclosure of the information. On the other hand, waiver, the voluntary relinquishment of a known right, is effected by the
statements of the client or is implied from his acts. Because the underlying action is not against an accountant, the statutory
exception is not involved in this case. Rather, the issue concerns the question of waiver. Does the voluntary commencement of
litigation placing in issue Erker's financial condition before and after the alleged wrongdoing amount to an implied consent for
its accountant to disclose relevant information?

We perceive no reason why the accountant-client privilege created by section 326.151 and the physician-patient privilege created
by section 491.060(5) RSMo 1986 should be accorded different treatment in so far as pre-trial discovery is concerned. In State ex
rel McNutt v. Keet, 432 S.W.2d at 601-602, the Missouri Supreme Court, after reviewing the history of judicial decisions wherein a
patient's various acts were determined to constitute implicit waivers of the physician privilege, concluded that by filing a law

suit which places the plaintiff's physical condition in issue, the plaintiff has waived the privilege under section 491.060(5). In reaching this conclusion the court noted that permitting a plaintiff to use the privilege to conceal until trial facts relating to the very issue the plaintiff had originated for submission to judicial inquiry would permit the plaintiff to use the privilege "as 'a shield and a dagger at one and the same time' (which we do not believe the legislature intended)." Id. at 601. This reasoning is equally pertinent to this case where Erker, by seeking damages for past and future loss of profits, has placed its financial "health" in issue.

Seeking to support respondent's order upholding the privilege as to Hal Stone and the documents relating to his accounting services, Erker submits that it has no intention of calling Stone as a witness at trial and therefore, Erker argues, McNutt is inapplicable. Erker points out that four days before Stone's scheduled deposition his name was withdrawn from the interrogatory answer listing of expert witnesses. It has furnished relators, albeit under compulsion of court order, with all the documentation given to its expert witness, Clifford Olson, for his use in calculating lost profits. It has no objection to Stone testifying about any conversation he had with Olson. Therefore, the argument continues, Stone's calculations, and the financial information and data he did not turn over to Olson, can have no bearing upon the issues in this litigation.

We find this argument unpersuasive. The calculation of profit or loss of a commercial enterprise is entirely a function of accounting practices and procedures. The bottom line of a corporation's profit and loss statement is the product of many factors susceptible of innumerable variations from one accounting period to another. One year's profit can appear as another year's loss

merely by a change in the method of depreciating assets, establishing a capital reserve account, payment of salaries and bonuses,
write-offs of delinquent accounts receivable, use of loss carry-overs, etc. The validity of Olson's calculation of the effect of
relators' alleged misconduct upon Erker's profits is inextricably dependent upon a showing of consistency in the accounting
practices and procedures used in the before and after calculation of profits. Accordingly, we hold that by instituting this action
in which it seeks damages for loss of profits, Erker has waived its privilege under section 326.151. Relators are entitled to
depose Hal Stone regarding the information and data he accumulated and the practices and procedures he adopted in preparing tax
returns and financial statements and reports for Erker, and to discover the supporting documentation therefor.

[2] Mandamus is appropriate to review a trial court's sustension of discovery objections because it is an abuse of discretion to
refuse to permit discovery of matters which are relevant to the law suit and reasonably calculated to lead to admissible evidence
and which are neither work product nor privileged. State ex rel. Hudson v. Ginn, 374 S.W.2d 34 (Mo. banc 1964); St. *33. Louis
Little Rock Hosp., Inc., v. Gaertner, 682 S.W.2d 146, 148 (Mo.App. 1984) To view preceding link please click here .

Accordingly, our preliminary order is made permanent and respondent is directed to vacate his order of March 1, 1988 and to
sustain relators' motion to compel.

GRIMM, P.J., and SIMEONE, J., concur.

965 S.W.2d 841, State ex rel. Health Midwest Development Group, Inc. v. Daugherty, (Mo. 1998)

*841 965 S.W.2d 841

Supreme Court of Missouri,
En Banc.

STATE ex rel. HEALTH MIDWEST DEVELOPMENT GROUP, INC. Relator,
v.
The Honorable Jay A. DAUGHERTY, Judge, 16 th Judicial Circuit, Respondent.

No. 80258.
March 24, 1998.

Rehearing Denied April 21, 1998.

Hospital filed petition for writ of prohibition to prohibit Sixteenth Judicial District Court, Jay A. Daugherty, J., from ordering discovery of its peer review committee documents in physician's action against hospital for actions taken by hospital's peer review committee that restricted his staff privileges. The Court of Appeals ordered writ to issue. Transfer was granted. The Supreme Court, Benton, C.J., held that: (1) statutory peer review privilege did not apply to action; (2) physician-patient privilege did not preclude discovery of peer review committee documents; and (3) documents relating to how committee treated other doctors were relevant.

Writ quashed.

West Headnotes

[1] Witnesses k184(1)

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k184 Nature and Grounds of Privilege in General
410k184(1) In General.

(Formerly 204k6)

At common law, there is no privilege for documents of hospital peer review committees; to be subject to discovery, the disputed documents must fall within a statutory privilege.

[2] Witnesses k184(1)

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications

410k184 Nature and Grounds of Privilege in General
410k184(1) In General.

(Formerly 204k6)

Statutory peer review privilege did not apply to physician's action against hospital seeking damages for actions of its peer review committee that restricted his staff privileges, such that privilege did not preclude discovery of hospital's peer review committee records, even those documents regarding matters unrelated to the physician. V.A.M.S. s 537.035, subds. 4, 5.

[3] Statutes k235

361 ----
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k235 Liberal or Strict Construction as Affected by Nature of Act in General.

Statutes creating privileges are strictly construed.

[4] Health k275

198H ----
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk268 Staff Privileges and Peer Review
198Hk275 Actions.

(Formerly 204k6 Hospitals)

Peer review committee documents are not protected by peer review privilege when a doctor sues a hospital for actions taken by its committee that restrict staff privileges. V.A.M.S. s 537.035, subds. 4, 5.

[5] Witnesses k208(1)

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k207 Communications to or Information Acquired by Physician or Surgeon
410k208 In General
410k208(1) In General.

Circumstances, facts, and interests of justice determine the applicability of the physician-patient privilege to a particular situation. V.A.M.S. s 491.060(5).

[6] Witnesses k208(1)

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k207 Communications to or Information Acquired by Physician or Surgeon
410k208 In General
410k208(1) In General.

Physician-patient privilege is not absolute, but must give way if there is a stronger countervailing societal interest. V.A.M.S. s 491.060(5).

[7] Health k275

198H ----
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk268 Staff Privileges and Peer Review
198Hk275 Actions.

(Formerly 204k6 Hospitals)

[See headnote text below]

[7] Witnesses k212

410 ----
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k207 Communications to or Information Acquired by Physician or Surgeon
410k212 Mode or Form of Communications or Acquisition of Information.

Physician-patient privilege did not preclude discovery of hospital's peer review committee documents in physician's action against hospital for actions taken by hospital's peer review committee that restricted his staff privileges, even though documents contained confidential medical information; however, identifying characteristics of records should be redacted to protect patients against humiliation, embarrassment, and disgrace. V.A.M.S. ss 491.060(5), 537.035, subds. 4, 5.

[8] Appeal and Error k961

30 ----
30XVI Review

30XVI(H) Discretion of Lower Court
30k961 Depositions, Affidavits, or Discovery.

Trial courts rule on discovery requests in the first instance, and appellate courts will prohibit the trial court from acting only in rare circumstances where the trial court abuses its discretion.

[9] Health k275

198H ----
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk268 Staff Privileges and Peer Review
198Hk275 Actions.

(Formerly 204k6 Hospitals)

Hospital peer review committees' records concerning how other doctors were treated were relevant in physician's action against hospital which restricted his staff privileges claiming that he was treated differently from other doctors in similar situations and that complaints about his competency were pretext to restrict his privileges.

[10] Prohibition k27

314 ----
314II Procedure
314k27 Evidence.

Party seeking writ of prohibition to prohibit judge from ordering discovery has the burden of showing that the trial court's ruling is beyond judicial discretion and must specify why a discovery request is overbroad, oppressive, burdensome or intrusive. V.A.M.R. 56.01(c).

[11] Pretrial Procedure k27.1

307A ----
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak27 Scope of Discovery
307Ak27.1 In General.

Discovery request that covers a ten-year period is not per se objectionable.

[12] Prohibition k5(3)

314 ----
314I Nature and Grounds
314k5 Acts and Proceedings of Courts, Judges, and Judicial Officers
314k5(3) Particular Proceedings.

Hospital's general objections that physician's discovery request, seeking peer review committee document produced during ten-year period, was overbroad and oppressive did not show good cause for issuing writ of prohibition to prohibit judge from ordering discovery. V.A.M.R. 56.01(c).

*842 Thomas G. Kokoruda, William E. Quirk, Lance V. Baughman, Shughart, Thompson & Kilroy, P.C., Kansas City, Steven D. Ruse, Overland Park, for Relator.

David M. Skeens, J. Michael Vaughan, Cindy L. Reams, Weisenfels & Vaughan, P.C., Kansas City, for Respondent.

BENTON, Chief Justice.

Manit Vajaranant, M.D., and his spouse Irma Vajaranant sued relator Health Midwest Development Group, Inc., for breach of contract, tortious interference with a business expectancy, defamation, and loss of consortium. The circuit judge ordered Health Midwest to produce information related to peer reviews at one of its hospitals, Lafayette Regional Health Center. The hospital sought a writ of prohibition, invoking the peer review privilege in section 537.035, (FN1) and the physician-patient privilege in section 491.060(5). The hospital also argues that the order is overbroad, oppressive, burdensome and intrusive. After the Court of Appeals, Western District, ordered a writ of prohibition to issue, this Court granted transfer. Mo. Const. art. V, sec. 10. Writ quashed.

I.

In January 1994, Dr. Vajaranant had open heart surgery. In May 1994, he returned to work at Lafayette Regional. In June 1994, the administrator summarily suspended Dr. Vajaranant's privileges, citing concerns about his ability to deliver quality obstetrical care. After peer review proceedings, the doctor's privileges were initially restricted, but later fully reinstated. The Vajaranants then filed the underlying lawsuit.

During discovery, the Vajaranants requested that the hospital produce certain documents of the Executive Medical Staff Committee and the Infection Control Committee, as well as other documents from the staff and the Community Board. The hospital objected to producing any documents that did not involve Dr. Vajaranant. The trial judge ruled:

1. Defendant shall provide Plaintiffs with information requested that relates to all summary suspensions, peer reviews and/or corrective actions which occurred at Lafayette Regional Health Center only. Defendant shall provide plaintiffs with such information dating from July 3, 1985, to July 3, 1995.

...

3. Defendant shall provide plaintiffs with requested information relating to Lafayette Regional Health Center's Infection Control Committee from January 1, 1990, to the present, including any documents relating to reports from the Infection Control Committee to the Medical Staff and/or the Community Board.

....

II.

[1] At common law, there is no privilege for documents of peer review committees. State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804, 807 (Mo. banc 1984). In order not to be subject to discovery, the disputed documents must fall within a statutory privilege.

*843 The hospital contends that the documents are protected by the peer review privilege in subsection 4 of 537.035:

Except as otherwise provided in this section, the proceedings, findings, deliberations, reports, and minutes of peer review committees concerning the health care provided any patient are privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person or entity or be admissible into evidence in any judicial or administrative action for failure to provide appropriate care.

However, subsection 5 of 537.035 states:

The provisions of subsection 4 of this section limiting discovery and admissibility of testimony as well as the proceedings,

findings, records, and minutes of peer review committees do not apply when a member, employee, or agent of the peer review committee or the legal entity which formed such committee or within which such committee operates is sued for actions taken by such committee which operate to deny, restrict or revoke the hospital staff privileges or license to practice of a physician or other health care provider.

Subsection 5 nullifies subsection 4 when, as applicable here: 1) an entity that formed the peer review committee 2) is sued for actions taken by such committee 3) that operate to restrict the hospital staff privileges of a physician.

The hospital initially argues that subsection 5 allows discovery only of the peer review committee documents that are related to Dr. Vajaranant. The hospital, at oral argument, contended that subsection 5, by using the term "such committee," restricts discovery to documents from the specific peer review committee that restricted Dr. Vajaranant's privileges. Since the members of a peer review committee may change, the hospital concludes that Dr. Vajaranant may discover only documents produced by the very members that reviewed his case.

[2] Subsection 5 plainly states, however, that subsection 4 does not apply when the entity that formed such committee is sued for committee action that restricts staff privileges. If this is the subject matter of a case, subsection 5 voids the privilege in subsection 4. The underlying case--a suit against the entity that formed the peer review committee that restricted Dr. Vajaranant's staff privileges--is one type of case where the provisions of subsection 4 "do not apply." The General Assembly has determined that in this type of case, the peer review privilege does not apply at all. The scope of both subsections 4 and 5 is peer review committees, plural, as demonstrated by their nearly identical introductory language. Compare sec. 537.035.4 with sec. 537.035.5. Section 537.035 does not support the narrower interpretations offered by the Relator hospital.

[3][4] Such narrower interpretations contradict the general principles that govern privileges. Statutes creating privileges are strictly construed. State v. Kurtz, 564 S.W.2d 856, 860 (Mo. banc 1978). Claims of privilege are "impediments to discovery of truth," "present an exception to the usual rules of evidence," and "are carefully scrutinized." Chandra, 678 S.W.2d at 807. Statutes creating privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."' Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980), quoting

Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1688 (1960) (Frankfurter, J., dissenting). In cases with the statutory subject matter, the legislature has determined that relevant evidence should not be excluded. Since privileges are impediments to the truth, and statutes creating them are strictly construed, the peer review privilege in section 537.035 does not apply at all when an entity is sued for actions of its peer review committee that restrict staff privileges. Here, at least the Executive Medical Committee acted to restrict Dr. Vajaranant's privileges. Therefore, subsection 4 does not apply in this case, and the trial court's order does not violate any peer review privilege.

*844 III.

The hospital also contends that the trial court's order violates the privilege in section 491.060(5), that a physician is incompetent to testify:

> concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe and provide treatment for such patient.

This statute prohibits the disclosure of confidential medical information by means of formal discovery such as interrogatories, depositions, or production of medical records. Brandt v. Pelican, 856 S.W.2d 658, 661 (Mo. banc 1993). The peer review committee documents at issue here certainly contain confidential medical information.

[5][6][7] The fact that documents fall within the scope of the physician-patient privilege does not end the inquiry. "The circumstances, facts and interests of justice determine the applicability of the physician-patient privilege to a particular situation." State ex rel. Lester E. Cox Medical Center v. Keet, 678 S.W.2d 813, 815 (Mo. banc 1984). The privilege is not absolute, but "must give way if there is a stronger countervailing societal interest." Brandt v. Medical Defense Associates, 856 S.W.2d 667, 671 (Mo. banc 1993). By enacting subsection 5, the General Assembly determined that peer review committee documents are not privileged when a doctor sues a hospital for actions taken by its committee that restrict staff privileges. If the physician-patient privilege were to prohibit the discovery of confidential medical information of peer review committees, then the words in subsection 5 of section 537.035 would have no meaning. See Hadlock v. Director of Revenue, 860 S.W.2d 335, 337 (Mo. banc 1993). In the absence of a statutory privilege, peer review documents are discoverable. Chandra, 678 S.W.2d at 807.

Patients must, however, be protected against humiliation, embarrassment or disgrace by appropriate protective orders. Keet, 678 S.W.2d at 815. To this end, identifying characteristics should be redacted, and the trial court should conduct an in camera inspection of the documents to ensure that patients are protected from humiliation, embarrassment, or disgrace. Id.

IV.

[8][9] Finally, the relator hospital argues that the trial court's order is overbroad, oppressive, burdensome, and intrusive. Relator first argues that the peer review information is not relevant to plaintiff's claims. Trial courts rule on discovery requests in the first instance, and appellate courts will prohibit the trial court from acting only in rare circumstances where the trial court abuses its discretion. State ex rel. Norfolk & W. Ry. Co. v. Dowd, 448 S.W.2d 1, 2-4 (Mo. banc 1969). Dr. Vajaranant claims that he was treated differently from other doctors in similar situations, and that complaints about his competency were a pretext to restrict his staff privileges. How peer review committees treated other doctors may be relevant in this case, and the trial court did not abuse its discretion.

[10][11][12] Relator also contends that the order is overbroad since it covers a ten-year period. Rule 56.01(c) provides:

Upon motion by a party or person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Relator has the burden of showing that the trial court's ruling is beyond judicial discretion. Dowd, 448 S.W.2d at 3; see also State ex rel. Faith Hospital v. Enright, 706 S.W.2d 852, 856 (Mo. banc 1986). A party must specify why a discovery request is overbroad, oppressive, burdensome or intrusive. Relator has made only general objections and not shown "good cause" for a writ of prohibition. A discovery request that covers a ten-year period is not per se objectionable. The record does not reflect how often any peer review committee met in that ten-year period, or how burdensome relator's compliance will be. However, the trial court should continue to monitor the discovery process, and may modify any order upon a showing of "good cause."

*845. Relator finally contends that the discovery order requires disclosure of privileged information, and is therefore overbroad, citing State ex rel. St. Anthony's Medical Ctr. v. Provaznik, 863 S.W.2d 21, 23 (Mo.App.1993). As discussed, the order does not require disclosure of privileged information. Relator has not met its burden of proof.

V.

The preliminary order in prohibition is quashed.

All concur.

(FN1.) All statutory references are to RSMo 1994.

LEXSEE 129 SW3D 893

STATE OF MISSOURI, Respondent, v. GLENN SPENCER GERHART, Appellant.

WD 62083

COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

129 S.W.3d 893; 2004 Mo. App. LEXIS 439

March 30, 2004, Opinion Filed

PRIOR HISTORY: [**1] APPEAL FROM THE CIRCUIT COURT OF COOPER COUNTY. The Honorable Donald L. Barnes, Judge.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was found guilty of four counts of first-degree statutory rape and sentenced to four consecutive terms of 10 years. Defendant appealed, contending that the Circuit Court of Cooper County (Missouri) erred in excluding certain evidence.

OVERVIEW: Accusations by defendant's stepdaughter formed the basis for the charges, and her testimony was the primary evidence against defendant. Defendant claimed that the trial court erred in excluding evidence that the stepdaughter told a member of her church that she had been pregnant with defendant's child but miscarried. Defendant made offers of proof that the stepdaughter would testify that she never made such a statement. Defendant argued that he should have been allowed to introduce the evidence in an effort to challenge the credibility of his stepdaughter's testimony. The court held that, to the extent that the trial court excluded the evidence under *Mo. Rev. Stat. § 491.015* (2000), the Rape Shield law, such a ruling was clearly erroneous. *Section 491.015* did not preclude introduction of evidence of prior allegations by an alleged victim of sexual abuse, if that evidence was offered to impeach the credibility of the victim. The court reversed, finding that the trial court also erred in excluding the evidence under *Mo. Rev. Stat. § 491.060(4)* (2000) as a confidential statement made to a member of the clergy in her capacity as a spiritual advisor, confessor, counselor, or comforter.

OUTCOME: The court reversed the judgment and remanded the case for a new trial.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
Criminal Law & Procedure > Trials > Judicial Discretion
[HN1] A trial court has broad discretion in deciding whether to admit or exclude evidence at trial, and its ruling will not be disturbed absent a clear abuse of that discretion. The trial court will be found to have abused its discretion when its ruling is clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Evidence > Relevance > Sex Offenses & Rape Shield Laws
[HN2] See *Mo. Rev. Stat. § 491.015* (2000).

Evidence > Relevance > Sex Offenses & Rape Shield Laws
[HN3] *Mo. Rev. Stat. § 491.015* (2000) does not preclude introduction of evidence of prior allegations by an alleged victim of sexual abuse if that evidence is offered to impeach the credibility of the victim as a witness.

Evidence > Witnesses > Credibility & Impeachment
Criminal Law & Procedure > Witnesses > Impeachment
[HN4] A witness may be impeached by extrinsic proof of a prior inconsistent statement if the alleged discrepancy relates to any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.

Evidence > Witnesses > Credibility & Impeachment
Criminal Law & Procedure > Witnesses > Impeachment
[HN5] A defendant can impeach a prosecuting witness with prior inconsistent statements, but the impeachment may not concern an immaterial or collateral matter. A matter is considered to be collateral if the fact in dispute is of no material significance in the case or is not pertinent to the issues developed. In contrast, a matter is not collateral if the alleged discrepancy involves a crucial issue directly in controversy or relates to any part of the witness account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.

Evidence > Privileges > Clergy Communications
Criminal Law & Procedure > Evidence > Privileges > Clergy Communications
[HN6] See *Mo. Rev. Stat. § 491.060(4)* (2000).

Evidence > Privileges > Clergy Communications
Criminal Law & Procedure > Evidence > Privileges > Clergy Communications
[HN7] The circumstances, facts and interests of justice dictate whether a privilege set forth in *Mo. Rev. Stat. § 491.060* (2000) is applicable to a particular situation. The party seeking to invoke a privilege set forth in *§ 491.060* bears the burden of proving its applicability. Statutes creating testimonial privileges are to be strictly construed against the privilege.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors
[HN8] The erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which can only be overcome by a showing that such erroneous exclusion was harmless error beyond any reasonable doubt. The burden of showing that the exclusion was harmless beyond a reasonable doubt rests with the State.

COUNSEL: Nancy A. McKerrow Columbia, Missouri, for appellants.

Charnette D. Douglass, Assistant Attorney General, Jefferson City, Missouri, for respondents.

JUDGES: Before Joseph M. Ellis, Chief Judge, Harold L. Lowenstein, Judge and Victor C. Howard, Judge. All concur.

OPINIONBY: Joseph M. Ellis

OPINION: [*895] Appellant Glenn S. Gerhart was charged by information in the Circuit Court of Cooper County with four counts of statutory rape in the first degree, *§ 566.032*, n1 and one count of felonious restraint, *§ 565.120*. Appellant was tried by jury beginning August 14, 2002. He was subsequently found guilty of four counts of first-degree statutory rape. The jury recommended sentences of ten years on each count and, thereafter, the trial court sentenced Appellant to four consecutive terms of ten years in the Missouri Department of Corrections. This appeal followed.

n1 All statutory references are to RSMo 2000, unless otherwise noted.

[**2]

Appellant does not challenge the sufficiency of the evidence to support his conviction. Rather, Appellant's points on appeal are directed at the trial court's exclusion of certain evidence and a claim that the prosecution improperly elicited testimony regarding his exercise of his constitutional right under the *Fifth Amendment* to remain silent. Accordingly, a brief summary of the evidence, as opposed to a detailed recitation, is sufficient.

Viewed in the light most favorable to the verdict, the evidence revealed that in October of 2000, Appellant and his wife Kimberly were both employed at the Tipton Correctional Center. They lived in a home outside of California, Missouri, with their daughter, A.G., and Kimberly's daughter, H.M., and son, K.M. At that time, H.M., the oldest of the three children, was thirteen years old. H.M. testified that Appellant (1) performed oral sex on her and had sexual intercourse with her on October 2, 2000; (2) had sexual intercourse with her on October 4, 2000; (3) performed oral sex on her and had sexual intercourse with her on October 6, 2000; and (4) handcuffed her to the bed and had sexual intercourse with her on October 7, 2000. H.M.'s accusations [**3] formed the basis for the charges brought against Appellant and her testimony was the primary evidence against him.

Appellant, Kimberly, and the children were members of the New Creation Bible Church in Sedalia,

Missouri. This non-denominational church was founded by Tony and Merry Kroeger, who apparently were the co-pastors. From the record, it is unclear whether the church had any written organizational rules but some of the testimony in the record would suggest that doctrine was more or less whatever the Kroegers decided as events occurred. Avanell McMullin was also a member of the church. After H.M.'s allegations came to light, various conversations were had by Appellant, Kimberly or H.M. with Tony and/or Merry Kroeger, or Ms. McMullin. Further evidentiary details will be added as needed throughout this opinion.

In his first point, Appellant claims that the trial court erred in excluding evidence that H.M. had told Avanell McMullin in December 2000 that she had been pregnant with Appellant's child in 1999 but had miscarried after five months. Appellant made offers of proof that H.M. would testify that she never made such a statement and that Ms. McMullin would testify that H. [**4] M. did in fact tell her that she had been pregnant with Appellant's child in 1999 but miscarried after five months. Appellant contends that he should have been allowed to introduce evidence that H.M. had made that statement and to then attempt to prove that statement false in an effort to challenge the credibility of H.M.'s testimony, upon which the State's case was based.

Prior to trial, the State filed a motion in limine seeking to exclude McMullin's testimony about her conversation with H.M., asserting that this evidence should be excluded as improper evidence of prior sexual conduct under the Rape Shield Law, *§ 491.015*, and also as a privileged communication with a member of the clergy under *§ 491.060(4)*. The trial court granted the State's motion.

[HN1] "A trial court has broad discretion in deciding whether to admit or exclude [*896] evidence at trial," and its ruling will not be disturbed absent a clear abuse of that discretion. ***State v. Sales**, 58 S.W.3d 554, 558 (Mo. App. W.D. 2001)*. The trial court will be found to have abused its discretion when its "ruling is 'clearly against the logic and circumstances [**5] before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" ***Id***. (quoting ***State v. Brown**, 939 S.W.2d 882, 883* (Mo. banc 1997)). "If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." ***State v. Biggs**, 91 S.W.3d 127, 133 (Mo. App. S.D. 2002)*.

To the extent that the trial court excluded McMullin's testimony under the *Rape Shield law*, n2 such a ruling was clearly erroneous. *Section 491.015* [HN2] provides, in relevant part, that:

In prosecutions under *chapter 566, RSMo*, or prosecutions related to sexual conduct under chapter 568, RSMo, opinion and reputation evidence of the complaining witness' prior sexual conduct is inadmissible; evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:

Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to [**6] the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or

Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

Evidence of immediate surrounding circumstances of the alleged crime; or

Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

n2 From the record, it is questionable whether the trial court excluded this testimony under *§ 491.015*. The trial court clearly found that the testimony was incompetent under *§ 491.060(4)* as a confidential comment made to a minister and, while briefly discussing the State's argument under the *Rape Shield law*, does not appear to have offered a definitive ruling on the subject.

[**7]

In this case, the State elicited testimony indicating that Appellant had begun sexually assaulting H.M. when she was five years old and began having intercourse with her several times per week starting when she was eight years old. The testimony that Appellant sought to admit related to allegations allegedly made by H.M. to Ms. McMullin in December 2000, after H.M. had told the Kroegers and her mother that Appellant had been raping her and the police had begun their investigation. Appellant's offer of proof reflects that he would have asked H.M. if she had ever claimed that she had been pregnant with Appellant's child but had miscarried. Once

H.M. denied making such an allegation to Ms. McMullin, as Appellant's offer of proof reflects she would have, Appellant would have introduced Ms. McMullin's testimony about this prior inconsistent statement to impeach H.M.'s testimony.

[*897] While in some instances evidence of a prior pregnancy or pregnancies might constitute improper evidence of prior sexual conduct by the victim, in this case, the evidence of the relevant prior sexual conduct was admitted into evidence by the State on direct examination of the victim. The evidence sought to be introduced [**8] by Appellant related to the collateral consequences of the alleged sexual acts that were already in evidence. Appellant intended to introduce the evidence that H.M. had made these allegations and to then demonstrate that they were not credible in an effort to impeach H.M.

Section 491.015 [HN3] "does not preclude introduction of evidence of prior allegations by an alleged victim of sexual abuse if that evidence is offered to impeach the credibility of the victim as a witness." ***State v. Scott**, 78 S.W.3d 806, 810 (Mo. App. S.D. 2002)*. Thus, allowing Appellant to cross-examine H.M. about whether she had told Ms. McMullin that Appellant's sexual assaults upon her had led to a pregnancy and miscarriage would not run afoul of the Rape Shield statute. Furthermore, once H.M. denied having ever been pregnant with Appellant's child or ever telling anyone that she had been, as the offer of proof indicates she would have, Appellant would have been entitled to elicit Ms. [*898] McMullin's testimony about H.M.'s prior inconsistent statement in order to impeach H.M., because [HN4] a witness may be impeached by extrinsic proof of a prior inconsistent statement "'if the [**9] alleged discrepancy . . . relates to 'any part of the witness' account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.'" n3 ***State v. Williams**, 849 S.W.2d 575, 578 (Mo. App. E.D. 1993)* (quoting ***State v. Foulk**, 725 S.W.2d 56, 65 (Mo. App. E.D. 1987))*. n4

> n3 [HN5] "A defendant can impeach a prosecuting witness with prior inconsistent statements, but the impeachment may not concern an immaterial or collateral matter." ***State v. Dunson**, 979 S.W.2d 237, 242 (Mo. App. W.D. 1998)*. "A matter is considered to be collateral if the fact in dispute is of no material significance in the case or is not pertinent to the issues developed." ***Id***. In contrast, "'[a] matter is not collateral if the alleged discrepancy involves a crucial issue directly in controversy or relates to any part of the witness account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.'" ***State v. Williams**, 849 S.W.2d 575, 578 (Mo. App. E.D. 1993)* (quoting ***State v. Foulk**, 725 S.W.2d 56, 65 (Mo. App. E.D. 1987))*. [**10]
>
> n4 This is not to say that the fact that H.M. may have lied about becoming pregnant and miscarrying as a result of Appellant's sexual abuse disproves her testimony that she was being sexually abused. Rather, her alleged untruthful statements regarding pregnancy are so intertwined with, and part of her account of the background and circumstances of her "story," ***State v. Williams**, 849 S.W.2d at 578*, i.e., the extended period of abuse, as to permit an inference regarding her credibility on the material transaction, the alleged sexual abuse.

Moreover, the excluded testimony does not elicit any further evidence of prior sexual conduct by H.M. than was brought out by the State in its direct examination of her. Having introduced H.M.'s testimony that Appellant had repeatedly sexually assaulted her over a period of years and further introduced evidence of some of the allegations made by H.M. to other people about those sexual assaults, the State was not entitled to have evidence of other allegations made by H.M. related to those sexual assaults excluded under *§ 491.015* [**11] . Thus, the trial court erred to the extent it relied upon *§ 491.015* to exclude that evidence.

This does not, however, end our inquiry regarding these statements, as Ms. McMullin's testimony was expressly excluded by the trial court under *§ 491.060(4)* as a confidential statement made to a member of the clergy in her capacity as a spiritual advisor, confessor, counselor or comforter. Appellant challenges the propriety of that ruling also. Accordingly, we must consider whether the trial court abused its discretion in excluding the evidence under that section.

Section 491.060(4) [HN6] provides:

The following persons shall be incompetent to testify:

* * *

(4) Any person practicing as a minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion, concerning a communication made to him or her in his or her

professional capacity as a spiritual advisor, confessor, counselor or comforter;

The application of the statute requires the trial court to engage in a two step analysis: (1) the trial court must first determine whether the individual from whom the testimony [**12] is sought is a minister, priest, rabbi or other person serving in a similar capacity for an organized religion; and (2) the court must then decide whether the communication made to them fell within the context of their professional duties as a "spiritual advisor, confessor, counselor or comforter." ***§ 491.060(4).***

[HN7] The circumstances, facts and interests of justice dictate whether a privilege set forth in *§ 491.060* is applicable to a particular situation. *See* ***State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty****, 965 S.W.2d 841, 844* (Mo. banc 1998). The party seeking to invoke a privilege set forth in *§ 491.060* bears the burden of proving its applicability. *See* ***Rodriguez v. Suzuki Motor Corp.****, 996 S.W.2d 47, 61-62* (Mo. banc 1999). Statutes creating "testimonial privileges are to be strictly construed against the privilege." ***Id***.

The trial court found that Ms. McMullin was a minister in the church and that Ms. McMullin was acting in that capacity and providing H.M. with counseling and comforting during their telephone conversation in December [**13] 2000. n5 Appellant challenges the trial court's ruling on this issue, arguing that Ms. McMullin was not a member of the clergy as contemplated in *§ 491.060(4)*. He further contends that the telephone conversation between Ms. McMullin and H.M. was a normal, casual conversation between members of the same church, i.e. friends or acquaintances, [*899] and was not the type of communication covered under the statute. n6

> n5 After hearing the evidence presented on the State's motion, the trial court found:
>
> The other issue claimed by the State is that these statements with regard to the alleged pregnancy - pregnancy and miscarriage were made to Witness McMullin under circumstances where [H.M.] reasonably believed that they were confidential pursuant to *Section 491.060*.
>
> The evidence on that point is that Witness McMullin was a minister in the church, that she was a counselor to children in the church, that she had called up and talked to [H.M.] under these circumstances in a counseling mode, inquiring as to how she was getting along with regard to these problems that she was experiencing because of the alleged sexual intercourse with the defendant and that she was engaged in prayer for her tended to support what [H.M.] states under oath was her belief, that they were - that the conversations were part of a counseling and comforting situation with someone she reasonably believed to be a, quote, minister or comforter or counselor with regard to the church congregation in which she apparently was - and the family was extremely involved.
>
> The Court believes it's a close issue, but based upon witness - or on [H.M.]'s testimony that she believed that it was - that she was speaking confidentially to Witness McMullin, the Court will sustain the State's Motion to Exclude that testimony pursuant to the privilege set forth in *Section 491.060*. [**14]

n6 Appellant made no claim in the trial court, nor does he in this court, that the New Creation Bible Church is not an "organized religion" for purposes of *§ 491.060(4)*. Consequently, the trial court made no express finding on that element of the statute. We likewise do not address the issue but note that the phrase is not defined in the statute and doing so can be a vexing problem. The following is indicative of the dilemma:

> I fear that the majority wanders into the forbidden thicket of the *First Amendment* in such a manner that, if a valid intrusion, will raise once again the centuries old inquiry into the propriety of government defining what constitutes an organized religion. . . . What does or does not constitute a church has addressed itself to the conscience of individuals and governments for centuries. The Christian Church of Faith has evidentially convinced both the State of Tennessee and the United States Internal Revenue Service that it is, indeed, a church. We do not believe this Court, nor a jury in Shelby County, has the authority to withhold from any organization duly incorporated and recognized by secular authority, as a religious organization, the recognition claimed by the church said to be served by the Reverend Vance. If he is hiding behind a false and hypocritical religious facade, he is among many others who do so for various and plentiful reasons. A Higher Authority than ours will have to judge his sincerity.
>
> ***Vance v. State****, 557 S.W.2d 750, 752, 754 (Tenn. Ct. Crim. App. 1977)* (Galbreath, J., dissenting).

[**15]

With regard to Ms. McMullin's position in the church, the trial court found that she was a "minister" within the church. The evidence to that effect is not particularly persuasive. However, we need not decide whether Ms. McMullin could properly be considered a member of the clergy as contemplated in *§ 491.060(4)* because the record does not support a finding that the conversation between H.M. and Ms. McMullin was a communication made to her in her "professional capacity as a spiritual advisor, confessor, counselor or comforter." Both H.M. and Ms. McMullin described their conversation in December 2000 as a casual telephone conversation. Ms. McMullin testified that she had called H.M.'s home in response to a message left by Kimberly. She stated that, after H.M. answered the phone and told her that Kimberly was not home, she and H.M. began to have a general conversation in which she generally asked H.M., "How are you?" According to Ms. McMullin, H.M. responded that it had been an extremely rough day and then went on to tell Ms. McMullin that in 1999 she had miscarried a child, fathered by Appellant, after a five-month pregnancy. Ms. McMullin ended the conversation [**16] by telling H.M. that she would pray for her, the manner in which she often ended conversations with other members of the congregation. Ms. McMullin testified that she was not trying to solicit any spiritual conversation when she spoke with H.M. in December 2000 and that it was simply a "Hi, how are you" type conversation. Ms. McMullin further testified that H.M. had never come to her for advice or asked for spiritual guidance.

H.M.'s testimony about the conversation is nearly identical to Ms. McMullin's except for denying that she ever told her that she had been pregnant or that she had a miscarriage. H.M. stated that she did not discuss anything of a spiritual nature with Ms. McMullin during that conversation. She testified that Ms. McMullin asked how she was doing, that she told Ms. McMullin that she was okay, and that Ms. McMullin then told her that she would pray for her. H.M. also testified that she would have had a similar conversation with other members of the church and that Ms. McMullin was not someone that she would ever go to for advice.

The foregoing evidence is insufficient to support a finding that the H.M.'s comments [*900] to Ms. McMullin were made to her in her "professional [**17] capacity as a spiritual advisor, confessor, counselor or comforter." The trial court's ruling that Ms. McMullin was acting in her professional capacity as a member of the clergy to provide H.M. with counseling and comforting is simply not supported by the record.

Finally, we must assess whether Appellant was prejudiced by the trial court's erroneous rulings. [HN8] "The erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which 'can only be overcome by a showing that such erroneous exclusion was harmless error beyond any reasonable doubt.'" ***State v. Bowlin****, 850 S.W.2d 116, 118 (Mo. App. S.D. 1993)* (quoting ***State v. Bashe****, 657 S.W.2d 321, 325 (Mo. App. S.D. 1983))*. The burden of showing that the exclusion was harmless beyond a reasonable doubt rests with the State. ***Id.***

The State's case against Appellant hinged almost entirely upon the credibility of H.M., and Appellant's lone theory of defense was that H.M.'s testimony was not credible. As a result of the trial court's rulings, Appellant was precluded from cross-examining H.M. about her comments to McMullin about the alleged pregnancy and then introducing [**18] McMullin's testimony to impeach H.M. after she denied making them. n7 This evidence went directly to the central issue of Appellant's defense, i.e., that H.M. was untruthful and could not be believed. The State has failed to demonstrate how the exclusion of this evidence was harmless beyond a reasonable doubt. On the record before us, we simply cannot find that the erroneous exclusion of the evidence related to H.M.'s alleged claims of pregnancy and miscarriage resulting from Appellant's sexual assaults was harmless beyond a reasonable doubt. n8 Consequently, we must reverse the trial court's judgment and remand for a new trial.

n7 At trial, H.M. testified that she had never been pregnant as a result of the sexual abuse of Appellant. During the offer of proof, H.M. testified that she did not tell McMullin that she had been pregnant or that she had a miscarriage.

n8 Indeed, the trial judge's comments from the bench in ruling on the aforementioned issues reflect that, but for the application of *§ 491.060(4)* and the Rape Shield Statute, he would have allowed Appellant to cross-examine H.M. about her statements to McMullin about the miscarriage.

[**19]

Before briefly discussing Appellant's other points, additional factual matters need to be mentioned. In 1998, H.M. told her mother, Kimberly, that Appellant had been molesting her. Kimberly confronted Appellant about the matter and ultimately concluded that H.M. was lying. As a result, Kimberly required H.M. to apologize to Appellant for making such accusations.

After H.M.'s year 2000 allegations became known, Tony Kroeger, Merry Kroeger, and Ms. McMullin were allegedly present on various occasions when Kimberly was discussing H.M.'s 1998 allegations against Appellant and heard Kimberly state that she had thought H.M. was lying and that H.M. had apologized to Appellant for making those accusations.

In his second point, Appellant contends that the trial court erred in excluding from evidence testimony from the Kroegers that Kimberly had told them that she thought H.M. had lied when she had accused Appellant of raping her in 1998. Appellant claims these statements were erroneously excluded from evidence under the clergy/penitent privilege contained in *§ 491.060(4)*. Appellant argues that the privilege did not apply because Kimberly's statements were not [**20] made in confidence or for the purpose of seeking comfort, counsel [*901] or guidance. Appellant also asserts that Ms. McMullin should have been allowed to testify that she had heard Kimberly tell Mrs. Kroeger that H.M. had admitted lying about the 1998 allegations.

In Point III, Appellant contends the State improperly elicited testimony about his exercise of his constitutional right under the *Fifth Amendment* to remain silent.

Since we are granting Point I and reversing and remanding for a new trial, we need not address these other points. It is unlikely that the matters complained of in Point III will occur again on retrial. While the issues presented by Point II may arise again on retrial, and while judicial economy sometimes dictates that we address such matters, we decline to do so in this instance. From the record before us it does not appear Appellant's first assertion in Point II was properly preserved in that we cannot ascertain whether the trial court actually ruled on the issue, and the offer of proof contained in the record does not substantiate the secondary claim in that Point. For these reasons, the matters presented by Point II do not lend themselves to meaningful review [**21] that could be of guidance to the trial court.

The judgments of conviction are reversed, and the case is remanded to the trial court for a new trial.

Joseph M. Ellis, Chief Judge

All concur.

2004 WL 502947, Stadium West Properties, L.L.C. v. Johnson, (Mo.App. W.D. 2004)

*502947 Only the Westlaw citation is currently available.

Missouri Court of Appeals,
Western District.

STADIUM WEST PROPERTIES, L.L.C., Respondent,
v.
Cebie Hassan JOHNSON, Appellant.

No. WD 63020.
March 16, 2004.

Motion for Rehearing and/or Transfer to Supreme Court Denied April 27, 2004.

Background: Property owner brought action to set aside tax sale and the resulting collector's deed issued to purchaser and to allow it to redeem the subject real estate. The Circuit Court, Boone County, Gary M. Oxenhandler, J., ruled that the sale was illegal and the deed was void. Purchaser appealed.

Holding: The Court of Appeals, Joseph M. Ellis, C.J., held that tax collector's notice of sale was insufficient so as to void collector's deed.

Affirmed.

[1] Taxation k636

371 ----

371IX Sale of Land for Nonpayment of Tax
371k635 Proceedings for Judgment Against Real Property
371k636 Nature and Form.

A tax sale conducted by a county collector is a proceeding in rem intended to be binding on all persons interested in the property, whether as owner or lien holder.

[2] Taxation k654

371 ----

371IX Sale of Land for Nonpayment of Tax
371k654 Mode of Sale.

Statutory requirements in proceedings in rem for the sale of land for delinquent taxes must be complied with strictly.

[3] Taxation k658(1)

371 ----

371IX Sale of Land for Nonpayment of Tax
371k657 Notice of Sale
371k658 In General
371k658(1) In General.

If the notice of tax sale does not strictly follow the statutory requirements concerning the contents of the notice of sale, the subsequent county tax sale is void.

[4] Taxation k660

371 ----

371IX Sale of Land for Nonpayment of Tax
371k657 Notice of Sale
371k660 Publication.

Property owner was not required to prove it had actual notice of or detrimentally relied on the property description in the tax collector's published notice of sale as a precondition of receiving equitable relief on the grounds that the notice was insufficient. V.A.M.S. s 527.150.

[5] Taxation k660

371 ----

371IX Sale of Land for Nonpayment of Tax
371k657 Notice of Sale
371k660 Publication.

Tax collector's published notice of sale did not describe the land which was to have been sold with reasonable certainty, and thus, notice was insufficient, even though notice contained the name of the delinquent record owner and used statutorily authorized abbreviations to describe the property, where the notice referred to two 40-acre quarter-quarter sections, but failed to locate the tracts within them other than to say that they were somewhere in the northeast and north. V.A.M.S. ss 140.030, 140.180, 140.530; s 140.170 (1997).

Thomas M. Schneider, Columbia, MO, for appellant.

Duane E. Schreimann, Jefferson City, MO, for respondent.

Before JOSEPH M. ELLIS, Chief Judge, HAROLD L. LOWENSTEIN, Judge and ROBERT G. ULRICH, Judge.

JOSEPH M. ELLIS, Chief Judge.

**1 This is an action to quiet title brought under s 527.150, RSMo 2000, in which the parties, Cebie Hassan Johnson ("Johnson") and Stadium West Properties, L.L.C. ("Stadium West"), litigated the validity of a tax sale resulting in the issuance of a Collector's Deed for Taxes ("collector's deed" or "tax deed") to Johnson by the Boone County Collector of Revenue ("collector"). The trial court quieted title in Stadium West, ruling that the sale was illegal and that the collector's deed was void since the notice of sale published by the collector contained an inadequate description of the real estate in question. Johnson timely appealed the trial court's judgment, and we affirm.

Facts and Procedural History

The trial court decided this case on what were almost entirely stipulated facts. Stadium West acquired its interest in the subject Boone County real estate from Scott W. Gibson ("Gibson") by way of a general warranty deed dated December 27, 1995. Two separate parcels of real estate were conveyed by Gibson to Stadium West, for which it paid Gibson $16,571.15. The warranty deed, which the parties have stipulated accurately describes the properties at issue in this case, described the first of these two parcels in following manner:

Part of the Southeast Quarter of the Northwest Quarter of Section Twenty-four (24), Township Forty-five (45) North, Range Twelve (12) West, Boone County, Missouri, more particularly described as follows:

From the southeast corner of the Northwest Quarter of Section 24; thence N. 01 degree 13'19"' E. along the Quarter Section Line, 167.14 feet to a point in the center of an old abandoned county road and the POINT OF BEGINNING for this description; thence Northwesterly, along the center of said old abandoned county road the following courses: N. 68 degrees 38'18"' W. 95.32 feet; thence N. 75 degrees 01'19"' W. 249.87 feet; thence N. 65 degrees 31'01"' W., 128.70 feet; thence N. 50 degrees 26'18"' W. 197.44 feet; thence N. 49 degrees 59'54"' W. 101.31 feet; thence N. 58 degrees 26'12"' W. 299.15 feet; thence N. 56 degrees 29'07"' W. 262.82 feet to a point on the west line of the Southeast Quarter of the Northwest Quarter of said Section 24; thence leaving the center of the old abandoned county road, N. 00 degrees 38'04"' W. along the Quarter Quarter Section Line, 40.70 feet to a point 330.00 feet south of the northwest corner of the Southeast Quarter of the Northwest Quarter of said Section 24; thence S. 89 degrees 56'28"' E. parallel the North line of said Quarter Quarter Section 660.00 feet; thence N. 00 degrees 38'04"' E. parallel to the west line of said Quarter Quarter Section, 330.00 feet to a point on the north line of the Southeast Quarter of the Northwest Quarter of said Section 24; thence S. 89 degrees 56'28"' E. along the Quarter Quarter Section line, 105.84 feet to point on the westerly line of U.S. Highway 63; thence Southerly, along the westerly line of said U.S. Highway 63, on a curve to the right, having a radius of 2,779.94 feet, an arc distance of 822.95 feet (the chord of said curve being S. 36 degrees 47'25"' E. 819.95 feet); thence S. 28 degrees 18'35"' E. along the westerly line of said U.S. Highway 63, 45.64 feet to a point on the east line of the Southeast Quarter of the Northwest Quarter of said Section 24; thence S. 01 degrees 13'19"' W. along the Quarter Section Line,

445.52 feet to the POINT OF BEGINNING.

**2 The warranty deed described the second parcel of land in this way:

PARCEL 2: Part of the Northeast Quarter of Section 24, Township 45 North, Range 12 West, Boone County, Missouri, more particularly described as follows:

From the southeast corner of the Northwest Quarter of said Section 24; thence N. 01 degree 13'19"' E. along the Quarter Section Line, 1,309.10 feet to the northeast corner of the Southeast Quarter of the Northwest Quarter of said Section 24; thence S. 89 degrees 56'28"' E. along the Quarter Quarter Section Line, 16.32 feet to a point on the easterly line of U.S. Highway 63, and the POINT OF BEGINNING for this description; thence continuing S. 89 degrees 56'28"' E. along the Quarter Quarter Section Line, 44.97 feet to the northwest corner of an unrecorded Property Boundary "AGREEMENT" Survey by David A. Brown, Mo. R.L.S. # 103, dated November 14, 1958; thence S. 89 degrees 14'51"' E. along the north line of said "AGREEMENT" Survey 1,247.36 feet to the northeast corner thereof; thence S. 03 degrees 21'43"' W. along the east line of said "AGREEMENT" Survey, 408.70 feet to the Southeast corner thereof; thence N. 89 degrees 21'56"' W. along the south line of said "AGREEMENT" Survey, 921.06 feet to a point on the easterly line of the aforesaid U.S. Highway 63; thence Northerly, along the easterly line of said U.S. Highway 63, the following courses: Northerly, on a curve to the left, having a radius of 3,246.94 feet, and arc distance of 108.20 feet (the chord of said curve being N. 29 degrees 40'25"' W. 108.19 feet); thence N. 36 degrees 40'48"' W. 258.22 feet; thence N. 50 degrees 53'28"' W. 161.86 feet; thence N. 51 degrees 27'08"' W. 17.72 feet to the POINT OF BEGINNING.

The warranty deed also specifically excluded ownership of "MINERAL RIGHTS RESERVED AND EXCEPTED IN PRIOR CONVEYANCES" as to both parcels. (FN1)

Due to an oversight by the closing agent, Guaranty Land Title, the Boone County Recorder of Deeds did not record the warranty deed. Since the closing agent failed to ensure that the warranty deed was recorded on a timely basis, no tax bills were ever mailed to Stadium West, which did not pay the 1996 and 1997 real estate taxes assessed against the properties. (FN2) The collector placed the real estate in question on Boone County's "land delinquent list" and began preparations for a tax sale. The "NOTICE OF TAX CERTIFICATE SALE," which was published on three occasions in late July and early August 1998 and stated that the "[s]aid lots and lands ... offered for sale" were "situated in Boone County, Missouri," described the subject real estate as follows:

US 63 NEPT SE NW / NPT SW NE S24

T45 R12 ACREAGE: 27.00 1996 $72.88

1997 $19.68 $92.56 GIBSON SCOTT W

A public auction took place on August 24, 1998, and Johnson purchased the real estate for the sum of $7,100.00. After receiving two Tax Sale Certificates of Purchase from the collector, Johnson took the subsequent steps necessary to perfect his inchoate interest in the properties, which included waiting the necessary two years; carrying out his statutory obligation to notify all persons and entities holding a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate at the time of the notice, by certified mail, of their right of redemption; (FN3) and filing an application for a collector's deed when none of the notified persons or entities sought to redeem the properties within ninety days. See, e.g., M & P Enters. v. Transamerica Fin. Servs., 944 S.W.2d 154, 156-57 (Mo. banc 1997). On January 5, 2001, the collector issued Johnson a tax deed, which described the real estate conveyed in the following manner:

**3 Parcel # 27-600-24-00-002.00

US 63 Acreage 27.00 NEPT SE NW / NPT SW NE

Sec 24 Twp 45 Rge 12

Boone County, Missouri

The tax deed issued to Johnson was recorded earlier the same day, in Book 1678, Page 901. At some point thereafter, one of Stadium West's employees happened to see Johnson walking around one of the parcels. He questioned Johnson, who told him that he (Johnson) owned the property. Stadium West quickly commenced an investigation into the matter, after which it discovered that this and the other parcel it had bought from Gibson had been sold at a tax sale in August 1998, and that the general warranty deed it had received from Gibson had never been recorded. Stadium West recorded the general warranty deed from Gibson on May 9, 2002 (in Book 1915, Page 157), and filed the present action in July 2002, seeking to set aside the tax sale and the resulting collector's deed issued to Johnson and to allow it to redeem the subject real estate.

After conducting a brief trial in 2003 during which it heard testimony from two witnesses (Farmer and Johnson), the trial court entered a judgment voiding the tax sale and resulting collector's deed and quieting title to the real estate in Stadium West based on the facts stated above and these conclusions of law:

[T]he legal description appearing in the Collector's Notice of Tax Certificate Sale failed to describe the property in question

with reasonable certainty.... The accurate description contained in the Parties' Stipulation is in excess of some 50 single spaced, typed lines. The Collector's Notice of Tax Certificate Sale's description comprised 2 lines. Further, [Johnson] contends that the 'owner of record' of the property, 'Scott W. Gibson' is a point of reference for locating the property. It is true that 'Gibson Scott W' is stated at the tail of the two line description but nowhere in the tax list is there any indication of what relationship 'Gibson Scott W' bears to the property. Is he a person who holds a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate or what? [Johnson] further contends that 'ACREAGE 27.00' is a point of reference for locating the property. Nowhere in the stipulated legal description of the property is there any reference to the property's acreage. Finally, the two line description generally described property in the 'NEPT,' reasonably translated to mean the 'northeast part' and likewise the 'NPT,' reasonably translated to mean the 'north part.' Query: if you could find the tracts of land in question, what 'parts' were being sold? Though, arguably, none of these inadequacies taken alone would amount to a lack of reasonable certainty, taken together, they do. The description was neither reasonably certain nor full as required by the applicable sections of Chapter 140 RSMo.

The trial court also imposed a lien on the real estate to secure payment of the redemption sum owed Johnson by Stadium West, which included: (1) the 1996 and 1997 real estate taxes, penalties and costs paid by Johnson at the tax sale, plus statutory interest of 10% per annum from and after August 24, 1998; (2) the real estate taxes paid by Johnson for the tax years 1998-2002, plus statutory interest of 8% per annum from and after the dates Johnson paid those taxes; and (3) the sum of $1.25, all pursuant to the applicable provisions of Chapter 140. Upon receipt of Stadium West's payment of the above-mentioned redemption sum, the trial court ordered Johnson to formally acknowledge payment thereof by filing an appropriate instrument and further ordered Johnson to then execute and deliver to Stadium West a quitclaim deed properly describing the real estate. Finally, the trial court awarded Johnson the excess sale proceeds from the August 24, 1998 tax sale and ordered the Boone County Treasurer to remit those proceeds to Johnson forthwith. (FN4)

Standard of Review

**4 This quiet title action was tried to the court, so our review is governed by Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Kohler v. Bolinger, 70 S.W.3d 616, 619 (Mo.App. W.D.2002). Thus we must affirm the trial court's judgment if it is supported by substantial evidence, is not against the weight of the evidence, and the trial court did not erroneously declare or apply the law. Id. "Our primary concern is the correctness of the trial court's judgment, not the route it took to get to that result, and therefore, we will affirm the judgment if it is supported by any reasonable theory, even if different from that

expressed by the trial court." SD Invs., Inc. v. Michael-Paul, L.L.C., 90 S.W.3d 75, 81 (Mo.App. W.D.2002).

Analysis

In his first point relied on, Johnson argues that the trial court erred in entering its judgment invalidating the tax sale and the resulting collector's deed on the ground that the notice of sale published by the collector contained an inadequate legal description of the subject real estate because the trial court erroneously applied the law to the facts in that since Stadium West admitted that none of its members or representatives ever saw the legal description published by the collector, Stadium West was not misled or confused by it and, therefore, suffered no legally cognizable prejudice. He further claims that inasmuch as Farmer, who was Stadium West's sole witness at trial, "admitted that neither he nor any other representative of [the] company ever saw the published notice before this lawsuit was filed," Stadium West "obviously was not misled by and did not rely upon any aspect of the published notice. No harm, no foul." We disagree.

To begin with, Stadium West correctly points out that the transcript shows that Farmer made no such admission, but instead merely testified that, prior to the tax sale, he did not know if anyone from Stadium West ever saw or was misled by the published notice of sale. While Farmer could not say for certain whether any of Stadium West's employees or representatives did or did not see the published notice, his testimony can hardly be viewed as an "admission" that no one associated with Stadium West ever saw the notice published by the collector or that they were "obviously" not misled by it, as claimed by Johnson.

More importantly, though, as pointed out by Stadium West, Johnson's brief cites not a single Missouri case holding that a plaintiff who seeks to have a tax sale and resulting collector's deed set aside on the grounds that the collector's notice of sale contains a deficient description of the property to be sold must prove his actual knowledge of and detrimental reliance on the defective notice to be entitled to relief. While this lack of authority is excusable since Johnson is raising what appears to be an issue of first impression in this state, we think that what applicable case authority there is weighs strongly against the actual knowledge and detrimental reliance requirement urged by Johnson.

**5 In his brief, Johnson cites only one relevant case in support of his position: U.S. v. Certain Land in Wayne County, Mo., 70 F.Supp. 730 (E.D.Mo.1947), a federal decision he also presented to the trial court for its consideration. That case involved competing claims to the proceeds of a court-administered fund into which the United States had paid compensation after condemning the subject real estate for use as a wildlife game refuge. Id. at 731. There were originally three claimants to the fund, but before trial, counsel for two of them announced they had settled their conflicting claims, leaving them on one side and a Mr. Arthur T. Brewster on the other. Id. Among other things, Brewster claimed that the tax deed under which one of the opposing

parties claimed its interest was invalid since the collector's published notice of sale was defective. Id. at 732. The district court decided the question as follows:

> Brewster questions the notice of sale as failing to comply with Section 11126, R.S.Mo.1939, Mo. R.S.A. [now s 140.170]. We think

the particulars on which the notice of sale is criticized (FN5) are of the same character as the Supreme Court of Missouri had under consideration in Kennen v. McFarling, 350 Mo. 180, 165 S.W.2d 681. The test stated by the Court in the Kennen case is could '... anyone ... have been misled or ... have misunderstood the purpose of the tax sales or what land was to be sold.' (loc. cit. 684)

Brewster does not charge the notices were misleading or that the errors complained of caused anyone to misunderstand the purpose of the tax sale or what land was to be sold. No such attack could be sustained.

Id.

While this language lends some support to Johnson's argument, a review of the Kennen case, upon which the federal district court relied, reveals that to the extent our Supreme Court even set forth a "test" for notice and reliance in Kennen, it was objective, not subjective: "While the notices of sale could have been better worded and the land could have been more clearly described, nevertheless we do not see how anyone could have been misled or could have misunderstood the purpose of the tax sales or what land was to be sold." Kennen v. McFarling, 350 Mo. 180, 165 S.W.2d 681, 684 (1942). Likewise, in Beldner v. General Electric Co., 451 S.W.2d 65, 77 (Mo.1970), the Court made a similar observation, noting that the question before it was "the effect of the publication of one notice properly describing the property to be sold for delinquent taxes, followed by two notices that do not properly describe the property to be sold and which are insufficient to advise the public or to enable one to reasonably identify and locate the property." A bit later in its opinion, the Court in Beldner observed: "Anyone interested in this sale or in the property to be sold would reasonably expect that the last notice published would contain a correct description of the lands remaining to be offered at the tax sale." Id. at 78. Thus to the extent the Court in Beldner intended to formulate a "test," it would be whether any member of the sale notice's target audience could reasonably have been misled by or misunderstood what land was to be sold and whether the notice contained sufficient information for one to reasonably identify and locate the property.

**6 [1][2][3] In contrast, our Supreme Court has spoken in much more direct, certain, and convincing terms as to the obligations of county collectors and tax sale purchasers like Johnson. A tax sale conducted by a county collector under what is now Chapter 140 "is a proceeding in rem intended to be binding on all persons interested in the property, whether as owner or lien holder." State ex rel. McGhee v. Baumann, 349 Mo. 232, 160 S.W.2d 697, 699 (1942). "It has universally been the rule that statutory requirements in proceedings in rem for the sale of land for delinquent taxes must be complied with strictly." Wates v. Carnes, 521 S.W.2d 389, 390 (Mo.1975). Indeed, if "the notice of sale does not strictly follow the statutory requirements concerning the contents of the notice of sale," the subsequent county tax sale is void. Lohr v. Cobur Corp., 654 S.W.2d 883, 887

(Mo. banc 1983) (Houser, Sr.J., concurring). The reason for this rule was explained by the Missouri Supreme Court in Schlafly v. Baumann, 341 Mo. 755, 108 S.W.2d 363 (1937), as follows:

> Exercise of the official action here involved is in derogation of private rights of property, disturbs vested rights therein, and deprives persons of their ownership of property; and this, under the Jones-Munger Act, by ex parte proceedings of a rather drastic and summary nature, based upon constructive notice.

Id. at 366. (FN6)

[4] In light of our Supreme Court's repeated and emphatic commands that county collectors and tax sale purchasers follow the strict letter of Missouri law governing such sales, we seriously doubt that it intended, in Kennen and Beldner, to impose an actual knowledge/detrimental reliance requirement on delinquent taxpayer-landowners divested of their legal title thereby. We therefore hold that Stadium West was not required to prove it had actual notice of or detrimentally relied on the property description in the collector's published notice of sale as a precondition of receiving equitable relief under s 527.150. Point denied.

In his second point relied on, Johnson argues that the trial court erred in entering its judgment invalidating the collector's deed on the ground that the notice of sale published by the collector contained an inadequate legal description of the subject properties because the judgment was either against the weight of the evidence or erroneously applied the law to the facts in that a legal description is sufficiently definite if one reasonably skilled in determining land locations can locate the real estate with the use of extrinsic facts and the information contained in the published notice indicated the section, township and range of the subject real estate, its acreage, and the fact that it was located on the U.S. Highway 63 corridor, as well as the name of its record owner, who had conveyed the property to Stadium West.

The legal framework governing this aspect of the case is built upon several interrelated Missouri statutes, most of which were new in the Jones-Munger Act of 1933. The foundational statute is s 140.530, RSMo 2000, which says, in relevant part:

> **7 No sale or conveyance of land for taxes shall be valid if at the time of being listed ... the description is so imperfect as to fail to describe the land or lot with reasonable certainty[.]

See also s 140.150.2, RSMo 1994, which states, in relevant part:

> No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale contains the names of all record owners thereof, or the names of all owners appearing on the land tax book and all other information required by law. (FN7)

The "other information required by law" to be contained in a collector's notice of sale is specified in two other statutes. As applicable here, the first of these statutes, s 140.030, RSMo 1994, provides:

> Whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make ... [a] 'land delinquent list', in which shall be stated the taxes on lands and town lots where taxes have not been collected, with a full description of said lands and lots, and the amount of taxes due thereon, set opposite each tract of land or town lot[.]

The relevant portions of the second statute, s 140.170, RSMo 1994, are:

> 1. The county collector shall cause a copy of the list of delinquent lands and lots to be printed in some newspaper of general circulation published in the county, for three consecutive weeks, one insertion weekly, before the sale, the last insertion to be at least fifteen days prior to the fourth Monday in August.
>
> 2. In addition to the names of all record owners or the names of all owners appearing on the land tax book it is only necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty acre tracts or other legal subdivisions, and the lots shall be described by number, block, addition, etc....

Finally, although it is quite lengthy and we do not set it forth in full, s 140.180, RSMo 1994, authorizes the use of certain letters, figures, and characters as shorthand in "all advertisements, notices, lists, records, certificates, deeds or other papers, required to be made by or under any of the provisions" of Chapter 140. s 140.180.1. (FN8)

At the outset, we note that a tax deed which has been properly "recorded in the recorder's office before delivery" as provided in s 140.460.1, RSMo 2000, is to be considered "prima facie evidence ... of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, ... and prima facie evidence of a good and valid title in fee simple in the grantee of said deed[.]" s 140.460.2, RSMo 2000. As the Missouri Supreme Court observed in Mitchell v. Atherton, 563 S.W.2d 13, 17-18 (Mo. banc 1978), this means that such a deed is also "prima facie evidence of notice in compliance with the law because notice and sale would be 'prior proceedings' under sec. 140.460." Of course, this does not prevent an opposing party from attempting to overcome this prima facie evidence of regularity by offering its own evidence at variance with the title, id. at 18, which is exactly what Stadium West did here. See, e.g., Nole v. Wenneker, 609 S.W.2d 212, 215 (Mo.App. W.D.1980). (FN9)

**8 The language of s 140.530 "quite plainly indicates that the failure of a description to describe the land in question

with reasonable certainty is a sufficient condition for invalidity[.]" McCready v. Southard, 671 S.W.2d 385, 389 (Mo.App. S.D.1984). However, that language does not mean "that if the description does describe the land with reasonable certainty it will ipso facto be valid," because the other statutes set forth above may also come into play. Id. (emphasis in original). In Costello v. City of St. Louis, 262 S.W.2d 591 (Mo.1953) (overruled on other grounds in Powell v. County of St. Louis, 559 S.W.2d 189, 196 (Mo. banc 1977)), the Missouri Supreme Court explained the relationship between the reasonable certainty standard set forth in s 140.530, the more particular requirements of ss 140.030 and 140.170, and the abbreviations authorized by s 140.180:

> Section 140.030 requires that the Collector's land delinquent list shall set out 'a full description of said land and lots' upon which taxes are delinquent. Section 140.170 provides that the Collector shall cause the publication of the list of delinquent lands and lots, 'and the land therein described shall be described in forty acre tracts or other legal subdivision, and lots shall be described by number, block, addition, etc.' Section 140.530 provides that, 'No sale or conveyance of land for taxes shall be valid if at the time of being listed ... the description is so imperfect as to fail to describe the land or lot with reasonable certainty.'
>
> * * *
>
> Section 140.180 authorizes the use of certain abbreviations in land descriptions. We are mindful of the general rule that if the description is sufficiently definite and certain to enable one reasonably skilled in such matters to locate the land that it will be held to be adequate. But that rule is modified by the plain requirements of the above statutes that there be a full description by correct lot number, block and addition, and all with reasonable certainty. The description must be accurate, correct and definite even though abbreviations are authorized.... 'Full' as used in Section 140.030 quite obviously means complete, entire, without abatement, perfect, but allowing of course for the use of the abbreviations authorized by Section 140.180. 'Described by number, block, addition, etc.,' as required by Section 140.170, requires that the lots shall be correctly given and referred to by number, block and addition, or subdivision.

262 S.W.2d at 594-95.

[5] Thus "a notice of tax sale must not only comply with the specific requirements of ss 140.030 and 140.170 but it must also describe the property with reasonable certainty" under s 140.530. McCready, 671 S.W.2d at 389 (citing Costello, 262 S.W.2d at 594-95). (FN10) This is not an idle or purely academic observation, as it "[i]t is readily conceivable that in a given situation the former circumstance may obtain while the latter may not." Id. Indeed, we think this is precisely such a case. That is to say, we think that while the notice of sale published by the collector arguably met the particular requirements of ss 140.030, 140.170.2, and 140.180, it nevertheless failed to meet the reasonable certainty standard set forth in s 140.530.

**9 In determining the legal sufficiency of the property descriptions contained in the notice of sale published by the collector in this case, we find the Missouri Supreme Court's decision in State ex rel. Martin v. Childress, 345 Mo. 495, 134 S.W.2d 136 (Mo.1939) particularly instructive. In Childress, the record owner of a half-acre tract of Douglas County real estate, Mr. Childress, failed to pay the property taxes that had been assessed thereon. 134 S.W.2d at 137. The Douglas County Collector of Revenue, Mr. Martin, published a notice of sale containing a description of the real estate, which he planned to auction off at the upcoming county tax sale. Id. The land in question had a large building (Childress' house) on it, which substantially increased the value of the tract. After learning that Childress had threatened to remove the house from the property, Martin sought a temporary injunction preventing him from doing so, claiming, inter alia, that if Childress was allowed to move the house off the land, the land would then be worth less than the amount of back taxes owed by Childress. Id. The trial court granted the temporary injunction, which it later made permanent. Id. Childress appealed, arguing that since the property descriptions contained in both the collector's land delinquent list and the pending notice of sale were "wholly insufficient to support a valid [tax] sale," they were also insufficient to support the injunction. Id. at 138.

Our Supreme Court agreed with Childress and reversed the trial court's judgment granting the injunction. Id. at 140. The Court began its analysis by noting that in the deed originally issued to Childress by the land's previous owner, the property was correctly described as follows:

> [B]eginning on rock corner on east line of NW 1/4 NW 1/4, Sec. 23, Twp. 27, range 17, 34 rods and 7 ft. north of SE corner of said NW 1/4 NW 1/4; thence west 7 rods; thence south 11 and 3/7 rods; thence east 7 rods; thence north 11 and 3/7 rods to place of beginning, containing 1/2 acre.

Id. at 137. The Court then observed that in both the collector's land delinquent list and the collector's notice of sale, the property to be sold was described in this abbreviated manner: "[P]art of NW 1/4 NW 1/4, Sec. 23, Twp. 27, range 17." Id.

The Court first rejected the collector's contention that, because the land was correctly described in his petition for injunctive relief and he had shown at trial that it was, in fact, the land owned by Childress, "any defect in [the] description on the tax books or in the notice of sale" was cured. Id. at 139. (FN11) Then, quoting s 9958b of the original Jones-Munger Act of 1933 (now codified as s 140.530, RSMo 2000), which then, as now, provided "that 'no sale or conveyance of land for taxes shall be valid ... if the description is so imperfect as to fail to describe the land or lot with reasonable certainty,' " the Court held that "a valid judgment for taxes could not have been obtained on the description here concerned, and if a valid judgment for taxes could

not have been obtained, then certainly no one ... could have interfered with defendant's removal of his house on the ground that such would jeopardize the collection of taxes against the tract upon which the house stood." Id. (FN12)

**10 Similarly, in Ijames v. Geiler, 783 S.W.2d 934 (Mo.App. E.D.1989), the notices of sale published by the collector, the collector's deed, and an unrecorded trustee's deed all made reference to "Pt. Lot 21 .80 Acres, Survey # 2991 School Dist. C-6 Road Dist # 13." Id. at 937. The trial court entered a judgment setting aside the deeds and quieting title in the plaintiff, concluding that "the description in the notices of sale, the collector's deed and the trustee's deed did not describe plaintiff's property with reasonable certainty since they did not state which portion of Lot 21 of Survey 2991 was involved." Id. at 936. The Eastern District affirmed, explaining:

> The trial court found, and we agree, that this description fails to establish with reasonable certainty what portion of Lot 21 is conveyed. The legal description describes, at most, .80 acres of a 32 acre lot, without reference to which .80 acres are to be conveyed. Such a description fails to describe plaintiff's land with reasonable certainty and is, therefore, invalid under s 140.530.
>
> Id. at 937. (FN13)

And so it is here. As in Childress and Ijames, the collector's published notice of sale does not describe the land which was to be sold with reasonable certainty because even though it refers to two 40-acre quarter-quarter sections, it fails to locate the tracts within them other than to say that they were somewhere in the northeast and north "PT"s thereof, respectively. As the trial court aptly put it, "if you could find the tracts of land in question, what 'parts' were being sold?"

Johnson cites three Missouri cases in support of his claim that the property descriptions contained in the collector's published notice of sale are adequate: Simmons v. Affolter, 254 Mo. 163, 162 S.W. 168 (1914), Elsberry Drainage District v. Seerley, 329 Mo. 1237, 49 S.W.2d 162 (1932), and Schwartz v. Dey, 780 S.W.2d 42 (Mo. banc 1989). All are readily distinguishable. In Simmons, the collector brought suit against the record owner of the property in question for back taxes, ultimately resulting in a judgment foreclosing the state's tax lien. 162 S.W. at 168. The judgment was executed and levied shortly thereafter, when the county sheriff sold the real estate at auction and issued a tax deed to the successful purchaser. Id. On appeal, the Court held that the judgment of foreclosure, which described the Phelps County land in question as "No. of acres 80, S. 2 S.W. 4, section 21, Twp. 36, range 7," was not void for uncertainty as it properly described the real estate comprising the south half of the southwest quarter of section 21, township 36, range 7. Id. at 169. Elsberry was an appeal from a judgment imposing a tax lien for delinquent drainage taxes on four tracts of property, in which the defendant argued that the descriptions of the tracts set forth in the tax

bill were insufficient to support the judgment. 49 S.W.2d at 163. On appeal, the defendant conceded that the description of the
first of these four tracts contained in both the plaintiff's petition and the judgment itself correctly identified his property.
Id. at 165. That description was as follows: "That part of the Northeast quarter of the Southwest quarter of Section 21, Township

52, Range 2 East, lying East and North of ditch right of way, being part of tract No. 10, Denny's subdivision, containing 19.99 acres." Id. at 164. The Court held that the description of the first tract contained in the tax bill (19.99 acres "NESW that Pt. Lying E & N of ditch R of W. being pt. Tract No. 10 D's SubD" in Sec. 21, Twp. 52, R. 2E), id. at 165, correctly identified that part of the northeast quarter of the southwest quarter of the designated section lying east and north of a ditch right of way, and was sufficiently definite to support the judgment imposing the lien. Id. at 166.

**11 However, in neither Simmons nor Elsberry (which were both decided prior to the enactment of the Jones-Munger Act) was the adequacy of a collector's published notice of tax sale at issue. Moreover, in both of those cases, unlike the one at bar, there was clearly no material variance between the property descriptions in the record owner's deed and the express terms of the judgments that were appealed; no highly irregularly-shaped fractional quarter-quarter sections were involved; and the descriptions there left nothing to pure speculation or conjecture. Meanwhile, Schwartz has absolutely nothing to do with this case, since, as pointed out in the Court's opinion: "Plaintiffs do not argue in this appeal that the collector, in attempting to notify them of the tax sale, failed to comply with state statute. Instead, they contend the notice provided by the collector violated the Due Process Clause of the Fourteenth Amendment." 780 S.W.2d at 44.

Johnson further argues that despite the deficiencies noted supra, the notice of sale published by the collector in this case is nevertheless sufficient in that it contains enough additional descriptive information for one reasonably skilled in such matters to locate the land. See Beldner, 451 S.W.2d at 78; Nat'l Cemetery Ass'n of Mo. v. Benson, 344 Mo. 784, 129 S.W.2d 842, 845 (1939). First, he points out that, as required by s 140.150.2 and Art. 10, s 13, the notice of sale contained the name of the delinquent record owner, Scott W. Gibson, who had originally conveyed the property to Stadium West in December 1995. But as noted supra, that is merely a necessary (but not sufficient) statutory condition for a valid notice of sale. Second, he asserts that the notice of sale correctly recited the fact that the "property consisted of 27 acres, the precise amount deeded to [Stadium West] by Scott W. Gibson." However, the trial court correctly ruled that the 27-acre figure was not a valid point of reference because it was contradicted by the terms of Stadium West's unrecorded general warranty deed, which contained no acreage figures for either of the parcels conveyed by Gibson. We further note that the redemption notices sent by Johnson recited that the first parcel was a "14.95-acres tract" and the second parcel was a "10.15-acre tract." This adds up to 25.10 acres, not the 27.00 acres stated in the collector's published notice of tax sale and in the tax deed itself. It therefore appears that Johnson himself was uncertain as to the total acreage of the properties he had purchased at the tax sale, which is all the more reason to reject his argument. Third, Johnson argues that the notice of sale correctly recited, using both statutorily authorized and unauthorized (although

decipherable) abbreviations, that the subject properties were located within the Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section 24, Township 45, Range 12. While this is true, the cases discussed supra clearly hold that even when abbreviations authorized by s 140.180 are used, partial descriptions such as this are simply not specific enough to describe the real estate to be sold with reasonable certainty. See also O'Day v. McDaniel, 181 Mo. 529, 80 S.W. 895, 896 (1904) (holding that while the use of abbreviations is authorized by what is now s 140.180, there is nothing in the law "permitting anything less than an accurate or correct description of the real estate"). Fourth, Johnson claims that since the notice of sale began with "US 63," it showed that the subject real estate "was along the U.S. Highway 63 corridor." While that is certainly one way to interpret the notice of sale, the fact remains that as published by the collector, it does not allow the reader to determine whether both or just one (and if just one, which one) of the parcels to be sold had some connection to U.S. Highway 63, and what that connection was. Fifth, Johnson argues that by using the "inverted grantee-grantor index" at the Boone County Recorder of Deeds office, and "armed with the four pieces of information outlined above, a reasonably experienced researcher at the Recorder's office could have found the subject deed to the 27 acres in five minutes in the undersigned's opinion." This opinion is completely unsubstantiated in the record.

**12. Finally, in his reply brief, Johnson claims that if the collector's published notice of sale in this case is held to be invalid, "it would appear to call into question a great many tax sales." Whether or not this claim is true, the fact remains that for the reasons stated in our discussion of Johnson's first point relied on, "[t]ax sales have always been carefully scrutinized by this court." Bussen Realty Co. v. Benson, 349 Mo. 58, 159 S.W.2d 813, 814 (1942) (overruled on other grounds by Powell v. County of St. Louis, 559 S.W.2d 189, 196 (Mo. banc 1977)). Indeed, such arguments have long properly been rejected on appeal in similar cases. See, e.g., State ex rel. Ward v. Linney, 192 Mo. 49, 90 S.W. 844, 844 (1905). Ultimately, we echo our Supreme Court's conclusion in Costello: "In this case the Collector did not observe the statutes. And in such cases equity will afford relief." 262 S.W.2d at 596. Point denied.

Conclusion

We hold that the record contains substantial evidence supporting the trial court's ruling that the notice of sale of the real estate in question did not describe the lands which were to be sold with reasonable certainty as required by s 140.530. This ruling was not against the weight of the evidence, and the trial court did not erroneously declare or apply the law in making it. Therefore, the August 24, 1998, tax sale at which Johnson purchased his interest in the subject real estate was conducted illegally as to those parcels, and the collector's deed under which he claims title is void and of no legal effect. Defendant-appellant Johnson thus has no right, title, or interest in the disputed lands, and plaintiff-respondent Stadium West Properties, L.L.C. is

the sole owner of the surface estates thereof. Accordingly, the trial court's judgment is affirmed.

All concur.

(FN1.) At trial, Stadium West's witness Elliott E. "Bud" Farmer, Jr. ("Farmer") testified that a third party holds the mineral rights to the subject real estate, which borders a quarry owned and operated by Stadium West. For this reason, Farmer explained,

Stadium West (which owns several other pieces of Boone County real estate) purchased these properties not for their value as future quarry sites, but to serve as a "buffer zone" around its existing quarry operations to prevent future disputes with adjoining landowners over potential dust and noise issues.

(FN2.) The tax bills were evidently mailed to Gibson, the last owner of record, who, for whatever reason, simply ignored them without notifying either county tax officials or Stadium West.

(FN3.) The record shows that the property descriptions contained in the redemption notices mailed out by Johnson were not the highly abbreviated versions set forth in the collector's notice of sale, but fully detailed metes-and-bounds versions almost identical to those contained in the then-unrecorded general warranty deed from Gibson to Stadium West.

(FN4.) Johnson lodges no complaint on appeal as to any of these equitable remedial orders, which were clearly designed to restore the status quo ante under Chapter 140 and s 527.150.

(FN5.) The court did not further explain what those "particulars" were.

(FN6.) "The Jones-Munger Act (chapter 140, RSMo) provides for the annual sale of real property on which payments of property taxes have been delinquent." M & P Enters., 944 S.W.2d at 156. This (literally) ground-breaking legislation, which "effected a radical change in the method of foreclosing the state's lien for delinquent taxes by suit in a court of competent jurisdiction," was enacted in 1933. Schlafly, 108 S.W.2d at 366; see also 1933 Mo. Laws 425-449. "Before the Jones-Munger Act, the lien for taxes was foreclosed by suit. If inferior lien holders were made parties to the suit, their liens were extinguished. Jones-Munger substituted an administrative proceeding for the judicial foreclosure and instead of being made parties to the suit, lienholders are notified by publication." McMullin v. Carter, 639 S.W.2d 815, 817-18 (Mo. banc 1982) (internal quotation marks and citations omitted).

(FN7.) Art. 10, s 13 of the Missouri Constitution contains a nearly identical provision, which was adopted in 1945: "No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law." For jurisdictional purposes, we note that this case does not require the construction of a revenue law and does not present even a colorable constitutional issue, much less a real and substantial one requiring resolution by our Supreme Court.

(FN8.) We note that several of the statutes we have quoted, including ss 140.150 and 140.170, were substantially modified in 2003. However, as those amendments occurred one or more years after the collector published the notice of sale and Stadium West filed

its petition in the case sub judice, the amended statutes have no application here.

**12_ (FN9.) We note that in Adams v. Gossom, 228 Mo. 566, 129 S.W. 16, 21 (1910), the Court observed: "[I]t is settled doctrine that a purchaser at a tax sale, who has notice of an unrecorded deed, takes subject to the rights of the grantee in such deed since he stands charged with the knowledge that the apparent record owner was not the real owner." See also Ortmeyer v. Bruemmer, 680 S.W.2d 384, 394-95 (Mo.App. W.D.1984) (one who purchases realty subject to a prior but unrecorded conveyance to another takes free of that interest only if he was a bona fide purchaser for value and did not have actual notice of the unrecorded conveyance). In his answer to Stadium West's petition, Johnson expressly invoked this principle as an affirmative defense, although he later abandoned it by failing to offer any evidence at trial on the matter. For its part, Stadium West does not claim Johnson had actual knowledge of the unrecorded conveyance from Gibson to Stadium West.

(FN10.) Of course, this reasonable certainty requirement applies not only to notices of sale published by the collector before tax sales, but also to the terms of collector's deeds issued after such sales. See, e.g., Mason v. Whyte, 660 S.W.2d 383, 386 (Mo.App. E.D.1983). This is because, by its express terms, the statute applies to both sales and conveyances of land for satisfaction of back taxes. As the adequacy of the property descriptions in the tax deed received by Johnson (which were the same as those contained in the notice of sale except for the addition of "Parcel # 27-600-24-00-002.00", the meaning or significance of which does not appear in the record) was neither raised by Stadium West in its pleadings nor tried by consent, we do not further consider that issue.

(FN11.) Cases decided both before and after Childress also make it clear that this is the rule in Missouri. See, e.g., Lowe v. Ekey, 82 Mo. 286, 291 (1884) (internal quotation marks omitted) ("[I]f there was no sufficient description of the land in the anterior proceedings, assuredly a good description in the tax deed could not retroact upon a prior bad description of the land and validate it."); Acton Enters., Inc. v. Stottle, 646 S.W.2d 149, 151-52 (Mo.App. S.D.1983) (affirming trial court's judgment setting aside a collector's deed issued to the successful bidder after a tax sale on the ground that that property description contained in the collector's notice of sale was too vague in that it "could have described any land within the S 1/2 of the S 1/2 of Section 30, Township 22, Range 20," even though the collector's deed itself contained a proper description of the subject real estate). Thus even if the tax deed issued to Johnson contained a valid description of the land conveyed (which, as noted above, we do not decide), it would not cure any deficiency in the notice of sale.

(FN12.) An unrelated part of the Court's holding in Childress was subsequently overruled in Kuyper v. Stone County Comm'n, 838 S.W.2d 436, 437 (Mo. banc 1992).

(FN13.) Although the plaintiff in Ijames also presented testimony to the effect that the description was too indefinite, we think

the Eastern District's opinion makes it plain that the case did not turn on that testimony, but instead on the patent inadequacy of
the property description in the notices of sale, the collector's deed and the trustee's deed.

963 S.W.2d 679, Davis v. Board of Educ. of City of St. Louis, (Mo.App. E.D. 1998)

125 Ed. Law Rep. 229

Missouri Court of Appeals,
Eastern District,
Division Two.

William DAVIS and Linda Davis, Plaintiffs/Appellants,
v.
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, David J. Mahan, John E. Ingram, Jr., and David G. Flieg, Defendants/Respondents.

No. 71493.
Feb. 3, 1998.

Motion for Rehearing and/or Transfer to Supreme Court Denied March 11, 1998.

Application to Transfer Denied
April 21, 1998.

Tenured physical education teacher and his wife brought action against board of education and various education officials, asserting malicious prosecution, tortious interference with contract, and loss of consortium claims arising from suspension of teacher pending investigation and hearing on charges that he had abused students. The Circuit Court, City of St. Louis, Donald Lamb, J., entered summary judgment in favor of superintendent and, after jury returned verdict against two other officials, entered judgment notwithstanding the verdict (JNOV) on those claims. Appeal was taken. The Court of Appeals, Crane, P.J., held that: (1) actions of assistant superintendent and executive director for elementary schools in interviewing students who alleged abuse and passing their statements to superintendent with recommendation for removal did not constitute instigation of charges as required for teacher's claim of malicious prosecution against assistant superintendent and executive director; (2) assistant superintendent and executive director had sufficient probable cause to pass along their reports of abuse to superintendent, which also precluded teacher's malicious prosecution claims against them; (3) superintendent was entitled to qualified immunity from liability on malicious prosecution claim absent showing of malice or bad faith; (4) lack of evidence of breach of permanent teacher's employment contract precluded claim of tortious interference with contract against education officials.

Affirmed.

West Headnotes

[1] Appeal and Error k863

30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

Contention that judgment notwithstanding the verdict (JNOV) was improperly entered raises issue of whether plaintiff made submissible case by adducing substantial evidence for every fact essential to liability.

[2] Trial k139.1(9)

388 ----
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k139.1 Evidence
388k139.1(5) Submission to or Withdrawal from Jury
388k139.1(9) Substantial Evidence.

Substantial evidence required for submissible case is that which, if true, has probative force upon issues, and from which trier of facts can reasonably decide case.

[3] Trial k136(1)

388 ----
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k136 Questions of Law or Fact in General
388k136(1) In General.

Whether evidence in case is substantial and whether inferences drawn are reasonable are questions of law.

[4] Appeal and Error k927(2)

30 ----
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(2) Dismissal or Nonsuit in General.

In determining whether plaintiff has made submissible case, reviewing court views evidence in light most favorable to that plaintiff and gives plaintiff benefit of all reasonable and favorable inferences to be drawn from evidence.

[5] Appeal and Error k927(2)

30 ----
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(2) Dismissal or Nonsuit in General.

In determining whether plaintiff has made submissible case, reviewing court disregards all of defendants' evidence which does not support plaintiff's case, but court does not supply missing evidence or give plaintiff benefit of unreasonable, speculative, or forced inferences.

[6] Trial k139.1(12)

388 ----
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k139.1 Evidence
388k139.1(5) Submission to or Withdrawal from Jury
388k139.1(12) Speculation or Conjecture; Choice of Probabilities or Theories.

To make submissible case, evidence and inferences must establish every element and not leave any issue to speculation.

[7] Appeal and Error k863

30 ----

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

Judgment notwithstanding the verdict (JNOV) is affirmed only if there is no room for reasonable minds to differ on issues and if trial court's action is supported by at least one of grounds raised.

[8] Malicious Prosecution k16

249 ----

249II Want of Probable Cause
249k16 Concurrence of Other Elements.

Elements of malicious prosecution claim are: (1) commencement of earlier suit against plaintiff, (2) instigation of suit by defendant, (3) termination of suit in plaintiff's favor, (4) lack of probable cause for suit, (5) malice by defendant in instituting suit, and (6) damages to plaintiff resulting from suit.

[9] Malicious Prosecution k3

249 ----

249I Nature and Commencement of Prosecution
249k3 Instigation of or Participation in Prosecution.

Actions of assistant superintendent and executive director for elementary schools in interviewing students who alleged abuse by teacher, taking their statements, passing on those statements to superintendent, and making recommendation based thereon, did not constitute instigation of charges as required for teacher's claim of malicious prosecution against assistant superintendent and executive director, where only superintendent had legal authority to issue charges. V.A.M.S. s 168.221.

[10] Malicious Prosecution k71(2)

249 ----

249V Actions
249k71 Questions for Jury
249k71(2) Probable Cause.

Whether facts are sufficient to establish lack of probable cause, for purposes of claim of malicious prosecution, is question of law for court.

[11] Malicious Prosecution k25(1)

249 ----

249II Want of Probable Cause
249k25 Civil Actions and Proceedings
249k25(1) In General.

Assistant superintendent and executive director for elementary schools had sufficient probable cause to pass along their reports of teacher's alleged abuse of students to superintendent, which thus precluded teacher's malicious prosecution claims against them, in light of fact that neither assistant superintendent nor executive director was person statutorily responsible for bringing charges and, therefore, were not under obligation to investigate students' statements in order to form reasonable belief in correctness of charges. V.A.M.S. s 168.221.

[12] Husband and Wife k209(4)

205 ----

205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(4) Personal Injuries to Husband.

Wife's claim for loss of consortium is derivative only, and she may not recover any damages *679 on claim for loss of services if her husband has no valid claim for his personal injuries.

[13] Appeal and Error k934(1)

30 ----

30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In General.

When considering appeal from summary judgment, appellate court reviews record in light most favorable to party against whom judgment was entered.

[14] Appeal and Error k863

30 ----

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

Criteria on appeal for testing propriety of summary judgment are no different from those which should be employed by trial court to determine propriety of sustaining motion initially.

[15] Appeal and Error k893(1)

30 ----
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In General.

As trial court's judgment is founded on record submitted and law, reviewing court need not defer to trial court's order granting summary judgment, which thus makes appellate review essentially de novo.

[16] Officers and Public Employees k114

283 ----
283III Rights, Powers, Duties, and Liabilities
283k114 Liabilities for Official Acts.

[See headnote text below]

[16] Officers and Public Employees k116

283 ----
283III Rights, Powers, Duties, and Liabilities
283k115 Liabilities for Negligence or Misconduct
283k116 In General.

Under doctrine of official immunity, public officials acting within scope of their authority are not liable for injuries arising from their discretionary acts or omissions, but official immunity is qualified immunity and does not apply to those discretionary acts done in bad faith or with malice.

[17] Officers and Public Employees k116

283 ----
283III Rights, Powers, Duties, and Liabilities
283k115 Liabilities for Negligence or Misconduct
283k116 In General.

Bad faith or malice required to overcome public official's qualified immunity ordinarily contains requirement of actual intent to cause injury.

[18] Malicious Prosecution k42

249 ----
249V Actions
249k42 Persons Liable.

[See headnote text below]

[18] Schools k63(3)

345 ----

345II Public Schools
345II(C) Government, Officers, and District Meetings
345k63 District and Other Local Officers
345k63(3) Powers, Duties, and Liabilities in General.

Superintendent was entitled to qualified immunity from liability on teacher's malicious prosecution claim, absent showing that superintendent acted with malice or bad faith in making charge that teacher abused his students.

[19] Constitutional Law k278.5(4)

92 ----

92XII Due Process of Law
92k278.5 Regulations Affecting Schools and Education
92k278.5(2) Staff and Faculty

92k278.5(4) Proceedings and Review.

[See headnote text below]

[19] Schools k147.34(1)

345 ----
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.34 Notice and Statement of Reasons or Grounds
345k147.34(1) In General.

[See headnote text below]

[19] Schools k147.38

345 ----
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.38 Hearing.

Teacher's due process rights concerning charges of abuse of students were satisfied by presentment of charges to teacher, opportunity for him to explain his conduct before he was suspended, and formal pre-termination hearing by city board of education. U.S.C.A. Const.Amend. 14.

[20] Torts k12

379 ----
379k12 Interference with or Injuries in Contractual Relations.

In order to establish cause of action for tortious interference with contract, plaintiff must show: 1) contract; 2) defendant's knowledge of contract; 3) that defendant intentionally interfered with and induced or caused breach of contract; 4) absence of justification; and 5) damages resulting from defendant's conduct.

[21] Judgment k185(6)

228 ----
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) Existence or Non-Existence of Fact Issue.

Defending party may establish right to summary judgment by showing facts that negate any one of claimant's elements.

[22] Schools k147.9

345 ----

345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.8 Grounds for Adverse Action
345k147.9 In General.

[See headnote text below]

[22] Schools k147.34(1)

345 ----

345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings

345k147.34 Notice and Statement of Reasons or Grounds
345k147.34(1) In General.

Statute precluding "removal" of permanent teacher except for cause upon written charges by superintendent of schools referred to termination of employment contract and, thus, neither pre-suspension reassignment of teacher to non-teaching duties pending investigations of abuse of students, nor pre-termination suspension, constituted "removal" of teacher who was subsequently returned to his teaching position after hearing. V.A.M.S. s 168.221, subd. 3.

[23] Torts k12

379 ----
379k12 Interference with or Injuries in Contractual Relations.

Lack of evidence of breach of city board of education's employment contract with permanent teacher, concerning his initial reassignment to non-teaching duties and subsequent suspension pending hearing on charges that he abused students, precluded teacher's claim of tortious interference with contract against several education officials involved in investigation and presentation of charges; board complied with each of its statutory and regulatory duties concerning investigation, and teacher was eventually returned to his teaching position with back pay. V.A.M.S. s 168.221, subd. 3.

*681 Charles W. Bobinette, Uthoff, Graeber, Bobinette & O'Keefe, Richard B. Blanke, St. Louis, for appellants.

Kenneth C. Brostron, Lisa O. Stump, Michael W. Roskiewicz, Lashly & Baer, P.C., St. Louis, for respondents.

CRANE, Presiding Judge.

Plaintiffs, a tenured physical education teacher in the St. Louis Public Schools and his wife, brought an action against the Board of Education of the City of St. Louis, the superintendent of the public schools, and two public school employees for damages and other relief for injuries plaintiffs incurred when, after students made complaints of abuse, the superintendent reassigned the teacher to non-teaching duties, then suspended him without pay and filed charges against him. The Board found him not guilty of the charges after an administrative hearing. The trial court entered summary judgment in favor of the superintendent on the malicious prosecution claim on the ground of official immunity. It also entered summary judgment in favor of the superintendent and the two employees on the claim for tortious interference with contract. The case was tried on the malicious prosecution and loss of consortium counts. The trial court refused *682 to submit punitive damages to the jury on the malicious prosecution count. The jury returned a verdict against the two employees on both counts. However, the trial court entered judgment

notwithstanding the verdict on these claims. Plaintiffs appeal, asserting the trial court erred in taking each of the above actions. We affirm.

FACTUAL BACKGROUND

The Board of Education of the City of St. Louis (the Board) is the governing body of the St. Louis Public Schools. Section 162.571 RSMo (1994). Prior to and for the school years 1990-1991, 1991-1992, and 1992-1993, plaintiff William Davis (hereinafter individually referred to as plaintiff) was employed by the St. Louis Public Schools as a permanent teacher pursuant to Section 168.221 RSMo (1986). The terms of plaintiff's employment are set forth in Section 168.221.3 RSMo (1994) (FN1) which provides in pertinent part:

> No teacher or principal whose appointment has become permanent may be removed except for one or more of the following causes:
> Immorality, inefficiency in the line of duty, violation of the published regulations of the school district, violation of the
> laws of Missouri governing the public schools of the state, or physical or mental condition which incapacitates him for
> instructing or associating with children, and then only by a vote of not less than a majority of all the members of the board,
> upon written charges presented by the superintendent of schools, to be heard by the board after thirty days' notice, with copy of
> the charges served upon the person against whom they are preferred ... Pending the hearing of the charges, the person charged may
> be suspended if the rules of the board so prescribe, but in the event the board does not by a majority vote of all the members
> remove the teacher or principal upon charges presented by the superintendent, the person shall not suffer any loss of salary by
> reason of the suspension.

Defendant David J. Mahan was the Acting or Interim Superintendent of Schools for 1990-1991 and became superintendent in 1991. Defendant John E. Ingram, Jr. was the Acting Assistant Superintendent for Elementary School Education for the 1990-1991 year and then became Assistant Superintendent in 1991. He was appointed by Mahan and was responsible for supervising the 75 public elementary schools in the district. Defendant David G. Flieg was the Executive Director of Elementary School Education. He reported to Ingram and was responsible for the day-to-day supervision of the elementary schools.

During the 1990-1991 school year, plaintiff was a physical education teacher at Woerner I.G.E. School, a St. Louis public school. On January 31, 1991 several students at Woerner reported to their school nurse that plaintiff had made sexual comments, improperly touched and looked at them, and cursed at them. On February 1 the principal at Woerner, Dr. Rejesta V. Perry, notified Flieg of possible sexual misconduct involving plaintiff. Flieg directed Perry to call the parents, the police, and the Missouri Division of Family Services (DFS) and to interview the students about their allegations. Dr. Perry conducted interviews and sent a handwritten

report of her questions and the student's answers in each interview to Flieg's office. The students again reported that plaintiff cursed at them, touched them offensively, and looked at them in an offensive manner. A DFS investigator and a police detective each began separate investigations in which they also interviewed the students.

On February 12, 1991 Ingram wrote to Mahan recommending that Davis be removed from Woerner School. On February 13, 1991 Superintendent Mahan temporarily reassigned plaintiff to a non-teaching position pursuant to Board Regulation 4680 which permits the superintendent to transfer an employee for the good of the system.

On February 25, 1991 Mahan directed Ingram and Flieg to go to Woerner School to interview those students who had made complaints and those students who had been interviewed by the police, DFS, and the principal. That same day Ingram and Flieg went to the school. Ingram took notes as *683 Flieg interviewed each of the students individually. They made follow-up visits on three subsequent days. Ingram and Flieg interviewed twenty students from the Woerner School, boys and girls of different races from the first, second, fourth, fifth, and eighth grades. These statements included serious allegations that plaintiff had engaged in sexual misconduct, physical misconduct, and profanity.

The DFS investigator conducting an independent investigation found no evidence of child or sexual abuse. On March 22 and April 2, 1991, she reported her findings to plaintiff and Mahan, but not to Ingram or Flieg.

The St. Louis police detective assigned to the case spoke with Flieg on March 4, 1991 and told him that his investigation was near completion and would be presented to the circuit attorney's office. Flieg told him that whatever the outcome of the criminal investigation, he would proceed with the termination. The detective presented the case to the circuit attorney's office, which did not issue warrants.

On March 13, 1991 a hearing was conducted in Flieg's office on the students' charges. Plaintiff appeared with a union representative. Ingram read the list of charges to plaintiff. Plaintiff denied most of the charges and gave an explanation consistent with innocence for the others.

On March 18, 1991 Flieg submitted a memorandum to Ingram which described the scope of their interviews and summarized each student's statement. The memorandum concluded, "[b]ased on the above, my recommendation is to dismiss Mr. William Davis." The memorandum was transmitted to Mahan. After reviewing Flieg's memorandum, Mahan directed Flieg to go back to the school and take written statements from the students about what had occurred. On March 25 Flieg took written statements from most of the students he had interviewed. On April 2 Ingram forwarded to Mahan the reports of the school nurse and Dr. Perry, Flieg's memorandum, and the handwritten statements from the interviews. Ingram told Mahan he concurred with Flieg's recommendation and recommended a

dismissal hearing.

By letter dated August 5, 1991, Mahan notified plaintiff that he was suspended without pay and Mahan would recommend his discharge pending a hearing before the Board of Education. Mahan enclosed a written Statement of Charges. Those charges contained fourteen separate charges of immorality or of violations of Board Regulation 4840.

On January 10, 1992 plaintiff's attorney wrote a seven-page letter to Mahan in which he asked Mahan to review his decision to file charges against plaintiff and move for his dismissal. The attorney reported in detail the results of the attorney's own investigation into the charges and reported that many of the students had made statements to him or testified in depositions. In those statements and depositions the students denied the substance of the complaints. The attorney reported that the School Board attorney was going to drop two of the charges made with respect to one female student and asked that the other charges be likewise dropped.

The Board conducted a hearing on the twelve remaining charges on the record on January 15 and 16, February 3, 6 and 10, and March 5, 1992. At the hearing some of the students repudiated their earlier statements. Other students gave testimony which the Board did not believe. On September 16, 1992 the Board notified plaintiff that it had issued Findings of Fact and Conclusions of Law finding that plaintiff was not guilty of the charges, that he would not be removed from his position as teacher, and that he should not suffer any loss of salary by reason of his suspension.

Plaintiff was reinstated by the Board effective September 21, 1992. After his reinstatement the Board paid plaintiff $37,271.46 as salary, holiday pay, and sick leave from the date of the suspension to the date of reinstatement. Plaintiff did not lose retirement benefits, creditable years of service, or seniority.

On July 7, 1993 plaintiff requested the Board to pay him $6,105.00 to compensate him for pre-judgment and post-judgment interest accrued on his back pay and wages lost from a third party which had denied him *684 summer employment because of his suspension. On August 24, 1993 the Board found plaintiff was not entitled to any of that relief.

TRIAL COURT PROCEEDINGS

On December 4, 1992 plaintiff and his wife, Linda Davis, filed an action against the Board, Mahan, Ingram, and Flieg for injuries suffered as a result of charges brought against him by Mahan. The issues on appeal relate to the second amended petition. In Counts I through III of that petition plaintiff sought relief against the Board. These counts were resolved in the Board's favor prior to trial, and the trial court's rulings thereon have not been appealed. Counts IV through VI sought relief against Mahan,

Ingram, and Flieg. In Count IV plaintiff sought damages for malicious prosecution. In Count V plaintiff sought damages for tortious interference with contract. In Count VI plaintiff's wife sought damages for loss of consortium.

The trial court granted summary judgment in favor of Mahan, Ingram, and Flieg on the tortious interference count. It also granted summary judgment in favor of Mahan on the malicious prosecution count on the ground of official immunity.

The remaining claims for malicious prosecution and loss of consortium against Ingram and Flieg were tried to a jury. At the close of evidence, the trial court sustained an objection by Ingram and Flieg to a jury instruction on punitive damages. The jury returned a verdict against Ingram and Flieg and in favor of plaintiff in the amount of $300,000.00 and in favor of Mrs. Davis in the amount of $100,000.00. The trial court subsequently granted Ingram's and Flieg's Joint Motion for Judgment Notwithstanding the Verdict but denied their Motions for New Trial and Alternative Motion for Remittur. At the same time the trial court denied plaintiffs' Motion for New Trial on Punitive Damages.

DISCUSSION

I. Trial Issues

A. Judgment Notwithstanding the Verdict--Malicious Prosecution

For his first point plaintiff asserts that the trial court erred in granting defendants Ingram's and Flieg's motion for judgment notwithstanding the verdict. Plaintiff argues that he adduced substantial and competent evidence to support each and every element of his claim for malicious prosecution.

[1][2][3] A contention that a judgment notwithstanding the verdict was improperly entered raises the issue of whether the plaintiff made a submissible case. Pikey v. Gen. Accident Ins. Co. of Am., 922 S.W.2d 777, 780 (Mo.App.1996). A submissible case requires substantial evidence for every fact essential to liability. Steward v. Goetz, 945 S.W.2d 520, 528 (Mo.App.1997); Eidson v. Reproductive Health Services, 863 S.W.2d 621, 626 (Mo.App.1993). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." Hurlock v. Park Lane Medical Center, Inc., 709 S.W.2d 872, 880 (Mo.App.1985). Whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law. Id.

[4][5][6][7] In determining whether a plaintiff has made a submissible case, we view the evidence in the light most favorable to that plaintiff and give the plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence. Steward, 945 S.W.2d at 528; Eidson, 863 S.W.2d at 626. We disregard all of defendants' evidence which does not support the

plaintiff's case. Feely v. City of St. Louis, 898 S.W.2d 708, 709 (Mo.App.1995). However, we do not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences. Id. The evidence and inferences must establish every element and not leave any issue to speculation. Steward, 945 S.W.2d at 528; Eidson, 863 S.W.2d at 626. We affirm a JNOV only if there is no room for reasonable minds to differ on the issues and if the trial court's action is supported by at least one of the grounds raised. Pikey, 922 S.W.2d at 780.

[8] The elements of a malicious prosecution claim are: (1) the commencement of an earlier suit against plaintiff, (2) instigation of *685 the suit by defendant, (3) termination of the suit in plaintiff's favor, (4) lack of probable cause for the suit, (5) malice by defendant in instituting the suit, and (6) damages to plaintiff resulting from the suit. State ex rel. Police Ret. Sys. v. Mummert, 875 S.W.2d 553, 555 (Mo. banc 1994). Defendants assert that plaintiff failed to make a submissible case on each of these elements except element (3).

1) Commencement of An Earlier Suit Against Plaintiff

This element can only be satisfied if a malicious prosecution claim can be based on an administrative proceeding. The parties agree that no Missouri court has recognized a claim for malicious prosecution premised on an administrative proceeding. The verdict-directing instruction for malicious prosecution is limited to the instigation of a judicial proceeding. MAI 23.07 [1996 5th Ed.]. In the reported Missouri cases based on the tort of malicious prosecution, the underlying proceeding is always either a civil or criminal lawsuit.

Plaintiff contends that such a claim is recognized by Section 680 of the Restatement (Second) of Torts. Section 680 provides:

> One who takes an active part in the initiation, continuation, or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if
>
> (a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and
>
> (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

Comment b under this Section provides that "... the proceedings must be before an administrative board having the power to impose

penalties upon or to take other action adversely affecting the legally protected interests of the person against whom they are brought ..."

A number of federal and state jurisdictions have held that liability for malicious prosecution may be based on the commencement of an administrative proceeding where 1) the administrative proceeding has the adjudicatory attributes of a judicial proceeding and 2) the administrative board has the power to adversely affect a person's legally protected interests. See National Surety Co. v. Page, 58 F.2d 145, 148 (4th Cir.1932); Melvin v. Pence, 130 F.2d 423, 426 (D.C.Cir.1942); Hardy v. Vial, 48 Cal.2d 577, 580-81, 311 P.2d 494, 496 (Cal.1957); DeLaurentis v. City of New Haven, 220 Conn. 225, 249, 597 A.2d 807, 819 (Conn.1991); American Credit Card Telephone Co. v. National Pay Telephone Corp., 504 So.2d 486, 489 (Fla.Dist.Ct.App.1987); Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 105-06, 70 S.E.2d 734, 740 (Ga.1952); Cassidy v. Cain, 145 Ind.App. 581, 588, 251 N.E.2d 852, 856-57 (Ind.App.1969); Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964, 979 (Kan.1994); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 564-66, 117 A.2d 889, 895-96 (N.J.1955); Groat v. Town Bd. of Town of Glenville, 73 App.Div.2d 426, 429, 426 N.Y.S.2d 339, 341 (N.Y.App.Div.1980); Carver v. Lykes, 262 N.C. 345, 352, 137 S.E.2d 139, 145 (N.C.1964); Donovan v. Barnes, 274 Or. 701, 704-05, 548 P.2d 980, 983 (Or. banc 1976); Hillside Associates v. Stravato, 642 A.2d 664, 666-69 (R.I.1994); Kauffman v. A.H. Robins Co., 223 Tenn. 515, 523, 448 S.W.2d 400, 403 (Tenn.1969). See also Annot., 143 A.L.R. 157 (1943); HARPER, JAMES & GRAY, THE LAW OF TORTS s 4.10, pp. 4:108-4:110 (3d ed.1996).

Defendants argue that Missouri courts should not recognize such a claim as a matter of public policy, but, if a cause of action for malicious prosecution may be based on commencement of an administrative proceeding, then they argue that the "more stringent" standards set out in the Restatement should be applied to determine if a submissible case has been made on the elements of a cause of action.

The elements of a cause of action for malicious prosecution based on the commencement of an administrative proceeding would *686 be the same as one based on a civil or criminal proceeding. However, different considerations govern these elements because an administrative action has characteristics which separate it from both criminal and civil actions. Unlike a criminal action an administrative action does not result in imprisonment. However, it is penal in nature and prosecuted for the benefit of the public, not an individual. National Surety, 58 F.2d at 148. The Restatement and cases recognizing the tort of malicious prosecution based on an administrative proceeding do not create "more stringent" elements for the tort. Rather, they give guidance on how the elements are interpreted when the underlying action is administrative.

We do not have to reach the question in this case whether Missouri should extend the tort of malicious prosecution to

administrative proceedings because, even if the tort was to be recognized, plaintiff failed to establish the elements of instigation and probable cause as a matter of law.

2) Instigation of Proceedings by Defendants Ingram and Flieg

What constitutes initiation, institution or instigation of charges in an agency setting depends on how charges are brought to the agency for adjudication. In those cases where the agency provides a means for persons to file complaints which automatically trigger agency action on those complaints, the person is held to have instigated the action.

Thus, where the defendants on their own initiative submitted affidavits to licensing officials with the intent to secure the revocation or non-renewal of plaintiff's private detective's license and the licensing authorities refused to renew the license on the basis of the affidavits, the court held that instigation was sufficient. Melvin, 130 F.2d at 427.

Where a defendant filed written verified charges of misconduct with a Real Estate Licensing Board which required the Board to hold a hearing, the defendant "instituted" the administrative action. Carver, 137 S.E.2d at 145-46. The defendant's motive is not relevant. Id. at 146. Likewise, where a document is filed with an agency which document initiates a contested proceeding, a defendant has instigated an action. Hillside Associates, 642 A.2d at 670 (filing an appeal of plaintiff's building permit with a zoning board). In Kauffman, 448 S.W.2d at 403-04, the Tennessee Supreme Court held that the defendant drug company had instituted an agency Board of Pharmacy proceeding where it filed a complaint in which it stated that it stood ready to attempt to prove that plaintiff violated certain pharmacy laws. As a result of the complaint, plaintiff was cited to appear before the State Board of Pharmacy for a hearing. Id. at 401.

On the other hand, when an agency official has sole authority to initiate the action, persons who have provided information to that official are not held to have initiated or taken an "active part" in initiating the action. The general rule is that an individual who merely provides facts concerning the conduct of another to an officer possessing the authority to issue charges is not liable for malicious prosecution. See e.g., Lindenman, 875 P.2d at 979. In Lindenman the Kansas Supreme Court held that a county board of health employee who inspected a day care center and filed a report with the board did not initiate the board's ex parte suspension of the day care center's license and cannot be considered an "active part" of the board's subsequent revocation action against the day care center. Id. The board filed the revocation action when the day care center refused to stipulate to the accuracy of the inspection report, a condition for lifting the suspension. Id. at 969. Likewise, in Werner v. Hearst Publications, Inc., 65 Cal.App.2d 667, 151 P.2d 308, 312 (1944), individuals who sent a letter to an investigator for a state bar association complaining about an attorney did not institute the show cause proceeding against the attorney, where the local bar

association committee made an independent investigation and one of its members signed the complaint initiating the proceeding.
This holding was reaffirmed in Stanwyck v. Horne, 146 Cal.App.3d 450, 194 Cal.Rptr. 228, 234 (1983).

[9] Under the above cases, Ingram's and Flieg's actions in interviewing the students, taking their statements, passing on the statements to Mahan, and making a recommendation *687 based thereon do not constitute instigation of the charges. Mahan was the only one who had legal authority to issue the charges. Section 168.221 RSMo (1986). Thus, as a matter of law, Flieg and Ingram could not have instigated the proceedings.

3) The Absence of Probable Cause

In proceedings before an administrative board, probable cause is a belief "that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board." Rest. Torts Second Section 680(a). In National Surety the court held probable cause for an agency prosecution exists

> where the uncontradicted evidence shows that the prosecutor in good faith believed that he had a right to institute such proceeding, and had knowledge of such facts as would excite the belief in a reasonable mind that the person against whom the proceeding was prosecuted had been guilty of such conduct as warranted invoking against him the remedy prescribed by statute.

Id. 58 F.2d at 149.

Both of these definitions describe the probable cause that a person needs to bring the agency proceeding. In this case, however, we must address how probable cause applies to a person who passes information on but is not the person who files a complaint or other document constituting the charges. This question is usually not reached because in such a situation the defendant has been held not to have instituted the proceeding. However, in Brien v. Lomazow, 227 N.J.Super. 288, 547 A.2d 318 (N.J. Super. A.D. 1988), the court went directly to the probable cause issue in a comparable situation.

In Brien the defendant, a neurologist, reported to the New Jersey State Board of Medical Examiners and the Attorney General's Office that a patient had stated that the plaintiff, a physiatrist, had molested her while performing a medical procedure. The Attorney General's Office ultimately filed a complaint against plaintiff on behalf of the Board seeking revocation of plaintiff's medical license. The complaining patient and four other patients testified against the plaintiff at an administrative hearing. The administrative law judge recommended the complaint be dismissed in the absence of sufficient credible evidence, and the Board accepted the recommendation. The plaintiff then filed an action against defendant which included a count for malicious prosecution. The trial court dismissed that count on the ground that the plaintiff had failed to establish lack of probable cause.

On appeal the plaintiff asserted that he had shown defendant's lack of probable cause with evidence that 1) the defendant had

reported the patient's allegation without investigating it, and 2) the defendant had characterized the patient as mature and credible despite the facts that he knew that the patient was on medication which may have interfered with her cognition and that he had previously noted in the patient's file that she might be paranoid. The plaintiff also adduced evidence that defendant stood to obtain the plaintiff's business from a hospital if plaintiff's license was revoked.

The appellate division found that, even assuming all facts in plaintiff's favor, defendant had probable cause to report the complaint. Brien, 547 A.2d at 325. It found that defendant took no public action and filed no complaint himself. Id. He merely passed on the allegations to the body charged with jurisdiction to investigate. Id. A nurse had also independently documented the patient's complaint. Id. Given the fact there was no dispute that the patient claimed abuse, defendant was held to have just cause to pass the information on "without further investigation or verification on his part." Id.

[10] Plaintiff argues that the record supports a lack of probable cause on the part of defendants Flieg and Ingram. In support of his argument plaintiff contends that defendants should have employed better interviewing techniques and should have interviewed persons other than the complaining students. Plaintiff adduced evidence of interviewing techniques to be used in cases of reported sexual misconduct and evidence that Flieg and Ingram did not use these techniques and did not interview other persons. Whether these facts are sufficient to establish the lack *688 of probable cause is a question of law for the court. Mummert, 875 S.W.2d at 555.

[11] Even if a better or more thorough investigation would have led defendants to question the students' veracity, plaintiff has not shown that Flieg and Ingram did not have probable cause to make their reports to Mahan. As in Brien, when they interviewed the complaining students, they obtained the same type of statements that the school nurse and the principal had obtained, which included serious allegations of sexual misconduct, physical misconduct, and profanity. They did not take any public action and did not file a public complaint but passed these statements on to Mahan. Neither Flieg nor Ingram was a person statutorily responsible for bringing the charges and, therefore, were not under an obligation to investigate the statements in order to form a reasonable belief in the correctness of the charges. There were no probative facts in the record to support a finding of a lack of probable cause on the part of Flieg and Ingram in making their reports to Mahan.

The trial court did not err in entering judgment notwithstanding the verdict on plaintiff's malicious prosecution claim against defendants Flieg and Ingram.

B. Judgment Notwithstanding the Verdict--Loss of Consortium

[12] Because the trial court properly entered a JNOV on plaintiff's claim, the JNOV on Linda Davis's claim for loss of consortium

must be affirmed. A wife's claim for loss of consortium is derivative only, and she may not recover any damages on a claim for

loss of services if her husband has no valid claim for his personal injuries. Lear v. Norfolk and Western Ry. Co., 815 S.W.2d 12, 14-15 (Mo.App.1991).

For all the above reasons, point one is denied.

C. Punitive Damages

For his second point plaintiff asserts that the trial court erred in refusing to submit his claim for punitive damages on the malicious prosecution count against defendants Flieg and Ingram to the jury. Because we have found the trial court did not err in entering judgment notwithstanding the verdict on the malicious prosecution count, this claim is moot.

II. Summary Judgment Issues

[13][14][15] Plaintiff's third and fourth points challenge the trial court's entry of summary judgment in favor of Mahan on the malicious prosecution count and in favor of all defendants on the tortious interference with contract count. Summary judgment is designed to permit the court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993); Rule 74.04. When we consider an appeal from summary judgment, we review the record in the light most favorable to the party against whom judgment was entered. Id. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. Id. As the trial court's judgment is founded on the record submitted and the law, we need not defer to the trial court's order granting summary judgment. Id. This makes appellate review essentially de novo. Id.

A. Official Immunity of Superintendent

For his third point plaintiff asserts that the trial court erred in granting summary judgment in favor of defendant Mahan on his malicious prosecution count. Plaintiff argues that summary judgment on Mahan's affirmative defense of official immunity was improper because the record revealed a genuine dispute as to whether Mahan acted in bad faith or with malice.

[16][17] Under the doctrine of official immunity, public officials acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions. Kanagawa v. State By and Through Freeman, 685 S.W.2d 831, 835 (Mo. banc 1985). However, official immunity is a qualified immunity and does not apply to those discretionary acts done in bad faith or with malice. State ex rel. Twiehaus v. Adolf, *689 706 S.W.2d 443, 446 (Mo. banc 1986) To view preceding link please click here ; State ex rel. Boshers v. Dotson, 879 S.W.2d 730, 731 (Mo.App.1994). Bad faith or malice in this context ordinarily

contains a requirement of actual intent to cause injury. Twiehaus, 706 S.W.2d at 447. In granting the motion for summary judgment, the trial court found, "[t]he record is barren of any suggestion of ulterior motive on the part of Mahan or of any evidence warranting an inference of actual or legal malice."

[18] Mahan supported his motion for summary judgment with an affidavit in which he attested to his general supervisory authority over the St. Louis Public Schools and his statutory authority to present written charges seeking dismissal of a permanent teacher pursuant to Section 168.221.3 RSMo (1994) and Board of Education Regulation 4811. He further attested that his decision to file charges and suspend plaintiff was made

> after a consideration of many student-witness statements alleging that Mr. Davis had engaged in offensive or provocative physical contact and engaged in immoral behavior. Additionally, I considered statements, reports, and recommendations from the Woerner School principal, Rejesta V. Perry, teachers, and nurse. I also received and considered verbal and written reports based on the allegations from David Flieg--the executive director of elementary school education, John Ingram--the associate superintendent of elementary school education, Carlos Miranda--associate superintendent for physical education in the St. Louis Public Schools, and Dr. Rosalyn England. Based upon all of this information, I formed a reasonable belief that the charges against Mr. Davis were valid and true.

He further attested:

> 11. I acted in good faith and was motivated only by a desire to act in a supervisory capacity during the course of my investigation of Mr. Davis. My decision to suspend and recommend dismissal for Mr. Davis was not motivated by malice. My actions were conducted primarily for the purpose of bringing Mr. Davis to justice for violating the Board of Education's regulations.

Plaintiff contends that the record in opposition to the motion for summary judgment supports a finding of the following facts which show a genuine dispute as to malice on Mahan's part:

> 1. Dr. Mahan purposefully ignored the reports and findings of the Division of Family Services, the St. Louis Metropolitan Police Department and Dr. Perry that Mr. Davis did not sexually or physically abuse the children named in the charges preferred against Mr. Davis, but instead adopted Mr. Flieg's recommended charges almost verbatim. [compare Plaintiffs' Ex. 1 and Defendants' Ex. L; also see Davis' Aff. Para. 13(y), Supp. LF 22-23].

2. Dr. Mahan purposefully removed Dr. Perry from the investigation because she believed that the reports of contact between Mr. Davis and the children were meritless or inconsequential and that she would not have made a good witness on behalf of the administration. [Flieg, Vol. III, BOE p. 110].

3. Mahan recklessly disregarded Mr. Davis' rights when he refused to meet with Mr. Davis after plaintiffs' attorney advised him of the results of his investigation and the taking of depositions of the students named in the charges. [Davis' Aff. Para. 13(x), Supp. LF 21; Appendix E, LF 232-238; LF 232].

4. Dr. Mahan recklessly disregarded Mr. Davis' rights when he did not interview any witnesses or otherwise reopen the investigation after being advised that many of the children implicated in the charges disavowed the allegations and provided proof that at least one student had lied to get Mr. Davis into trouble. [Davis' Aff. Para. 13(x)-(y), Supp. LF 22, Appendix E, LF 232-238; LF 232; Mahan Depo. 14, 29, 30, 34, 46, 85].

5. Dr. Mahan, in bringing charges against Mr. Davis, relied upon allegations which were nearly ten years old, which had been previously determined to be meritless and which the administration agreed to expunge from Mr. Davis' employment record. *690 [England, Vol. II, BOE p. 7-46; Davis' Aff. Para. 13(v), Supp. LF 20-21].

6. In order to increase his chances of prevailing on the merits of the charges, Dr. Mahan unfairly and scandalously used the Board hearing as a vehicle to air complaints and accusations against Mr. Davis which had been previously resolved in his favor and were not contained in the charges. [Id.].

A party opposing a motion for summary judgment must set forth, by affidavit or otherwise, specific facts showing a genuine issue for trial. Rule 74.04(e). Plaintiff has not identified such facts. We will address plaintiff's contentions in each of the above paragraphs separately.

Nothing in those portions of the record referred to in paragraph 1 indicates that Mahan "purposefully ignored" the witnesses or the reports of the DFS or the police. The page of Flieg's testimony referred to in paragraph 2 does not mention Mahan or that Dr. Perry believed the reports were meritless or inconsequential. Rather Flieg explained, "She [Dr. Perry] was extremely reluctant to get involved in these things. She would not have made a very good witness this evening at this hearing."

[19] Likewise, nothing in those portions of the record referred to in paragraphs 3 and 4 supports an inference that Mahan "recklessly disregarded Mr. Davis's rights" when he refused to meet with him about the results of the attorney's investigation or reopen the investigation. (FN2) Plaintiff was presented with the charges and given an opportunity to explain before he was suspended. He was also given a formal pre-termination hearing. These procedures satisfied both his constitutional and statutory

rights to due process. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-46, 105 S.Ct. 1487, 1493-95, 84 L.Ed.2d 494 (1985); Section 168.221.3. Plaintiff cites no authority to support his contention that he had a right to a pre-hearing meeting or a reopening of the investigation five days prior to the scheduled pre-termination hearing.

The allegation in paragraph 5, that Mahan relied on ten-year-old allegations against plaintiff, is likewise not supported by the portions of the record referred to. Dr. England, plaintiff's principal in the 1980's, testified to the allegations which were made against plaintiff and the admonitions she had given at that time but did not reference Mahan in any way. Paragraph 13(v) of plaintiff's affidavit refers to the fact that Flieg mentioned the allegations to plaintiff, but again does not refer to Mahan much less assert that Mahan relied on these allegations in his decision to suspend and file charges against plaintiff.

Finally, the claim that Mahan unfairly used the Board hearing to air the allegations from the 1980's is also wholly unsupported. The cited portions of the record show only that the Board's attorney called Dr. England as a witness at the hearing. Plaintiff's counsel objected on the grounds of relevancy, and the Board's attorney responded that she had called Dr. England to show that plaintiff had previously been instructed that students considered the type of touching and behavior he had been charged with offensive and that he was not to engage in such behavior. The Board president indicated he understood the relevancy objection but overruled it. Nothing in this record indicates Mahan called the witness or he did so to prejudice the Board against plaintiff.

Because plaintiff failed to set forth specific facts showing a genuine dispute for trial on the issue of Mahan's malice or bad faith, summary judgment was properly granted.

B. Tortious Interference with Contract

For his final point plaintiff asserts that the trial court erred in granting summary judgment in favor of defendants Mahan, Ingram, and Flieg on plaintiff's claim for tortious interference with contract. Plaintiff argues that defendants were not entitled to judgment as a matter of law because the record reveals a genuine dispute as to each element of the claim.

*691 [20][21] In order to establish a cause of action for tortious interference with contract, a plaintiff must show: 1) a contract; 2) the defendant's knowledge of the contract; 3) that defendant intentionally interfered with and induced or caused a breach of the contract; 4) the absence of justification; and 5) damages resulting from defendant's conduct. Fleischer v. Hellmuth, Obata & Kassabaum, 870 S.W.2d 832, 837 (Mo.App.1993). A defending party may establish a right to summary judgment by showing facts that negate any one of the claimant's elements. ITT, 854 S.W.2d at 381; Trotter's Corp. v. Ringleader Restaurants, 929 S.W.2d 935, 939 (Mo.App.1996). In this case defendants successfully adduced facts showing that there was no breach of plaintiff's contract as a matter of law.

In his brief plaintiff asserts that the Board materially breached his contract of employment by (1) permitting Davis to be removed from his teaching responsibilities on February 13, 1991, without requiring written charges against Davis to be filed; (2) arbitrarily and capriciously permitting Davis to be removed from his teaching responsibilities on February 13, 1991; (3) arbitrarily and capriciously permitting Davis's indefinite suspension without pay on August 5, 1991; and (4) arbitrarily and capriciously requiring Davis to attend a hearing, employ counsel, and defend against the charges. Plaintiff had alleged these acts in his second amended petition. In their motion for summary judgment, defendants adduced facts that the Board had complied with the applicable statute and regulations in transferring and suspending plaintiff.

Section 168.221 RSMo (1994) governs the rights and obligations of teachers and principals with respect to suspension and termination in the St. Louis Public Schools. Toole v. Jones, 778 S.W.2d 376, 382 (Mo.App.1989). No permanent teacher may be removed except for cause upon written charges presented by the superintendent of schools. Section 168.221.3.

Plaintiff argues that he was "removed" from his teaching position within the meaning of Section 168.221.3 without written charges presented by the superintendent as required by the statute when he was reassigned to non-teaching duties pending the investigation. He relies on Umphries v. Jones, 804 S.W.2d 38 (Mo.App.1991) as authority for the proposition that his reassignment was a removal. Umphries does not support that conclusion. In Umphries, a teacher whose medical condition made it impossible for her to perform her job safely was suspended without pay. Following a hearing the Board upheld the suspension, removed her from her position as instructional coordinator, and directed that she be reassigned to a comparable non-teaching position at a non-school site. The teacher claimed a right to back pay during the period of her suspension under Section 168.221.3, claiming that she had not been removed but only reassigned. The court held that, although the Board had used the word "reassigned," it was proceeding on charges brought by the superintendent to remove the teacher and did in fact remove her. Id. at 42. The court found the "reassignment" to in fact be a removal and rehiring. Id. at 41-42.

[22] In contrast, in this case plaintiff was reassigned to other duties and was subsequently suspended; however, after a hearing the Board voted not to remove him. As used in Section 168.221.3, removal refers to the termination of the employment contract. Neither plaintiff's pre-suspension reassignment nor his pre-termination suspension constituted a removal within the meaning of Section 168.221.3.

[23] Plaintiff was reassigned to non-teaching duties pursuant to Board Regulation 4680 which permits the superintendent to transfer an employee for the good of the system. Plaintiff continued to receive his full salary and benefits during the period he

was reassigned pursuant to such transfer. On August 5, 1991, Mahan suspended plaintiff without pay pending a hearing on the statement of charges against him as allowed by Board Regulation 4811 and Section 168.221.3. Mahan provided plaintiff with written notice of the charges against him and notified him of his right to a hearing on those charges, his right to counsel, and his right generally to conduct a defense against the charges in compliance with Section 168.221.3 and Board *692. Regulation 4811. The Board conducted a six-day hearing. At the conclusion of the hearing, the Board determined not to remove plaintiff. As required by the statute and the regulation, plaintiff did not suffer any loss of salary by reason of his suspension because he was not removed. Section 168.221.3; Board Regulation 4811. Plaintiff was returned to his teaching position and received back pay for the period of his suspension. The Board complied with each of its statutory and regulatory duties. The Board did not breach its employment contract with plaintiff.

The trial court did not err in entering summary judgment on this count. Point four is denied.

The judgment of the trial court is affirmed.

RHODES RUSSELL and JAMES R. DOWD, J., concur.

(FN1.) The same version of the statute was in effect in the years 1990-1992.

(FN2.) The references to the Mahan deposition are to testimony that Mahan did not interview certain witnesses before the charges were filed; they do not refer to the time period after the attorney's letter.